

**IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH**

**IVN.P. NO.02/2017 & M.A. 222/2017 in
C.P. NO.1043/I&BP/NCLT/MAH/2017**

Under Section 7 of IBC, 2016

In the matter of

J. M. Financial Asset Reconstruction Company --- Applicant/Intervener

vs

Indus Finance Ltd Petitioner

Quantum Ltd Respondent/Corporate Debtor

Order delivered on 26.09.2017

Coram: Hon'ble B.S.V. Prakash Kumar, Member (J)
Hon'ble V. Nallasenapathy, Member (T)

For the Petitioners: Mr. Vineet Jagtap, i/b Nena Jagtap

For the Respondent: Mr. Abbas Mandriwala, i/b Rawal Shah & Co.,
Advocate for IRP

For the Intervener: Mr. Nikhil Rajani i/b V. Deshpande & Co. Mr.
Ashish Kamat, Ms. Megha Chandra, Ms. Madhu Chaudhary, Mr.
Mitesh Agarwal, i/b Naik Naik & Co.

Per B. S. V. Prakash Kumar, Member (Judicial)

ORDER

IVN. P.No.02/2017

It is a miscellaneous application (IA 02/2017) filed by a secured creditor (an asset reconstruction company namely J. M. Financial Asset Reconstruction Company, to which Corporation Bank assigned the debt availed

by the Corporate Debtor herein) for recall of the order of Moratorium declared in CP 1043/I&B/NCLT/MB/MAH/2017 filed against the corporate debtor seeking clarification:

- that the admission order dated 29.5.2017 declaring moratorium against the Corporate Debtor does not operate and/or does not in any manner effect the rights of the applicant to enforce its security and/or the rights of the third party to enjoy the property purchased by it in public auction,
- or in the alternative to modify the Moratorium order dated 29.5.2017 to the extent that the said order does not operate and/or does not in any manner effect the rights of the applicant to enforce its security and/or the rights of the third party to enjoy the property purchased by it in public auction and such the reliefs as this Tribunal deems fit.

2. For the sake of brevity, the petitioner/financial creditor in the CP is referred as "Indus", corporate debtor as "corporate debtor" only, applicant/secured creditor in MAAs "JM", the purchaser of the property in SARFAESI proceedings, namely Omni Active Health Technologies Ltd. as "Omni", Learned Debt Recovery Tribunal, Mumbai as "DRT".

3. JM is an asset reconstruction company incorporated under Companies Act, 1956 and thereafter registered u/s 3 of SARFAESI Act. For the Corporate debtor defaulted in making repayment of the loan facility availed on mortgage of its assets situated at Village Maan, Taluka Mulshi, District Pune from Corporation Bank, it invoked SARFAESI proceedings against the Corporate Debtor in respect to the mortgaged property above referred. On the said proceedings, as the Corporate Debtor invoked Section 17 of SARFAESI Act before Debt Recovery Tribunal, Pune by filing Securitisation Application 41/2013, the said Corporation Bank on 30.3.2013, instead of itself proceeding, assigned this debt to JM by an Assignment Agreement, whereupon JM has filed OA 286/2013 before Debt Recovery Tribunal, Pune, upon which, the DRT on 5.5.2014 ordered this Corporate Debtor to pay to JM a sum of ₹14,58,46,527 with further interest @12% per annum from 9.5.2013 till the date of realisation. In addition to the aforesaid original application, JM has also taken measures under the provisions of

SARFAESI Act by issuing notice u/s 13 (2) and obtained an order u/s 14 for getting necessary assistance from the District Magistrate for taking physical possession of the immovable property mentioned above. Since the Corporate Debtor has felt aggrieved of the orders mentioned above, this Corporate Debtor once again filed a fresh Securitisation Application 75/2016 in DRT, Mumbai challenging the measures taken by JM. On which, DRT, Mumbai, has refused to grant any interim relief to this Corporate Debtor challenging the sale notice issued by JM. Since no stay had been granted by DRT, Mumbai, JM on 28.2.2017 proceeded with auction confirming the offer from Omni for sale price of ₹19,26,00,000 on payment of 25% of sale price on the same day i.e., 28.2.2017 and the balance sale price payable on or before 14.3.2017. Again when this Corporate Debtor filed stay application on 21.3.2017 on issuance of sale certificate to Omni DRT Mumbai.

