

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 27.10.2021

CORAM :

THE HON'BLE MR.SANJIB BANERJEE, CHIEF JUSTICE

AND

THE HON'BLE MR.JUSTICE P.D.AUDIKESSAVALU

C.R.P. Nos.1892 & 2282 of 2021

Shanmugavelu
Managing Director
M/s. Sunbright Designers Private Limited
Module No.4
Readymade Garment Complex
SIDCO Industrial Estate
Guindy, Chennai - 600 032.

Petitioner in
CRP No.1892/21
Respondent in
CRP No.2282/21

Vs.

The Authorised Officer
Central Bank of India
Corporate Finance Branch
Addison Buildings
No.803, Anna Salai
Chennai-600 002.

Respondent in
CRP No.1892/21
& Petitioner in
CRP No.2282 /21

Prayer in CRP No.1892 of 2021: Petition under Article 227 of the Constitution of India against the order dated 30.07.2021 in R.S.(SA)119 of 2019 in SA No.143 of 2018 i.e "The impugned order stands modified to the extent that bank is entitled for forfeiture of a

sum of Rs.50 lakhs" passed by the Debt Recovery Appellate Tribunal Chennai on the file of the Debt Recovery Appellate Tribunal, Chennai.

Prayer in CRP.No.2282 of 2021: Petition under Article 227 of the Constitution of India against the order dated 30.07.2021 made in RA (SA) No.119 of 2019 on the file of the Debt Recovery Appellate Tribunal, Chennai.

For Petitioner in
CRP No.1892/21 &
Respondent in
CRP No.2282/21 : Mr.G.Sethuraman

For Respondent in
CRP No.1892/21 &
Petitioner in
CRP No.2282/21 : Mr.M.Devaraj

COMMON ORDER
(Made by the Hon'ble Chief Justice)

Both the secured creditor bank and the original auction-purchaser question the propriety of an order dated July 30, 2021 passed by the Debt Recovery Appellate Tribunal in Chennai. The order impugned has been passed on an appeal by the bank assailing an order dated May 06, 2019 passed by the Debts Recovery Tribunal II, Chennai in proceedings under Section 17 of the Securitisation and

Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002.

2. The appeal raises a fundamental issue and needs to be dealt with on first principles. At the center of the controversy is a provision of the Security Interest (Enforcement) Rules, 2002. Rule 9 of the said Rules pertains to the time of sale, issue of sale certificate and delivery of possession and the like of secured assets. Sub-rule (5) of Rule 9, which is relevant for the present purpose, provides as follows:

"9. Time of sale, issue of sale certificate and delivery of possession, etc. -

(1)

(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 claim to the property or to any part of the sum for which it may be subsequently sold.

... "

3. In the present case, the property was put up for sale in December, 2016. The petitioner in CRP No.1892 of 2021 bid Rs.12.27

crore for the relevant immovable property at the auction conducted by secured creditor Central Bank of India on December 07, 2016. An initial deposit was made by the auction-purchaser and, subsequent to the bid, a total amount of Rs.3,06,75,000/- was tendered in total against the bid price of Rs.12.27 crore. Repeated requests from the secured creditor failed to elicit any further payment and, upon due notice to the said highest bidder, the same property was put up for sale again.

4. At the subsequent auction held on March 30, 2019, the highest bid received was of Rs.14.76 crore. There is no doubt that the sale has now been completed, the subsequent highest bidder has put in the entire consideration and the sale certificate has been issued in favour of such purchaser.

5. The issue that remained unresolved between the secured creditor and the initial auction-purchaser was how the amount that had been tendered by the initial auction-purchaser could be dealt with by the secured creditor. After all, a substantial part of the consideration, to the extent of Rs.3,06,75,000/- as indicated above, had been paid

against the bid amount of Rs.12.27 crore. The secured creditor read Rule 9(5) of the said Rules to imply that it was entitled to forfeit the entire amount tendered. The initial auction-purchaser questioned such forfeiture before the DRT II.

6. By a judgment and order of May 06, 2019, the DRT II made a rough and ready estimate of the expenses that the secured creditor may have incurred in conducting the sale for a second time and allowed the secured creditor to retain a sum of Rs.5 lakh out of the entire money tendered by the initial auction-purchaser. As a consequence, the secured creditor was liable to refund a sum of Rs.3,01,75,000/- to the initial auction-purchaser in terms of the order of the Tribunal of May 06, 2019.

