

**IN THE HIGH COURT OF JUDICATURE AT PATNA**  
**Civil Writ Jurisdiction Case No.18557 of 2019**

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Sujay Kumar, aged about 45 years, Male, Son of Late Krishna Sharan Vidharthi, At Prabhat Colony near, Bhoot Nath Mandir, P.S.-K Hatt, Dist-Purnia.

... .. Petitioner

Versus

1. U.C.O. Bank Head Office, 10 BTM Sarani, Brabourne Road, Kolkata-700001 through General Manager,
2. The Zonal Manager, U.C.O., Bank, Begusarai.
3. The Branch Manager, U.C.O., Bank, Purnia.

... .. Respondents

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**Appearance :**

For the Petitioner/s : Mr.Badri Narayan Singh, Advocate  
Mr. Sanjay Kumar Pandey, Advocate  
For the Respondent/s : Mr. Shivendra Kr. Roy, Advocate

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**CORAM: HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD**  
**C.A.V. JUDGMENT**

**Date : 02-12-2019**

This Writ Application has been filed seeking quashing of the auction notice issued by the UCO Bank, Zonal Office at Begusarai (hereafter referred to as 'respondent-Bank'), published in daily Hindi Newspaper "Hindustan".

2. It is the case of the writ petitioner that the auction notice published on 01.09.2019 is in complete contravention of the provisions of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as the 'SARFAESI Act, 2002' or 'Act of 2002'). It is contended



that earlier the respondent-Bank had filed Original Application under Section 19 of the Recovery of Debts and Bankruptcy Act, 1993 (as amended upto date) giving rise to O.A. No. 810/2016. After filing of the said Original Application, the loan account had been upgraded and it was declared out of Non-Performing Asset (NPA) category, therefore the respondent-Bank withdrew O.A. No. 810/2016.

**3.** It is also the contention of learned counsel for the petitioner that the respondent-Bank cannot take possession of the two Air Condition Buses of the petitioners forcibly and without following the established procedure of law.

**4.** By filing I.A. No. 01/2019, the petitioner has sought to modify his prayer whereunder he is now challenging the order dated 09.09.2019 auctioning the buses by the Zonal Manager, UCO Bank, Begusarai in Rs. 6.90 Lakhs and Rs. 7.35 Lakhs. It is submitted that this writ application was presented in this court on 03.09.2019 after serving copies of the writ application upon learned counsel for the respondent-Bank on 03.09.2019, therefore during



pendency of the writ application the respondent-Bank and its authorities should not have acted in haste and the auction of the buses within few days from the date of their taking over forcible possession is wholly wrong, unjust and improper. It is also submitted that any action taken by the Bank during pendency of the Writ Application automatically becomes subject to result of the case, hence to challenge such action the persons in whose favour sale has been made are not necessary parties as they take the risk of entering into a deal which is under challenge before a Court of Law.

5. It is further contention of the petitioner that against the financed amount of Rs. 70 Lakhs, the petitioner has paid Rs. 1.1 Crore till January, 2019 and under the agreement the entire loan has to be repaid with interest by July, 2020, therefore at this stage, the respondent-Bank could not have proceeded to auction sale the buses. In this connection, learned counsel has also pointed out Annexure '4' attached with the I.A. No. 01/2019 to show that after service of copies of the writ application, learned counsel for the petitioner had communicated to the Bank on 07.09.2019



i.e. well before the auction of the buses that for the present the buses, should not be auctioned, but it appears that the respondent-Bank was in hurry to sell the buses.

6. In course of hearing as the argument progressed, this court vide it's order dated 15.10.2019 called upon the respondent-Bank to say as to whether the impugned action has been taken by the Bank in accordance with the provisions of the SARFAESI Act, 2002 and in this regard an appropriate affidavit was called for. An interim order of status quo was also granted and it is an admitted position that the possession of buses were not given to the auction-purchasers.

7. In their counter affidavit the respondent-Bank has taken a plea that since the petitioner had failed to pay the installments towards repayment of loan and the buses were lying under hypothecation with the Bank as security for repayment of the loan amount, in terms of the agreement annexed as Annexure 'A' to the counter affidavit, the respondent-Bank proceeded to seize the vehicles and in this regard the Bank has followed its' policy for seizure and disposal of vehicles of defaulter borrowers and the same



exhaustively deals with the process to be followed by the respondent-Bank while repossessing the vehicles. A copy of policy for seizure and disposal of vehicles is Annexure 'B' to the counter affidavit.

