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

FMA 1015 of 2021

Atanu Mondal
-Versus-
The State of West Bengal & Ors.

For the Appellant	:	*Ms. Sucharita Roy,* *Ms. Jhuma Sen,* *Ms. Trisha Saha,* *Mr. Dinesh Vishwakarma.*
For the State	:	*Mr. Amal Kumar Sen, Ld. A.G.P.,* *Mr. Lal Mohan Basu.*
Hearing is concluded on	:	*7th December, 2023.*
Judgment On	:	**9th January, 2024.**

<u>Tapabrata Chakraborty, J.</u>

1. The present appeal has been preferred challenging an order dated 12th March, 2019 passed in a writ petition being WP No. 2600 (W) of 2019.

2. Shorn of unnecessary details, the facts are that one Sujit Dutta along with one Subhajit Dutta mortgaged all that part and parcel of the property consisting of entire commercial land & building on Burdwan Kalna Road covering land area of 9.00 decimal and building area of 5689 square feet (hereinafter referred to as the said property) with the United Bank of India, Burdwan Branch (hereinafter referred to as the bank) for obtaining financial facility of Rs.40,38,106/-. As they subsequently failed to repay the loan, the bank took possession of the said property by invoking the provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as the SARFAESI Act). The writ petitioner/appellant herein, namely, Atanu Mondal (in short, Atanu) participated in the auction conducted by the bank and emerged to be highest bidder. Upon payment of the bid amount of Rs.39,00,000/-, sale certificate was issued by the Authorised Officer (hereinafter referred to as the AO) of the bank and possession of the property was handed over to Atanu, who thereafter applied for *online* query on 8th August, 2018 being query no. 023-00011280728/2018 and in response thereto, the valuation of the said property was assessed to be Rs.1,71,19,140/- and 6% of the valuation, i.e., Rs.10,27,158/- was quantified to be the stamp duty. Atanu thereafter submitted several representations praying for cancellation of the impugned assessment done by the registering authority contending *inter alia* that stamp duty ought to have been quantified on the basis of the sale price indicated in the sale certificate but in vain and as such Atanu was constrained to prefer the writ application.

3. By the order impugned in the present appeal the writ petition was dismissed observing *inter alia* that following the judgment delivered in the case of *Anil Kamal Singh vs. The State of West Bengal & Ors.,* reported in *2017(1) Cal LJ (Cal) 609,* wherein it was held that the market price will be as determined by the registering authority, no interference is called for.

4. Ms. Jhuma Sen, learned advocate appearing for the appellant argues that the issue involved in the writ petition was considered earlier in the cases of *Anil Kamal Singh (supra), Vitarich Agro Food India Ltd. vs. State of West Bengal* and *Glovi Infracon LLP vs. Inspector General of Registration and C.S.R*, reported in *2017 OnLine Cal 9368* and it was decided that AO, acting under the provisions of the SARFAESI Act, cannot be said to be a Court and as such stamp duty is chargeable on assessment under Section 47A of the Indian Stamp Act, 1899 (hereinafter referred to as the 1899 Act) and that the judgments delivered in the cases of *State of West Bengal vs. Sati Enclave*, reported in *2010 (3) CHN 651* and *V.N. Devadoss vs. Chief Revenue Control Officer-cum-Inspector,* reported in *(2009) 7 SCC 438* are distinguishable. The said decisions were not agreed to by a learned Single Judge in the case of *Ballyfabs International Limited & another vs. State of West Bengal and Ors.*, reported in *2021 SCC OnLine Cal 421* and the matter was referred for placement before a larger Bench for deciding as to *'whether a sale conducted by an Authorized Officer under the SARFAESI Act, 2002 is an open market sale and is thus excluded from the scrutiny contemplated in Section 47A of the Indian Stamp Act, 1899 (as amended in West Bengal)'.* The matter was, accordingly, placed before a Division Bench and upon contested

hearing the said Hon'ble Division Bench was pleased to deliver a judgement on 22nd April, 2022 answering the reference as follows : -

