Debts Recovery Tribunal, Allahabad,
9/2A, Panna Lal Road Allahabad

Presiding Officer : **Shri R. M. Kushawaha**

SA Case No. : 345 OF 2023

1. Dolly Tyagi, W/o Vineet Tyagi, R/o Flat No. 168, Parsavnath Edens Alpha-2, Greater Noida (U.P.).
2. Rakesh Kumar Tyagi, S/o Late Sri Mohar Singh, R/o House No. 27, Adhyana, Dist. Saharanpur, U.P.
3. Shailesh Kumar Atri, S/o Virendra Singh, R/o 417, Atri Niket, Mandir Wali Gali, Bulanshehar.
4. Ms. Nandini Maheswari, D/o Sh. J. L. Maheshwari, R/o 5, Suresh Park, Modinagar.
5. Ms. Neera Maheshwari, W/o Sh. J. L. Maheshwari, R/o 5, Suresh Park, Modinagar.
6. Sh. Ashish Aggarwal, S/o Late Sri Bhagwati Prasad, R/o A1003, Amrapali Greens, Vaibhav Khand, Indirapuram, Ghaziabad.
7. Himani Jain, W/o Parveen Jain, R/o 9/1228, Vasundhara, Ghaziabad.

.......S. Applicants

Vs.

1. Canara Bank (Erstwhile Syndicate Bank), Authorized Officer/Chief Manager, ARM Branch, Agra through its Authorized Officer at B-501, Bansal Tower, Kamla Nagar, Main Market, Agra.
2. M/s Zars Developers Private Limited (Formerly known as ARSG Infrastructure Pvt. Ltd.) Registered Office:- 104, 1st Floor, Ram Vihar, Delhi-110092.
3. Vivek Kapoor, S/o Ravi Kapoor, R/o 144 South Bhopa Road, Sanjay Marg, New Mandi, Muzzarfarnagar, Uttar Pradesh-251002.
4. Ritu Kappor, S/o Anil Kapoor, R/o D-220, Sector 47, Noida.
5. Manish Kunchal, S/o Brahm Prakash, R/o Flat No. 82, Indraprastha Appts, Pocket-3, Sector-12, Dwarika South West, Delhi-110078.
6. Rohit Kumar Makkar, S/o Harbansh Lal Makkar, 227/33/2, Ansari Road, Muzaffarnagar, Uttar Pradesh-251002.

...Respondents

Present:

For the S. Applicants	: Shri Arjun Sanjay, Advocate
For the Respondent Bank	: Shri Maneesh Mehrotra, Advocate
For the auction purchaser	: Sh. V. K. Shukla along with Sh. Pushkar Malhotra
For borrowers	: Sh. Pankaj Goyal, in person.

Dated: 08.12.2023

JUDGMENT

1. This SA has been filed by the S. Applicants challenging the entire SARFAESI actions including the sale notice and auction held on 15.05.2023. The entire SARFAESI actions have been initiated by the respondent Bank for recovery of Rs. 12,44,04,538.58 plus interest and other charges.

2. Reply of the SA has been filed by the respondent Bank as well as the auction purchaser denying all the allegations as alleged by the S. Applicants.

3. Ld. Counsels for the parties are heard on merits of the case.

4. Ld. Counsel for the S. Applicants submitted that the S. Applicants are neither borrowers nor guarantors but are the aggrieved persons as there was prior charge over the property in question already created in their favour by the borrower M/s Zar Developers Pvt. Ltd. It is further submitted that the S. Applicants are not in possession of the property in question. It is further submitted that the respondent No. 2-builder-M/s Zar Developers Pvt. Ltd. has allotted to the S. Applicants and the S. Applicants have deposited the money as per the description given herein below:-

Date of allotment	Unit No.	Total Sale price	Price paid
Dolly Tyagi 12.11.2012	Aster A-25, admeasuring 1140 sq. feet	Rs. 22,23,000	Rs. 11,35,612
Rakesh Kumar Tyagi 09.12.2012	Aster A-27, admeasuring 1040 sq. ft.	Rs. 21,82,000	Rs. 8,81,198
Shailesh Kumar 12.11.2012	Aster-A-27, admeasuring 1040 sq. feet	Rs. 25,48,600	Rs. 16,02,013

5. It is submitted that the respondent Bank has issued the sale notice on 06.04.2023 fixing the date of e-auction on 15.05.2023 but in the sale notice the encumbrances have not been mentioned which is a violation of Rule 8 (7) of the Security Interest (Enforcement) Rules, 2002. It is submitted that the builder-M/s Zar Developers Pvt. Ltd. has allotted the flats to the S. Applicants in the year 2012 while the respondent No. 2 M/s Zar Developers Pvt. Ltd. has obtained the loan from the respondent Bank on 15.11.2014 and 21.04.2015. The S. Applicants have also executed the builder-buyers agreement which was executed between Rakesh Kumar Tyagi and builder-M/s Zar Developers Pvt. Ltd. prior to sanction of the loan. It is further submitted that the builder- M/s Zar Developers Pvt. Ltd. had already informed the respondent Bank that total 45 flats including the flats of the S. Applicants were sold. The respondent Bank knowing fully well that the flats buyers including the S. Applicants have deposited initially money towards purchaser of flats but the respondent Bank has issued the sale notice without mentioning the encumbrances. It is further submitted that the respondent bank was well aware about the fact that there were agreements between the other buyers including the S. Applicants and builder-M/s Zar Developers Pvt. Ltd. It is further submitted that

as per section 55 (6) (B) of the Transfer of Property Act, the charge cannot end unless it is ended by the buyers. It is submitted that the sale notice has not been published in two leading newspapers.

