

Public Auction Under Securitisation Act, 2002

Supreme Court has drawn a line and said 'no more and no further' to mischievous borrowers, writes Sridhar Potaraju, Advocate on Record, Supreme Court of India



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It is often said that the real travails of a decree holder commence on obtaining a decree to get the same executed. The said adage is more than appropriate in the context of bonafide purchaser in public auctions. The process of public auction is taken recourse to by statutory authorities, courts as also public authorities in order to bring in transparency as well as to ensure maximum value for the secured asset. Unfortunately, the experience of auction purchasers has been no different than that of Decree holder, when confronted with mischievous borrowers who use litigation as a tool to delay and sometimes deny the fruits of the Public auction.

In the recent judgement of the Supreme court in *CELIR LLP. v Bafna Motors*¹ has authoratively settled the issue of sanctity of public auction under section 13(8) of the SARFAESI Act, 2002 as amended in 2016. The sale notice of secured asset was published on 25.3.22. The outstanding amount including principal with interest, cost, charges etc. on 30.4.23 was an aggregate sum of Rs.123.83 crores. About 8 attempts of auction failed, then the borrower offered to pay about Rs.92 crores and settle the loan account and redeem the secured asset.

Bank proceeded with a fresh auction notice with a reserve price of Rs.105 crore. The appellant was the successful bidder in the said auction with a bid of Rs.105.05 crores. Sale Confirmation Letter was issued in favor of the successful bidder on 30.6.23. The borrower on 4.7.23 then moved the DRT for redemption of mortgage by paying total outstanding of Rs.123.83 crore(approx). Pending the said application the auction purchaser on 27.7.23 deposited the auction amount and same was accepted by the Bank. The DRT reserved orders in the Borrowers application.

Apprehending rejection of the application by DRT, the borrower moved the Bombay High Court with similar prayers and offered to pay an enhanced sum of Rs.129 crores. The High Court allowed the writ petition permitting the redemption of the mortgage on payment of outstanding dues on or before 31.8.23, failing which the sale of secured asset in favor of the appellant was to be confirmed.

The Supreme Court was dealing with the appeal of the auction purchaser who had already paid the full auction amount of Rs.105.05 crores. In the appeal before the Supreme court the auction purchaser offered to match the amount of Rs.129 crores deposited by the borrower pursuant to the High court order, by offering to deposit further Rs.23.95, in addition

Rs.105.05 crore already deposited with the Bank. The said offer helped balance the equities between the auction purchaser and the borrower.

The Supreme Court was dealing with the right of redemption as understood under Transfer of Property Act, 1882, which is available to the Borrower until a registered conveyance is made as against the rights of Auction Purchaser who participated pursuant to publication of a notice for public auction and was issued a Sale Certificate under the SARFAESI Act, 2002.

The Supreme court in its erudite judgement settled the legal issue by holding that the right of borrower to redeem the mortgaged asset under section 60 of the Transfer of Property Act, 1882 is not applicable for actions initiated under Section 13(8) of the SARFAESI Act, post Amendment of 2016.

The amended Section 13(8) of the SARFAESI Act introduced an express limitation on the right of redemption available under the general law to "any time before the date of publication of notice for public auction or inviting quotations or tender from public or private treaty for transfer by way of lease, assignment or sale of the secured assets". Thereby restricting the right of the borrower to redeem by paying all dues to secured creditor.

The legislative intervention was to remove the substratum of the judgement of Supreme court in Mathew Varghese⁴, wherein the Supreme court interpreted the unamended section 13(8) of the SARFAESI Act and section 60 of the Transfer of Property Act, 1882 harmoniously holding that the words "before the dates fixed for transfer" in the unamended section 13(8) of the SARFAESI Act refers to transfer which is akin to the process of redemption under the 1882 Act. It was held that the general right of redemption of mortgage contained in section 60 of the Transfer of Property Act, 1882 would apply even in respect of SARFAESI Act, 2002.⁵

The 2016 amendment in effect has made the SARFAESI Act regime quite distinct thereby making it a special provision dealing with rights of secured creditors and borrowers governed by the SARFAESI Act by introducing a cut-off date for exercising the right of redemption of mortgage, distinct from Transfer of Property Act which continues to recognise the right of redemption until conveyance of the secured asset by registered deed. The legislature has consciously brought about a difference between the general law governing redemption of mortgages under the Transfer of Property Act, and the SARFAESI Act which is a special law to make it more effective.

The plight of auction purchaser in our country is such that they many-a-times unwittingly purchase litigation and end up blocking their funds. This has dissuaded many bonafide purchasers in the market from participating in public auctions occasioned on account of loan defaults. The adverse impact of such unrealised debts on the banking industry is well documented and has also been subject of public and political discourse as well.

The Supreme court was quite alive to these realities and has drawn a line and held,

*"...it is necessary to interpret the amended Section 13(8) of the SARFAESI Act in such a manner where a legal sanctity is attached to an auction process and a bright line is drawn where a mischievous borrower is told 'no more and no further' and precluded from hastily exercising its right of redemption from nowhere at the very end of the process and thereby set the entire auction process at naught."*⁶

"87. Any other interpretation of the amended Section 13(8) will lead to a situation where multiple redemption offers would be encouraged by a mischievous borrower, the members of the public would be dissuaded and discouraged from in participating in the auction process and the overall sanctity of the auction process would be frustrated thereby defeating the very purpose of the SARFAESI Act. Thus, it is in the larger public interest to maintain the sanctity of the auction process under the SARFAESI Act.

"88. In view of the aforesaid discussion, we hold that as per the amended Section 13(8) of the SARFAESI Act, once the borrower fails to tender the entire amount of dues with all cost & charges to the secured creditor before the publication of auction notice, his right of redemption of mortgage shall stand extinguished / waived on the date of publication of the auction notice in the newspaper in accordance with Rule 8 of the Rules of 2002."

The inventory of Non-Performing Assets with financial institutions is mind boggling, thereby depriving them of much needed liquidity. The judgement of the Supreme court restores the much needed legal sanctity to the statutory auction process and enhances the efficacy of the securitisation process.

2 Supra Note 1 at Para 72

3 2014 5 SCC 610

4 Supra Note 2 at Para 67

5 Supra Note 3 at Para 82

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