> *'The sale conducted by the authorized officer in exercise of the powers conferred under Rule 8 of the Security Interest (Enforcement) Rule, 2002 by public auction or by inviting tenders from the public would be regarded as the sale in the open market and the price so accepted shall be the price which it would fetch if sold in the open market under Section 47A of the Stamp Act. The sale must be conducted by making a wide publication at least in one newspaper widely circulated in the particular city/town/district where the property is situated.'*

5. According to Ms. Sen the proposition of law laid down by the Hon'ble Division Bench in the case of *Ballyfabs International Limited (Supra)* is squarely applicable to the facts and circumstances of the present case and accordingly the order impugned in the present appeal needs to be set aside with appropriate direction upon the registering authority to assess the stamp duty on the basis of the auction price as per the mandate of Article 18 of 1899 Act, as applicable to the State of West Bengal.

6. She informs that the State of West Bengal preferred a Special Leave Petition (in short, SLP) challenging the judgment delivered by the Hon'ble Division Bench in the case of *Ballyfabs International Limited (supra)* and an order was passed on 23rd September, 2022 observing that *'we are not inclined to interfere with the impugned judgement and order passed by the*

High Court. The Special Leave Petitions are dismissed accordingly, leaving question of law open'.

7. She argues that a question of law when kept open by the Hon'ble Supreme Court can only be decided by the said Court and as far as the High Court is concerned, it would be bound by the judgment not interfered with in the SLP as per the law of precedents. In support of such contention reliance has been placed upon the judgments delivered in the cases of *Collector vs. Liquidator – Petrofils Co-Operative Limited and Ors. (Manu/GJ/1291/2015), Hemal Ishwarbhai Patel vs. Veer Narmad South Gujarat University and Others*, reported in *2016 SCC OnLine Guj 10037*, *Commissioner of Income Tax I vs. Integra Engineering India Ltd.*, reported in *2013 SCC OnLine Guj 7389* and *Cipla Limited vs. Competent Authority and the District Deputy Registrar, Co-operative Society and Others*, reported in *2021 SCC OnLine Bom 622*.

8. She further argues that the issue of sale is not in question. Such sale has not been contested by the secured creditor or by the borrower. The AO in consonance with the provisions of the SARFAESI Act and the Security Interest (Enforcement) Rules, 2022 (hereinafter referred to as the 2002 Rules) sold the secured assets upon fixing the reserve price as Rs.36,50,000/-. In the *e*-auction there were two participants including Atanu and he emerged to be successfully and duly paid the bid amount of Rs.39,00,000/-. The reserve price was not reduced and it was an open market sale satisfying the condition of wide publicity.

9. She contends that an AO, who conducts a sale under the provisions of the SARFAESI Act, would be a Revenue Officer and the certificate issued by him in evidence of such sale, would be a document which is not compulsorily registerable under Section 17(2)(xii) of the Registration Act, 1908 (hereinafter referred to as the 1908 Act). It would be sufficient, if a copy of the sale certificate is forwarded to the registering authority to be filed in Book I as per Section 89(4) of the 1908 Act. In support of such contention reliance has been placed upon the judgments delivered in the cases of *Bell Tower Enterprises LLP vs. The State of Tamil Nadu and Ors.* (MANU/TN/7573/2022), *Esjaypee Impex Private Ltd. vs. Assistant General Manager and Authorised Officer, Canara Bank,* reported in *(2021) 11 SCC 537* and *Registrar of Assurances and Anr. vs. ASL Vyapar Private Ltd. and Anr.,* reported in *2022 SCC OnLine SC 1554*. The proposition of law as laid down in the said judgments was tested by the Hon'ble Supreme Court in the case of the *Inspector General of Registration and anr. vs. G. Madhurambal anr.* wherein the Hon'ble Supreme Court observed that *'once a direction is issued for the duly validated certificate to be issued to the auction purchaser with a copy forwarded to the registering authorities to be filled in Book I as per Section 89 of the Registration Act, it has the same effect as registration and obviates the requirement of any further action'*. The Court further cautioned that *'it is time that the authorities stop filing unnecessary special leave petitions only with the objective of attaining some kind of a final dismissal from this Court every time. Costs this time has been spared but will not be spared the next time'*.

