

BANK OF INDIA

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v.

YADAV CONSULTANCY SERVICES (P) LTD. AND ANR.

(Civil Appeal No. 5150 of 2017)

DECEMBER 05, 2017

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[KURIAN JOSEPH AND R. BANUMATHI, JJ.]

Recovery of Debts due to Banks and Financial Institutions Act, 1993 – s. 31A – Suit for recovery, filed by Bank against debtors – Recovery proceedings – Attachment of property followed by auction – Issuance of certificate of sale in favour of auction purchasers – Since, Certificate Debtors creating obstruction in delivery of possession of the property to auction purchasers, first respondent appointed as Court Commissioner – Direction to the Bank to pay service charges to first respondent – Even though the Bank had decided to discharge the Court Commissioner with effect from 08.05.2007 and the Bank also paid charges of first respondent upto 08.05.2007, and possession of the property was handed over to the auction purchasers, the Recovery Officer directed the Bank to continue to pay the charges to first respondent – In appeal, recovery officer directed the first respondent to take steps for recovery of its charges from auction purchasers from 08.05.07 – First respondent after pursuing the matter before DRT, DRAT and High Court, sought arbitration before Micro, Small and Medium Enterprises Development Facilitation (MSMEDF) Council – Award passed by MSMEDF Council directing the Bank to pay Rs.1,62,82,079/- with interest @ 24% to first respondent – Upheld by the District Judge and the High Court – On appeal, held: Order of the Recovery Officer makes it clear that the continuation of the services of the first respondent for safeguarding the auctioned property was only on behalf of auction purchasers and that only the auction purchasers were bound to pay the charges for security services to the first respondent – Bank was under no obligation to pay the charges to the first respondent in any case after 24.07.2008(order of DRT) – High Court was not right in saying that DRT had no jurisdiction to entertain the appeal and, thus, the order would be non est – When the parties were vigorously pursuing the matter before DRT, DRAT, having trappings of the civil court,

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A *and also before the High Court, first respondent was not right in approaching MSMEDF Council – Award passed by MSMEDF Council, as affirmed by District Court and also by High Court not sustainable – Micro, Small and Medium Enterprises Development Act, 2006.*

B **Allowing the appeal, the Court**

C **HELD: 1.1** The order of the Recovery Officer makes it clear that the continuation of the services of the first respondent for safeguarding the auctioned property was only on behalf of auction purchasers and that only the auction purchasers were bound to pay the charges for security services to the first respondent. The first respondent’s duty as “Court Commissioner” had ceased to exist on 13.11.2006. After 13.11.2006 or at least after 24.07.2008 (Order of DRT), for the services of respondent No. 1, if any, were availed by the auction purchasers, only the auction purchasers are liable to pay the said charges to respondent No. 1. The appellant Bank, therefore, was under no obligation to pay the charges to the first respondent in any case after 24.07.2008. The High Court has not kept in view the order of DRT dated 24.07.2008 and the order of the Recovery Officer dated 25.03.2009. The High Court was not right in saying that DRT had no jurisdiction to entertain the appeal and, therefore, the order would be non est. [Para 10] [75-D, G-H; 76-A, D-E]

F **1.2** After the order of the Recovery Officer, respondent No. 1 filed application before DRT seeking payment of charges for security services from the auction purchasers as directed by DRT in its order which clearly indicates that the first respondent had accepted the said order of DRT and also acted upon it. Be it noted, the proceedings of the Recovery Officer in which all the parties participated proceeded mainly on the basis of the order of DRT. The High Court held that DRT had no jurisdiction to entertain Appeal, the order dated 24.07.2008 passed by it would be *non est* and hence must be ignored.” The High Court did not keep in view that the respondent No. 1 had not challenged the order of DRT; and had acquiesced to the said order and also acted upon it. The subsequent proceedings clearly show that respondent No. 1 and other parties have accepted the order of DRT and acted upon it. [Para 11] [76-F-H; 77-A]

