

IN THE HIGH COURT AT CALCUTTA
Civil Appellate Jurisdiction
APPELLATE SIDE

Present:

The Hon'ble Justice Tapabrata Chakraborty
&
The Hon'ble Justice Partha Sarathi Chatterjee

MAT 303 of 2018
+
IA No.: CAN 2 of 2018 (Old No.: CAN 3431 of 2018)

S. L. Ispat Private Limited & Another
versus
Punjab National Bank & Others

For the Appellants : *Mr. Kishore Dutta,*
Mr. Nilendu Bhattacharya,
Ms. Arunima Lala,
Mr. Arun Kumar Upadhyay.

For the Bank/Respondent
Nos.1-5 : *Ms. Aparajita Rao,*
Ms. Ankana Basu.

For the Respondent No.6 : *Ms. Susmita Shaw.*

Hearing is concluded on : *20th December, 2022.*

Judgment On : **4th January, 2023.**

Tapabrata Chakraborty, J.

1. S.L. Ispat Private Limited (in short, Ispat) and its Managing Director, the appellants herein preferred a writ petition being WP 31344 (W) of 2014 challenging a notice/*e-mail* dated 7th October, 2017 by which the Authorized Officer (in short, AO) of Punjab National Bank (in short, the bank) forfeited an amount of Rs.1,70,80,250/- (Rs.99,18,000.00 + Rs.71,62,250.00) being 25% of the total bid amount as deposited by the appellants upon emerging to be successful in the *e-auction* conducted on 6th September, 2017 pertaining to the properties detailed under serial nos.5 and 6 of the public notice for *e-auction* dated 29th July, 2017. The said writ petition was dismissed by an order dated 4th January, 2018, which has been impugned in the present appeal.

2. The appellants' case is that the AO of the bank published a public notice dated 29th July, 2017 inviting bids for sale of properties. The appellant no.2 visited the premises on 10th August, 2017 when he was informed by the security guards that the entire land including plant and machineries are the assets as detailed under serial nos.5 and 6 of the said notice and such fact was also confirmed and reiterated by the AO over phone. Ispat participated in the *e-auction* on 6th September, 2017 and submitted bids for the properties as detailed under serial nos.5 and 6 of the said notice being a Rolling Mill and land/building respectively. By two letters both dated 6th September, 2017, Ispat being the appellant no.1 was intimated that the assets are being sold on '*as is where is basis*' and '*as is what is basis*' and the appellants were directed

to deposit 25% of the sale price as initial deposit immediately. Such payment was made on 7th September, 2017. Immediately thereafter the appellants started receiving phone calls from the previous owner, namely, Brilliant Steel Products Private Limited (in short, Brilliant) informing that the land upon which the plant exists is not in possession of the bank and threatening the appellants of dire consequences in the event Ispat pays the remaining amount and attempts to take possession of the properties. Intimating such facts, the appellant no.2 sought for a clarification from the bank as regards ownership rights of the bid assets by a representation dated 16th September, 2017 but in vain. About a week thereafter by letters dated 22nd September, 2017, Ispat was asked to deposit the remaining amount on or before 21st September, 2017 and before execution of an agreement for sale. The appellant no.2 submitted further representations on 25th September, 2017 and 5th October, 2017 requesting the bank to postpone the time towards payment of the remaining amount. Surprisingly thereafter, the appellants received a copy of a writ petition being WP No.25708 (W) of 2017 preferred by Brilliant and its functionary *inter alia* praying for issuance of necessary direction upon the bank to give effect to the proposal for one time settlement (in short, OTS) furnished by letter dated 1st August, 2017. Ispat was impleaded as a party respondent in the said writ petition. Thereafter, the appellants were served with a notice/*e*-mail dated 7th October, 2017 stating *inter alia* that the money already deposited by it stands forfeited. Challenging the said notice/*e*-mail the present writ petition was filed

on 21st December, 2017 enclosing two further representations submitted by the appellants on 9th October, 2017 and 15th December, 2017 to which the bank did not respond.