6. Ld. Counsel for the S. Applicants has placed reliance on the judgment passed by the Hon'ble High Court of Jammu and Kashmir and Ladakh at Jammu in WP (C) No. 465/2021 and CM No. 4507/2021 decided on 30.11.2022 in the matter of S. K. Bakshi Vs. Punjab National Bank & Ors. The relevant paragraph 12 of the said judgment is reproduced herein below:-

> *"12. No doubt, the Bank could auction the property even with encumbrances attached to property but it was incumbent upon the Bank to disclose the encumbrances and litigations on the same or tenancy, if any, attached to the property to all the persons who wanted to participate in the same and to the successful bidder. By including a clause of 'as is where is' it would not be sufficient for respondent No. 1 from disclosing encumbrances or handing over the property to the petitioner.*

Request is made that since there was prior charge of the buyers including the S. Applicants over the properties in question and these charges/encumbrances were not mentioned by the respondent Bank in the sale notice which is a violation of Rule 8 (7) of the Security Interest (Enforcement) Rules, 2002, therefore, the S. Application may be allowed.

7. In addition to above submissions advanced by Ld. Counsel for the S. Applicants orally, the Ld. Counsel for the S. Applicants has also filed written submissions which runs as under:-

a. That the applicants herein are the allottees of the housing project named and styled as "Ark Twin Towers" which was developed by the Respondent No. 2 Company at the land situated at Jataouli, Main Haridwar-Delhi By Pass Road, Meerut City. The details of the allotment in relation to the applicants are given herein below:-

Date of allotment	Unit No.	Total Sale price	Price paid
Dolly Tyagi 12.11.2012	Aster A-25, admeasuring 1140 sq. feet	Rs. 22,23,000	Rs. 11,35,612
Rakesh Kumar Tyagi 09.12.2012	Aster A-27, admeasuring 1040 sq. ft.	Rs. 21,82,000	Rs. 8,81,198
Shailesh Kumar 12.11.2012	Aster-A-27, admeasuring 1040 sq. feet	Rs. 25,48,600	Rs. 16,02,013

The documents such as the Allotment Letter, Builder Buyer Agreement and the receipts of the Applicants are collectively annexed and marked as Annexure A/2.

b. That it is not out of context to mention that the allotments of the applicants herein and many other Allottees had been made much prior to the charge created by the Respondent No. 2 in favour of the respondent No. 1 Bank. As per the knowledge of the applicants herein and the other Allottees in the project before the grant of credit facilities. The sanction facilities were disbursed vide two sanction letters dated 15.11.2014 and 21.04.2015. The allotment letters were issued in the year 2012 which are much prior to sanctioning of the credit facilities. Even the Builder Buyer Agreements of Rakesh Kumar Tyagi has been executed much before the sanctioning of credit facilities. Similarly, the BBA for Allottees Ashish Aggarwal, Nandini Maheshwari and Neena Maheshwari have executed much before the letters of sanctions.

c. That the account of the respondent No. 2 company was declared NPA Account by the respondent No. 1 Bank and measures under section 13(2) and 13(4) of the SARFAESI Act were initiated by the respondent No. 1 Bank.

d. That subsequently on 06.04.2023 a sale notice was issued by the Respondent No.1 Bank which is a totally false and frivolous sale notice as the same mentions in clause a) of the Terms & Conditions that the sale property is free from encumbrances to the knowledge of the Bank

e. That the once the payments were made by the Applicants. there was charge of the applicants on the said property Section 55 (6) (b) of the contract is reproduced herein below

(6) The Buyer is entitled to:

(b) unless he has improperly declined to accept delivery of the property, to a charge on the property, as against the seller and all persons claiming under him, 2[***] to the extent of the seller's interest in the property, for the amount of any purchase-money properly paid by the buyer in anticipation of the delivery and for interest on such amount; and, when he properly declines to accept the delivery, also for the earnest (if any) and for the costs (if any) awarded to him of a suit to compel specific performance of the contract or to obtain a decree for its rescission. An omission to make such disclosures as are mentioned in this section, paragraph (1), clause (a), and paragraph (5), clause (a), is fraudulent.

That the steps taken by the respondent No. 1 Bank under section 13(4) are wholly illegal and arbitrary. The respondent No. 1 Bank is very much in the know of the rights/interest/charge over the project land and they are the legal allottees in the project. While taking possession of the project land under Section 13 (4) of the SARFAESI, the Respondent No.1 Bank was to declare the interests of the Applicants and other allottees. As per Section 55 (6) (b) of the Contract, the applicants have a prior charge on the project land and the same cannot be waived off by the subsequent mortgage created in the favour of the respondent No.1 Bank by the respondent No.2 Company.

That section 55(6) (b) makes it very clear that the charge of the applicants shall be against the seller i.e. respondent No.2 and all persons claiming under him, i.e. Respondent No.1 Bank. The subsequent mortgage of the property does not hamper/disturb the charge of the applicants on the project land. The possession notice dated 01.11.2018 and the subsequent sale notice and auction are therefore bad in law and liable to be quashed.