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1.3 The proceedings were conducted before DRT under RDDBFI Act, 1993 which finally culminated in DRT's order dated 24.07.2008 and had become final and binding and was also accepted and acted upon by respondent No.1. DRT and DRAT are not merely having the trappings of the courts but also vested with the powers of ordinary civil court including the power to summon and examine the witnesses on oath, the power to order inspection of the documents etc. When the proceedings were lawfully conducted before the quasi-judicial authorities like DRT and DRAT, having trappings of the civil court, MSMEDF Council had no jurisdiction to entertain the application filed by the first respondent; more so, when the orders passed by the DRT were accepted and acted upon by respondent No.1. The High Court did not consider the question of lack of jurisdiction of MSMEDF Council. [Para 12] [77-C-E]

1.4 The High Court mainly seems to have proceeded with the matter as if it is a regular appeal arising out of the award passed by the MSMEDF Council and commenting upon the conduct of the Bank in not seriously pursuing the matter in challenging the award. The High Court did not consider the earlier proceedings before DRT, DRAT and before the High Court except merely referring to certain proceedings before DRT and DRAT. The High Court did not consider various orders passed by DRT and DRAT and the conduct of the parties who have been vigorously pursuing the matter before DRT, Recovery Officer and DRAT. The High Court also did not keep in view that the parties were bound by the earlier orders passed by DRT and Recovery Officer which clearly held that charges towards security services are payable only by the auction purchasers. Thus, the order passed by the High Court suffers from serious infirmity. [Para 13] [77-F-H; 78-A]

1.5 Pursuant to the order dated 19.03.2013 passed by the High Court, an amount of Rs.1,93,22,590/- was deposited by the appellants Bank. By an order dated 30.03.2016 passed by DRT, respondent No.1 has withdrawn an amount of Rs.1,22,00,000/- (Rs.1,00,00,000/- plus accrued interest). The balance amount of Rs.93,22,590/- is lying in deposit with the District Court. By order dated 22.04.2016, this Court has granted interim stay of the impugned order of the High Court. However, by order dated

- A 24.10.2016, respondent No.1 was permitted to withdraw 50% of the said amount Rs.93,22,590/- on furnishing a bank guarantee. The first respondent has not withdrawn the said 50% amount of Rs.93,22,590/- as he has failed to furnish bank guarantee. The impugned judgment of the High Court is set aside and resultantly the award passed by the MSMEDF Council is also set aside.
- B The appellant Bank is free to recover the amount of Rs.1,22,00,000/- withdrawn by the first respondent after adjusting the payments due upto 24.07.2008. The bank is permitted to withdraw the amount of Rs.93,22,590/- along with accrued interest. So far as the charges towards security services payable to the first respondent after 24.07.2008, liberty is granted to the first respondent to proceed against the auction purchasers in accordance with law. [Para 14-15] [78-B-E]
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CIVIL APPELLATE JURISDICTION : Civil Appeal No..5150 of 2017.

- D From the final Judgment and Order dated 19.11.2015 of the High Court of Judicature at Bombay in ARA No.15/2014.

Dushyant A. Dave, Sr. Adv, Vipin Kumar Jai, Vipul Jai, Ms. Shaily Dinkar, Advs for the Appellant.

- E Respondent-in-person.

The Judgment of the Court was delivered by

- R. BANUMATHI, J. 1. This appeal is preferred against the judgment dated 19.11.2015 passed by the High Court of Judicature at Bombay in ARA No. 15 of 2014 dismissing the appeal of the appellant Bank thereby affirming the judgment of the District Judge, Pune and the award passed by the MSMEDF Council directing the appellant Bank to pay Rs.1,62,82,079/- with interest at the rate of 24% to respondent No. 1 and also pay cost of Rs. 5,00,000/- to respondent No. 1.
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2. The matter has a chequered history of two decades. Brief facts which led to filing of this appeal are as follows:- The appellant Bank filed suit in Special Suit No. 628 of 1998 for recovery of Rs.9.55 lakhs along with interest against one M/s Sona Aluminium Finishers (P) Ltd. The said suit was decreed on 30.01.1999. Since the decreed amount exceeded rupees ten lakhs, in view of Section 31-A of Recovery of Debts due to Banks and Financial Institutions (RDDBFI) Act, 1993, the
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recovery proceedings were transferred to the Recovery Officer, Debt Recovery Tribunal (DRT), Pune and registered as R.P. No. 06/2002. After attachment of the property, the property was auctioned on 08.03.2006. By order of DRT dated 14.07.2006, certificate of sale was issued in favour of auction purchasers-respondents No. 3 to 5. Since the Certificate Debtors (Mortgagor/Guarantor) were said to be creating obstruction in delivery of possession of the property to the auction purchasers, by order dated 26.07.2006, the Recovery Officer, DRT, Pune appointed respondent No.1 as "Court Commissioner". The appellant Bank was directed to pay service charges to the first respondent. Respondent No. 1 took possession of the property on 09.11.2006. Auction purchasers filed an application in R.P. No. 06 of 2002 on 13.11.2006 and DRT, Pune on the same date i.e. 13.11.2006 directed respondent No. 1 to hand over the possession of the subject property to the auction purchasers.