**8.** According to the respondent-Bank, a demand notice dated 01.06.2018 was issued by the respondent-Bank calling upon the petitioner to make payment of the due amount of Rs. 44,39,882.50 within a period of 15 days or else steps for recovery of amount will be taken. The petitioner did not pay any heed to the said notice, therefore the petitioner was informed vide notice dated 27.09.2018 that the hypothecated vehicles may be taken over with intention to sell the same in order to recover the amount.

**9.** In the counter affidavit, however the respondent-Bank had stated that the postal receipt of the letter dated 27.09.2018 is not traceable in the file but it is entered in the dispatch register. One S.S. Associates was appointed as Recovery Agent to repossess the hypothecated buses. The buses were repossessed on 17.07.2019 and after waiting for over a month, the sale notice dated 31.08.2019 was issued by the respondent-Bank to the petitioner



informing him about the default made by the petitioner and it was stated in the sale notice that price of the vehicle has been estimated at a sum of Rs. 13,50,000.00 and the sale is fixed on 09.09.2019. It is submitted that the petitioner was given an opportunity to repay the Bank's due on any day before the date of sale and get back the possession of the vehicle.

**10.** Annexure 'E' to the counter affidavit is a copy of sale notice dated 31.08.2019 addressed to the petitioner but the postal receipt enclosed therewith shows that it was dispatched on 04.09.2019 in the afternoon.

**11.** It is further contention of the respondent-Bank that the Bank does not require any order from the court of law before repossession and auction sale of the hypothecated vehicles and it is not a case of hire purchase and therefore the Hire Purchase Act have no bearing in the present case.

**12.** In the supplementary counter affidavit the respondent-Bank has relied upon Clause 5 of the Agreement which empowers the Bank to take possession of the vehicle in the event of default and Clause 6 empowers the Bank to



sell the seized vehicle for recovery of the due amount. It is the stand of the respondent-Bank that the Bank had an option either to follow the procedures under the SARFAESI Act, 2002 or to exercise its right under the Agreement.

**13.** Learned counsel for the respondent-Bank has relied upon the judgment of the Hon'ble Gauhati High Court in Crl. Rev.(P) No. 48 of 2007 in the Batch of cases, the lead case being ICICI Bank Vs. Prakash Kaur and Others. In the said case the Hon'ble Gauhati High Court was dealing with a case wherein a case of theft was lodged by the two truck owners alleging that their trucks were stolen away whereas it was the case of the petitioner in the High Court that they had repossessed the vehicles which were hypothecated with them as the truck owners who had availed the loan and financial assistance had defaulted in making payment of the petitioners companies' dues. It was the contention of the petitioner that the informant had wrongly informed the police authorities that the vehicles were stolen away. The direction of the learned court below to release the two vehicles were under challenge before the Hon'ble Gauhati High Court.



**14.** In the aforesaid context, the Hon'ble High Court came to a conclusion that acting upon a hypothecation agreement which permits the hypothecatee to take possession of the hypothecated property when the hypothecatee exercises the right to take possession of the hypothecated property, such exercise will not amount to commission of offence of theft. The court was of the view that taking over of any object with the consent of its owner cannot amount to an offence of theft unless such taking is dishonest. The impugned order was thus set-aside.

**15.** Let it be recorded that normally in SARFAESI matters this court has taken a view that the aggrieved person may invoke the alternative remedy under the said Act before the Debts Recovery Tribunal, but in this case since learned counsel for the respondent-Bank raised an issue saying that the Bank is not obliged to follow the procedures of the SARFAESI Act and the Rules framed thereunder and the Bank has chosen to take possession by exercising its right under the Agreement (Annexure '1'), this court has to go into the contention of the respondent-Bank threadbare.



**Consideration**

16. In the aforementioned background of facts and submissions advanced on behalf of the parties and upon perusal of the records, this court finds that the facts are not in much dispute. There is a default in repayment of loan and such default would entitle the respondent-Bank to take appropriate steps for taking over possession of the hypothecated buses and sale them in accordance with law.

17. The question which really arises for consideration in the present writ application is, firstly, as to whether under the hypothecation agreement which confers a right and power upon the respondent-Bank, in case of default on the part of the borrower to seize and take possession of the vehicles without any notice to the borrower from any place and without recourse to any suit may be interpreted so as to mean that the respondent-Bank has a license to forcefully take possession of the vehicles at any place without giving notice to the borrower or the guarantor and without recourse to any suit or proceeding and permission from a competent of law. The right and entitlement to seize the vehicle may be one thing, here the



manner in which that right and entitlement has been exercised by the respondent-Bank has been questioned.