3. The bank's case is that on 28th October, 2011 the respondent no.2 issued a notice u/s 13(2) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (in short, SARFAESI Act) calling upon Brilliant to repay the dues of Rs.27,15,77,642.50/- and thereafter the bank issued possession notice on 25th May, 2012. The auction sale notice was issued on 29th July, 2017. Ispat participated in the e-auction and was declared to be the successful purchaser. Ispat paid 25% of the bid amount being Rs.1,70,80,250/- on 7th September, 2017. Thereafter by a letter dated 22nd September, 2017 Ispat was asked to pay the remaining 75% within 15 days but it failed and as such the earnest money was forfeited by a notice/e-mail dated 7th October, 2017. In the midst thereof, Brilliant offered OTS proposal on 23rd August, 2017 and the same was accepted but as Brilliant failed to make necessary payments, such proposal was cancelled on 6th October, 2017. Brilliant thereafter submitted a further proposal for OTS and the same was accepted by the bank on 29th December, 2018.

4. Records reveal in the present appeal and the connected application an order was passed by a coordinate Bench of this Court on 14th January, 2021 directing the bank to file an affidavit as to whether in this case there is any

possibility of settlement by paying off the appellants a reasonable amount including the return of 25% of the bid amount which had already been paid. Pursuant to such direction an affidavit has been filed on behalf of the respondent no.1 stating *inter alia* that the earnest money of 25% amounting to Rs.1,70,80, 250/- had been forfeited in terms of Rule 9(5) of the Security Interest (Enforcement) Rules, 2002 (in short, the said Rules) and that OTS settlement was arrived at with Brilliant on 29th December, 2018 for Rs.7.9 crores against a total outstanding amount of Rs.29,66,79,863.60 and such OTS was approved bearing a revenue loss of Rs.21.77 crores.

5. From the writ petition preferred by Brilliant, as annexed to the writ petition of Ispat, the supplementary affidavit and the affidavits exchanged in the appeal it appears that Brilliant submitted OTS proposal pertaining to the properties as detailed under serial nos.5 and 6 of the public notice on 1st August, 2017 agreeing to pay an upfront amount of Rs.60 lakhs. By a letter dated 9th August, 2017 Brilliant was intimated that its proposal would be forwarded to the competent authority for consideration after deposit of the upfront amount. Such money was deposited by Brilliant on 23rd August, 2017 and on the same date Brilliant issued a letter to the bank stating *inter alia* that in the event the OTS proposal is not approved, the margin money/upfront deposited may be refunded. The bank thereafter issued a letter dated 4th October, 2017 to Brilliant intimating that its OTS proposal was not acceptable. Brilliant thereafter submitted a further proposal for OTS enhancing the initial

offer of Rs.6 crores to Rs.7.90 crores on 23rd July, 2018. Such proposal was ultimately accepted by the bank by a letter dated 23rd July, 2018.

6. Drawing our attention to the letter of acceptance of bids dated 6th September, 2017 issued by the bank, Mr. Dutta, learned senior advocate appearing for the appellants submits that in the said letter of acceptance it was categorically stated that *'the acceptance of the same is subject to confirmation by the bank as secured creditor'*. The contents of the public notice dated 29th July, 2017 speak that on closure of the e-auction process the name of the successful bidder would be declared and the sale *'shall be subject to confirmation by authorized officer/secured creditor'*. The successful bidder shall deposit 25% of the bid/sale amount immediately and the balance 75% of the amount shall have to be deposited on or 15 days *'from the date of confirmation of sale or such extended period as may be agreed upon in writing between the parties'*.

7. Mr. Dutta contends that there had been no default on part of the appellants since the bank had never intimated any date of such confirmation of bid/sale. Being oblivious of such fact, the learned Single Judge dismissed the writ petition. It is the duty of the bank to handover unencumbered possession to the auction purchaser and unless the encumbrance is clear, liability of the bank or the onus of the bank, in fulfilling the duty conferred on it by the provisions of the SARFAESI Act does not end, merely because the auction

purchaser had participated in the auction and had paid 25% of the bid amount.

8. According to him, the learned Single Judge did not take into consideration the fact that immediately after submission of bid and deposition of 25% of the bid amount the appellant no.2 submitted a representation on 16th September, 2017 stating that they were receiving threatening calls from the previous owners that the land on which the plant and machineries exists, is not in the possession of the bank. Without furnishing any contemporaneous reply to such representation, the appellants were asked to deposit the remaining amount before 21st September, 2017 though the letter demanding such amount was issued on 22nd September, 2017. The representations submitted thereafter by the appellants were also not responded to and by a notice/e-mail dated 7th October, 2017 the amount deposited by the appellants was forfeited in a most illegal and *malafide* manner.