3. There was then a dispute between the appellant Bank and M/s Sona Aluminium Finishers (P) Ltd. – Certificate Debtor and the same came to be compromised; however the same failed due to non-compliance of the terms and conditions of the compromise. Appellant Bank sent letter dated 04.05.2007 informing the first respondent that they had decided to discharge the Court Commissioner with effect from 08.05.2007 and the Bank also paid the charges of respondent No. 1 up to 08.05.2007. However, the Recovery Officer by his order dated 12.06.2007 directed the appellant Bank to continue to pay the charges to respondent No. 1 which was challenged by the appellant Bank before the Presiding Officer, DRT, Pune by preferring Appeal No. 25 of 2007. In Appeal No. 25 of 2007, *vide* order dated 24.07.2008, DRT set aside the order of the Recovery Officer and directed the first respondent to take steps for recovery of its charges from the auction purchasers from 08.05.2007. Be it noted, respondent No. 1 had not challenged the order dated 24.07.2008; but filed an application on 07.11.2008 in R.P. No. 06/2002 seeking for direction to the auction purchasers to pay its charges. Only the auction purchasers challenged the order of DRT dated 24.07.2008 before Debt Recovery Appellate Tribunal (DRAT), Mumbai in Appeal No. 589 of 2008 wherein respondent No. 1 was one of the respondents. When the said appeal filed by the auction purchasers was pending before DRAT, the first respondent filed Writ Petition No. 10259 of 2011 seeking direction from the High Court to expedite hearing of the

A said appeal and dispose the same at an early date. The said writ petition was disposed of by order dated 16.01.2012 directing DRAT, Mumbai to decide the appeal within a period of three months and accordingly, the said Appeal No. 589 of 2008 was dismissed for default on 30.05.2012.

4. After so pursuing the matter before DRT, DRAT and the High Court, the first respondent instead of challenging the order dated 30.05.2012, sought arbitration before Micro, Small and Medium Enterprises Development Facilitation Council (MSMEDF Council), Pune under Micro, Small and Medium Enterprises Development (MSMED) Act, 2006. The MSMEDF Council passed an *ex parte* award on 12.09.2012 directing the appellant Bank to pay a sum of Rs. 1,62,82,079/- to respondent No. 1 within the period of one month from the date of award i.e. 12.09.2012 with interest at the rate of 24%. In the incidental proceedings arising out of the award passed by the MSMEDF Council, by order dated 19.03.2013 in Writ Petition No. 2877 of 2013 filed by the appellant Bank, the High Court stayed the order of the District Judge, Pune passed in DKT No. 1741 of 2012, subject to deposit the entire decretal amount that is Rs. 1,93,22,590/- within one week with the Registrar, High Court of Judicature at Bombay and the appellant Bank had deposited the said amount. Appeal filed by the appellant Bank under Section 34 of the Arbitration and Conciliation Act, 1996 being Civil Application No. 352 of 2013 was dismissed by the District Judge, Pune *vide* order dated 16.06.2014. Further appeal filed by the appellant Bank under Section 37 of the Arbitration and Conciliation Act, 1996 in Arbitration Petition No. 15 of 2014 came to be dismissed by the High Court *inter alia* on various grounds:- (i) DRT has no jurisdiction to entertain the appeal and therefore order dated 24.07.2008 would be *non est*; (ii) MSMED Act, 2006 was specially enacted to deal with dispute of delayed payments to service providers and the MSMEDF Council had jurisdiction to adjudicate the dispute; and (iii) Bank has not taken any step to take possession from Court Commissioner after paying the charges; but it has simply refused to pay the charges and dragged the litigation. Being aggrieved, the appellant Bank preferred this appeal.