**18.** The second question which arises for consideration is as to whether after coming into force of the SARFAESI Act, 2002 the respondent-Bank would be justified in ignoring the provisions of the SARFAESI Act, 2002 which has got a legal sanctity and the purpose behind that enactment was to regulate Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest. If the legislatures of this country decided to enact a regulatory law for enforcement of security interest, is it open for the respondent-Bank to take a plea that in terms of its own policy the Bank can appoint a recovery agent and may take possession of the hypothecated/movable in which a security interest has been created by virtue of a hypothecation agreement in a manner which is in teeth of the statutory provision.

**19.** Let us see first the scheme of the SARFAESI Act, 2002. The preamble of the Act of 2002 reads as under:

*An Act to regulate securitization and reconstruction of financial assets and enforcement of security interest and for matters connected therewith or incidental*



*thereto.*

The dictionary Section 2 defines financial assistance, financial asset, hypothecation, property, secured asset, secured creditor and security interest as under: -

“2.(k) “financial assistance” means any loan or advance granted or any debentures or bonds subscribed or any guarantees given or letters of credit established or any other credit facility extended by any bank or financial institution [including finds provided for the purpose of acquisition of any tangible asset on hire or financial lease or conditional sale or under any other contract or obtaining assignment or licence of any intangible asset or purchase of debt securities];

2(l). "financial asset" means debt or receivables and includes-

- (i) a claim to any debt or receivables or part thereof, whether secured or unsecured; or
- (ii) any debt or receivables secured by, mortgage of, or charge on, immovable property; or
- (iii) a mortgage, charge, hypothecation or pledge of movable property; or
- (iv) any right or interest in the security, whether full or part underlying such debt or receivables; or
- (v) any beneficial interest in property, whether movable or immovable, or in such debt, receivables, whether such interest is existing, future, accruing, conditional or contingent; or
- [va] any beneficial right, title or interest, in any tangible asset given on hire or financial lease or conditional sale or under any other contract



which secures the obligation to pay any unpaid portion of the purchase price of such asset or an obligation incurred or credit otherwise provided to enable the borrower to acquire such tangible asset; or]

[any right, title or interest on any intangible asset or licence or assignment of such intangible asset, which secures the obligation to pay any unpaid portion of the purchase price of such intangible asset or an obligation incurred or credit otherwise extended to enable the borrower to acquire such intangible asset or obtain licence of the intangible asset; or;]

(vi) any financial assistance;

2(n). "Hypothecation" means a charge in or upon any movable property, existing or future, created by a borrower in favour of a secured creditor without delivery of possession of the movable property to such creditor, as a security for financial assistance and includes floating charge and crystallisation of such charge into fixed charge on movable property;

2(t). "property" means--

(i) immovable property;

(ii) movable property;

(iii) any debt or any right to receive payment of money, whether secured or unsecured;

(iv) receivables, whether existing or future;

(v) intangible assets, being know-how, patent, copyright, trade mark, licence, franchise or any other business or commercial right of similar nature;



2(zc). "secured asset" means the property on which security interest is created;

2(zd) "secured creditor" means--

(i) any bank or financial institution or any consortium or group of banks or financial institutions holding any right, title or interest upon any tangible asset or intangible asset as specified in clause (1);

(ii) debenture trustee appointed by any bank or financial institution; or

(iii) an asset reconstruction company whether acting as such on managing a trust set up by such asset reconstruction company for the secularization or reconstruction, as the case may be; or

(iv) debenture trustee registered with the Board appointed by any company for secured debt securities; or

(v) any other trustee holding securities on behalf of a bank or financial institution, in whose favour security interest is created by any borrower for due repayment of any financial assistance.;

2(zf). "security interest" means right, title or interest of any kind, other than those specified in section 31, upon property created in favour of any secured creditor and includes ---

(i) any mortgage, charge, hypothecation, assignment or any right, title or interest of any kind, on tangible asset, retained by the secured creditor as an owner of the property, given on hire or financial lease or conditional sale or under any other contract which secures the



obligation to pay any unpaid portion of the purchase price of the asset or an obligation incurred or credit provided to enable the borrower to acquire the tangible asset; or  
(ii) such right, title or interest in any intangible asset or assignment or licence of such intangible asset which secures the obligation to pay any unpaid portion of the purchase price of the intangible asset or the obligation incurred or any credit provided to enable the borrower to acquire the intangible asset or licence of intangible asset.]”