9. He argues that on one hand the bank was considering the OTS proposal of Brilliant and on the other hand was proceeding with the auction process. Such OTS of Brilliant was ultimately accepted after receipt of 25% amount from the appellant. It is not a case that the bank through such OTS had received a lesser amount than the bids offered in the e-auction by Ispat. In support of his arguments, Mr. Dutta has placed reliance upon the judgments delivered in the cases of *Alisha Khan -vs- Indian Bank (Allahabad*

Bank) and Others, reported in 2021 SCC OnLine SC 3340 and *V. Sridhar –vs- The Authorized Officer Indian Bank, Chennai*, reported in AIR 2018 Madras 87.

10. *Per contra*, Ms. Rao, learned advocate appearing for the bank submits that the properties were intimated to be transferred or conveyed on ‘*as is where is basis*’ and ‘*as is what is basis*’ as would be explicit from the contents of the public notice dated 29th July, 2017. Responding to such notice Ispat participated in the tender-cum-e-auction sale on its own volition. Ispat had full knowledge that 25% remitted amount would be forfeited in the event the remaining 75% or balance sale consideration is not paid within 15 days. Admittedly, such time towards payment of the remaining 75% had not been extended in writing by the bank. Due to non-fulfillment of such condition and for non-payment of the remaining amount the bank had forfeited the amount deposited by the appellant in strict consonance with the contents of the said notice and the provisions of the said Rules. There is, thus, no infirmity in the notice/*e-mail* dated 7th October, 2017 by which the amount had been forfeited.

11. Ms. Rao argues that nothing has been pleaded in support of the arguments as advanced on behalf of the appellants to the effect that in terms of the public notice the appellants had no obligation to deposit the remaining 75% amount within 15 days from the date of deposit of the 25% amount. The SARFAESI Act does not contemplate that a secured creditor having symbolic possession cannot transfer the secured assets to the auction purchaser. In the

instant case the bank had symbolic possession over the assets and it was notified in the public notice that such assets would be sold on '*as is where is basis*' and '*as is what is basis*'. The appellants having full knowledge participated in the e-auction accepting the terms and conditions of the sale notice. After such participation and payment of 25% of the bid amount, the appellants could not have withheld payment of the remaining 75% on a purported plea that the bank was not in a position to handover actual physical possession of the assets. Thus the learned Single Judge rightly refused the appellants' prayer for withdrawal of the notice of forfeiture and for refund of the earnest money. In support of such contention, reliance has been placed upon a judgment delivered in the case of *ITC Limited -vs- Blue Coast Hotels Limited and Others*, reported in 2018 SCC OnLine SC 237.

12. She denies that the bank proceeded with the OTS proposal of Brilliant and the auction process simultaneously. The first OTS proposal of Brilliant was rejected by a letter dated 4th October, 2017 and thereafter a fresh OTS proposal was submitted and the same was accepted on 23rd July, 2018 whereas the appellants 25% deposit was forfeited by the notice/e-mail dated 7th October, 2017. There was no subsisting OTS proposal of Brilliant on 6th / 7th October, 2017. The bank had suffered a huge loss of Rs.21.77 crores for the delay on the part of Ispat to deposit the 75% amount and its ultimate denial to accept the sale.

13. After issuance of the public notice on 29th July, 2017, the *e*-auction was conducted on 6th September, 2017, 25% of the bid amount was received by the bank on 7th September, 2017 and without any intimation as regards confirmation of sale, the said amount was forfeited by the impugned notice/*e*-mail dated 7th October, 2017. In the midst thereof, the bank was considering the OTS proposal as given by Brilliant on 1st August, 2017. The said proposal was allegedly cancelled on 6th October, 2017 but no such notice has been produced before this Court. Thus, the bank had simultaneously proceeded with the *e*-auction process and the OTS proposal pertaining to the self-same properties which were put up for sale. In connection with the first OTS the bank received a margin money of Rs.60 lakhs from Brilliant on 23rd August, 2017. The said amount was not refunded to Brilliant prior to submission of a proposal for OTS enhancing the previous proposed amount of Rs.6 crores to Rs.7.9 crores. The records would also reveal that the OTS of Rs.7.9 crores was sanctioned, the amount was received and a no liability certificate was issued on 29th December, 2018. Even after such settlement, the bank did not refund the 25% as deposited by the appellants. On and from the date of payment of such amount on 7th September, 2017 till date, the amount of Rs.1,70,80,250/- has not been refunded. The allegation that the bank has suffered a revenue loss of Rs.21.77 crores for the delay on the part of Ispat is also not acceptable inasmuch as from the OTS proposal dated 1st August, 2017 it appears that loan was granted to M/s Brilliant against collateral security pertaining to