7. The secured creditor carried such order of the Tribunal to the appellate authority. By the judgment and order impugned dated July 30, 2021, the DRAT agreed in principle that the secured creditor was not entitled to forfeit the entire amount tendered by the defaulting initial auction-purchaser; but the Appellate Tribunal enhanced the amount permitted to be retained by the secured creditor from Rs.5

lakh to Rs.55 lakh. Both sets of parties have questioned the order dated July 30, 2021: the initial auction-purchaser on the ground that there is no basis for the enhancement of the quantum to be forfeited; and, the secured-creditor on the ground that the law permits the entire amount to be forfeited and neither the DRT nor the DRAT had any authority to question the forfeiture.

8. In support of the secured creditor's case, Section 35 of the Act of 2002 is placed to indicate that the Act of 2002 has overriding effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or even any instrument having the effect by virtue of any other law. According to the secured creditor, since the said Rules permit the forfeiture and since it is evident that the initial auction-purchaser may have bitten off more than it could chew and did not have the means to sustain its bid, it is only appropriate that the money has been forfeited so that other upstarts do not come in future and make fanciful bids that their resources cannot match up to.

9. Before even referring to the primary assertion made on behalf

of the initial auction-purchaser, what begs the question is whether any distinction may be made between an auction-purchaser who is in default to the extent of 99% of the bid amount and an auction-purchaser who may be in default to the extent of 1% of the bid amount. The key to understanding the answer to the issue may lie in appreciating the different positions of such defaulting bidders.

10. Section 74 of the Contract Act, 1872 provides for compensation for breach of contract where the penalty is stipulated. Section 73 of the Contract Act is the general rule that provides for compensation for loss or damage caused by breach of contract and Section 74 is where the quantum is specified. What Section 73 of the Contract Act mandates is that a party who suffers as a result of a breach committed by the other party to the contract "is entitled to receive from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it". Any detailed discussion on such provision would be beyond the scope of the present lis and may require many more

sheets that may be conveniently expended in the present exercise. Indeed, Section 73 of the Contract Act is in the nature of a jurisprudential philosophy that is accepted as a part of the law in this country. In short, it implies that only such of the loss or damage suffered by the party not in breach, may be recovered from the party in breach, as a consequence of the breach. It is possible that as a result of the breach, the party not in breach does not suffer any adverse impact. It is also possible, as in the present case, that as a consequence of the breach, the party not in breach obtains a benefit. In such cases, where no loss or damage has been occasioned to the party not in breach, such party cannot extract any money merely on account of such breach, as the entitlement in law to compensation is not upon the commission of breach, but only upon any loss or damage being suffered as a consequence thereof. That is elementary.

11. Even in cases of liquidated damages, where the quantum specified is regarded as a genuine pre-estimate by parties to the contract, there needs to be some loss or damage suffered for the party not in breach to even be entitled to claim the amount quantified in the contract itself. The factum of having suffered damages in such a

situation has to be established, though the quantum of the loss need not be, since the contract contains a genuine pre-estimate thereof.

12. Rule 9(5) of the said Rules of 2002 has to be seen as an enabling provision that permits forfeiture in principle. However, such Rule cannot be conferred an exalted status to override the underlying ethos of Section 73 of the Contract Act. In other words, Rule 9(5) has to yield to the principle recognised in Section 73 of the Contract Act or it must be read down accordingly. Thus, notwithstanding the wide words used in Rule 9(5) of the said Rules, a secured creditor may not forfeit any more than the loss or damage suffered by such creditor as a consequence of the failure on the part of a bidder to make payment of the consideration or the balance consideration in terms of the bid. It is only if such principle, as embodied in Section 73 of the Contract Act, is read into Rule 9(5) of the said Rules, would there be an appropriate answer to the conundrum as to whether a colossal default of the entirety of the consideration or the mere default of one rupee out of the consideration would result in the identical consequence of forfeiture as indicated in the provision.