The law has been set at rest by the Hon'ble Supreme Court in Videocon Properties V/s Bhalchnadra Laboratories [AIR 2004 SC 1787 (Para 15)]. The relevant portion is extracted herein:

> "15. The buyer's charge engrafted in Clause (b) of paragraph 6 of Section 55 of the Transfer of Property Act would extend and enure to the purchase-money or earnest money paid before the title passes and property has been delivered by the purchaser to the seller, on the seller's interest in the property unless the purchaser has improperly declined to accept delivery of property or when he properly declines to accept delivery including for the interest on purchase money and costs awarded to the purchaser of a suit to compel specific performance of...

f. That the Respondent No.1 Bank does not have the authority to take possession over the entire project land without giving due acknowledgment to the charge/rights of the applicants and other allottees in the project. The possession notice dated 25.07.2022 is therefore bad in law and liable to be struck down.

g. That the Respondent No.1 is guilty of suppression of material facts and playing fraud with the applicants herein. The Bank being very much in knowledge of the charge of the applicants on the project land, have on purpose concealed the fact of the charge of the Applicants and other allottees, while issuing the sale notice dated 06.04.2023 (Page No. 21 to 26). The sale notice and auction are therefore contrary to Rule 8(6) (a) of the Security enforcement rules and liable to be struck down. The Rule makes it very clear that the authorized officer of the Bank is bound to mention the encumbrances on the immovable Property. The respondent No.2 has on purpose not mentioned the fact about the charge of the applicants and other allottees, which is a violation of Rule 8(6) of the rules and therefore liable to be struck down. The statement as and where basis cannot be construed as to inform about the charges on the property. The law has been set at rest by the Hon'ble High Court at Jammu & Kashmir in S.K Bakshi V/s "Punjab National Bank & Others" [2023 (1) RCR (Civil) 343, para 12]. The relevant portion is executed herein below:

> "No doubt, the Bank could auction the property even with encumbrances attached to property but it was incumbent upon the Bank to disclose the encumbrances and litigations on the same or tenancy, if any, attached to the property to all the persons who wanted to participate in the same and to the successful bidder. By including a clause of 'as is where is' it would not be sufficient for respondent No. 1 from disclosing encumbrances or handing over the property to the petitioner."

h. That the Respondent No.2 Bank has further failed to comply with the proviso of Rule 8(6) of the Security Enforcement Rules as to the best of applicants' knowledge, the Bank has failed to publish the sale proclamation in two leading newspapers, which have sufficient circulation in the locality where the subject property is situated. The conspicuous part of the matter is that the Bank has not denied the same.

i. That further the instant sale proclamation is in violation of Rule 8 (5) as apparently no fresh valuation has been obtained by the authorized officer of the Bank. That the provision of Rule 8(5) are mandatory provisions and the same cannot be ignored before conducting a sale notice.

j. That the instant impugned Sale proclamation is further in violation of the Rule 8 (6) (b) of the Security enforcement Rules as it does not disclose the current outstandings of the borrower. The proclamation refers to amount as on 06.04.2023, however, the same does not give a breakup of the principal amount, interest, penal interest and other charges, which is mandatory under the Security enforcement Rules. The law in this regard is not longer Res Integra and the same has been set rest by the Hon'ble Apex Court in a catena of decision.

k. That at the best knowledge of the applicants the respondent No.2 Bank had not published the possession notice contemplated under Rule 8(2) of the Security Interest Enforcement Rules 2002 in two newspapers. It is also relevant to submit as per best of the knowledge of the applicants respondent bank had not made publication of the possession notice in two leading newspaper having sufficient circulation in the locality in which secured asset situated as contemplated aforesaid rules.

l. That in the present case the respondent No.1 Bank has absolutely no right to sell the units belonging to the Applicants and the other Allottees. The respondent No.1 Bank has right to sell only the unsold inventory and the sale conducted by the Bank on "As is where is" "As is What is" and "whatever there is" basis is bad in law and in contravention of the rights of the applicants herein and other allottees.

m. That the entire recovery proceedings initiated by the bank authorizes under the Act 2002 are void ab- initio, in the eyes of Law for any reason occasion and justification and fragrant violation of Law of the land.

n. The Applicants herein having been aggrieved by the acts of the Respondent Bank shall be covered other the definition of "Any Person" as defined under section 17 of the SARFAESI Act.

B. Judgments relied by the respondent No.1 Bank & the Auction purchaser

i. Rambhau Namdeo V/s Narayan Bapuji [2004 (8) SCC 614]

The above judgment relied upon by the Respondents do not apply to the facts in our case as the same is specifically in relation to Section 53A Transfer of Property and the conditions for the application of the same. It provides that a buyer if has paid the entire sale consideration and is in possession of the property, he shall be entitled to file a suit for specific performance in order to defend his interest in the property.

The judgement in Para 13 while relying upon the State of U.P v/s District judge [1997 (1) SCC 496] relies upon the law that the unregistered document does not transfer any title in the property. i.e. the buyer is not entitled to transfer the property to any third party. Para 6 to 13 is important in the matter.

The applicants herein are not seeking titled in the property. The only aspect which requires consideration is that a charge has been created in favour of the Applicants due to Section 55 (6) (b) of the Transfer of property Act. The applicants herein have never submitted that they have titled over the subject property.

That even clause 18 of the Allotment letter which was being relied on the Bank defines the same. It specifically says that until the conveyance deed is executed, the applicant shall not have titled over the property in order to enter into an agreement to sell over the property.