**20.** Under the scheme of the SARFAESI Act, 2002, a demand notice under Section 13(2) has to be issued to the borrower calling upon him to discharge in full his liabilities to the secured creditor within 60 days from the date of the notice, failing which the secured creditor shall be entitled to exercise all or any of the rights under sub-section (4). If the borrower submits an objection within the aforesaid period of 60 days, the same is to be considered by the secured creditor and the objections are to be disposed off by communicating the decision to the borrower within 15 days of the receipt of such representation or objection. The reasons for non-acceptance of the representation is to be provided. Under sub-section (4) of Section 13, in case



the borrower fails to discharge his liability within the prescribed period the secured creditor may take recourse to one or more of the measures provided under sub-section (4) to recover his secured creditor. It includes taking over the possession of secured assets of the borrower including the right to transfer by way of lease, assignment or sale for realizing the secured asset.

**21.** We are concerned here with the power to be exercised under Section 13(4)(a) of the SARFAESI Act, 2002. The Security Interest (Enforcement Rules, 2002) lays down the procedures to be followed. For purpose of taking possession of movable property in possession of the borrower, the Authorized Officer shall take possession of such movable property in presence of two witnesses after a Panchnama drawn and signed by the witnesses as merely as possible in Appendix I to the Rules. Under sub-rule (2) of rule 4 after taking possession the Authorized Officer shall make or cause to be made an inventory to the property in Appendix II and deliver a copy of such inventory to the borrower or any person entitled to receive the same on behalf of the borrower. All notices are to be served upon the



borrower through electronic mode of service, in addition to the modes specified under Rule 3. Rule 3 provides for service of notice by registered post with acknowledgment due or by speed post or by courier or by any other means of transmission of documents like Fax message or electronic mail service. Under Rule 5 the valuation of movable secured assets is to be made and thereafter if considered necessary the Authorized Officers would fix in consultation with the secured creditor the reserve price of the assets to be sold in realization of the dues of the secured creditor. Under Rule 6 the Authorized Officer may sell the movable secured assets in one or more lots by adopting any of the methods mentioned under Clause (a), (b), (c) and (d). Clause (b) and (c) talks of inviting tender from the public; or holding public auction including through e-auction mode. Proviso to sub-rule (2) of Rule 6 says that if the sale of such secured asset is being effected by either inviting tenders from the public or by holding public auction, the secured creditor shall cause a public notice in the Form given in Appendix-II-A to be published in two leading newspapers, including one in vernacular language having wide circulation in the



locality.

**22.** In this case, we are concerned with clause (c) as the case of the respondent-Bank is that the vehicle has been sold through auction mode though not through e-auction mode. We will examine this. Under sub-rule (4) of Rule 6 the authorized officer shall upload the detail terms and conditions of the sale of movable assets on the website of the secured creditor. The contents of such terms and conditions are mentioned in Clause (a) to Clause (f) of sub-rule (4) of Rule 6.

**23.** Thus, to regulate the recovery of Bank's dues by enforcing security interest the Parliament has provided the procedures required to be followed under the SARFAESI Act, 2002.

**24.** In order to appreciate the rival contentions it would be necessary to extract clause 4, 5 and 6 of the Agreement (Annexure 'A' to the counter affidavit) as under:

4) उधारकर्ता यह घोषणा करता है कि उक्त वाहन ..... स्थान पर गैरेज किया जाएगा। उधारकर्ता वचन देता है कि इस प्रतिभूति के जारी रहने के दौरान उक्त वाहन को उस गैरेज से नहीं हटाएगा या जिन क्षेत्रों में चलाने हेतु लाइसेंस दिए गए हैं उन क्षेत्रों से बाहर नहीं ले जाएगा। यदि निहायत आवश्यक होने पर उधारकर्ता उस



गैरेज से उक्त वाहन को दूसरे गैरेज में ले जाता है तो विधिवत उसका पता बैंक को सूचित करेगा।

The borrower declares that the said vehicle shall remain garaged at Purnea. The Borrower undertakes not to remove during the continuance of this security the said vehicle from the said garage or to any place outside the territorial jurisdiction for which the said vehicle is licensed to ply. The Borrower shall duly notify to the Bank all change of address of the garage for the said vehicle, if such change becomes necessary.