4. Since the Corporate Debtor expressed its readiness to redeem the mortgaged security by repaying the debt amount of ₹19.02crores within a period of six months, the DRT by an order dated 21.3.2017 stayed the proceedings subject to the Corporate Debtor depositing a sum of ₹5.00crores within 4 weeks and remaining amount of ₹14.26crores with interest @12% per annum from the date of auction till the date of redemption within six weeks thereof with a clarification that in the event the Corporate Debtor failed to comply with the conditional order, JM would be at liberty to mention for vacation of the stay. When the Corporate Debtor admittedly failed to comply with the said directions, the Corporate Debtor has sought for extension of time for payment of ₹5crores as directed by the Ld. DRT. Surprisingly, Indus who moved this Company petition filed an Intervening Application on 18.4.2017 before the Ld. DRT that it was willing to deposit ₹5crores on behalf of the Corporate Debtor and also deposit the remaining balance of ₹14.26 crores within a period of six months, but the Ld. DRT did not entertain that application from by treating ₹5crores deposited by Indus as paid by the Corporate Debtor. Though ₹5crores has been paid by Indus within the extended period, remaining balance amount did not come within a period of six weeks, i.e. on or before 30.5.2017, then JM moved an application before Ld. DRT for vacating the stay granted for enabling it to hand over the possession of the property to Omni. JM says when hearing date 30.5.2017 came, Indus has caused its appearance before Ld. DRT with a prayer for the stay of pending securitisation application on

the ground that it had already filed CP u/s 7 of Insolvency & Bankruptcy Code, 2016 before this Bench. JM further submits that this Bench admitted the CP u/s 7 of Insolvency & Bankruptcy Code on 29.5.2017 declaring moratorium over the Corporate Debtor.

5. Now JM submits that this Corporate Debtor threadbare litigated with JM at all stages, above this, Indus, sailed along with the Corporate Debtor before DRT until before initiating Insolvency proceedings before this Bench. JM says since Indus filed this CP colluding with the corporate debtor by misusing the avowed object of Insolvency & Bankruptcy Code, this Bench ought not to have declared Moratorium without hearing and considering the case of JM – the only secured creditor of the Corporate Debtor. By the time this Insolvency proceeding initiated, JM already conducted sale of the asset of the debtor, wherein Omni deposited 25% of the sale price, pursuant to which, the authorised officer confirmed sale in favour of Omni. Since the sale of secured asset being a concluded transaction, JM says that the impugned order dated 29.5.2017 shall have no effect on the concluded sale, therefore this sale transaction cannot be read down as hit by the moratorium declared on 29.5.2017. The Applicant further submits that the sale of the impugned asset by JM in enforcement of its security in view of the default committed by the Corporate Debtor would not in any manner prejudice the rights of Indus; therefore, JM has sought the reliefs as mentioned above.

6. On this MA, the argument of JM and Omni is that the admission order has been fraudulently obtained by Indus without bringing full facts, therefore, this order is to be set aside by invoking Section 65(1) of Insolvency & Bankruptcy Code, 2016 whereas, Indus and the Corporate Debtor side submission is that the sale canvassed as concluded sale is not a concluded sale and this Bench having in the order 29.5.2017 already dealt with pendency of SARFAESI proceedings, the order dated 29.5.2017 is valid, and it can't be recalled in the name of fraud.

7. Indus submits that this Miscellaneous Application is a futile attempt to try and circumvent the moratorium declared by the order dated 29.5.2017 on a false and dishonest assumption that sale in respect of the only fixed asset owned by the Corporate Debtor situated at Rajiv Gandhi IT-BT Park, Phase II, Hinjewadi, Pune is a concluded sale in favour of Omni. Indus further submits, in case, the

purchase amounted to concluded sale, the DRT, subsequent to such purchase, could not have granted the right of redemption to the Corporate Debtor; interestingly no appeal was preferred by this applicant against the order dated 21.3.2017 passed by DRT granting an opportunity to the Corporate Debtor to redeem the property on payment. Indus further submits that though JM tried to develop an argument to impress upon this Bench that this application is covered by Section 65 of the Insolvency & Bankruptcy Code, 2016, the prayers in the Miscellaneous Application are contrary to the averments of the Affidavit. The Indus Counsel further submits that the asset was sold for low price, though rate of the asset is higher, if it fetches right value Indus could also get something from the corporate debtor company. In this situation, as no other option available to protect its interest, Indus approached this Authority with bonafide intention either to redeem the Corporate Debtor for impending insolvency and safeguard its claim or in the alternative to liquidate the Corporate Debtor assets equitably to satisfy all the claims under the supervision of an Insolvency Resolution Professional. The counsel of Indus also says that even in resolution process also, JM being a financial creditor having majority stake, everything happens at the wish of JM alone, but only hope to Indus is if the sale of it happens on the supervision of IRP, Indus interest will also be taken care of.

