IN THE DEBTS RECOVERY APPELLATE TRIBUNAL AT KOLKATA

Appeal No. 66 of 2022
(Arising out of S.A. No. 24 of 2022 in DRT, Siliguri)

THE HON'BLE MR. JUSTICE ANIL KUMAR SRIVASTAVA
CHAIRPERSON

1. The Authorised Officer, Punjab National Bank, N.J.P. Siliguri Circle, United Bank Building, 2nd Floor, Hill Cart Road, Siliguri – 734 001, District – Darjeeling;

2. Punjab National Bank, Sastra Division, N.J.P. Siliguri Circle, United Bank Building, 2nd Floor, Hill Cart Road, Siliguri – 734 001, District – Darjeeling.

… Appellants

-Versus-

Bikash Saha, Nandalal Basu Sarani, College Para, Siliguri – 734 001, District - Darjeeling, West Bengal.

… Respondent

Counsel for the Appellants … Mr. Debasish Chakrabarti
Ms. Sharmistha Pal

Counsel for Respondent … Mr. Nemani Srinivas

JUDGMENT : 11th July, 2023

THE APPELLATE TRIBUNAL :

Instant Appeal arises against a judgment and order dated 5th July, 2022 passed by Learned Debts Recovery Tribunal, Siliguri allowing the SARFAESI Application No. 24 of 2022 thereby the forfeiture of amount of Rs.21,63,250.00 was set aside and the Appellant Bank was directed to refund the deposited amount to the SARFAESI Applicant after deducting Rs.50,000.00 towards expenditure within four weeks.

1. As per the pleadings of the parties, facts in brief are that in response to the Sale Notice dated 4th June, 2021 published by the Appellant Bank, Respondent, Bikash Saha (who is Applicant in the SARFAESI Application), participated in the e-auction sale conducted on 29th June, 2021. He was the highest bidder for an amount of Rs.66,53,000.00. EMD of Rs.6,63,000.00 was deposited and further

an amount of Rs.10,00,250.00 was deposited on 30th June, 2021. Accordingly, total amount of Rs.21,63,250.00 was deposited being 25% of the bid amount. The Appellant Bank directed the Auction Purchaser to deposit 75% of the auction sale amount on or before 14th July, 2021 which could not be deposited by him so time was sought by the Auction Purchaser on 11.8.2021, 24.9.2021 and 2.11.2021. Appellant informed the Auction Purchaser vide letter dated 8.11.2021 regarding forfeiture of the amount after rejecting the time for deposit under Rule 9 (5) of The Security Interest (Enforcement) Rules, 2002 (hereinafter referred to as 'Rules, 2002').

2. SARFAESI Applicant/Respondent challenged the action of the Bank on the ground that the action of the Bank was against law. Secured assets have been subsequently sold by the Bank; Bank enriched unlawfully itself by forfeiting the amount.

3. After hearing the Learned Counsel for the parties, Learned DRT, relying upon a judgment of the Hon'ble Apex Court (Alisha Khan -vs- Indian Bank (Allahabad Bank) & Others, reported in 2021 SCC Online SC 3340, held that the forfeiture is bad in law, accordingly allowed the SARFAESI Application and directed the Bank to refund the 25% deposited amount of Rs.21,63,250.00 after making deduction of Rs.50,000.00 towards expenditure in conducting the subsequent auction sale.

4. Feeling aggrieved, the Appellant Bank preferred the appeal.

I have heard the Learned Counsel for the parties and perused the record.

5. Learned Counsel for the Appellant submits that the impugned judgment is bad in law. It is against the provisions of Rule 9 (4) of the Rules, 2002. It is submitted that no subsequent sale was conducted, hence law laid down in Alisha Khan (supra) would not apply.

