

Calcutta High Court (Appellate Side)

Ballyfabs International Limited vs The State Of West Bengal & Ors on 22 April, 2022

IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE

Present:

THE HON'BLE JUSTICE HARISH TANDON
&
THE HON'BLE JUSTICE RABINDRANATH SAMANTA

WPA 7006 OF 2020
Ballyfabs International Limited
Vs.
The State of West Bengal & Ors.

Appearance:

For the Petitioner : Mr. Dhruba Ghosh, Adv.
Mr. Rupak Ghosh, Adv.
Mr. Pradip Kumar Sarwagi, Adv.

For the State : Mr. Anirban Roy, Adv.
Mr. Ayan Banerjee, Adv.
Ms. Debasree Dhamali, Adv.

For the Respondent no 4 : Mr. Surojit Auddy, Adv.

Ms. Swapnalekha Auddy, Adv.

Judgment On : 22.04.2022

Harish Tandon, J.:

The Single Bench while dealing with the instant writ petition noticed several decisions of a Co-ordinate Bench rendered in cases of Vitarich Agro Food India ltd Vs State of West Bengal (WP no. 1236 W of 2017), Glovi Infracon LLP Vs. Inspector General of Registration & CSR & Anr. (2017 SCC Online Cal 9368), VPH Real Estate Private Ltd. & Anr. Vs. Directorate of Registration and Stamp Revenue, Finance Department & Ors (WP 1069 of 2015) wherein it is held that the authorized officer under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as "SARFAESI Act") conducting a sale of the mortgaged property is not a court sale or a sale conducted by an authorized officer of the Court or a company sale, but rendered the dissenting view upon interpreting the provisions contained in Section 47A and Section 2 (16B) of the Indian Stamp Act and Section 3 of the West Bengal Stamp (Prevention of Undervaluation Instruments) Rules, 2001 holding that once the sale is affected by an authorized officer under SARFAESI Act by making wide publication in the widely circulated

newspapers shall be regarded as the open market sale and, therefore, the registering authority cannot have any reason to believe that the sale price has been shown under-valued having not sold in the open market. The Single Bench referred the matter to the Chief Justice for following reference:

"Whether the sale conducted by an authorized officer under SARFAESI Act, 2002 is an open market sale and is, thus, excluded from the scrutiny contemplated under Section 47A of the Indian Stamp Act, 1899 (as amended in West Bengal)."

The Chief Justice has referred this matter to this Bench to answer such aforesaid reference.

Since the reference is required to be answered by this Bench, it would be necessary to broadly state the salient facts involved in the instant case.

Twelve acres of land comprised in several dag nos. in Mouza Gangarampur, P.S. Bisnupur, District 24 Parganas (South) together with the structures, factories, shades, gudams, bungalows, offices and houses originally belonged to JJ Exports Ltd. The said owner mortgaged the aforesaid property with the IDBI Bank Ltd. but later on, failed to repay the loans which constrained the said bank to activate the provisions contained in SARFAESI Act, 2002. The possession of the mortgaged property was taken under the provision of the said Act on July 14, 2017. The first notice was advertised in various newspapers by the bank on August 25, 2017 but did not find any offer. Even the Second advertisement dated November 3, 2017 could not fetch any buyer. However, the third advertisement published on December 31, 2017 could fetch a buyer i.e., Petitioner no. 1 who offered to purchase the mortgaged property at Rs.4 crores 10 thousand for the movable assets and Rs. 14 crores 1 lakh for immovable assets. The sale was confirmed and the sale certificate was issued on 19.1.2018 followed by the delivery of possession. The Petitioner no. 1 demanded the bank to execute the deed of conveyance to perfect the sale so conducted but the dispute arose over the terms and conditions incorporated in the draft conveyance deed. This led to the institution of Civil Suit being CS no. 64 of 2018 in the Original Side of this court seeking reliefs against the bank to approve the draft conveyance deed. An inter-locutory application being GA no. 820 of 2018 was taken out in the said suit for temporary mandatory injunction upon the bank to approve the draft deed of conveyance forwarded under the covering letter dated 20th February, 2018 which was taken up on 16.4.2018 wherein the direction was passed upon the bank to disclose discrepancies in the proposed deed of conveyance. Apropos such direction the bank suggested the changes which they intend to incorporate in the proposed deed of conveyance and the same was accepted by the Petitioner no. 1 as reflected in the Order dated 23 rd April, 2018. Simultaneously, the court directed the parties to take steps to get the deed of conveyance registered within two weeks therefrom. The queries were raised to the Registrar for Assessment of Stamp Duty on 25th April, 2018 which was answered by the said authority disclosing the market value of the property at Rs. 24,74,96,541/-. Subsequently, the same was enhanced to Rs. 37,45,5089/- when further clarification was sought. The Petitioner no. 1 responded to the said assessment of the market value of the property at Rs. 37 crores and odd indicating that the property was sold in public auction after wide publication and, therefore, the assessment of stamp duty must be restricted to the price declared in the public auction i.e., Rs. 14 crores 1 lakh only. The said facts were disclosed before the Suit Court and an order was passed on