8. It has further submitted that in order to protect the interest of unsecured creditors, Indus filed the CP u/s 7 of the Insolvency & Bankruptcy Code, 2016, but not to frustrate the claim of JM. It can't be said that Indus manoeuvred the proceedings to frustrate the rights of JM. Assuming Indus had not initiated these proceedings, could it become an impediment to the Corporate Debtor to initiate proceedings u/s 10 of Insolvency & Bankruptcy Code, 2016? Definitely not, therefore, it could not be said that Indus moved this petition by colluding with the Corporate Debtor. Indus further submits that it had deposited ₹5crores on debtor company behalf with the Hon'ble DRT on 24.4.2017 seeking further six months to deposit ₹14.06crores. Since that application was not heard, as Indus filed this case hoping for resolution protecting the interest of all the stakeholders under one roof for preparation of resolution plan. In view of the same, this Petitioner submits that this application has to be dismissed in limine because there is no provision under Insolvency & Bankruptcy Code for recall of the order

unless it is vitiated by fraud. The Counsel says that this Bench having elaborately dealt with in the order dated 29.5.2017 in respect to SARFAESI proceeding effect upon section 7 petition, no merit being found on that score, this Bench declared moratorium by admitting the Petition.

9. The counsel of Omni also vehemently argued by filing separate MA saying that Omni interest has been stuck for it has already paid 25% of the sale price and in pursuance of the sale being confirmed, the Counsel says that such concluded sale is not hit by the moratorium declared by the order dated 29.5.2017, henceforth sought for clarification that this sale shall not be put to suspension by the moratorium declared on 29.5.2017.

10. On hearing the submissions of rivals, the point for consideration appears to us is as follows:

1. *Whether the sale allegedly confirmed is hit by declaration of moratorium u/s 14 or not?*
2. *Whether this application can be treated as grievance u/s 65 of IB Code or not?*

Point 1 for consideration: Whether the sale allegedly confirmed is hit by declaration of moratorium u/s 14 or not?

Before going into the legal proposition on this point, let us see what the factual situation in this case is.

It is a fact that SARFAESI proceedings were initiated against the immovable asset of the company, in pursuance thereof, the sale of the said asset was also initiated u/s 13 of SARFAESI Act. In furtherance of it, Omni paid 25% of sale price in compliance of Rule 9 (3) of Security Interest (Enforcement) Rules, 2002 but the remaining balance has not yet been paid by the auction purchaser. In the meanwhile, the Corporate Debtor approached DRT and obtained a conditional order that the Corporate Debtor should pay ₹5crore initially and the remaining balance of ₹14.06crores to be paid in six weeks thereof. When the Corporate Debtor failed to pay this amount on its own, Indus alongwith other unsecured creditor, deposited ₹5crores before the DRT expressing their willingness to pay remaining balance of ₹14.06crores

within six months while the said application was pending before DRT, since Indus coming forward for making payment has not been agreed by the Ld DRT, Indus moved this Company petition u/s 7 of Insolvency & Bankruptcy Code on which this Bench declared moratorium on 29.5.2017 by admitting this Company Petition after having dealt with the issue of pendency of SARFAESI proceedings before DRT, Mumbai.

The contentious issue before this Bench is JM and Omni submit that sale is concluded thereby not hit by moratorium u/s 14, whereas Indus says that it is not a concluded sale therefore, it is hit by moratorium given u/s 14.

In the backdrop of fact of Omni paying 25% consideration to the sale held, let us see what happens in SARFAESI proceeding and examine how moratorium operates over the SARFAESI proceedings pending.

On reading SARFAESI Act, 2002, a separate chapter is set out as "Enforcement of Security Interest" wherein a section has been culled out to deal with enforcement of security interest, i.e. Section 13 under which sub-section 6 deals with transfer of secured interest by the secured creditor. In respect to Enforcement of Security Interest, the right of transfer of title to third party is set out in the section 13 (6), how it has to be accomplished is set out in "The Security Interest (Enforcement) Rules, 2002".

These Rules have been drawn out in exercise of powers conferred by Sub Section 1 and Clause (b) of Sub Section 2 of Section 38 with Sub Sections (4), (10) and (12) of Section 13 of the SARFAESI Act, 2002. In those Rules, Rule 9 deals with time of sale, issue of sale certificate and delivery of possession, etc. which is as follows:

"Rule 9: Time of sale, issues of sale certificate and delivery of possession, etc. —

(1) *No sale of immovable property under these rules shall take place before the expiry of thirty days from the date on which the public notice of sale is published in newspapers as referred to in the proviso to sub-rule (6) or notice of sale has been served to the borrower.*

(2) *The sale shall be confirmed in favour of the purchaser who has offered the highest sale price in his bid or tender or quotation or offer to the authorised officer and shall be subject to confirmation by the secured creditor:*

Provided that no sale under this rule shall be confirmed, if the amount offered by sale price is less than the reserve price, specified under sub-rule (5) of rule 9:

Provided further that if the authorised officer fails to obtain a price higher than the reserve price, he may, with the consent of the borrower and the secured creditor effect the sale at such price.