6. Learned Counsel further submits that admittedly Respondent participated in the auction sale held on 29.6.2021 and was declared as the highest bidder. In the Sale Notice it is mentioned that all the

terms and conditions are available on the website of the Bank. Respondent participated in the auction sale and deposited 25% of the bid amount, hence it is clear that he accepted the terms and conditions of the auction sale which is a binding contract entered into by and between the Bank and the Auction Purchaser hence now he cannot resile from the terms and conditions of the contract wherein it is specifically provided that if the bid amount is not deposited as per terms and conditions of the bid, same shall be forfeited.

7. It is further submitted that the extension for deposit of 75% of the bid amount was sought by the Respondent on 11.8.2021, 24.9.2021 and 2.11.2021. On 8.11.2021 it was communicated that request for extension is refused and the amount is forfeited in favour of the Bank.

8. Learned Counsel further submits that the Respondent cannot take advantage of the law laid down in Alisha Khan (supra). He has not deposited the amount of 75% of bid amount within the stipulated period, accordingly, forfeiture was made by the Bank in accordance with the provisions of 9(4) and 9 (5) of the Rules, 2002. Accordingly, the impugned judgment is liable to be set aside.

9. Learned Counsel for the Respondent submits that the Bank is taking contradictory stand in the appeal. It is submitted that the provisions of Rule 9 (4) are not complied by the Appellant Bank as in the letter dated 2nd July, 2021 Appellant Bank directed to deposit the remaining 75% amount by 14.7.2021. It is further submitted that no response was received by the Respondent on its letters dated 11.8.2021 and 24.9.2021 an 2.11.2021.

10. It is further submitted that the letter dated 8.11.2021 forfeiting the bid amount was never sent to the Respondent, rather it was sent as an attachment to e-mail dated 3.12.2021. Prior to it, a fresh Sale Notice was issued by the Bank on 19.11.2021 which too is against the provisions of law.

11. It is further submitted that the Learned DRT has passed the impugned order considering the hardship as well as placing reliance upon the judgment of Alisha Khan (supra). Accordingly the appeal is liable to be dismissed.

Hon'ble Apex Court in Alisha Khan (supra) had passed the following order:

> *"1. Leave granted .*
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> *2. Learned Counsel appearing on behalf of the Appellant was arguing from the Car and there was poor connectivity. When we asked him from where he is arguing, he told that he is on the road. We refuse to hear the counsel, who is arguing from the Car. Even otherwise, due to poor connectivity we are not able to hear him. However, in the interest of justice, we have considered the matter on merits and heard learned counsel appearing on behalf of respondents.*
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> *3. Having gone through the impugned judgment and orders passed by the High Court, we are of the opinion that the High Court ought to have allowed the refund of the amount deposited being 25% of the auction sale consideration. Considering the fact that though initially the appellant deposited 25% of the auction sale consideration, however, subsequently she could not deposit balance 75% due to COVID-19 pandemic. It is required to be noted that subsequently the fresh auction has taken place and the property has been sold. It is not the case of the respondents that in the subsequent sale, lesser amount is received. Thus, as such, there is no loss caused to the respondents. (emphasis supplied)*
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> *4. Considering the aforesaid facts and circumstances, we allow these appeals and set aside the order of forfeiture of 25% of the amount of auction sale consideration and directed respondent Bank to refund/return the amount earlier deposited by the appellant, deposited as the part auction sale consideration (minus 50,000/- towards the expenditure which were required to be incurred by the respondent Bank for conducting the fresh auction) within a period of four weeks from today.*
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> *5. The appeals are accordingly allowed. No Cost."*

A bare perusal of the impugned judgment shows that the Learned DRT has placed reliance upon Alisha Khan (supra).