The above judgment therefore does not apply to the present facts of the case.

ii. "G.Vikram Kumar V/s State Bank of Hyderabad" [AIR 2023 SC 2359]

The reliance of the Bank on the said judgment is totally misconceived and without any basis. The judgment has absolutely different facts and do not apply to our present case. The case was in relation to a sale conducted by the Respondent Bank behind the Back of the DRT although the matter was already subjudice before the DRT and the sale of flats in the property were being overwatched by the DRT itself.

iii. "Union Bank of India V/s Rajasthan Real Estate Authority" (Special Leave to Appeal Civil 1861/2022)

The judgment is not applicable in our case due to Point (iv) of para 36 of the Judgement. The same is being reiterated herein:

> "(iv) RERA would not apply in relation to the transaction between the borrower and the Banks and Financial Institutions in case where Security Interest has been created by mortgaging the property prior to the introduction of the Act unless and until it is found that the creation of such mortgage or such transaction is fraudulent or collusive."

The present credit facilities having been sanctioned in 2015, much before the enactment of RERA, the proceedings under RERA are not maintainable and therefore the present citation cannot be relied upon.

Prayer

On the submissions placed above, the present Application may kindly be allowed and sale notice dated 06.04.2023 and auction sale 15.05.2023 may kindly be quashed.

8. On the contrary, Ld. Counsel for the respondent Bank submitted that the S. Applicants are not aggrieved persons as they

have no right title in the property in question. Since they are not aggrieved persons therefore, they cannot challenge the SARFAESI actions. However, as per builder-buyers agreement attached by the S. Applicants with SA at page No. 58, clause 32 mentions about the arbitration and accordingly, the S. Applicants have alternative arbitration clause. It is further submitted that the S. Applicants have also attached detailed terms and conditions of the sale notice dated 06.04.2023 and as per clause 18 of the said terms and conditions, unless a conveyance deed is executed and registered, the company shall for all intends and purposes continue to be the owner of the land and also the constructions, if any, thereon and this agreement shall give to the allottee (s) only the right and interest an allottee (s). It is further submitted that no conveyance deed has been executed and registered therefore, the company remains for all intends and purposes to be the owner of the land also the construction and the said agreement gives to the allotee (s) only the right and interest of an allottee (S) and not owner. It is further submitted that the borrower has filed SA before the DRT, Lucknow and the same is pending. It is submitted that the present S. Applicants are the proxy setup by the borrower for obtaining the favourable order. It is submitted that the S. Applicants are aggrieved persons upto the extent of the money deposited by them with the borrower and not with the Bank and the S. Applicants cannot question the action of the respondent Bank.

9. It is further submitted that there is an agreement to sale between the S. Applicants and borrower M/s Zar Developers Pvt. Ltd. on Rs. 100/- stamp paper which is unregistered. Therefore, that agreement to sale cannot be enforced in law as it is held by the Hon'ble Supreme Court of India in the matter of Rambhau Namdeo Gajre Vs. Narayan Bapuji Dhotra (dead) through LRS (2004) 8 Supreme Court Cases 614. Relevant paragraph 13 of the said judgment is reproduced herein under:-

> *13. The agreement to sell does not create an interest of the proposed vendee in the suit property. As per Section 54 of the Act, the title in immovable property valued at more than Rs. 100 can be conveyed only by executing a registered sale deed. Section 54 specifically provides that a contract for sale of immovable property is a contract evidencing the fact that the sale of such property shall take place on the terms settled between the parties, but does not, of itself, create any interest in or charge on such property. It is not disputed before us that the suit land sought to be conveyed is of the value of more than Rs. 100. Therefore, unless there was a registered document of sale in favour of Pishorrilal (the proposed transferee) the title of the suit land continued to*

vest in Narayan Bapuji Dhotra (original plaintiff) and remain in his ownership.

10. It is further submitted that, there is no illegality or infirmity in the sale notice issued by the Bank. The alleged application form or any unregistered agreement does not create any title or encumbrance in favour of applicants. The Hon'ble Allahabad High Court has held in the Application U/s 482 No.37458 of 2016 (Ajit Kumar Gupta Vs. State of U.P. & another) as under:

> Para 17: "Now adverting to the second question, this Court finds that a perusal of Section 54 of the Transfer of Property Act, 1882, clearly proves that a contract for the sale of immoveable property is only a contract that sale of such property shall take place on terms settled between the parties. It does not, of itself, create any interest in or charge on such property. Therefore, it is clear that an agreement to sell does not creates any right or title in favour of intending buyer. It is only a document creating right to get another document of sale from seller on fulfilment of terms and conditions specified therein. On the strength of such an agreement, a buyer does not becomes the owner of the property. The ownership remains with the seller. It will be transferred to the buyer only on the execution of the sale deed by the seller. The buyer obtains only right to get sale deed executed in his favour."

11. It is further submitted that admittedly the respondent Bank granted credit facilities to the principal borrower - respondent no.2 in the year 2014 and the applicants entered into the alleged unregistered Agreement to Sell for purchase of flats from respondent no.2 in the year 2015 that too without any prior consent or knowledge of respondent Bank. Since, the property in question was mortgaged in favour of respondent Bank prior to the alleged unregistered agreement to sell in favour of applicants by respondent no.2, so the applicants do not get any title over the property in question. The Section 17 of the Registration Act, 1908, prior the Amendment Act, 2012 ('Act, 2012') and Section 17 post Amendment Act, 2012, and said that on and after the Act, 2012, as per Section 17(1) (g), instrument of agreement relating to sale of immovable property of the value of Rs. 100/- and upwards is required to be registered compulsorily. The alleged unregistered agreement does not create any title or encumbrance in favour of applicants.