13. In any event, notwithstanding the reference to Section 35 of the Act of 2002, the apparent overriding effect of the provisions of the Act of 2002 has to be tempered in the light of Section 37 of the Act. Though Section 37 of the Act refers to several statutes by name, the residual limb of such provision recognises "or any other law for the time being in force", which would embrace the Contract Act within its fold. It is completely unacceptable that by virtue of the delegated legislation as in the Rules of 2002, the fundamental principle envisaged in the Contract Act would get diluted or altogether disregarded.

14. As far as the secured creditor's contention is concerned, the above adequately answers the same. Accordingly, the secured creditor's challenge to the order impugned is found to be without basis, though it remains to be seen whether the enhancement of the amount forfeited was permissible.

15. For any quantum to be awarded on account of the damages, there is a twin exercise which has to be undertaken: the first limb of the exercise is to ascertain the factum; it is only upon the factum being established that the quantum may be assessed. In other words,

if the factum of loss and damage is not established, there is no need to proceed to the second part to try and assess the quantum.

16. It must also be noticed that assessment of damages is a complex exercise and sometimes courts are given to making an approximation on the basis of a degree of guesswork and estimation, as there can be no exact science in ascertaining the quantum of damages suffered with any arithmetical precision. In several fields, particularly in engineering contracts, there are complex formulae which are relied upon in different situations. Even the Supreme Court, as regards the law in this country, has reckoned that when there is loss of profit, an amount of about 15% of the total contract value may be taken as the profit component. There are several other fields where judicial precedents indicate the bandwidth, on the basis of percentage or otherwise, of the quantum in assessing damages.

17. In the present case, the DRT did not embark on any rational methodology for trying to assess the quantum of loss and damage apparently suffered by the secured creditor as a consequence of the initial auction-purchaser not honouring its commitment. The DRT

assessed in a rough and ready manner that a sum of Rs.5 lakh on account of additional expenses incurred would be an appropriate amount, since the subsequent sale fetched a substantially higher price than the initial sale. It must also be noticed that the initial auction-purchaser had accepted its fate and not questioned the quantum of forfeiture as directed by the DRT. It was only the secured creditor which carried the order dated May 06, 2019 passed by the DRT to the appellate authority seeking the entire pound of flesh in terms of Rule 9(5) of the said Rules of 2002 that the secured creditor considered to be sacrosanct.

18. It was completely open to the appellate authority to enhance the quantum as awarded by the DRT. However, such exercise could have been undertaken by inviting evidence in such regard. The appellate authority purported to enhance the quantum from Rs.5 lakh to Rs.55 lakh without indicating any or cogent grounds for such enhancement. Though an element of guesstimation is permitted while assessing damages, when an initial authority has indicated a ballpark figure, any tinkering with such figure at the appellate stage would require material in support thereof, which is completely lacking in the

judgment and order impugned dated July 30, 2021 passed by the appellate authority in the present case.

19. For the reasons aforesaid, the enhancement of the quantum of forfeiture as permitted by the Appellate Tribunal in the impugned order of July 30, 2021 cannot be sustained and the same is set aside. The quantum as awarded by the DRT II, Chennai in its order of May 06, 2019 is restored and, to such extent, the order of the appellate authority is set aside.

20. Before parting, there is another aspect that has to be referred to for the completeness of the discussion. The purpose of the Act of 2002 is to ensure speedy recovery of the debt due to secured creditors covered by such statute. Towards such end, the provisions of the said Act and the Rules made thereunder give primacy to the secured creditor in initially assessing the quantum of debt due and in proceeding against the securities furnished for realising such debt due. However, no secured creditor, not even by embracing the provisions of the said Act of 2002, can unjustly enrich itself or obtain any more by way of resorting to any of the measures contemplated under Section

13(4) of the Act or otherwise than the debt that is due to it and the costs that may have been incurred in course of trying to recover the debt due. In a sense, if the forfeiture provision in Rule 9(5) of the said Rules is ready to imply what the secured creditor in this case seeks to, it may result in a secured creditor unjustly enriching itself, which is not permissible.

21. CRP Nos. 2282 and 1892 of 2021 are disposed of as above. There will, however, be no order as to costs. CMP Nos.17278 and 14695 of 2021 are closed.

(S.B., CJ.) (P.D.A., J.)
27.10.2021

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CRP Nos.1892 & 2282 of 2021

THE HON'BLE CHIEF JUSTICE
AND
P.D.AUDIKESAVALU, J.

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