12. As far as applicability of the law, laid down in Alisha Khan (supra), is concerned, it is admitted in paragraph 11 of the objections

filed by the Bank before the Learned DRT in SARFAESI Application No. 24 of 2022 that :

> *"That it is further submitted that the Authorised Officer of the Defendant Bank after making forfeit of the amount, to recover the dues of the said loan accounts once again issued a fresh E-Auction Sale Notice dated 21.01.2022 fixing the date of sale on 15.02.2022 and the property was sold in the said auction to the highest bidder and after receiving 25% of the Auction sale Amount from the said successful bidder, sale Confirmation Letter has been issued in his favour."*

13. Admittedly, Respondent participated in the auction sale held on 29.6.2021. He deposited the 25% of the bid amount on 30th June, 2021. On 2nd July, 2021, he was asked to deposit 75% by 14th July, 2021. Rule 9 (4) of the Rules, 2022 provides that the purchaser shall pay the balance amount on or before the 15th day of confirmation of sale. Prima facie 15 days time, as required under Rule 9 (4) of the Rules, was not given by the Bank.

14. It is specifically stated by the Respondent that the letter of forfeiture dated 8.11.2021 was communicated to the Respondent with an attachment of e-mail dated 3.12.2021. Why forfeiture was not done on lapse of three months of the date of auction sale? Why the letter dated 8.11.2021 was not sent to the Auction Purchaser immediately on 8.11.2021? Why it was sent as attachment to the e-mail dated 3.12.2021? All these lapses could not be explained by the Appellant Bank.

15. Rule 9 (4) and 9 (5) The Security Interest (Enforcement) Rules, 2002 reads as under :

> "*(4) The balance amount of purchase price payable shall be paid by the purchaser to the authorized 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 purchaser and the secured creditor, in any case not exceeding three months] (5) In default of payment within the period mentioned in sub-rule (4), the deposit shall be forfeited [to the secured creditor] 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."

Rule 9 (4) and 9 (5) provides for payment of balance amount of purchase price on or before the fifteenth day of confirmation of sale of the immoveable property or such extended period, as agreed between the parties, but in no case it can exceed three months. Rule 9 (5) makes a provision for forfeiture in case of default as provided under Rule 9 Sub-rule (4) of the Rules.

16. In the present case admittedly 25% amount was deposited by the auction purchaser on the next date of the auction, i.e. 30th June, 2021. Auction Purchaser was asked to deposit 75% by 14th July, 2021 which is against the provisions of Rule 9 (4) wherein minimum 15 days time should have been given to the Auction Purchaser to make the deposit. However, the deposit was not made by the Auction Purchaser and he sought time on 11th August, 2021, 24th September, 2021 and 2nd November, 2021 on different grounds. Thereafter, on 2nd November, 2021 Auction Purchaser sought time for two months on the ground of illness and death of his father but no reply was given. It is pertinent to note that maximum three months time is provided under Rule 9 (4) of the Rules. It makes it clear that the secured creditor should pass appropriate orders on expiry of three months time. Secured Creditor has right under Rule 9 (5) to forfeit the amount deposited by the Auction Purchaser and to re-sell the property. The Secured Creditor, i.e. the Appellant, had not forfeited the amount on expiry of three months period which lapsed on 30th September, 2021. Thereafter, on application of the Appellant dated 2nd November, 2021, no reply was given and the forfeiture was allegedly done on 8th November, 2021 which too was communicated vide an e-mail attachment on 3rd December, 2021. This shows that the Secured Creditor was not vigilant enough to exercise its right of forfeiture. When right is accrued in favour of the Secured Creditor and if it is not exercised within the stipulated time, it will show that the

Secured Creditor has waived its right of forfeiture after lapse of three months from the date of deposit. Even thereafter, the right of the Secured Creditor could not be said to have been extinguished but when a right is waived by the Secured Creditor, a right accrues in favour of the Auction Purchaser, i.e. the amount was not forfeited within the stipulated period of three months. Then, thereafter, when the right of forfeiture, under Rule 9 (5) of the Rules, is exercised by the Secured Creditor then the Secured Creditor would be under an obligation to afford an opportunity of hearing to the Auction Purchaser. Rule "Audi Alterem Partem" would be applicable when a right accrues in favour of the Auction Purchaser by not forfeiting the amount on lapse of three months period then if that right of forfeiture is exercised by the Secured Creditor after the lapse of stipulated period, Auction Purchaser should be given an opportunity of hearing. It is the basic principle of natural justice; although it is true, the principle of natural justice is not made applicable under the SARFAESI Act but when a right accrues in favour of the Auction Purchaser and is being denied by the Secured Creditor then the Auction Purchaser has a right of hearing before the forfeiture of the amount.