12. Ld. Counsel for the respondent Bank has further relied upon the judgment passed by the Hon'ble Supreme Court of India in the matter of G. Vikram Kumar Vs. State Bank of Hyderabad and others 2023 SCC OnLine SC 549 and referred paragraph 22 and 23 of the said judgment. Request is made that since the S. Applicants have

no locus standi and they do not come within the purview of aggrieved person therefore, the SA may be dismissed.

13. In addition to the above submissions advanced orally, Ld. Counsel for the respondent Bank has also filed written submissions which runs as under:-

> 1. That, the applicants have alleged in the S.A. that they are allottees of flats proposed to be constructed over housing project developed by respondent no.2 Company at Jataouli, Main Haridwar-Delhi by pass road, Meerut. The applicants have alleged that they were allotted separate flats in their favour through Allotment Letter issued by respondent no.2 Company on 12-11-2012 and 09-12-2012.
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> 2. That, the applicants have further admitted in the S.A. about grant of credit facilities by respondent Bank to respondent no.2 Company in the year 2014.
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> 3. That, the applicants have further alleged in the S.A. that allotments of the applicants had been made much prior to the charge created by the respondent no.2 in favour of respondent Bank and the Bank was aware about the rights and interest of the applicants and other allottees before grant of credit facilities even then the Bank has proceeded for auction sale under the provisions of SARFAESI Act, 2002 without any notice to the applicants.
>
> OBJECTION OF THE RESPONDENT BANK IN THE S.A. :
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> 4. It is wrong to allege that the applicants were allotted respective flats in the year 2012 prior to the sanction of credit facility by respondent Bank to principal borrower - respondent no.2. The correct fact is that the alleged documents dated 12-11-2012 and 09-12-2012 are Application Form by which the applicants applied for purchase of flats from respondent no.2. <u>The applicants with malafide intentions have succeeded in misleading this Hon'ble Tribunal by placing the Application Forms as allotment letters.</u>
>
> 5. It is wrong to allege that the applicants were allotted respective flats much prior to the charge created by respondent no.2 in favour of respondent Bank and the respondent Bank was aware about the alleged charge created by respondent no.2 in favour of respondent no.1. The correct fact is that the alleged documents dated 12-11-2012 and 09-12-2012 referred in the S.A. are Application Form by which the applicants applied for purchase of flats from respondent no.2.
>
> 6. That, admittedly the applicants are third party who have no concern with the credit facilities granted by respondent Bank to respondent no.2 so no notice/ permission is required before proceeding for recovery under the provisions of SARFAESI Act, 2002. It is pertinent to mention here that the applicants have been set up by the principal borrower - respondent no.2 to any how obstruct and withhold the recovery proceedings. The respondent no.2 - borrower had already challenged recovery proceedings initiated by the Bank under the provisions of SARFAESI Act, 2002 by filing application under

Section 17(1) of SARFAESI Act, 2002 before DRT, Lucknow in which they could not get any interim relief and it is pending adjudication so they had setup the applicants before this Hon'ble Tribunal to anyhow withhold the recovery proceedings.

7. That, there is no illegality or infirmity in the sale notice issued by the Bank. The alleged application form or any unregistered agreement does not create any title or encumbrance in favour of applicants. The Hon'ble Allahabad High Court has held in the Application U/s 482 No.37458 of 2016 (Ajit Kumar Gupta Vs. State of U.P. & another) as under:

> Para 17: "Now adverting to the second question, this Court finds that a perusal of Section 54 of the Transfer of Property Act, 1882, clearly proves that a contract for the sale of immoveable property is only a contract that sale of such property shall take place on terms settled between the parties. It does not, of itself, create any interest in or charge on such property. Therefore, it is clear that an agreement to sell does not creates any right or title in favour of intending buyer. It is only a document creating right to get another document of sale from seller on fulfilment of terms and conditions specified therein. On the strength of such an agreement, a buyer does not becomes the owner of the property. The ownership remains with the seller. It will be transferred to the buyer only on the execution of the sale deed by the seller. The buyer obtains only right to get sale deed executed in his favour."

8. That, admittedly the respondent Bank granted credit facilities to the principal borrower - respondent no.2 in the year 2014 and the applicants entered into the alleged unregistered Agreement to Sell for purchase of flats from respondent no.2 in the year 2015 that too without any prior consent or knowledge of respondent Bank. Since, the property in question was mortgaged in favour of respondent Bank prior to the alleged unregistered agreement to sell in favour of applicants by respondent no.2, so the applicants do not get any title over the property in question. **The Section 17 of the Registration Act, 1908, prior the Amendment Act, 2012 ('Act, 2012') and Section 17 post Amendment Act, 2012, and said that on and after the Act, 2012, as per Section 17(1) (g), instrument of agreement relating to sale of immovable property of the value of Rs. 100/- and upwards is required to be registered compulsorily.** The alleged unregistered agreement does not create any title or encumbrance in favour of applicants.

9. That, the applicants are neither borrower nor guarantors/ mortgagors so they cannot question the proceedings initiated by the Bank.

10. That, admittedly the applicants have alleged their claim upon three flats towards which they alleged to have advanced an amount of Rs.36 Lacs (Approx.) to the respondent 2 borrowers but on the other hand the respondent Bank has

auctioned the entire secured asset for an amount of Rs.17 Crores and after appropriation of entire outstanding dues of respondent no.2 borrowers an excess amount of approximately Rs.3 Crores is lying with the respondent Bank. So to protect the interest of applicants the respondent Bank is ready to withhold the excess amount of auction sale proceeds as directed by this Hon'ble Tribunal.