5. We have heard at length Mr. Dushyant Dave, learned senior counsel appearing for the appellant Bank and Mr. Prakash Wamanrao Yadav-the first respondent who appeared in-person. We have carefully considered the rival contentions and perused the impugned judgment and the materials on record.

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6. Upon consideration of the rival contentions, the following points arise for consideration in this appeal:- A

- i. When the obligation of the appellant Bank to pay the charges expired on 30.11.2006, when the physical possession of the subject property was handed over to the auction purchasers and when the order dated 24.07.2008 of Debt Recovery Appellate Tribunal, Pune has attained finality, can the first respondent claim charges for security services from the appellant Bank? B
- ii. Whether the High Court was right in saying that DRT had no jurisdiction to entertain the appeal and that the order dated 24.07.2008 would be *non est*? C
- iii. When the first respondent was appointed as Court Commissioner through the order of the Recovery Officer in the proceedings before DRT in R.P. No. 06/2002 and when the parties were vigorously pursuing the matter before DRT, DRAT and also before the High Court, whether the first respondent was right in approaching the Micro, Small and Medium Enterprises Development Facilitation (MSMEDF) Council, Pune; D

-and- E

- iv. Whether the award passed by the Micro, Small and Medium Enterprises Development Facilitation (MSMEDF) Council, Pune affirmed by the District Court and also by the High Court is sustainable?

7. The auction of the property was conducted on 08.03.2006 and the sale of the auctioned property was confirmed on 14.07.2006 and the sale certificate was issued in favour of the auction purchasers on the same date. The Recovery Officer appointed the first respondent as Court Commissioner on 26.07.2006 and the fees of the first respondent to be directly paid by the Certificate Holder Bank. On 13.11.2006, the appellant Bank filed purshis praying to hand over the possession of subject property (Pavitra Hall) to the auction purchasers and on the same date i.e. 13.11.2006, on the application filed by the auction purchasers, possession of the subject property was handed over to the auction purchasers and they have also issued acknowledgement of possession. F

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A On the same date i.e. 13.11.2006, purshis on behalf of the auction purchasers was also filed in R.P. No. 06 of 2002 before DRT in and by which the auction purchasers undertook to pay all expenses as required to protect their possession. Purshis of expenses filed by the auction purchasers reads as under:-

B “Purshis of expenses

Purshis on behalf of auction purchaser is as under:

a) That from the time of taking possession i.e. 13.11.2006 of auctioned property as purchased i.e., “Pavitra Hall”, the Auction Purchaser shall bear all the expenses as may be required to protect their possession, including payments if required to be made to the security personnel. That the Auction Purchaser shall be liable accountable & duty bound to safeguard the possession to the exclusion of all others

b) Hence this purshis.”

D 8. The appellant Bank sent the communication to the first respondent on 04.05.2007 calling upon him to get his bill cleared for Rs. 30,866/- being the charges for security services at “Pavitra Hall” up to 08.05.2007. In the said communication, Bank had made it clear that “.....no further payment will be made to you (Yadav Consultancy) by the Bank.....”; however, the Recovery Officer by his letter dated 12.06.2007 directed the appellant Bank to continue to pay the charges for security services to the first respondent. Appellant Bank challenged the said order of Recovery Officer dated 12.06.2007 before DRT in Appeal No. 25 of 2007. DRT set aside the said order of the Recovery Officer and directed the Recovery Officer to recover Court Commissioner charges from 08.05.2007 from the auction purchasers. We may usefully refer to the said order of the DRT dated 24.07.2008 which reads as under:-

G “.....The Court Commissioner was appointed at the instance of the Recovery Officer and the Recovery Officer has wrongly saddled the appellant to pay the charges. The Court Commissioner should not suffer in the present proceeding and, therefore, Recovery Officer is directed to recover Court Commissioner charges from 08.05.2007 till his discharge from the auction purchasers.....”