May 16, 2018 directing the Registrar of Assurance to express his views on the assessment of the market value above the price fetched in public auction. The view was expressed by the Registrar of Assurance, Calcutta on May 29, 2018 that since the public auction was conducted by the authorized officer of IDBI Bank Ltd. Who is not a court, it cannot be regarded as a price fetched in the open market sale and, therefore, Section 47A of the Indian Stamp Act and Rule 3 of the West Bengal Stamp (Prevention of Undervaluation Instruments) Rules, 2001 are applicable. By an order dated July 11, 2018 the said inter locutory application being GA 820 of 2018 was disposed of with categorical observation that it is neither necessary nor proper for the court to entertain the merits of dispute raised by the registering authorities and parties were relegated to ventilate the grievances by approaching the appropriate forum. The said order was assailed in an intra-court appeal but the Division Bench declined to interfere with the said order holding that the petitioners shall be free to avail whatever remedies that might be open to them to question the propriety of the demand made by the registering authority. The said liberty is the genesis of the writ petition filed by the petitioners and the Single Bench took a dissenting view to the views of the other Co-ordinate Bench and the matter is referred to this Bench for answering the reference.

The submission of the petitioners is primarily based upon two judgments which, according to them, are occupying the field in this regard. The reference is made to a judgment of the Supreme Court in case of V.N. Devadoss Vs. Chief Revenue Control Officer- Inspector & Ors reported in 2009 (7) SCC 438 and the Special Bench judgment of this court in case of State of West Bengal Vs. Sati Enclave Private Ltd. & Ors. reported in 2010 (3) CHN (Cal

651). It is arduously submitted by the learned Advocate for the petitioners that in the aforesaid reports the question which fell for consideration was whether the sale conducted by the court or by statutory authorities like Board for Industrial and Financial Reconstruction and Direction(BIFR) and Appellate Authority for Industrial and Financial Reconstruction (AAIFR) or Asset Sales Committee can be regarded as a sale fetching a price in open market and, thus, is kept outside the purview of Section 47A of the Stamp Act. It is arduously submitted that if a property is sold in open market by a statutory authority fetching the best price, it would be regarded as a sale in open market and, therefore, the registering authority cannot have any reason to believe that the said price is not a true and correct reflection of the market price under Section 47A of the said Act. It is further submitted that mere reduction of the reserve price cannot be a reason to believe that the price fetched therein is not a price which would be fetched if the sale is made in the open market as a concept of fixing the reserve price is distinct and different from the concept of ascertaining the market price. It is vehemently submitted that the expression 'reason to believe' cannot be imported if the sale is conducted by an authorized officer under the SARFAESI Act if such sale is conducted by wide circulation inviting the prospective buyer. According to the Counsel for the petitioner the stand of the registering authority that the sale conducted by the court or its authorized officer or Company Court or the BIFR or AAIFR are exempted from the purview of Section 47A is too narrow the interpretation assigned in the aforesaid decisions. The ratio of the aforesaid judgment as would be culled out therefrom leaves no ambiguity that if the sale is conducted by an authorized officer in exercise of the power conferred in the statute by making wide publication in the widely circulated newspapers having no relation or nexus with the prospective buyer will be regarded as open market sale and thus, immuned from the purview of Section 47A of the Act. A distinction has to be drawn to

the sale between two private individuals and the sale conducted on open advertisement inviting the public to offer the price which appears to have been misconstrued by the registering authorities by giving narrower interpretation to the judgment of the Apex Court in Devadoss (Supra) and Sati Enclave (Supra). It is further submitted that Section 47A of the Act can only be activated if the registering authority has reason to believe that the consideration price shown in the instrument has been fraudulently under-valued to evade the stamp duty which can be reasonably perceived in case of a private sale but has no manner of application if the sale is conducted in open market by a statutory authority in exercise of the powers conferred in the statute itself. The learned Counsel thus concluded that sale by an authorized officer under the SARFAESI Act is an open market sale having conducted after wide publication and, therefore, there is no justification in the stand of the registering authority over the inapplicability of the decisions rendered in V.N. Devadoss (Supra) and Sati Enclave (Supra).