क) उधारकर्ता द्वारा इस विलेख और/या बैंक की संस्वीकृति-सूचना के किन्ही निबंधन एवं शर्त का भंग किए जाने की दशा में बैंक, उधारकर्ता को सूचित किए बिना, ऐसे भंग की तारीख से ऐसे सभी निबंधन और शर्तों का अनुपालन किए जाने तक उपर्युक्त ब्याज की दर से ..... % प्र.व. अधिक की दर पर दांडिक ब्याज प्रभारित करने का हकदार होगा।

a) In the event of the Borrower committing a breach of any of the terms and conditions of these presents and/or Bank's sanction-advice, the Bank shall be entitled to, without notice to the Borrower, charge penal interest @ 2% p.a. over and above the rate of interest mentioned hereinabove from the date of such breach until all such terms and conditions are complied with.

5) यदि उधारकर्ता यहां उल्लिखित और उसके द्वारा पालन एवं निष्पादित की जाने वाली प्रसंविदाओं, शर्तों एवं विनिर्देशनों को भंग करता है या उधारकर्ता द्वारा बैंक को दिया गया कोई प्रतिवेदन झूठ साबित होता है या यदि उधारकर्ता ऊपर उल्लिखित पद्धति एवं समय के भीतर देय मासिक किस्तों की राशि के भुगतान में चूक करता है या



यदि उधारकर्ता की किसी संपत्ति और उक्त वाहन के लिए कोई रिसीवर नियुक्त किया जाता है या यदि उस उधारकर्ता की संपत्तियों एवं उक्त वाहन की कुर्की की जाती है या यदि उधारकर्ता अपने ऋणदाता के साथ कोई करार या समझौता करता है या यदि उधारकर्ता दिवालियेपन के लिए कोई अर्जी दाखिल करता है या वह दिवालिया निर्णीत किया जाता है तो इन स्थितियों में और इस प्रकार के किसी मामले में बैंक की बकाया सारी राशि और उसपर उक्त प्रकार से ब्याज तत्काल देय जो जाएगा भले ही इसमें पहले कुछ भी उल्लिखित हो और उक्त प्रकार की किसी भी घटना के होने पर या यदि ऐसी कोई परिस्थिति उत्पन्न होती है जो बैंक के निर्णयानुसार एतद्वारा निर्मित प्रतिभूति पर प्रतिकूल प्रभाव डालेगी या उससे प्रतिकूल प्रभाव पड़ने की संभावना होगी या प्रतिभूति को संकट में डालेगी तो बैंक के लिए यह विधिपूर्ण होगा और उसका अधिकार होगा कि वह उधारकर्ता के खर्च एवं जोखिम पर उक्त वाहन को किसी भी स्थान से जब्त कर ले और अपने कब्जे में ले लें और उसके लिए उधारकर्ता या गारंटीकर्ता को कोई नोटिस नहीं दे और वे किसी प्रकार के मामले का सहारा नहीं ले सकेंगे एवं इससे इन विलेखों के अधीन उधारकर्ता या गारंटीकर्ता के विरुद्ध परवर्ती शर्त के भंग या अन्यथा कार्य हेतु उपचार के लिए बैंक के अधिकार पर कोई प्रतिकूल प्रभाव नहीं पड़ेगा।

If the Borrower shall commit any breach of the covenants, conditions and stipulations herein contained and on his part to be observed and performed or if any of the representations made by the Borrower to the Bank shall turn out to be false or if the Borrower shall make default in payment of any moneys of the monthly instalment payable in the manner and and within the time hereinbefore mentioned or if any Receiver be appointed on the properties of the



Borrower including the said vehicle or if any attachment be levied on the properties of this Borrower including the said vehicle or if the Borrower enters into any composition or arrangement with his creditors or if the Borrower files any petition for insolvency or is adjudged an insolvent then and in any such case the whole of the amount then remaining due and owing to the Bank with interest as aforesaid shall forth-with become payable notwithstanding anything hereinbefore contained AND on the happening of any such events as aforesaid or if any circumstances shall occur which in the judgment of the Bank is prejudicial to or is likely to be prejudiced or imperil the security hereby created, it shall be lawful for and the Bank shall have right and power at the risk and expenses of the Borrower to seize and take possession of the said vehicle from any place where the same may be without giving any notice to the Borrower or the Guarantor and without recourse to any suit and without prejudice to the Bank's rights against the Borrower or the Guarantor as to any remedy for any subsequent breach or otherwise under these presents.