17. No justification could be explained by the Appellant Bank as to why forfeiture was made on 8th November, 2021. Further there is no justification on record to show as to why the intimation of forfeiture was sent to the Auction Purchaser by an attachment to an e-mail dated 3rd December, 2021. No doubt powers have been given to the Secured Creditor under the SARFAESI Act but those powers have to be exercised in accordance with law. Any exercise against the provisions of law would be an arbitrary exercise of powers which cannot be accepted under the law.

18. A right accrues in favour of the secured creditor if the mandatory provision of pre deposit is not complied by the Auction Purchasers. But that right, if not exercised within time by the secured creditor and exercised at a later stage after granting time for extension to the

Auction Purchaser for making the deposit what would be the effect of such extension? Whether it would amount to a waiver of the right accrued in favour of the secured creditor? Whether forfeiture made by the secured creditor is in accordance with law or not?

19. It was held by the The Hon'ble Apex Court in the case of GM, Sri Siddeshwara Co-operative Bank Limited & Another -vs- Sri Ikbal & Others [(2013) 10 SCC 83 that

> *"23. x x x x It is settled position in law that even if a provision is mandatory, it can always be waived by a party (or parties) for whose benefit such provision has been made. The provision in Rule 9(1) being for the benefit of the borrower and the provisions contained in Rule 9(3) and Rule 9(4) being for the benefit of the secured creditor (or for that matter for the benefit of the borrower), the secured creditor and the borrower can lawfully waive their right These provisions neither expressly nor contextually indicate otherwise. Obviously, the question whether there is waiver or not depends on facts of each case and no hard and fast rule can be laid down in this regard."*

20. In Vasu P. Shetty -vs- Hotel Vandana Palace & Others [(2014) 5 SCC 660], The Hon'ble Apex Court in paragraph 16 has placed reliance upon Ikbal case (supra) and held that:

> *"16. This Court in Ikbal case, after interpreting the provisions of Rule 9, returned a categorical opinion that the said provision is mandatory in nature. It was further held that even though this Rule is mandatory, that provision is for the benefit of the borrower. The Court held that it is a settled position in law that even if a provision is mandatory, it can always be waived by a party (or parties) for whose benefit such provision has been made. The provision in Rule 9(1) being for the benefit of the borrower and the provisions contained in Rule 9(3) and Rule 9(4) being for the benefit of the secured creditor (or for the benefit of the borrower), the secured creditor and the borrower can lawfully waive their rights. These provisions neither expressly nor contextually indicate otherwise. Obviously, the question whether there is waiver or not depends on the facts of each case and no hard-and-fast rule can be laid down in this regard."*

21. Further reliance is placed on State of Punjab -vs- Davinder Pal Singh Bhullar [(2011 14 SCC 770] wherein in paragraph 41 of Davinder Pal Singh Bhullar (supra) it was held that

"41. Waiver is an intentional relinquishment of a right. It involves conscious adandonment of an existing legal right, advantage, benefit claim or privilege, which except for such a waiver, a party could have enjoyed. In fact, it is an agreement not to assert a right. There can be no waiver unless the person who is said to have waived, is fully informed as to his rights and with full knowledge about the same, he intentionally abandons them. (Vide Dawson's Bank Limited -vs- Nippon Menkwa Kabushiki Kaisha [(1934-35) 62 IA 100 : (1935) 41 LW 764], Basheshar Nath -vs- CIT (AIR 1959 SC 149), Mademsetty Satyanarayana -vs- G. Yelloji Rao (AIR 1965 SC 1405), Associated Hotels of India Limited -vs- S.B. Sardar Ranjit Singh (AIR 1968 SC 933), Jaswantsingh Mathurasingh -vs- Ahmedabad Municipal Corporation (1992 Supp (1) SCC 5), Sikkim Subba Associates -vs- State of Sikkim [(2001) 5 SCC 629] and Krishna Bahadur -vs- Purna Theatre [(2004) 8 SCC 299 : 2004 SCC (L&S) 1086)]."