The State respondent however, submits that Section 13 (4) (a) of the SARFAESI Act empowers the creditor to take possession of the secured assets of the borrower in the event the borrower failed to discharge his liability in its entirety within the period so specified and to transfer by way of lease, assignment or sale of the secured assets to recover its debts. Rule 8(5) of the SARFAESI Rules mandates that before effecting sale of the secured assets if it is an immovable property, the authorized officer shall obtain a valuation of the property from the approved value and in consultation with the secured creditor may fix a reserve price before it proceeds to sell the whole or any part of the immovable property/secured assets. It is further submitted that the sale would not be confirmed under Rule 9(2) if the sale price is less than the reserve price. Taking clue therefrom, it is submitted that by reducing the reserve price which was initially fixed and thereafter confirming the same is in violation of the aforesaid provisions. It is further submitted that the sale by an authorized officer under the SARFAESI Act and the Rules is not a sale conducted by the court and, therefore, the registering authority is within its competence to invoke the provisions contained under Section 47A of the Stamp Act. The reliance was placed upon a judgment of the Single Bench of this court in case of Anil Kamal Singh Vs. State of West Bengal reported in 2016 SCC Online Cal 7460 wherein it is held that an authorized officer under the SARFAESI Act cannot be regarded as a court by repelling the contention that such sale if accepted would defeat the purpose of the Act and the Rules. It is vociferously submitted that the open market sale has to be construed in the perspective of the sale conducted by the court or its officer or the Company Court and not by an authorized officer under the SARFAESI Act. It is further submitted that there is no ambiguity that the reserve price cannot be attributed to the valuation of the property as they operate in different sphere as held in Anil Kumar Srivastava Vs. State of UP & Anr. reported in 2004 (8) SCC 671. The learned Counsel further submits that it is an ardent duty of the authority to fetch the best price based on the correct valuation report and fixation of the reserve price and placed reliance upon a judgment of Supreme Court in case of Ramkishun & Ors. Vs State of UP & Ors. reported in 2012 (11) SCC 511.

It is thus submitted that the purpose behind the incorporation of Section 47A of the Indian Stamp Act and Rule 3 of the West Bengal Stamp (Prevention of Undervaluation Instruments) Rules, 2001 are to prevent the rampant evasion of the Stamp Duty by undervaluing the instrument and the moment the registering authority has reason to believe that the valuation shown in the instrument is not a market price as defined in Section 2 (16)(B) of the said Act. There is no fetter in invoking the

aforesaid provision. It is further submitted that the sale conducted by the court or its officer or the company court or the statutory authority like BIFR and AAIFR are outside the purview of Section 47A of the Act provided such sale is conducted strictly in terms of the parameters set forth in Sati Enclave (Supra). According to the learned Advocate any sale conducted by the authority not mentioned above shall be subject to Section 47A of the Act and, therefore, any interpretation which runs counter to the above decision shall open a floodgate for all and sundry to wriggle out from the clutches thereof and would render the purpose and object behind its incorporation otiose.

On the conspectus of the aforesaid submissions advanced by the respective parties and before we proceed to answer the reference as entrusted upon us, it would be profitable to quote the relevant provisions which runs thus:

"Section 47A, as it presently stands, was substituted by the "West Bengal Amendment Act of 1998 with effect from 15 th March, 2001. Sub-section (1) of Section 47A reads as under:-

"47A. Instruments of conveyance, etc. under-valued, how to be dealt with-

(1) Where the registering officer appointed under the Registration Act, 1908 (16 of 1908) has while registering any instrument of:

(a) agreement or memorandum of an agreement relating to a sale or lease-cum-sale of immovable property,

(b) conveyance, (c) to (h)

reason to believe that the market value of the property which is the subject-matter of any such instrument has not been truly set forth in the instrument presented for registration, he may, after receiving such instrument, ascertain the market value of the property which is the subject-matter of such instrument in the manner prescribed and compute the proper stamp duty chargeable on the market value so ascertained and thereafter, he shall, notwithstanding anything to the contrary contained in the Registration Act, 1908, in so far as it relates to registration, keep registration of such instrument in abeyance till the condition referred to in sub-section (2) or sub-section (7), as the case may be, is fulfilled by the concerned person."