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9. The first respondent has not challenged the order of DRT dated 24.07.2008; but even filed application on 07.11.2008 before DRT, Pune seeking for direction to the auction purchasers to pay the Court Commissioner charges to the first respondent. The first respondent had also filed contempt petition against the appellant Bank and the auction purchasers. The Recovery Officer had heard all the parties including the Certificate Debtor (CD) who prayed for setting aside the sale of the auction property "Pavitra Hall". The Bank *inter alia* prayed that the auction purchasers be directed to pay the Court Commissioner charges only up to 13.11.2006 and discharge the Court Commissioner from that date. After considering the rival claims of all the parties, by order dated 25.03.2009 in R.P. No. 06/2002, the Recovery Officer held that the continuation of respondent No. 1 for safeguarding the auctioned property was solely on behalf of auction purchasers and his duty as "Court Commissioner" had ceased to exist on 13.11.2006.

10. Order of the Recovery Officer dated 25.03.2009 makes it clear that the continuation of the services of the first respondent was only on behalf of auction purchasers and that only the auction purchasers were bound to pay the charges for security services to the first respondent. The relevant portion of the order of the Recovery Officer reads as under:-

"8.....The Auction Purchasers have not filed any application to discharge the said Agency, therefore, they have opted to continue the services, of the said Agency, in exercise of their discretion and in furtherance of their Exh 225. This Tribunal would therefore not be inclined to accept the prayer of CH to discharge the said Agency, as doing so is likely to prejudice the Auction Purchaser's rights, in the matter of preservation and protection of the auctioned property, and violation of their rights, and discretion, as the CH has no concern in the preservation or protection of the auctioned property from 13.11.2006 i.e., since the Auction Purchasers having filed Undertaking at Exh 225.

9.....The status of the said Agency as "Court Commissioner" appears to be lost from 13.11.2006, as thereafter the "Court Commissioner" appears to have continued to safeguard the auctioned property for and on behalf of the Auction Purchasers, in furtherance of their private arrangement, particularly in light of Exh 225 of the Auction Purchaser. The term "Court Commissioner" as used by CH in its application Exh 308 therefore

A is a misnomer. The said Agency from 13.11.2006 does not appear to have rendered services to the Auction Purchasers as “Court Commissioner” but as a private agency..... The order of the Hon’ble PO dated 24.07.2008, passed in Misc. Civil Appeal 25/2007 whereby, it appears, relief is granted to the Auction Purchasers, who have been directed to pay the Court Commissioner charges w.e.f. 08.05.2007. Therefore, I am not required to go into the said aspects again, as the same having reached finality, as from the available record and papers, no appeal appears to be filed against the said order dated 24.07.2008....”

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C The above order of the Recovery Officer ~~makes it clear~~ that the continuance of respondent No. 1 for safeguarding the auctioned property was solely on behalf of auction purchasers and the first respondent’s duty as “Court Commissioner” had ceased to exist on 13.11.2006. After 13.11.2006 or at least after 24.07.2008 (Order of DRT), for the services of respondent No. 1, if any, were availed by the auction purchasers, only
D the auction purchasers are liable to pay the said charges to respondent No. 1. The appellant Bank, therefore, was under no obligation to pay the charges to the first respondent in any case after 24.07.2008. The High Court has not kept in view the order of DRT dated 24.07.2008 and the order of the Recovery Officer dated 25.03.2009. The High Court was not right in saying that DRT had no jurisdiction to entertain the appeal
E and, therefore, the order dated 24.07.2008 would be *non est*.