22. Hence, it is abundantly clear that the right of forfeiture had accrued in favour of the Appellant Bank but the said right was not exercised by the Bank on expiry of the three months. Even it was not exercised uptill when on 2nd November, 2021 a representation is made by the Auction Purchase for extension of time. Thereafter, allegedly forfeiture was made on 8th November, 2021 that too was not communicated to the Auction Purchaser. It was communicated to the Auction Purchaser as an attachment to e-mail dated 3rd December, 2021. No explanation is given by the Bank for not forfeiting the amount in accordance with law. Hence, it can safely be inferred that Appellant Bank waived its right accrued under the Rule 9 (5) of the Rules.

23. Appellant would also be entitled for benefit of the period covered under the pandemic Covid-19 in view of the *Suo Motu proceedings in Miscellaneous Application No. 665 of 2021 in SMW(C) No. 3 of 2020* wherein the The Hon'ble Apex Court in order dated 08.03.2021 has observed that:

"1. In computing the period of limitation for any suit, appeal, application or proceeding, the period from 15.03.2020 till 14.03.2021 shall stand excluded. Consequently, the balance period of limitation remaining

as on 15.03.2020, if any, shall become available with effect from 15.03.2021.

2. In cases where the limitation would have expired during the period between 15.03.2020 till 14.03.2021, notwithstanding the actual balance period of limitation remaining, all persons shall have a limitation period of 90 days from 15.03.2021. In the event the actual balance period of limitation remaining, with effect from 15.3.2021, is greater than 90 days, that longer period shall apply."

24. In the case of Alisha Khan (supra) the The Hon'ble Apex Court has granted benefit of Covid-19 in favour of the Auction Purchaser. So on this count also the Respondent/Auction Purchaser is entitled to revocation of the forfeiture amount. Explanation is given by the Bank for not forfeiting the amount in accordance with law. Hence, it can safely be inferred that Appellant Bank waived its right accrued under Rule 9 (5) of the Rules.

24. As far as fresh auction is concerned, it is brought on record that fresh auction notice was issued wherein auction was held and 25% of the bid amount was deposited but subsequently, due to an interim order of the Learned Debts Recovery Tribunal, sale could not be confirmed and the remaining amount was not deposited. Bid amount EMD of 25% was also refunded to the Auction Purchaser.

25. Forfeiture was allegedly made by the Bank on 8th November, 2021 after the lapse of the mandatory period of three months that too was communicated to the Appellant as an attachment with an e-mail dated 3rd December, 2021. It makes it clear that secured creditor, which is a Nationalised Bank, was well aware of its rights but did not exercise the rights in accordance with law rather waived its right provided under the law. Accordingly, I have no hesitation to hold that there is a waiver on the part of the secured creditor in making the forfeiture after expiry of three months.

On the basis of the discussion made above, I am of the view that forfeiture made by the Appellants is against the provisions of law. Accordingly, the appeal lacks merit and is liable to be dismissed.

O R D E R

Accordingly, the appeal is dismissed. Judgment and order dated 5th July, 2022 passed by Learned Debts Recovery Tribunal, Siliguri, is hereby affirmed.

No order as to costs.

File be consigned to Record room.

Copy of the order be supplied to Appellant and the Respondents and a copy be also forwarded to the concerned DRT.

Copy of the Judgment/Final Order be uploaded in the Tribunal's Website.

Order dictated, signed and pronounced by me in the open Court on this the 11th day of July, 2023.

(Anil Kumar Srivastava,J)
Chairperson

Dated: 11th July, 2023
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