The other sub-sections provide for laying down the manner in which the registering authority is to proceed where the concerned party does not pay the deficit stamp duty demanded where the registering officer finds that there was deficit in the amount of stamp duty paid on the instrument."

"16. In exercise of powers conferred by Clause (16B) of section 2, section 27, section 47A and section 75 of the Indian Stamp Act, 1899, the Government of West Bengal has made the Rules called W.B. Stamp, (Prevention & Under-valuation of Instruments) Rules, 2001 (hereinafter referred to as the Under-valuation Rules), Sub-rule (1) of Rule 3 of the said Rules reads as under:-

Manner of determination of market value and furnishing of particulars relating to any property - (1) The market value within the meaning of Clause (16B) of section 2 in relation to any land or any land with building shall, after taking into consideration the particulars referred to sub-rule (2), be determined on the basis of the highest price for which the sale of any land or any land with building, of similar nature and area and in the same locality or comparable locality, has been negotiated and settled during the five consecutive years immediately preceding the date of execution of any instrument setting forth such market value, or on the basis of any Court decision after hearing the State Government, or on the basis of information, report or record that may be available from any court or any officer or authority of the Central Government or the State Government or any local authority or local body, or on the basis of consideration stated in such instrument for such land or land with building, whichever is greater." "Keeping the aforesaid object of insertion of section 47A in mind, we have to examine the definition of market value in section 2 (16B) of the Act. The said definition reads as under:-

2 (16B) - 'Market' Value means, in relation to any property which is the subject-matter of an instrument, the price which such property would have fetched or would fetch if sold in open market on the date of execution of such instrument as determined in such manner and by such authority as may be prescribed by rules made under this Act of the consideration stated in the instrument, whichever is higher."

Similar definition is to be found in Explanation to Section 47A of the Indian Stamp Act, as applicable to the State of Tamil Nadu (as amended by T.N. Act, 24 of 1967) which reads as under -

"Explanation - For the purpose of this Act, market value of any property shall be estimated to be the price which, in the opinion of the Collector or the Chief Controlling Revenue Authority or the High Court, as the case may be, such property would have fetched or would fetch, if sold in the open market on the date of execution of the instrument of conveyance-exchange gift, release of benami right or settlement."

Section 47A has been substituted and inserted by way of West Bengal Amendment Act of 1998 which came into effect on and from 15th March, 2001 empowering the registering authority to ascertain the market value of the property being the subject matter of an instrument in the manner prescribed if he has the reason to believe that the market value of the property shown in the said instrument has not been truly set forth in the instrument presented for registration and may keep the registration in a bag. It further provides the modalities to be adopted by the said registering authorities in the event the deficit stamp duty or the registration fees are not paid. The market value has not been defined in the aforesaid provision but the support can be lend to such definition assigned in Section 2 (16B) of the said Act to mean the price which the property being the subject matter of the instrument would have fetched or would fetch if sold in the open market as on the date of the execution of the said instrument. However, Rule 3 of the aforesaid rules is relatable to the modalities required to be adopted for determining the market value and furnishing the particulars

of any land or a building and taking the highest price for the sale of any land or land with the structure in the same area or a same locality or a comparable locality has been negotiated and settled preceding five consecutive years of the date of execution of such instrument or on the basis of the decision of the court passed after hearing the State Government or on the basis of the information reported or record available from any court or any officer or authority of the Central Government or the State Government or the Local Authority or Local Body.

The harmonious reading of Section 47A and Section 2 (16B) of the Stamp Act manifest that if the price shown in the instrument is not the market price to the belief of the registering authority, the ascertainment and/or determination may be made under Rule 3 of the West Bengal Stamp (Prevention of Undervaluation Instruments) Rules, 2001. Equally the market price in relation to a property should be the price which such property would fetch or would have fetched if sold in the open market. The expression "open market" has not been defined in the said Act and, therefore, the import can be made to a generic meaning of the same. Open market is described in Black's Law Dictionary as a market wherein supply and demand are expressed in terms of a price. The market price is defined as the price at which the seller is ready and willing to sell and the buyer is ready and willing to buy in ordinary course of trade; the price actually given in the current market dealings; price established by public sales or sales in way of ordinary business; sometimes the market price is synonymous with the market value. The market value has been defined in Section 2 (16B) of the Stamp Act and, therefore, any other meaning should not be ascribed to it but to be restricted within the four corners thereof. The Expression "if sold in the open market" was in fact a center of debate before the Special Bench in Sati Enclave (Supra). It has been held that such expression pre-supposes that the property was not sold in the open market. The Special Bench further held that the conjoint reading of Section 47A and Section 2 (16B) of the Stamp Act with Rule 3 of the Undervaluation Rules does not imbibe the sale effected in the open market but basically applies to a case pertaining to a private sale which by no stretch of imagination may be termed as the sale in open market. The Special Bench ruled out the applicability of the aforesaid provisions if the sale is effected in open market in these words:

"25. If the legislature had intended that Section 2 (16B) was to apply to open market sales also, the legislature would have made a separate or specific provision regarding the determination of the price of the property being sold in open market. The expression "if sold in open market" pre-supposes that the property was not sold in open market and, therefore, the legislature made the provision of Section 2 (16B). The language of Rule 3 also buttresses the view being taken by us. None of the four methods of determining the value of the property in question refers to value fetched at an open market sale.

In our view, therefore, the legislative scheme is very clear that Section 47A read with Section 2(16B) of the Act and the West Bengal (prevention of Under-valuation of instruments) Rules, 2001 are enacted/made to deal with cases where the property is not sold in open market. Since Section 47A(1), 47B and 47C read with Section 2(16B) of the Act are not to apply to open market sale, as interpreted above, sub-rules (1), (7) and (8) of Rule 3 of the Under-valuation Rules made to implement the said provisions do not apply to open market sales.

While the Legislature is quite competent to create a legal fiction, in other words, to enact a deeming provision for the purpose of assuming existence of a fact which does not really exist, a legal provision created by a Legislature in an Act cannot be widened by rules made under the Act vide *Agricultural Market Committee v. Shalimar Chemical Works Ltd.*, 1997 (5) SCC 516."

In *V.N. Devadoss (Supra)*, the identical question i.e., whether the sale effected by the Statutory authorities such as BIFR and AAIFR by forming an Assets Sales Committee is subject to the scrutiny under Section 47A of the Stamp Act for the simple reason that the registering authority has a reason to believe that the price shown in the instrument is not a market price which would or would have fetched if sold in the open market. It is ultimately held that such a sale by a statutory authority in exercise of the powers reserved or conferred upon them cannot be a subject matter of scrutiny under Section 47A of the Stamp Act as there cannot be any reason to disbelieve that the price shown in the instrument is fraudulently and intentionally undervalued. The reason for holding can be reasonably inferred from the above noted decision that though the market value has been defined under Section 2 (16B) of the said Act, but in relation to the price which the property being the subject matter of the instrument would fetch or would have fetched if sold in the open market. In absence of any definition assigned to a sale in open market, Rule 3 of the Undervaluation Rules forms a basis of determining the highest price which any land or a land with building of similar nature and area and in the same locality or in a comparable locality have been negotiated and settled during the preceding 5 years from the date of the execution of the instrument. Such being the intention of the legislature, it necessarily excludes the sale effected in open market and not through a private negotiation. It is no gainsaying that the market value is a changing concept and dependant upon the price which the subject property would fetch or would have fetched if sold in the open market. The object and purpose behind the incorporation of the aforesaid provision can be reasonably visualized that it is primarily aimed at the prevention, against the fraudulent and/or arbitrary disclosure of the price of the property with intent to evade the Stamp Duty. The intention to evade the Stamp Duty by undervaluing the price is required to be prevented in order to protect the probable loss of revenue to the Government. For such reason, the Apex Court in *V.N. Devadoss (Supra)* observed that the basis for exercise of the power under Section 47A of the Act is the willful undervaluation of the subject property so transferred with fraudulent intention to evade the payment of proper Stamp Duty. Ultimately, it was held in *V.N. Devadoss (Supra)* that if the property is sold by the statutory authorities like BIFR and AAIFR through Assets Sales Committee it will be regarded as a sale in open market and, therefore, the stand of the Registering authority that he has reason to believe that the price shown in the instrument in respect of the subject property is not the price which it would fetch or would have fetched if sold in the open market in these words:

"18. On the facts of the case it cannot be said that Section 47-A has any application because there is no scope for entertaining a doubt that there was any undervaluation. That being so, the High Court's order is clearly unsustainable and is set aside. The registration shall be done at the price disclosed in the document of conveyance. There is no scope for exercising power under Section 47-A of the Act as there is no basis for even entertaining a belief that the market value of the property which is the subject-matter of conveyance has not been truly set forth with a view to fraudulently evade payment of proper stamp duty."