various properties as detailed under serial nos. 1 to 6 in the said letter and Ispat submitted bid only for the land including plant and machineries as detailed under serial no. 2 in the said letter. The total bid amount of Ispat was Rs.6,83,21,000/- whereas the OTS was of Rs.7.9 crores.

14. The appellants have contended that though the property has been auctioned on '*as is where is basis*' and '*as is what is basis*', the bank could not have shirked its responsibility to disclose the encumbrances from taking clear possession *moreso* when there was no clause in the public notice to the effect that the properties were being transferred '*without any representations and warranties on the part of the bank relating to encumbrances/statutory liabilities etc. attached to the properties*'. The bank could not have forfeited 25% of the total bid amount having proceeded simultaneously with the *e*-auction process and the OTS proposal as submitted by the original owner/borrower.

15. The word 'forfeiture' has not been defined under the SARFAESI Act but it amounts to loss of a legal right by means of some breach of an obligation. If left absolutely unfettered to the discretion of the authority, it may possibly result in an extremely harsh order. The power of resumption and forfeiture needs be exercised only as a last resort and in a reasonable manner. Such reasonability has to be established on the basis of the facts and circumstances of the case. We are not satisfied with the manner in which the bank had ultimately forfeited the earnest money paid by the appellant. The

appellants' apprehension that there was a dispute as regards possession of the properties put up for sale could not have been ruled out since admittedly for non-payment of the dues the bank made an attempt to sell the mortgaged properties of the borrower, namely, Brilliant in the year 2016 and at that juncture Brilliant applied for OTS upon depositing an amount of Rs. 20 lakhs, as would be explicit from the letter dated 1st August, 2017 by which an enhanced proposal for OTS was submitted by the borrower.

16. That on the date of *e*-auction i.e., on 6th September, 2017, the bank was in *seisin* of a proposal towards OTS submitted by Brilliant on 1st August, 2017. The initial OTS proposal dated 1st August, 2017 was enhanced from Rs.6 crores to Rs.7.9 crores upon retaining the upfront amount of Rs. 60 lakhs deposited by Brilliant on 23rd August, 2017 and the final decision was taken by the bank to accept the same on 29th December, 2018. The '*no due certificate*' was also issued in favour of Brilliant on the said date with an advice to withdraw all cases. In view of such sequence of facts, it cannot be argued that there was no continuity and link between the first OTS proposal and the subsequent enhanced proposal.

17. In the case of *ITC Limited (Supra)* the creditor having symbolic possession transferred a property and on the date of such transfer itself the creditor applied for taking physical possession of the secured assets under Section 14 of the SARFAESI Act. In the backdrop of such facts, the Court held

that the transfer of a property by a secured creditor having symbolic possession though cannot be construed to be a complete transfer as contemplated under Section 8 of the Transfer of Property Act but nevertheless it had a right to take actual possession and continued to be a secured creditor even after such limited transfer to the purchaser. The proposition of law laid down in the said judgment does not debar the appellants' challenge against the decision of the bank to forfeit the money advanced.

18. For the reasons as discussed hereinabove, we are of the opinion that the impugned notice/*e*-mail dated 7th October, 2017 and the order impugned in the present appeal are not sustainable in law and the same are, accordingly, set aside. The bank is directed to refund the forfeited amount being Rs.1,70,80,250/- to the appellants within a period of four weeks from the date of communication of this order.

19. The appellants have not made proper enquiry about the property before participating in the auction and in our opinion, they ought to have been more diligent. For such laches, we are not inclined to allow their prayer for interest.

20. The appeal and the connected application are, accordingly, disposed of.

21. There shall, however, be no order as to costs.

22. Urgent Photostat copy of this judgment, if applied for, shall be granted to the parties as expeditiously as possible, upon compliance of all formalities.

(Partha Sarathi Chatterjee, J.)

(Tapabrata Chakraborty, J.)