F 11. After the above order of the Recovery Officer, respondent No. 1 filed MA No. 35 of 2009 before DRT seeking payment of charges for security services from the auction purchasers as directed by DRT in its order dated 24.07.2008 which clearly indicates that the first respondent
G had accepted the said order of DRT and also acted upon it. Be it noted, the proceedings of the Recovery Officer dated 25.03.2009 in which all the parties participated proceeded mainly on the basis of the order of DRT dated 24.07.2008. But, strangely, respondent No. 1 made submission before the High Court that “....DRT had no jurisdiction to entertain
H *Appeal No. 25/2007 against the order of the Recovery Officer dated 12.06.2007.....*”. The said submission of respondent No. 1 was accepted by the High Court and it was held that “.....DRT had no jurisdiction to entertain *Appeal No. 25/2007, the order dated 24.07.2008 passed by it would be non est and hence must be ignored.*” In our view, the High Court did not keep in view that the

respondent No. 1 had not challenged the order of DRT dated 24.07.2008; and had acquiesced to the said order dated 24.07.2008 and also acted upon it. As discussed earlier, the subsequent proceedings clearly show that respondent No. 1 and other parties have accepted the order of DRT dated 24.07.2008 and acted upon it. The findings of the High Court that DRT had no jurisdiction to entertain the appeal against the order of Recovery Officer cannot be sustained.

12. Next question falling for consideration is whether in the facts of this case, the Micro, Small and Medium Enterprises Development Act, 2006 would apply. As discussed earlier, the proceedings were conducted before DRT under RDDBFI Act, 1993 which finally culminated in DRT's order dated 24.07.2008 and had become final and binding and was also accepted and acted upon by respondent No.1. As per Section 5 of the RDDBFI Act, the Debt Recovery Tribunal is headed by the Presiding Officer who is or has been or is qualified to be a District Judge. Likewise, as per Section 10 of the said Act, the Appellate Tribunal is headed by the Chairperson who is or has been or is qualified to be a judge of a High Court. DRT and DRAT are not merely having the trappings of the courts but also vested with the powers of ordinary civil court including the power to summon and examine the witnesses on oath, the power to order inspection of the documents etc. When the proceedings were lawfully conducted before the quasi-judicial authorities like DRT and DRAT, having trappings of the civil court, MSMEDF Council had no jurisdiction to entertain the application filed by the first respondent; more so, when the orders passed by the DRT were accepted and acted upon by respondent No.1. The High Court did not consider the question of lack of jurisdiction of MSMEDF Council.

13. The High Court mainly seems to have proceeded with the matter as if it is a regular appeal arising out of the award passed by the MSMEDF Council and commenting upon the conduct of the Bank in not seriously pursuing the matter in challenging the award. The High Court did not consider the earlier proceedings before DRT, DRAT and before the High Court except merely referring to certain proceedings before DRT and DRAT. The High Court did not consider various orders passed by DRT and DRAT and the conduct of the parties who have been vigorously pursuing the matter before DRT, Recovery Officer and DRAT. The High Court also did not keep in view that the parties were bound by the earlier orders passed by DRT and Recovery Officer which clearly

A held that charges towards security services are payable only by the auction purchasers. The impugned order passed by the High Court thus suffers from serious infirmity and is liable to be set aside.

14. Pursuant to the order dated 19.03.2013 passed by the High Court, an amount of Rs.1,93,22,590/- was deposited by the appellant Bank. By an order dated 30.03.2016 passed by DRT, Pune, respondent No.1 has withdrawn an amount of Rs.1,22,00,000/- (Rs.1,00,00,000/- plus accrued interest). The balance amount of Rs.93,22,590/- is lying in deposit with the District Court, Pune. By order dated 22.04.2016, this Court has granted interim stay of the impugned order of the High Court. However, by order dated 24.10.2016, respondent No.1 was permitted to withdraw 50% of the said amount Rs.93,22,590/- on furnishing a bank guarantee. The first respondent has not withdrawn the said 50% amount of Rs.93,22,590/- as he has failed to furnish bank guarantee. We have set aside the impugned judgment of the High Court and resultantly the award passed by the MSMEDF Council is also set aside.

D 15. The impugned order is set aside and this appeal is allowed. The appellant Bank is free to recover the amount of Rs.1,22,00,000/- withdrawn by the first respondent after adjusting the payments due upto 24.07.2008. The bank is permitted to withdraw the amount of Rs.93,22,590/- along with accrued interest. So far as the charges towards security services payable to the first respondent after 24.07.2008, liberty is granted to the first respondent to proceed against the auction purchasers-respondents No. 2 and 3 in accordance with law. No order as to costs.