The plea has been taken that initially the reserve price was fixed at 17 crores which was subsequently reduced to 14 crores in the last advertisement so published which raises a doubt on the correct market value of the subject property which was sold Rs. 1 lakh above the reserve price. The importance of keeping a reserve price in an open bid is to put a reasonable restriction on the auctioneer not to accept the bid below the said reserve price. It is the reasonable restriction put on the auctioneer in refusing to accept the bid below the reserve price which has no correlation with the valuation of the property. The concept of reserve price and the valuation of the property are distinct concept and operate in different spheres. The fixation of the reserve price is indicative of the probable price below which the intending seller would not sell the property and, therefore, both the expressions are not synonymous as held in *Anil Kumar Srivastava vs. State of U.P. and Anr.*, reported in (2004) 8 SCC 671 in the following:

"11. Before coming to the above challenge, we would like to examine the concepts of "valuation" and "upset/reserve price". In the case of *McManus v.*

Fortescue (1907) 2 KB 1: (1904-07) All ER Rep 707 : 96 LT 444 it has been held by the Court of Appeal that in a sale by auction, subject to reserve, every offer/bid and its acceptance is conditional. That the public is informed by the fact, that the sale is subject to a reserve, that the give only in case that amount is equal to or higher than the reserve. That the reserve puts a limit on the authority of the auctioneer. He cannot accept a price below the upset/reserve price. That he could refuse the bid which is below the upset price.

12. The aforesaid ruling explains the meaning of the term "reserve price". It indicates the object behind fixing the reserve place viz. to limit the authority of the auctioneer. In the present case, the Board resolution is meant to guide the officers of the second respondent. The resolution prescribes the guidelines for fixing the reserve price. The concept of reserve price is not synonymous with "valuation of the property". These two terms operate in different spheres. An invitation to tender is not an offer. It is an attempt to ascertain whether an offer can be obtained with a margin. [See *Pollock & Mulla: Indian Contract & Specific Relief Acts* (2001), 12th Edn., p. 50.]

13. Valuation is a question of fact. This Court is reluctant to interfere where valuation is based on relevant material. (See *Duncans Industries Ltd. V. State of U.P.* (2002) 1 SCC 633) The difference between valuation and upset price has been explained in the case of *B. Susila v. Saraswathi Ammal* (AIR 1970 Mad 357: (1970) 1 MLJ 192 in which it has been held that fixation of an upset price may be an indication of the probable price which the land may fetch from the point of view of intending bidders. However, notwithstanding the fixation of upset price and notwithstanding the fact that a bidder has offered an amount higher than the reserve/upset price, the sale is still open to challenge on the ground that the property has not fetched the proper price and that the sale be set aside. That the fixation of the reserve price does not affect the rights of the parties. Similarly, in the case of *A.U. Natarajan (Dr.) v. Indian Bank* (AIR 1981 Mad 151: (1981) 1 MLJ 286 it has been held that the expressions "value of a property" and "upset price" are not synonymous but have different meanings. That the term "upset price" means lowest selling price or reserve price. That unfortunately in many cases the word "value" has been used with reference to upset price. That the sale has to commence at the higher price and in the absence of bidders, the price will have to be

progressively brought down till it reaches the upset price. That the upset price is fixed to facilitate the conduct of the sale. That fixation of upset price does not preclude the claimant from adducing proof that the land is sold for a low price."

In *Ram Kishun and Ors. Vs. State of Uttar Pradesh and Ors.*, reported in 2012 (11) SCC 511 the Apex Court succinctly restated the difference between the reserve price and the valuation of the properties and held that both are distinct and operate in different spheres in these words :

"18. The word "value" means intrinsic worth or cost or price for sale of a thing/property. (Vide *Union of India v. Bombay Tyre International Ltd.* [(1984) 1 SCC 467:

1984 SCC (Tax) 17] and *Gurbachan Singh v. Shivalak Rubber Industries* [(1996) 2 SCC 626: AIR 1996 SC 3057].)

19. In *State of U.P. v. Shiv Charan Sharma* (1981 Supp SCC 85: AIR 1981 SC 1722) this Court explained the meaning of "reserve price" explaining that it is the price with which the public auction starts and the auction bidders are not permitted to give bids below the said price i.e. the minimum bit at auction.