(3) *On every sale of immovable property, the purchaser shall immediately pay a deposit of twenty-five per cent of the amount of the sale price, to the authorised officer conducting the sale and in default of such deposit; the property shall forthwith be sold again.*

(4) *The balance amount of purchase price payable shall be paid by the purchaser to the authorised officer on or before the fifteenth day of confirmation of sale of the immovable property or such extended period as may be agreed upon in writing between the parties.*

(5) *In default of payment within the period mentioned in sub-rule (4), the deposit shall be forfeited and the property shall be resold and the defaulting purchaser shall forfeit all claims to the property or to any part of the sum for which it may be subsequently sold.*

(6) *On confirmation of sale by the secured creditor and if the terms of payment have been complied with, the authorised officer exercising the power of sale shall issue a certificate of sale of the immovable property in favour of the purchaser in the form given in Appendix V to these rules.*

(7) *Where the immovable property sold is subject to any encumbrances, the authorised officer may, if he thinks fit, allow the purchaser to deposit with him the money required to discharge the encumbrances and any interest due thereon together with such additional amount that may be sufficient to meet the contingencies or further cost, expenses and interest as may be determined by him.*

(8) *On such deposit of money for discharge of the encumbrances, the authorised officer may issue or cause the purchaser to issue notices to the persons interested in or entitled to the money deposited with him and take steps to make the payment accordingly.*

(9) *The authorised officer shall deliver the property to the purchaser free from encumbrances known to the secured creditor on deposit of money as specified in sub-rule (7) above.*

(10) *The certificate of sale issued under sub-rule (6) shall specifically mention that whether the purchaser has purchased the immovable secured asset free from any encumbrances known to the secured creditor or not."*

According to sub Rule 1, Public Notice of Sale shall be published in newspapers as referred in Rule 8 of these Rules thereafter, on conducting sale, under Sub Rule 2, the said sale shall be confirmed in favour of the purchaser who has offered the highest sale price in the bid to the authorised officer (authorised officer - an officer as specified under the Act) subjecting to confirmation by the secured creditor. The balance of the purchase price payable shall be paid by purchaser on or before 15th day of confirmation of sale of the immovable property (determination that particular purchaser is the highest bidder) or such extended period as agreed upon but not exceeding three months. If at all not paid within the time aforesaid, the defaulting purchaser shall forfeit all claims to the property or to any part of the sum for which it may be subsequently sold. If we see sub rules from 2 to 5, it has not been seen anywhere that secured creditor will confirm the sale after 25% of the purchase price has been paid, it appears for the first time under Sub Rule 6, secured creditor will confirm sale only after full payment has been made, after compliance of sub rule 2 to 4, on confirmation of sale by the secured creditor, the authorised officer, for the first time exercising the power of sale will issue certificate of sale of the immovable property in favour of the purchaser in the form given in Appendix V to these Rules.

By giving a combined reading to sub rules 2 to 6, we will find two confirmations, one confirmation appears in sub-rule 2 – here in this sub-rule, authorised officer who is conducting auction will confirm the sale price offered by the purchaser in the bid, the purchaser will not even make 25% by the time this confirmation is given, therefore it can be in no way understood as confirmation of sale in favour of the auction purchaser, it is only a confirmation that the said purchaser made highest offer, therefore bid is complete for the price and purchaser is confirmed. It is obvious whenever auction is held, bid is declared as complete by declaring the highest bidder and bid price, since this process of auction is given to authorised officer, he will confirm the same, therefore it can't be said confirmation given by authorised officer in Sub Rule -2 cannot be equated to making sale absolute. That apart, in sub rule - 2 itself, it is made clear that such confirmation by authorised officer is *subject to confirmation by the secured creditor*.

Thereafter, we will not find word "confirmation" anywhere except in sub-rule 6. Sub-rule 3 speaks of payment of 25% of sale price on the same day auction held, in default a right to the authorised officer to resale it, sub - rule 3 speaks of payment of remaining 75% of sale price within 15 days of confirmation given by authorised officer under Sub Rule-2, on failure of payment of balance sale price by the purchaser – the deposit will be forfeited and the property will be resold. If the entire payment has been made by the purchaser as envisaged under sub-rule 4, then under sub-rule 6, the secured creditor will confirm the sale if the terms of payment have been complied with, on such confirmation, the authorised officer, exercising the power of sale will issue the certificate of sale of the immovable asset in favour of the purchaser in the form given under these Rules.

By this incisive reading, it is evident that the word confirmation employed in sub rule -2 is different from the word confirmation employed in sub rule-6, the context, object and purpose of employment of the word confirmation at these two places is different. The persons given confirmation is also different. In subrule-2, it is confirmation determining sale price and auction purchaser in the auction held by auction purchaser, but confirmation of sale will indeed be given by secured creditor under subrule-6 only after full payment is made.