10. Thus summarising her arguments, as advanced, Ms. Sen submits that the sale certificate issued by AO under SARFAESI is equivalent to the sale certificate of a Revenue Officer and hence exempted from the applicability of Section 47A of 1899 Act and the appellant is only required to pay the stamp duty as quantified on the basis of price indicated in the sale certificate issued by the AO and as mandated under Article 18 Schedule 1A of the 1899 Act.

11. Mr. Amal Kumar Sen, learned senior government advocate appearing for the State argues that the SLP preferred against the order passed by the Division Bench in *Ballyfabs International Limited (supra)* has been dismissed unaccompanied by any reason and as such the said order cannot be construed to be a law declared by the Hon'ble Supreme Court under Article 141 of the Constitution of India. Even a long standing decision if found to have departed from the plain language of the statute then the same cannot be followed as a precedent. In support of such arguments reliance has been placed upon the judgments delivered in the cases of *Union of India and Ors. vs. M.V. Mohanan Nair*, reported in *(2020) 5 SCC 421* and *State of Himachal Pradesh and Ors. vs. Ashwani Kumar and Ors.,* reported in *(2015) 15 SCC 534*.

12. He argues that the certificate of sale issued by the AO of a public sector bank and/or any private financial institution against sale of any immovable property in auction in open market u/s. 13(4)(a) of the SARFAESI Act read with Rules 8(1) and 8(5) of the 2002 Rules are not excluded from the applicability of Section 47A of 1899 Act read with clause

18 of Schedule 1A of 1899 Act since such AO of the secured creditor is neither Civil nor Revenue Court nor a Collector. The provisions of Section 47A of 1899 Act are made applicable to such sale to arrest the menace of under-declaration of the actual sale price of a property at the time of registration and consequential evasion of the actual stamp duty payable. In the present case, there were only two participants in the auction and a property covering land area of 9 decimal and building area of 5689 sq. ft and comprising of entire commercial land and building on Burdwan Kalna Road comprising 14 shops at ground floor and marriage commercial hall at first floor had been transferred at a paltry amount of Rs.39,00,000/- leading to evasion of a substantial amount of about Rs.8,00,000/- towards stamp duty payable to the State. Reliance has been placed upon the judgment delivered in the case of *M/s Cenney Hotels Private Ltd vs. State of Tamil Nadu* on 18th September, 2019.

13. According to Mr. Sen the title of Section 37 of the SARFAESI Act is *'application of other laws not barred'*. The said section provides that '*the provisions of this Act or the rules made thereunder shall be in addition to and not in derogation of the Companies Act, 1956, the Securities Contracts (Regulation) Act, 1956, The Securities & Exchange Board of Indian Act, 1992, The Recovery of Debts Due to Banks and Financial Institutions Act, 1993 or any other law for the time being in force'*. Under the 1993 Act all debts, defined in Section 2(g) which includes liability (inclusive of interest) whether secured or unsecured are recoverable by a Recovery Office appointed by the Central Government. The provisions of the SARFAESI Act and the 1993 Act

need to be considered together and not in isolation and a composite consideration of the provisions cannot lead to a conclusion that sale conducted by an AO under the SARFAESI Act would be free from the rigors of Section 47A of the 1899 Act. The said issue was neither argued nor considered by the Court and the issue has passed *sub silentio*.

14. As regards the contention of Ms. Sen that this Court is bound by the judgment as delivered by another co-ordinate Bench in the case of *Ballyfabs International Ltd. (supra)*, Mr. Sen submits that such a proposition would apply only in the event this Court gives its imprimatur to the reasoning given by the earlier Division Bench in the case of *Ballyfabs International Ltd. (supra)*.