20. In *Anil Kumar Srivastava v. State of U.P.* (2004) 8 SCC 671 this Court considered the scope of fixing the reserve price and placing reliance on its earlier judgment in *Duncans Industries Ltd. V. State of U.P.* (2000) 1 SCC 633, Explained that reserve price limits the authority of the auctioneer. The concept of the reserve price is not synonymous with valuation of the property. These two terms operate in different spheres. An invitation to tender is not an offer. It is an attempt to ascertain whether an offer can be obtained with a margin. The valuation is a question of fact, it should be fixed on relevant material. The difference between the "valuation" and "reserve price" is that, fixation of an upset price may be an indication of the probable price which the property may fetch from the point of view of intending bidders. Fixation of the reserve price does not preclude the claimant from adducing proof that the land had been sold for a low price.

21. In *Desh Bandhu Gupta v. N.L. Anand* [(1994)1 SCC 131] this Court held in an auction-sale and in execution of the civil court's decree, the Court has to apply its mind to the need for furnishing the relevant material particulars in the sale proclamation and the records must indicate that there has been application of mind and principle of natural justice had been complied with. (See also *Gajadhar Prasad v. Babu Bhakta Ratan* [(1973) 2 SCC 629: AIR 1973 SC 2593] and *Gajraj Jain v. State of Bihar* [(2004) 7 SCC 151]).

The ratio laid down in the above noted decisions leaves no ambiguity that the reserve price so fixed is not relatable to the valuation of the property which it would fetch or would have fetched if sold in the open market. The reserve price is a probable price of the property which the intending seller would accept while selling the property with reasonable restriction on the auctioneer not to accept a bid below such price. By lowering reserve price as the earlier two advertisements did not find any bid has no bearing on the valuation of the subject property as both operates on different fields

having different concepts and cannot be equated with each other. Simply because the reserve price was lowered in third advertisement does not raise presumption of undervaluation of the property if the bid is accepted having offered higher price than the reserve price. The judgment of Sudipta Traders Pvt. Ltd. & Anr. vs. State of West Bengal & Ors. (APO 226 of 2017 decided on February 18 of 2020) is not pointer to a reference required to be answered in the instant case. It was a case where the sale was conducted by the recovery officer under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 by issuing the sale certificate but instead of registering the same the deed of conveyance was presented before the registering authority based upon the sale certificate. The Registering Authority raises a doubt on the price fetched while conducting the sale by the recovery officer which has a status of a revenue officer while conducting the sale under the Act of 1993 and a contention was raised that if the price shown in the said deed of conveyance is not a market price which it would fetch or would have fetched if sold in the open market, the Registering Authority is within its competence to believe that there has been an evasion of the Stamp Duty in not correctly indicating the valuation of the property being the subject matter of the instrument. It was held that there is no necessity of seeking the registration of deed of conveyance when the sale certificate was issued by the recovery officer being the Revenue officer but the sale certificate should be registered and Article 18 of Schedule 1A of the Stamp Act would apply and not Article 23 of Schedule 1A of the said act. Such stand was accepted by the State at the time of an argument and the judgment which is based on a concession cannot be said to have laid down a ratio so as to bind the coordinate or the Bench of Lesser Quorum. However, the stray observations made by the Division Bench cannot be said to be a ratio nor the exposition of law that in all conceivable sale by the recovery officer the authority can activate the provisions contained under Section 47A of the said Act.

This led us to various judgments of the Single Bench which has taken a uniform view that the sale conducted by the authorized officer under the SARFAESI Act does not come within the purview of a sale conducted by the Court. In a dissenting view taken in the instant matter, more particularly, in the order of reference took note of the aforesaid judgments and held that such narrow construction would frustrate the legislative intent behind the incorporation of Section 47A of the Act. According to the Single Bench, the ratio decidendi of Sati Enclave (supra) has been misconstrued by the coordinate Bench in case of Anil Kumar Srivastava (supra), Vitarich Agro Food India Ltd. (supra), VPH Real Estate Pvt. Ltd. (supra) and Glovi Infracon LLP (supra) to have been restricted to a sale conducted by the court or its authorized officer or the statutory authorities like BIFR, AAIFR and Assets Sales Committee and not the authorized officer under the SARFAESI Act. The ratio has been succinctly jotted down in Para 29 of Sati Enclave (supra) as under:-

"29. (1) on a correct interpretation of the provisions of Section 47A read with Section 2 (16A) of the Indian Stamp Act, 1899 as applicable to the State of West Bengal and the West Bengal Stamp (prevention of under-

valuation Instruments) Rules, 2001, the sale conducted by the Court or conducted by the Court through its officers which qualifies to be an open market sale as contemplated in Section 2 (16B) of the Act cannot be the subject-matter of exercise of powers by the registering authority under sub-sections (1) & (2) of section 47A of the Act.