In between payment of 25% purchase price and remaining balance payment, if the balance is not paid by the purchaser, the deposit of 25% shall be forfeited and the property can be resold to somebody else which is exactly in para materia to the procedure laid under Order 21 of CPC.

In Order 21 of CPC also, when immovable property has been sold in auction, the purchaser, under Order 21 Rule 84, *the purchaser*, just as mentioned in Rule 9 (3) of Security Interest (Enforcement) Rules 2002, *shall pay immediately after such declaration*(the word used in Sub-Rule 2 is confirmation) *a deposit of 25% on the amount of his purchase to the officer conducting the sale* (in SARFAESI it is an authorised officer) *and in default of such deposit, the property shall forthwith be resold*". In respect to payment of full purchase money, in both cases, under Order 21 Rule 85 of CPC and Rule 9 (4& 5) of Enforcement

Rules, the remaining balance shall be paid by the purchaser on or before the Court closes on 15th day from the sale of the property. If at all said purchaser defaulted in making the balance payment, such person shall forfeit all claim to the property and the same could be resold just as prescribed under The Security Interest (Enforcement) Rules, 2002.

Striking difference is, conspicuous absence of provisions similar to Order 21 Rules 89-91 of CPC in Security Interest (Enforcement) Rules, 2002, such as any person claiming interest in the property, in between, can file application under Rule 89 of Order 21 of CPC likewise, application on the ground of irregularity or fraud under Rule 91 of the Order 21 or entitlement of purchaser to seeking set-aside of sale on the no saleable interest to Judgement Debtor under Rule 91 of Order 21, but a right of 30 days notice to the borrower is given so as to get hearing before auction under Rule 8 (6) of Enforcement Rules.

Sub-Rule 6 of Rule 9 of Enforcement Rules speaks of confirmation of sale and issuing of sale certificate after full payment has been made, same is the case under Order 21 Rule 92 and 94 of CPC, no difference at all. In both the cases, confirmation and issuing sale certificate will happen only after full payment has been made; therefore confirmation to be given by Secured Creditor under Sub-Rule 6 of Rule 9 in SARFAESI is equivalent to confirmation by court under Rule 92 of Order 21 of CPC. It is contextual if I say here itself that Courts have laid ratio that issuing sale certificate to purchaser under Rule 94 of Order 21 as administrative in nature, it is right, here in the case of SARFAESI also, if Sub Rule 4 and first part of Sub-Rule 6, i.e., confirmation of sale by the secured creditor after full payment is made complete, then issuing sale certificate will arise. But that is not the case here, so far only 25% payment is made, remaining acts yet not being completed, it has to be construed mandate under sub-rule 6 has not been complete. All I say is the procedure that is to be complete under sub rule 6 is not complete; therefore case has to be considered as not reached to the stage of issuing sale certificate. Since case has not reached to the stage of issuing sale certificate, the counsel on behalf of secured creditor and the purchaser cannot say that

since only sale certificate is to be issued, it has to be treated as sale process is complete under section 13 of SARFAESI Act. In effect, transfer has not been effected, leave of issuing sale certificate.

On the top of it, Enforcement Rules have come into existence by exercising power under Section 13 which is earmarked for enforcement of security interest, therefore, as long as full payment has not been made, as long as sale has not been confirmed by the secured creditor, the process has to be treated as part and parcel of enforcement of security interest, that being the situation, the sale in the given case cannot be considered as concluded sale, it has to be treated as sale in progress under Security Interest Enforcement Rules, 2002 governed by Section 13 of the SARFAESI Act, 2002.

In both the cases under Order 21 of CPC as well as under The Security Interest (Enforcement) Rules, 2002 after 25% of the purchase price has been paid, sale price will be confirmed but whereas, the sale will be confirmed only after entire payment has been made, in the case of sale under CPC it will be confirmed by the Court whereas under SARFAESI Act, sale will be confirmed by the purchaser under sub-rule 6 of Rule 9 of The Security Interest (Enforcement) Rules, 2002, therefore, confirmation of sale price under sub-rule 2 cannot be construed as confirmation of sale by the secured creditor as envisaged under sub-rule 6 of Rule 9 of the Enforcement Rules. It is true it is an established legal proposition that normally once sale is confirmed and made absolute then issuing of sale certificate has been connoted as an administrative in nature. But as long as full payment has not been made and the same has not been confirmed by the secured creditor, it can't be considered that the sale is complete. As long as sale is not complete, and made absolute, no interest can be construed as transferred to the purchaser as is the case herein.