11. That, the respondent Bank has initiated auction proceedings are following all mandatory provisions of SARFAESI Act & Rules and there is no illegality in the process adopted by the Bank. It is further submitted that there is no violation of any of the mandatory provisions of SARFAESI Act & Rules, 2002.

12. That, the present S.A. is not maintainable in view of alternative remedy available to the applicants for raising their complaint before RERA authority under RERA Act, 2016.

13. That, in view of above mentioned facts and circumstances the present S.A. is a clear abuse of process of law and is liable to be dismissed.

14. Ld. Counsels for the auction purchasers adopted the contentions of the Ld. Counsel for the respondent Bank. However, they have also filed written submissions which run as under:-

This present application is being preferred by the applicants (Allottees) before this Hon'ble Tribunal Under Section 17 of SARFAESI Act, 2002. The applicants are challenging the alleged illegal and arbitrary sale conducted by Respondent No. 1 under the SARFAESI Act, 2002. the grounds for the challenge include disputing the sale notice dated 06.04.2023, under Rule 8(6) of the SARFAESI Act, and contesting the possession, and auction sale held on 15.05.2023 by Respondent No. 1 Bank. The applicants are allegedly aggrieved by the actions taken by the Respondent Bank under Section 13(4) of the SARFAESI Act, 2002, and seek the statutory remedy available Under Section 17 of the SARFAESI Act, 2002.

Dates	Events	Annexures
01.07.2017 13.02.2018	The Respondent Bank declared the account of the Respondent No. 2 company as a Non-Performing Asset (NPA) and subsequently initiated measures under section 13(2) and 13(4) of the SARFAESI Act.	
20.07.2018	The Respondent No. 1 Bank took the possession of the project land.	
06.04.2023	Respondent No. 1 Bank issued a Sale Notice in accordance with the provisions of the SARFAESI Act.	
15.05.2023	Respondent No. 1 Bank, in accordance with the Sale Notice dated 06.04.2023, conducted an auction for the project land. The	

	highest bidder was determined through the proper procedure of the SARFAESI Act.
25.05.2023	Sale certificate was issued in favour of the purchasers by respondent Bank. auction the

ARGUMENTS FORWARDED BY THE APPLICANTS-

A. It is alleged by the applicants that Respondent No. 1 Bank's actions Under Section 13(4) is illegal and arbitrary the rights of applicants and other allottees, despite their prior charge/ Encumbrance on the project land.

B. It is alleged by the applicants that respondent No. 1 Bank's actions purportedly violate Rule 8(6) by not publishing the sale proclamation in two leading newspapers and failing to provide a breakdown of the current outstanding of the borrower.

WRITTEN SUBMISSION ON BEHALF OF THE AUCTION PURCHASER

The Applicants begs to submit as under:

A. That by means of the present Securitization Application the Applicants have challenged the Securitization process initiated by the Respondent Bank under Section 13 (4) of the SARFAESI Act, 2002 whereby sale notice dated 06.04.2023 as well as possession notice dated 20.07.2018 and other proceedings of the Respondent Bank.

B. That the present Securitization Application is highly misconceived and devoid of any merits substance and due process of law has been followed by the Respondent Bank in the present case while conducting the auction proceedings conducted on 15.05.2023 by the Respondent Bank.

C. That the present Securitization Application is not maintainable in the eyes of law because the Applicants have no locus to challenge the Securitization process initiated by the Respondent Bank.

D. That Applicants are not the borrower but they are claiming that they have submitted the application for purchasing the flats from borrowers who happened to be builders/developers. It is submitted that the Applicants have filed the Securitization Application based on frivolous and irrelevant ground.

E. That the Applicants have enclosed the application form dated 12.11.2011 wherein terms and conditions for allotment of the Flats have been mentioned.

F. That according to the para No. 18 of the terms and conditions mention in the application form is quoted below:-

> "Unless a conveyance deed is executed and registered, the company shall for all intents and purposes continue to be the owner of the land and also the construction, if any, thereon and this agreement shall given to the allottee (S) only the right and interest and allottee(S)."

G. That the above mention condition has clearly shows that the Applicants have no right, title and interest in the property which has been auctioned by the Respondent Bank because till date no sale deed has been executed in their favour.

H. That the Applicants have also enclosed the unregistered allotment cum-agreement dated 16.06.2015 which is enclosed at page No. 35 of the Securitization Application. The paragraph No. 32 is quoted below:-

> "32 ARBITRATION:
> All are any dispute arising out of or touching upon or relation to in terms of this agreement or its termination, including the interpretation and validity thereof and the respective rights and obligations of the parties shall be settled amicably by mutual discuss failing which the same shall be settled through arbitration, the arbitration proceedings shall be governed by the Arbitration and Conciliation Act, 1996 or any statutory amendments, modifications thereof the time being enforce, the Arbitration proceedings shall be held at the registered office of the Developer Company alone in New Delhi by sole arbitrator who shall be appointed by the Developer Company, oт any person nominated by him, however, in case the allottees doesn't agree to the appointment of a sole arbitrator appointed by the Developer Company, in that case three Arbitrators will be appointed. The first Arbitrator as proposed by the Developer Company, the second Arbitrator as proposed by allottees and the third Arbitrator proposed by the two appointed Arbitrators by the Developer Company and allottees respectively. The third Arbitrator will act as Presiding Arbitrator, the the allottees hereby confirms that he/she/it shall have no objection to this appointment. The Courts at Meerut shall alone have the jurisdiction in all matters arising out of/touching and/or concerning this Agreement. This will be subject to the statutory jurisdiction of Allahabad, High Court."