5 (क) यह कि बैंक द्वारा उधारकर्ता को दिए गए ऋण/अग्रिम की पूर्व-शर्त के रूप में उधारकर्ता इसके द्वारा करार करता है कि यदि उधारकर्ता नियत तारीख (खों) को ऋण/अग्रिम की चुकौती में या उस पर ब्याज या ऋण की किन्हीं करार पाई गई किस्त की चुकौती में चूक करता है तो बैंक और/या भारतीय रिजर्व बैंक को ऐसी रीति से एवं ऐसे माध्यम से चूककर्ता के रूप में उसके नाम या



उसकी कंपनी/फर्म/यूनिट या उसके निदेशकों/भागीदरों/स्वत्वधारियों के नाम को प्रकट या प्रकाशित करने का पूर्ण अधिकार है, जैसा कि बैंक और/या रिज़र्व बैंक अपने पूर्ण विवेकाधिकार से उपयुक्त समझे।

That the Borrowers hereby agrees as a pre-condition of the loan/advances given to him by the Bank that in case the Borrower commits default in the repayment of the loan/advances or in the repayment of interest thereon or any of the agreed instalment of the loan on due date/s, the Bank and/or the Reserve Bank of India will have an unqualified right to disclose or publish his names or the name of his company/firm/unit and its directors/partners/proprietors as defaulter in such manner and through such medium as the Bank or Reserve Bank of India in their absolute discretion may think fit.

6) उक्त वाहन को अपने कब्जे में लेने के बाद बैंक उक्त वाहन को सार्वजनिक नीलामी द्वारा या निजी संधि द्वारा और उस कीमत पर एवं उन शर्तों एवं निबंधनों तथा विनिर्देशनों तथा उस प्रकार से, जिसे बैंक उचित एवं ठीक समझता हो, बेचने के लिए स्वतंत्र होगा। एतद्द्वारा यह स्पष्ट रूप से घोषित किया जाता है कि बैंक एतद्द्वारा निर्मित प्रतिभूति को लागू करने हेतु उक्त वाहन को कब्जे में लेने तथा बेचने के लिए किसी भी प्रकार की सिविल, आपराधिक एवं अन्य कार्रवाई करने के लिए किसी भी परिस्थिति में दायी नहीं होगा।

Upon taking possession of the said vehicle the Bank shall be at liberty to sell the said vehicle either by public auction or private treaty and at such price and subject to such terms and conditions and stipulations and in such manner as



the Bank may think fit and proper. It is hereby expressly declared that the Bank shall not be liable under any circumstances whatsoever for any action civil, criminal or otherwise for taking possession of and selling the said vehicle for enforcement of the security hereby created.

**25.** The contention of learned counsel for the respondent-Bank is that under Clause 4, 5 and 6 of the Agreement (Annexure 'A') the respondent-Bank need not approach the court and they can proceed to take possession of the vehicle through their recovery agent from any place without any notice to the borrower. They have also right to sell the vehicle.

**26.** The contention of learned counsel for the respondent-Bank seems to be totally misplaced. This court has no iota of doubt in saying that under Agreement as contained in Annexure 'A' to the counter affidavit, a right has been created in favour of the respondent-Bank who is the secured creditor to act against the borrower in case of breach of the covenants, conditions and stipulations present in Annexure 'A' to the counter affidavit. The Bank has a right to take possession of the vehicle and sale the same but



to say that for purpose of taking over possession of the vehicle and selling the same the respondent-Bank has an option not to follow the procedures laid down under the provisions of SARFAESI Act, 2002 would be a wholly untenable argument on the part of the respondent-Bank. Such submission, if allowed to prevail, the vary object of the SARFAESI Act, 2002 would stand frustrated and a secured creditor would be free to act in complete violation of the provisions of the Act of 2002. To engage a recovery agent who can forcefully stop a hypothecated bus at any place and take away the vehicle in their possession has no sanctity of law.

27. Learned counsel for the petitioner has rightly referred the judgment of the Hon'ble Supreme Court in the case of **ICICI Bank Vs. Shanti Devi Sharma & Ors arising out of SLP (Crl.) No. 4935 of 2006 reported in (2008) 7 SCC 532** wherein after taking note of the allegation of high handedness of a recovery agent of the ICICI Bank which led to suicide of the son of the petitioner in the said case the Hon'ble Apex Court not only took a strong view against such approach of the respondent -Bank



but also directed the Bank to pay a cost of Rs. 25,000/-.