In view of the above proposition, the sale cannot be called as concluded sale, the only difference in CPC and Enforcement Rules is, in CPC, Civil Court will confirm and will make the sale absolute, whereas as here secured creditor will confirm sale, but the common denominator in both the situations as above stated is payment in full by the purchaser thereafter

confirmation by the secured creditor in the case of Enforcement Rules and in the case of civil case, it is before Civil Court.

Now let us look into Section 14 of Insolvency & Bankruptcy Code, 2016 which is as follows:

On reading this provision, it is clear that the proceedings pending against the Corporate Debtor or the institution or suits against the corporate Debtor are to be suspended during the moratorium period, likewise, the Corporate Debtor cannot transfer or create any third party rights in relation to any of its assets or any legal right or beneficial interest therein.

If we come to clause (c) of this Section, it is evident that whenever any recourse for enforcement of any security interest created by the Corporate Debtor is in progress, it has to be suspended. By seeing this provision, we are in no doubt that whenever any issue to enforcement of security interest created by the Corporate Debtor is pending that has to be suspended in the moratorium period. Since sale has already been construed as not a concluded sale as prescribed under Enforcement Rules, the sale proceedings in progress under SARFAESI proceedings are covered under Clause (c) of Section 14 of Insolvency & Bankruptcy Code, whereby this Bench hereby holds that the sale is not a concluded sale, therefore, the proceedings pending under SARFAESI will remain suspended until Moratorium period is completed.

Point No. 2 for consideration: *Whether this application can be taken as a grievance under Section 65 of the Insolvency & Bankruptcy Code, 2016 or not?*

On examination of the order dated 29.5.2017 already passed by this Bench, it is not in doubt about the status of the petitioner in that case, it is also not disputed by JM that Indus is not a Financial Creditor, since Insolvency & Bankruptcy Code entitles a Financial Creditor to initiate proceedings u/s 7 against the Corporate Debtor regardless of SARFAESI proceedings pending, how can it is attributed to the petitioner or corporate debtor that company petition was filed with a fraudulent intention to frustrate the sale in progress under SARFAESI Act?

In respect to SARFAESI proceedings JM talking of, this issue came before this Adjudicating Authority when order was passed, and the learned Member Judicial Shri Mukhul Shrawat, holding additional charge of this Bench, dealt with this issue holding that this Adjudicating Authority under Insolvency & Bankruptcy code is empowered to exercise jurisdiction u/s 7 of Insolvency & Bankruptcy Code despite proceedings under SARFAESI pending. It appears to us that Indus has not hidden anything from the light of this Authority, therefore, we have not seen that Indus fraudulently curtailing the legitimate rights of JM or Omni. When this Financial Creditor (JM) has a right to initiate proceedings in accordance with law, this Bench obviously to decide lis come before this Adjudicating Authority, and pass a valid order declaring moratorium on admitting the Petition filed by the Petitioner. When law permits to pass an order notwithstanding the proceedings pending before some other forum, this applicant is not expected to jump to a conclusion that this Petitioner initiated proceedings fraudulently so as to circumvent the proceedings pending before some other forum. Since this Bench has already held that it is not a concluded sale, the order passed by this Bench will certainly prevail over the proceedings under SARFAESI so long as moratorium is in force. Accordingly, we hereby hold that the Petitioner herein has not initiated the proceedings u/s 7 fraudulently or with a malicious intention for any process other than for resolution of insolvency therefore, the situation does not warrant this Bench to invoke jurisdiction u/s 65 of the Insolvency & Bankruptcy Code, 2016, or to recall the order validly passed. Accordingly, this point is also decided against the applicant herein.

11. JM Counsel has relied upon *Indian Bank Vs. Satyam Fibres (India) Pvt. Ltd.* (1996) 5SCC 550; *S. P. Chengalvaraya Naidu Vs. Jagannath* (AIR 1994 Supreme Court) 853 to say that when fraud is committed, the Court is empowered to recall its judgement when fraud is played against the court or any party, since fraud vitiates all proceedings, proceedings pending will get vitiated. But here in this case, since no fraud is found either in the Petition filed by the petitioner or in the order passed by this Adjudicating Authority, the proceedings cannot be vitiated just by being sought.

12. JM Counsel relied upon **M/s. Innoventive Industries Ltd. Vs. ICICI Bank and Anr. (Company Appeal (AT) (Insolvency) 1 & 2/2017 NCLAT)** to say that hearing has not been given to this applicant at the time of passing impugned order, to which our answer is there is no obligation or a mandate upon this Bench to give a notice to another Financial Creditor at the time of hearing insolvency petition therefore, passing an order before hearing JM would not become a ground to say that hearing has not been given to JM because law says that notice is only to be given to the Corporate Debtor therefore, unless mandate is prescribed to hear a particular party before passing an order, therefore it could not be construed that this Bench has to hear this applicant/secured creditor before passing order in the insolvency petition. Accordingly, the ratio envisaged in the aforesaid case is not applicable to the present case. This applicant should not get lost sight of the fact that the Hon'ble NCLAT dealt with in respect to giving notice to the Corporate Debtor not to a person other than Corporate Debtor.