I. That the Applicants have a remedy to approach before the Arbitrator to settle their grievances and furthermore they have to approach RERA.

J. That the Applicants have no locus standee to file the present Securitization Application before this Tribunal, the Securitization Application filed by the Applicants is not maintainable and liable to be dismissed.

K. That the Applicants cannot challenge the process initiated by the Respondent Bank under the SARFAESI Act, 2002 because they have no right, title and interest in the property in dispute, the Company have exclusive owner of the land till the registered deed are executed in favour of the Applicants, therefore, the process initiated by the Respondent bank are legal and valid and cannot be challenged by the Applicants.

ARGUMENT IN FAVOUR OF THE RESPONDENTS-

L. The respondents assert that the applicants have no locus before this Hon'ble Tribunal as it is established in the legal precedent (Union Bank of India V. Rajasthan Real Estate Regulatory Authority, 2021 SCC OnLine Raj 4369, Paragraph 36 and 37) by a division bench of the Rajasthan High Court upheld by the Hon'ble Supreme Court in Union Bank of India Vs. Rajasthan Real Estate Regulatory Authority, 2022 SCC OnLine SC 1885 determines that jurisdiction over complaints against banking utilizing SARFAESI Act lies solely with the RERA authority. This jurisprudence stance questions. The maintainability of the current Securitization Application before this Tribunal by the allottee.

M. The sale notice and auction conducted by the bank are executed in accordance with the stipulations outlined in the SARFAESI Act and its associated rules. Regarding the disclosure encumbrances in the sale notice for immovable property, the bank's adherence to the principle of "as is where is basis" within the auction notice indicates compliance with Rule 8(6). This aligns with the comprehensive elucidation of the term "as is where is basis" by the Full Bench of the Hon'ble Supreme court in the case of K.C. Ninan V. Kerala SEB (2023 SCC OnLine SC 663), particularly elaborated upon in paragraph 146 and 147 of the said judgment.

CONCLUSION-

The above discussion and the stand of the respondent auction purchasers goes to show that the secured applicant has not come with clean hands before this Hon'ble Tribunal. Furthermore the secured applicant is not in a position to challenge the action of the respondent bank as they have a alternative remedy to approach the Real Estate Regulatory Authority Uttar Pradesh for their grievance and this Hon'ble Tribunal is no forum for them to agitate their at claim/demands.

The interim order has been obtained by the secured applicants from the Hon'ble Tribunal by stating misleading facts and advancing false statements at the bar. The auction purchasers are in physical possession of the property in question and they are lawful owners of the same.

This Hon'ble Tribunal may be kind enough to dismiss the present Securitization Application and direct the bank to immediately execute the sale deed in favour of the auction purchasers at once otherwise the auction purchasers shall suffer irreparable loss and injury shall follows..

15. Considered the rival contentions of the parties and perused the records including the written submissions filed on behalf of the parties.

16. The Tribunal has to examine as to whether the S. Applicants are covered under the purview of aggrieved person or not. For ready reference, section 17 (1) of the SARFAESI Act, 2002 is being quoted herein under:-

17. (1) Any person (including borrower), aggrieved by any of the measures referred to in sub-section (4) of section 13 *taken by the secured creditor or his authorized officer under this Chapter, (may make an application along with such fee, as may be prescribed) to the Debts Recovery Tribunal having jurisdiction in the matter within forty-five days from the date on which such measure had been taken.*

17. As per Ld. Counsel for the S. Applicants, the S. Applicants are neither borrowers/guarantors nor they are in possession of property in question but they are aggrieved persons as in the sale notice dated 06.04.2023 vide which the auction sale was fixed on 15.05.2023, the encumbrances already created by the borrower-builder in favour of the S. Applicants have not been mentioned by the respondent Bank inspite of the fact that the builder-M/s Zar Developers Pvt. Ltd. had already informed the respondent Bank that total 45 flats including the flats of the S. Applicants were sold.

18. As per the S. Applicants, prior charge over the property in question was created by the borrower M/s Zar Developers Pvt. Ltd. in favour of the S. Applicants as the S. Applicants had deposited money for allotment of flats which were yet to be constructed and accordingly, the respondent No. 2-builder-M/s Zar Developers Pvt. Ltd. has allotted the unconstructed flats to the S. Applicants in the year 2012 while the respondent No. 2 M/s Zar Developers Pvt. Ltd. has obtained the loan from the respondent Bank on 15.11.2014 and 21.04.2015. The S. Applicants have also entered into a builder-buyers allotment-cum-agreement on 16.06.2015, 27.06.2014 and 06.07.2015. As per S. Applicants, as per section 55 (6) (B) of the Transfer of Property Act, the charge cannot end unless it is ended by the buyers.

19. On perusal of records, it appears that there are builder-buyers allotment-cum-agreements written on the stamp papers of Rs. 100 attached by the S. Applicants with this SA. The perusal of said builder-buyers allotment-cum-agreements show that these are unregistered and clause 32 of the said allotment-cum-agreement provides Arbitration for redressal of any dispute arising out between builder and buyers. Further, on perusal of the detailed terms and conditions mentioned in the Application form for allotment dated 12.11.2012, it is seen that under clause 18 of the said terms and conditions, it is mentioned that *unless a conveyance deed is executed and registered, the company shall for all intends and purposes continue to be the owner of the land and also the constructions, if any, thereon and this agreement shall give to the allottee (s) only the right and interest an allottee (s).* It is worthwhile to mention here that in the said allotment-cum-

agreement, the respondent Bank is neither party, nor no objection from the respondent Bank was taken.

