

BEFORE THE DEBTS RECOVERY
APPELLATE TRIBUNAL, AT: MUMBAI

Present: Mr Justice Ashok Menon, Chairperson

Appeal No. 216/2016

Between

Namdeo Bhagat ... Appellant/s
V/s.

Bank of Baroda & Ors. ... Respondent/s

Mrs. Uma Fadia, Advocate for Appellant.

Mr. Anant B. Shinde, Advocate for Respondent.

Mr. N.B. Khaire, Advocate for Respondent No.8

:- Order dated: 30/10/2023:-

The Appellant is in appeal impugning the dismissal of the Securitisation Application (S.A.) No. 192 of 2013 on the files of the Debts Recovery Tribunal-III, Mumbai, by judgment and order dated 27/05/2016.

2. The 1st Respondent Bank of Baroda (BoB) is the creditor and mortgagee of certain immovable properties belonging to the 2nd Respondent company named M/s Arham Exims Pvt. Ltd. the principal borrower, and Respondents Nos. 2 to 7 as guarantors and mortgagors. Respondent Nos. 1 to 7 defaulted in repayment of the debt and the mortgaged properties were proceeded against under the provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ("SARFAESI Act", for short).

3. The sale notice was published on 07/02/2012 inviting tenders from interested parties. The secured assets consisted of three shop rooms bearing Nos. 20 to 22 and three office rooms bearing Nos. 317

to 319. The reserve price for the shop rooms was fixed at ₹ 17,800,000/-and that for office rooms was fixed at ₹ 58,00,000/-.

4. The Appellant was interested in purchasing the secured assets and deposited ₹ 2,360,000/-as Earnest Money Deposit (EMD) expressing his willingness to participate in the auction sale. The auction was conducted on 16/03/2012, and the Appellant being the sole bidder, came out successful for the above-mentioned reserve price. The Appellant deposited the 15% required to be deposited for confirmation of the sale and agreed to deposit the balance of 75% in two instalments. 25% of the aforesaid balance amount was agreed to be paid by 31/03/2012 and the balance 50% was agreed to be paid by 11/04/2012.

5. On 31/03/2012 when the payment of 25% of the balance consideration was due for payment, the Appellant wrote a letter stating that the share certificate in respect of one of the shop rooms was not shown to him and that he had not received any clearance from the 1st Respondent to the effect that there is no other outstanding liability with regard to the secured assets. The Appellant stated that unless the 1st Respondent clarified the query posed by him, he would not be able to pay the 25% due and payable on 31/03/2012 as undertaken by him. The 1st Respondent replied on 02/04/2012 to the aforesaid letter of the Appellant clarifying that the title documents and share certificates in respect of all the properties except in respect of Gala No. 22 were available. The Appellant contends that when he visited the site on 15/09/2012, he found a notice affixed on shop No. 22 by the 8th Respondent Cosmos Bank stating that constructive/physical possession of the said shop has been taken by it under section 13 (4)

of the SARFAESI Act.

6. The 1st Respondent had, vide letter dated 25/06/2012 informed the Appellant that there was no stay with regard to proceedings with regard to the sale of the properties. The Appellant was, therefore, requested to deposit the balance of 75% of the bid amount forthwith. The Respondent bank had again issued a letter to the Appellant on 06/08/2012 giving 15 days' time to deposit the amount failing which, it was informed, that the 25% deposited by the Appellant would stand forfeited and the sale cancelled.

7. The Appellant approached the D.R.T. with the aforesaid S.A. under section 17 of the SARFAESI Act seeking a declaration to the effect that he is the successful bidder in the auction of the secured assets held on 16/03/2012 and to direct the 1st Respondent to refund the 25% deposited by the Appellant together with interest at the rate of 18% per annum.

8. The Ld. Presiding Officer dismissed the S.A. finding no merits in the contentions raised by the Appellant and upheld the forfeiture of the amount. The Appellant is aggrieved and hence in appeal.

9. The Appellant contends that he was always willing and ready to deposit the balance sale consideration of 75%. The 1st Respondent however suppressed facts with regard to the clear title of one of the shop rooms. S.A. filed by the borrowers challenging the Sarfaesi measures initiated by the 1st Respondent was also not revealed at the time of the sale. The secured assets have been subsequently sold to various persons and amounts realised by the 1st Respondent. The forfeiture of 25% of the sale consideration deposited by the Appellant would, therefore, amount to the unjust enrichment of the 1st

Respondent.