13. JM counsel relied upon a case in between **Unigreen Global Pvt Ltd In Re (Company petition IB-39 (PB)/2017 order dated 4.5.2017)** to say that if it is a collusive petition between the creditor and the corporate debtor with a fraudulent intention to frustrate the interest of other financial creditors, it amounts to an attempt to defraud the other creditors, in view of the same, the counsel submits to this Bench to consider this case in the line it was considered by the Principal Bench, NCLT New Delhi. On perusal of the order passed by honourable Principal Bench, New Delhi, it appears the Ld. Bench has come to a conclusion that the petitioner, who filed CP under Section 10 of Insolvency & Bankruptcy Code, has not furnished full particulars in relation to the assets mortgaged and already set up one of the promoters' driver as a tenant of the Corporate Debtor properties so as to frustrate the SARFAESI proceedings, therefore, the Petition was dismissed by holding that Section 10 Petition was filed with a fraudulent intention to frustrate the interest of financial institution. Here, this Bench having not seen a situation as apparent in the case aforementioned therefore, it is not applicable to say that Petitioner has filed this case with fraudulent intention to frustrate the interest of JM. Moreover, as I already stated the petitioner has brought the pendency of SARFAESI proceedings to the notice of the Adjudicating Authority, basing on those facts, the Adjudicating Authority, i.e. Ld. Member Shri Mukul

Shrawat declared moratorium by admitting the petition therefore the aforesaid citation is not applicable to this case.

14. JM counsel relied upon a case in between *Pattam Kader Khan vs. Pattam Sardar Khan & Anr. (1996) (5 Supreme Court cases) 48* to say that when sale has become absolute on confirmation under Order 21 Rule 92 (1) of CPC, the delay happened in issuing sale certificate on inaction of the purchaser in completing the formalities of issuing a sale certificate will not make any difference to the title accrued upon the purchaser after claim has been made absolute.

15. As to this point is concerned, it has already been decided that sale will become absolute and confirmation of sale will happen only after purchase price is fully paid and the same has thereafter been confirmed by the secured creditor. Since full payment has not yet been paid, sale according to the Enforcement Rules is to be construed as not been confirmed because full payment as envisaged under sub Rule 6 of Rule 9 of Enforcement Rules has not been made and confirmed by secured creditor, sale cannot be construed as concluded sale, therefore the ratio decided in the aforesaid case is not applicable to the present case.

16. JM Counsel relied upon a case in between *Aatam Gems, Mumbai vs. Oriental Bank of Commerce, Mumbai (2009)(1) Mh Li 892* to say that Petitioners are not permitted to raise issues in respect to non compliance of Rule 54 of the Rules as well as non service of form no. 17 upon JDR will not become objections when auction purchaser has deposited the entire sale consideration, accordingly the objections to the sale have been dealt with and disposed of in accordance with law and the competent authority has confirmed sale vesting absolute right in the auction purchaser, therefore, the auction purchaser is entitled to sale certificate.

17. On reading this citation, it is apparent that one - it is a case decided under Recovery of Debts due to Banks and Financial Institution Act, 1993, two – the auction purchaser deposited entire sale consideration and three – sale has been confirmed, henceforth Hon'ble High Court has held that Petitioner cannot be permitted to raise the issues for the first time before High Court in respect to the correctness of the concurrent orders passed by DRT and DRAT. The present case cannot be considered on par with that ratio because moratorium granted u/s 14 of Insolvency & Bankruptcy Code, 2016 prevails over all other proceedings

inconsistent with Code provisions. Moreover the case Supra indeed is a writ petition, the petitioner in the case supra made an attempt to challenge the orders of DRT and DRAT with an allegation that the Financial institution has not complied Rule 54 of the Rules as well as non-service of Form 17 upon the judgement-debtor.

18. The facts of the present case are contrary to the facts of the case supra, there being an explicit rider under section 14 over all other proceedings covered under Section 14, once this Authority holds that the proceeding pending under SARFAESI falls within the ambit of Section 14, an analogy by taking a ratio decided on facts and legal proposition altogether different from the facts and legal position of this case cannot be taken into consideration. Hence, the ratio above is not applicable to the present case.

19. The applicant relied upon a case in between *Mohan Singh and Ors Vs. International Airport Authority of India and Ors. (1997) 9 SCC 132*, if the facts of the case are looked into, it appears it's a case where procedural aspect giving notification under Section 4(1) of Land Acquisition Act is not to be treated as mandatory in the cases where Government exercised urgent provision (Section 17(4)) to acquire land on urgent basis to cater the needs of the public.