20. On perusal of records, it is observed that as stipulated under clause 18 of the detailed terms and conditions of the application form for allotment of flats dated 12.11.2012, since no conveyance deed has been executed and registered therefore, the company remains for all intends and purposes to be the owner of the land also the construction and the said agreement gives to the allotee (s) only the right and interest of an allottee (S) and not owner. Moreover, the allotment-cum-agreements being unregistered are not enforceable in law and clause 32 of the said allotment-cum-agreements specifically provides for Arbitration for redressal of any dispute arising out between builder and buyers and the respondent Bank is neither party to the said allotment-cum-agreements nor "no objection" was obtained from the respondent Bank. Since the S. Applicants are neither owner of the property in question nor the respondent Bank has any concern with the allotment-cum-agreements entered into between the Builder and Buyers, therefore, the S. Applicants do not fall under the category of aggrieved persons from any of the SARFAESI actions undertaken by the respondent Bank and if the S. Applicants are aggrieved by the respondent No. 2-builder, they may approach to the appropriate forum.

21. Perusal of record further shows that there is an allotment-cum-agreement between the S. Applicants and borrower M/s Zar Developers Pvt. Ltd. on Rs. 100/- stamp paper which is unregistered. Therefore, that agreement to sale cannot be enforced in law as it is held by the Hon'ble Supreme Court of India in the matter of Rambhau Namdeo Gajre Vs. Narayan Bapuji Dhotra (dead) through LRS (2004) 8 Supreme Court Cases 614. Relevant paragraph 13 of the said judgment is reproduced herein under:-

> *13. The agreement to sell does not create an interest of the proposed vendee in the suit property. As per Section 54 of the Act, the title in immovable property valued at more than Rs. 100 can be conveyed only by executing a registered sale deed. Section 54 specifically provides that a contract for sale of immovable property is a contract evidencing the fact that the sale of such property shall take place on the terms settled between the parties, but does not, of itself, create any interest in or charge on such property. It is not disputed before us that the suit land sought to be conveyed is of the value of more than Rs. 100. Therefore, unless there was a registered document of sale in favour of Pishorrilal (the proposed transferee) the title of the suit land continued to vest in Narayan Bapuji Dhotra (original plaintiff) and remain in his ownership.*

22. The Hon'ble Allahabad High Court has held in the Application U/s 482 No.37458 of 2016 (Ajit Kumar Gupta Vs. State of U.P. & another) as under:

> Para 17: "Now adverting to the second question, this Court finds that a perusal of Section 54 of the Transfer of Property Act, 1882, clearly proves that a contract for the sale of immoveable property is only a contract that sale of such property shall take place on terms settled between the parties. It does not, of itself, create any interest in or charge on such property. Therefore, it is clear that an agreement to sell does not creates any right or title in favour of intending buyer. It is only a document creating right to get another document of sale from seller on fulfilment of terms and conditions specified therein. On the strength of such an agreement, a buyer does not becomes the owner of the property. The ownership remains with the seller. It will be transferred to the buyer only on the execution of the sale deed by the seller. The buyer obtains only right to get sale deed executed in his favour."

23. On perusal of sale notice issued by the respondent Bank, there appears no illegality or infirmity in the same. The alleged application form or any unregistered agreement does not create any title or encumbrance in favour of applicants. Further, Section 17 of the Registration Act, 1908, prior to the Amendment Act, 2012 ('Act, 2012') and Section 17 post Amendment Act, 2012, it is provided that on and after the Act, 2012, as per Section 17(1) (g), instrument of agreement relating to sale of immovable property of the value of Rs. 100/- and upwards is required to be registered compulsorily. It is admitted by the S. Applicants that the respondent Bank has granted credit facilities to the principal borrower - respondent no.2 in the year 2014 and 2015 and the applicants entered into the alleged unregistered Allotment-Cum-Agreement for purchase of unconstructed flats from respondent no.2 in the year 2015 that too without any prior consent or knowledge of respondent Bank. Since, the property in question was mortgaged in favour of respondent Bank prior to the alleged unregistered agreement to sell in favour of applicants by respondent no.2, so the applicants do not get any title over the property in question.

24. The present S. Applicants appear to be proxy setup by the borrower for obtaining the favourable order. The S. Applicants does not fall within the purview of aggrieved persons by the SARFAESI actions undertaken by the respondent Bank. However, they may be aggrieved but only upto the extent of the money deposited by them with the borrower and not with the Bank. Therefore, in my

considered view the S. Applicants cannot question the SARFAESI actions of the respondent Bank.

25. The judgments relied upon by the S. Applicants are not applicable in this case as the facts and circumstances of this case are different.

26. In view of above facts and circumstances and the judgments passed by the Hon'ble Apex Court, since the S. Applicants are failed to prove that they are aggrieved persons against the SARFAESI actions undertaken by the respondent Bank, accordingly, the SA is not maintainable and having no merits and is liable to be dismissed.

ORDER

The SARFAESI Application, filed by the S. Applicant is, hereby, dismissed.

Interim order dated 16.05.2023 stands vacated.

I.A. pending if any, is stands disposed off.

Copies of this order be furnished to the parties as per Rules.

Judgment signed, sealed, dated and pronounced in the open court on this 8th Day of December, 2023.

Dictated & Corrected by me.

[R. M. Kushawaha]
Presiding Officer
Debts Recovery Tribunal, Allahabad

[R. M. Kushawaha]
Presiding Officer
Debts Recovery Tribunal,
Allahabad

VK