Paragraph '11' of the judgment in **ICICI Bank's case** reads as under: -

“11. As mentioned, the investigation is ongoing. Neither the High Court's order nor the observations made herein are to influence the investigation, save the time period in which it must be completed. Nevertheless, it is appropriate to remind financial institutions that they are bound by law. The recovery of loans or seizure of vehicles can only be done through legal means.”

**28.** Learned counsel for the petitioner has given much emphasis on the judgment of the Hon'ble Gauhati High Court. This court has already taken note of the facts and circumstances under which the Gauhati High Court had been examining the issue. It was a criminal case in which the order of release of the vehicles which were allegedly stolen away was under challenge at the instance of the Bank. The court was, thus, not dealing with a case of forcible possession of the vehicles as has been done in the present case and having gone through the terms of the hypothecation agreement the court was of the view that the



borrower having given the consent to the Bank/hypothecatee to take possession of the vehicles in case of default cannot say that the vehicle has been taken away without their consent and hence there being a consent no question of theft arises.

**29.** The Hon'ble High Court has not given it's final opinion on the procedures required to be followed in the matter of taking over physical possession of the hypothecated vehicles. The Gauhati High Court examined various judgments of the different High Courts and found that there were two views in the judicial pronouncements of the various High Courts. Thus in paragraph 62 of it's judgment the Hon'ble High Court recorded as under:

“62. Be that as it may, what follows from the above discussion is that there are two views noticeable in the judicial pronouncements of the various High Courts. While one view is that a hypothecatee has no right to take possession of the hypothecated goods and his remedy lies in approaching the Court to take possession of the goods or sell the same, the other view is that even a hypothecatee has a right to take possession of the hypothecated goods and sell the same without intervention of the Court.”



**30.** The Hon'ble Gauhati High Court thereafter discussed the judgment of the Hon'ble Punjab & Haryana High Court in the cases of Tarun Bhargava Vs. State of Haryana & Anr (AIR 2002 P&H 98) and Sundaram Finance Ltd. Vs. State of Kerala & Anr. (AIR 1966 SC 1178) and thereafter differed with the view of the other High Courts that no borrower, under any hypothecation agreement, can ever consciously, willingly and voluntarily agreed to allow the financier, as hypothecatee, to take possession of the hypothecated goods in the event of default in making repayment of the loan.

**31.** Here again, this court would point out that the Gauhati High Court had not taken a view that any borrower can agree under a hypothecation agreement to allow the financier to use force in taking over possession of the hypothecated goods in the event of default in making payment of loan. Moreover, the court was not examining the effect of the regulatory law such as SARFAESI Act, 2002.

**32.** So far as the agreement as contained in



Annexure 'A' to the counter affidavit of respondent-Bank is concerned, even if it is assumed that the Bank has a right to take possession of the hypothecated goods in case of default and the borrower has consented for that, it would at most create a 'security interest' in favour of the Bank in terms of the definition as noticed hereinabove under Section 2(zf) of the SARFAESI Act, 2002. In fact, if the submission of learned counsel for the respondent-Bank is accepted, it would amount to reading a consent of the borrower that the vehicle may be repossessed through a recovery agent forcibly by the secured creditor. There is no such consent under Clause 4 & 5 of the Agreement (Annexure 'A' to the counter affidavit) and any such contention of the respondent-Bank that they can recover the possession of hypothecated vehicle through their recovery agent at any place at any time without any notice to the borrower has to be rejected at the threshold. This court understands that such taking over possession of the vehicles through recovery agent at any place without any notice to the borrower has an inbuilt component of use of force against an unwilling borrower who has no notice and if accepted



would amount to permitting the respondent-Bank to commit an unlawful act in the garb of exercise of its right under Clause 4 & 5 of the Agreement.

**33.** In the opinion of this court, the manner in which Clause 4 & 5 have been tried to be read over and construed to justify the action of the respondent-Bank in taking over the physical possession of the two vehicles in this case are liable to be deprecated and this court cannot approve such action. The first question formulated by this Court here-in-above is, thus, answered in aforesaid terms.