20. The points looking important in the case Supra are as follows:

1. No universal principal of law could be laid as to whether a particular provision on enactment shall be considered as mandatory or directory. It is the duty of the court to try to get at the real intention of the legislature by carefully analysing the whole scope of the statute or Section or phrase under consideration.
2. Construction of the any word or phrase shall be read in a way to give effect to the objects of the section and enactment.
3. The meaning and intention of the legislature would govern design and purpose of the Act seeks to achieve.
4. Whether mandate under Section 4 of Land Acquisition Act is mandatory or directory is decided on the fulcrum of Section 17 of Land Acquisition Act.

21. In the backdrop of the ratio abovesaid, now the point for determination is whether the word "may" employed in Section 7 (5) (a) of Insolvency & Bankruptcy Code, 2016 can be stretched to invalidate the purpose and object of the Section 7 of the Code or not. Generally, the word "may" or the word "shall" cannot be used to go against the mandate of the Section – mandate is if debt and default is ascertained, if other conditions are fulfilled, then the petition has to be admitted. If that is so, the Adjudicating Authority is limited to see and to all conditions requisite for admitting the petition have been set out or not. That being so, can it be said that the petition need not be admitted for some other reason that is not envisaged either under the respective section or the code? To my knowledge, it can't be so.

22. Moreover, in the case Supra, some procedural aspect said as not mandatory so as to give validation to the right of the Government to acquire land on urgent basis to effectuate the purpose and objective of the respective enactment, here, "shall" is read as directory. The guiding force for holding so, is to uphold the scope of the respective enactment.

23. In the analogy taken into consideration in the case Supra, if the point involved in the case is looked into, as to whether SARFAESI proceeding or a provision of SARFAESI Act can be worked into Section 7 of the Code to say that admission of Section 7 petition will amount to public mischief. I fear, not.

24. Normally the word "shall" and "may" are construed imperatively Lord Brougham in Queen v. Alloparao (1847) 3MLA 488 P 492, it has been held "if the words are it "shall and may" be so and so done, by such and such officer and body then the word "may" is held in all soundness of construction to confer, a power but the word "shall" is held to make that power, or the exercise of that power compulsory."

25. Insolvency & Bankruptcy Code operates in the following manner:

1. Notwithstanding clause under Section 238 of the Code will have effect on any other law inconsistent with the provisions of the Code, SARFAESI Act also being an Act dealing with creditor and debtor

relation and operation of law in both the enactments being on the same field, Insolvency & Bankruptcy Code will prevail over SARFAESI Act.

2. Section 14 having categorically mentioned that declaration of moratorium will prohibit enforcement of security interest created by the Corporate Debtor in respect of its property including any action under SARFAESI Act, 2002, it can't be said that sale in progress will not remain under suspension during the moratorium period.

26. As I already said sale is not concluded because full payment is not made till date and confirmation has not been given as prescribed under sub Rule 6 of Rule 9 of Enforcement Rules, which are notified taking power from Section 13 of SARFAESI Act which is meant for enforcement of security interest.

27. Omni Counsel relied upon M/s. Jeevan Credit and Lending Pvt Ltd. vs. M/s. King Airways Ltd.(NCLT principal Bench CA (IB) 13/PB/2017) to say that since the Principal Bench dealt with the fraud under Section 65, the same shall be applied to this case. By going through the facts of the case, it appears that the petitioner filed defective petition and statutory auditor certificate is found manipulated, the petition is dismissed due to lack of bonafides. Since the case referred being dismissed for lack of bonafides, that analogy cannot be applied in this case where neither the petitioner nor corporate debtor concede the fact of SARFAESI proceedings pending before DRT.

28. There is another point that is raised by JM and Omni is that the debt in the Main petition is time barred therefore, this Bench should have dismissed instead of admitting the petition. If at all it is point to be canvassed by them they ought to have filed a appeal before Hon'ble NCLAT not before this Bench for recalling the order. Therefore, this Bench has not dealt with that point.

29. On reading the plethora of cases, filed by JM and Omni counsel, we have not seen any of the case facts and ratio applicable to the present case facts whereby it is hereby held that the ratio decided in the respective cases is not applicable to the given facts of this case.

MA 222/2017

30. Omni also filed an application as filed by JM, since the argument of Omni being covered in the discussion above made, that application is also dismissed.

31. In view of the reasons aforementioned, Ivn. P. No.02/2017 and MA 222/2017 are hereby dismissed without costs.

32. The Order is pronounced on 11.9.2017 and delivered on 26.09.2017.

33. The Registry is hereby directed to communicate this order to the parties, within seven days from the date order is made available.

Sd/-

V. NALLASENAPATHY
Member (Technical)

Sd/-

B.S.V. PRAKASH KUMAR
Member (Judicial)