(2) For a Court sale to satisfy the requirements of an open market sale, the following conditions shall be satisfied:

(a) There must be wide publicity of the proposed sale and particularly there shall be publication of advertisement in at least one newspaper having wide circulation in the concerned city/town/district.

(b) The purchaser of the property must not be connected with or related to the authority/officer conducting the sale. (3) The above conclusions will equally apply to sale's conducted by the Company Court after publication of advertisement in a widely circulated newspaper."

What can be deciphered from the above quoted passage from the Sati Enclave, the sale conducted by the court or its officer qualifying the open market sale under Section 2 (16B) of the Act is not a subject matter of scrutiny under Section 47A of the Act nor the authority can take recourse to Section 3 of the Undervaluation Rules to constitute such sale as open market sale. There must be a wide publicity of the advertisement at least in one newspaper having wide circulation in the concerned city/town/district and the purchaser of the property should not be related to an authority or the officer conducting the sale. What can be reasonable inferred from the above noted decision that if the sale is conducted by a statutory authority as in case of V.N. Devadoss (supra) or the court, its officer or Company Court as in case of Sati Enclave (supra) those are outside the ambit of scrutiny under Section 47A of the Act. It can be reasonably inferred from the ratio decidendi of the aforesaid judgment that the sale conducted by the Statutory authority in exercise of statutory powers by making an wide publication inviting the bid from the intending purchaser and the intending purchaser has no connection or relation with the seller it would be regarded as an open market sale. The Security Interest (Enforcement) Rules, 2002 which came into effect on 28 th September, 2002 defines the authorized officer in Section 2(A) thereof. Rule 8 can be pressed in action for sale of the immovable secured assets after exhausting the provision contained under Section 13(4) of the SARFAESI Act, 2002. Sub-Rule 5 of Rule 8 postulates that before effecting the sale of the immovable property referred to in Rule 9 (1) the authorized officer after obtaining the valuation of the property from the approved valuer and in consultation with the secured creditor may fix the reserve price and sell the property either by obtaining a quotation from a person dealing with the similar secured assets or otherwise interested in buying such assets or by inviting the tenders from the public or by holding public auction or by private treaty. The authorized officer if embarks to sell this immovable property by inviting tenders from the public or by holding public auction and not by a private treaty or by obtaining quotation from the persons dealing with the similar secured assets or otherwise interested therein such exercise would certainly come within the purview of the open market sale. The object of such rule is to secure the best price by selling the property in the open market to reduce the burden of the debt and it is inconceivable that such secured creditor would sell the property at the lower price than what it would fetch or would have fetched in the open market. The authorized officer is the statutory authority having no personal interest in the secured assets and in fact deals with the public money. Raising any suspicion would impinge upon the freedom and the competence as envisioned in the aforesaid provision. However, the checks and balances can be made in this regard in not bringing all the course of action as

indicated in Rule 8 (5) of the said rules but if the sale is effected by public auction and by inviting a public bid it excludes the operation of Section 47A of the Stamp Act and be regarded as the sale effected in the open market.

The reference is answered in the following:

1. The sale conducted by the authorized officer in exercise of the powers conferred under Rule 8 of the Security Interest (Enforcement) Rule, 2002 by public auction or by inviting tenders from the public would be regarded as the sale in the open market and the price so accepted shall be the price which it would fetch if sold in the open market under Section 47A of the Stamp Act. The sale must be conducted by making a wide publication at least in one newspaper widely circulated in the particular city/town/district where the property is situated.
2. The authorized officer shall not have any relation or connection with the intending purchaser.
3. Let the writ petition be placed before the Single Bench having determination for disposing of the writ petition in the light of the answers given to the reference.

Urgent photostat certified copies of this judgment, if applied for, be made available to the parties subject to compliance with requisite formalities.

I agree.

(Harish Tandon, J.)

(Rabindranath Samanta, J.)