**34.** This court finds from the records and it is not in dispute that the respondent-Bank is said to have issued a demand notice on 01.06.2018. If it is the contention of respondent-Bank that the said demand notice was not paid heed to by the writ petitioner, the Bank could have proceeded to take possession of the vehicle but strictly in accordance with the procedures prescribed under Rule 4 of the Security Interest Rule, 2002. The SARFAESI Act 2002 is a complete code unto itself and it provides for the taking over of actual physical possession of a movable and immovable property in which the secured creditor has got a



security interest. Section 14 of the SARFAESI Act, 2002 provides that how an application is to be made before the Chief Metropolitan Magistrate or District Magistrate to assist secured creditor in taking possession of the secured asset. It is the mandate of law made by the Parliament of India with an object i.e. recovery of loans in accordance with law and this court finds no reason as to why the respondent-Bank which is an instrumentality of the State would not follow the procedures under Section 14 of the Act of 2002 and why they would make their own procedure to appoint a recovery agent who will stop a vehicle anywhere at any place and will take possession of the same obviously such kind of possession cannot be taken without use of force.

**35.** In this case, neither the procedures for taking over symbolic possession of the movable asset in terms of Rule '4' were followed nor the procedures under Section 14 of the SARFAESI Act, 2002 were followed for the purpose of taking over actual physical possession of the vehicles.

**36.** This court also finds from the records that the respondent-Bank and its authorities were in haste in selling



the buses. With the counter affidavit the respondent-Bank has brought on record a copy of the sale notice dated 31.08.2019 (Annexure 'E'). It was dispatched to the petitioner on 04.09.2019 in the afternoon. A sale notice was published in only one Newspaper on 01.09.2019 fixing the sale on 09.09.2019 but the notice required to be served on borrower was not dispatched. There was no clear 30 days notice as required. It is evident that the sale notice was not issued in terms of Rule 6 of the Rules of 2002. The Bank has not even brought on record as to how valuation was done and reserve price was fixed. It is evident that the writ application was filed in this court on 03.09.2019 after serving copies thereof on the learned counsel for the respondent-Bank. It is thereafter the sale notice has been dispatched on 04.09.2019 which gives a reason to believe that the sale notice was prepared by antedating as it was dispatched only on the next day after the writ application had been presented before this court. Even learned counsel for the Bank had advised the respondent-Bank not to sell the Buses as the writ application had been filed but only one day after receipt of the advise from learned counsel for



the Bank, the sale was effected and what is said to be an auction sale process on 09.09.2019. In such circumstances, this Court agrees with the submission of learned counsel for the petitioner that the third party right whatsoever created during pendency of this writ application was not absolute and such action of the Bank became subject to the result of the writ application, hence, the auction purchasers are not necessary parties to the writ.

37. This court finds that there are clinching materials on the record to take a view that the respondent-Bank and its authorities were acting in hot haste by violating the provisions of SARFAESI Act, 2002 and the Rules framed thereunder. This court is of the view that the contention of respondent-Bank in an attempt to justify its action by taking a plea that the Bank had an option not to follow the procedures under the SARAFESI Act, 2002 is wholly misplaced and untenable stand of the respondent-Bank. Once the Parliament has enacted a law with an intention to regulate the enforcement of security interest, the respondent-Bank is obliged to follow the procedures laid down under the statute. The second question, is, thus



also decided against the respondent-Bank.

**38.** Since the action of the respondent-Bank has been found in complete violation of the provisions of SARFAESI Act, 2002 and the Rules framed thereunder as also that the Bank has acted in hot haste, unreasonably and arbitrarily by totally ignoring the provisions of the Act of 2002 and Rules, this court is of the considered view that the action of the respondent-Bank in taking over the possession of the vehicle and sale of the same is liable to be set-aside. Accordingly, the action taking possession of the vehicle, the sale notice (Annexure '3' to the writ application) and sale thereof are hereby set-aside. The respondent-Bank is directed to restore the vehicles to the petitioner.

**39.** It would however be open for the respondent-Bank to proceed afresh against the petitioner in accordance with the provisions of the SARFAESI Act 2002 and the Rules framed thereunder. In order to protect the interest of the Bank this court deems it just and proper to restrain the petitioner from creating any encumbrance or third party right over the buses without permission of the Bank.

**40.** This Writ Application is, therefore, allowed.



**41.** It will be open for the petitioner to seek his remedy for the loss of business and any other monetary relief before an appropriate Court/Forum.

**(Rajeev Ranjan Prasad, J)**

Rajeev/-

<b>AFR/NAFR</b>	<b>AFR</b>
<b>CAV DATE</b>	15.11.2019
<b>Uploading Date</b>	03.12.2019
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