10. Heard the Ld. Counsel appearing for the Appellant, 1st Respondent and the 8th Respondent. Records perused.

11. Mrs Uma S. Fadia appearing for the Appellant relies on the decision of the Hon'ble High Court of Gujarat in *Nileshbhai D. Sapariya vs. Authorised Officer, South Indian Bank & Ors.* 2015 SCC OnLine Guj 2648 wherein the Hon'ble High Court directed a refund of the sale consideration deposited by the auction purchaser to him together with interest at the rate of 8% per annum. Reliance is also placed on a decision of the Hon'ble High Court of Karnataka in *P Balaji Babu vs. State Bank of India & Ors., Writ petition No. 46450 of 2014* wherein it was held that since the bank has not suffered any loss or damages it is not entitled to retain the amount initially deposited by the auction purchaser

12. Per contra, Mr Anant Shinde appearing for the 1st Respondent submits that the Appellant was never ready with the entire 75% payable by him and had therefore sent letters and communications to the bank requesting clarifications which were not required. It is submitted that under the provisions of Rule 9 (5) of the Security Interest (Enforcement) Rules, 2002 ("Rules", for short) the Respondent bank has the authority to forfeit the amount in case the balance sale consideration is not paid by the auction purchaser. The Ld. Counsel relies on the decision of the Hon'ble Supreme Court reported in *Authorised Officer State Bank of India vs. C. Natarajan & Ano.* 2023 SCC OnLine SC 510 wherein the finding of the Madras High Court in a writ petition directing the creditor bank to refund the amount deposited by the auction purchaser together with interest for

the reason that the bank should not be permitted to enrich by forfeiting the amount deposited by the auction purchaser and simultaneously appropriate the sale proceeds from the highest bidder in the auction sale held subsequently, was set aside.

13. The legal question that arises for consideration in this appeal is whether the 1st Respondent bank was justified in forfeiture of the amount deposited by the auction purchaser on the ground that the authorised officer had acted in an arbitrary manner and also for the reason that the documents pertaining to the shop room No. 22 was not handed over for examination by the Appellant despite being asked for it and it also turned out that that item of property was actually mortgaged by the borrowers to the 8th Respondent.

14. Similar questions had arisen for consideration in the decision *C. Natarajan* (supra) before the Hon'ble Supreme Court. The facts, in that case, would reveal that the auction purchaser therein had bid the secured asset for a sum of ₹12,300,000/- and had deposited ₹3,075,000/- towards 25% of the sale price inclusive of the EMD, but failed to deposit the balance 75% despite being granted an extension of time by the authorised officer, resulting in forfeiture of the amount paid in advance. The auction purchaser invoked the writ jurisdiction of the High Court seeking a refund of the forfeited amount. During the pendency of the writ proceedings, the secured asset was once again put up for sale by auction and was sold for the very same amount that was bid by the auction purchaser therein. The High Court allowed the writ and the bank challenged the finding before the Hon'ble Supreme Court, and it was observed thus:

“18. Having regard to the terms of rule 9, the notice for auction constitutes

the 'invitation to offer'; the bid submitted by the bidders constitute the 'offer' and upon confirmation of sale in favour of the highest bidder under sub-rule (2) of rule 9, the contract comes into existence. Once the contract comes into existence, the bidder is bound to under the terms of the statute under which the auction is conducted and suffer consequences for breach, if any, as stipulated. Rule 9 (5) legislatively lays down the penal consequence. 'Forfeiture' referred to in sub-rule (5) of rule 9, in the setting of the SARFAESI Act and Rules, has to be construed as denoting a penalty that the defaulting bidder must suffer should he fail to make payment of the entire sale price within the period allowed him by the authorised officer of the secured creditor.

19. Though it is true that the power conferred by sub-rule (5) of rule 9 of the Rules ought not to be exercised indiscriminately without having due regard to all relevant facts and circumstances, yet, the said sub-rule ought also not be read in a manner so as to render its existence only on paper."

15. The Hon'ble Supreme Court has also observed that whenever a challenge is laid to an order of forfeiture made by an authorised officer under sub-rule (5) of rule 9 of the Rules by a bidder, who has failed to deposit the entire sale price within 90 days, the Tribunals/Courts ought to be extremely reluctant to interfere unless, of course, a very exceptional case for interference is set up. It was also observed by the Hon'ble Supreme Court that, "...the authorised officer had adhered to the statutory rules. If by such adherence any amount is required to be forfeited as a consequence, the same cannot be scrutinised wearing the glasses of misplaced sympathy. Law is well settled that a result flowing from the statutory provision is never an evil and that the court has no power to ignore that provision to relieve what it considers a distress resulting from its operation. The statute must, of course, be given effect to, whether the court likes the result or not."

16. In the decision of *Nileshbhai* (supra) relied upon by the Ld. Counsel for the Appellant, the facts are different the auction purchaser therein had deposited the entire sale consideration. There was a contention regarding the procedures not being followed by the

creditor bank and therefore, it was held that the auction purchaser could not be made to suffer. In the decision of the Hon'ble High Court of Karnataka in *P Balaji Babu* (supra) it was found that there was a deliberate suppression of material facts by the creditor bank. The ratio in the decisions relied upon by the Ld. Counsel for the Appellant, on facts, is not applicable to the instant case.

17. In the instant case, the Appellant had raised a challenge only regarding one item of the property sold, there is no case that there is a defective title with regard to the rest of the properties sold in the auction. It is pertinent to note that in the subsequent auction sale, all the items of properties were sold by the bank. Seeking an extension of time by the Appellant was, therefore, only a ruse to protract payment of the balance sale consideration.

The appeal has no merits and is, therefore, dismissed.

Sd/-
Chairperson

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