15. Mr. Sen further argues the judgments delivered the cases of *Bell Tower Enterprises LLP (supra)*, *Esjaypee Impex Private Ltd. (supra), Registrar of Assurances (supra) and Inspector General of Registration (supra) are* not applicable to the facts of this present case since in the said judgments the issue as regards applicability of the provisions of Section 47A of the 1899 Act in cases of registration of a sale certificate issued by the AO of a bank under SARFAESI Act was not considered.

16. We have given our thoughtful consideration to the arguments advanced by the learned advocates appearing for the respective parties and have gone through the materials placed before us.

17. The proposition of law that can be culled out from the judgments delivered in the cases of *Collector vs. Liquidator – Petrofils Co-Operative*

Limited (supra), Hemal Ishwarbhai Patel (supra), Commissioner of Income Tax (supra) and *Cipla Limited (supra)* is that when a question of law is kept open by the Hon'ble Supreme Court after dismissing the SLP against the order passed by the Appeal Bench of the High Court, the said order would continue to bind a Bench of coordinate strength of the said Court unless the Bench finds that the order suffers from any error apparent on the face of the record and is persuaded to refer it to a larger Bench. The doctrine of merger is based on the principles of the propriety in the hierarchy of the justice delivery system. The said doctrine postulates that there cannot be more than one operative decree governing the same subject matter at given point of time. The question of law kept open would be treated to have been left open for the Hon'ble Supreme Court only.

18. The object of the 1899 Act is to collect proper stamp duty on an instrument or conveyance on which such duty is payable. This is to protect the State revenue. The stamp duty is a revenue earned by the State. The intention to evade the stamp duty under valuing the price of the property is required to be prevented in order to protect the revenue of the State and if the price shown in the instrument is not a market price to the belief of the registering authority, the ascertainment and the determination may be made under Rule 3 of the West Bengal Stamp Duty (Prevention of under valuation of Instruments) Rules, 2001 (hereinafter referred to as the 2001 Rules). It is no longer *res integra* that when a property is sold by a competent Court through any Receiver by auction after publication in newspapers, the rigors of Section 47A of the 1899 Act would not be applicable [See the judgment

delivered in the cases of *V.N. Devadoss (supra)* and *Sati Enclave (supra)*]. The contention of the State as regards under valuation of the property sold had been discounted by the Courts in the said judgments as in the facts of the said cases there was no basis for entertaining any belief that that the market value of the property had not been truly set forth with a view to fraudulently evade payment of proper stamp duty. The argument advanced on behalf of the State that the value set forth for sale cannot be termed as market value was also not accepted on the reasoning that market value is a changing concept and that the value fetched when sold in the open market after publication of advertisement and invitation of bids would be the market value and such open market sales are exempted from scrutiny under Section 47A of the 1899 Act.

19. The Division Bench in the case of *Ballyfabs International Limited (supra)* was testing the finding of the learned Single Judge that relying on the *ratio decidendi* of *Sati Enclave (supra)* sales under the SARFAESI Act by public *e*-auction on sufficiently wide publication come within the purview of open market sales thus excluding such sales from the scrutiny contemplated in Section 47A of the 1899 Act. The sale conducted by AO does not originate from any settlement between the parties to obliterate the shackles of mortgage upon the said property. Such sale is also not in between two private individuals; on the other hand it is a sale in consonance with the provisions of the SARFAESI Act. The transaction cannot be construed as circuitous or designed to evade tax.

20. We are also unable to accept the argument of Mr. Sen that as the provisions towards sale under the 1993 Act were not argued, it was not noticed that the status of the AO under the SARFAESI Act is not at par with that of a Recovery Officer under the 1993 Act and the issue has passed *sub silentio*. The object of the 2002 Act and the 1993 Act are same. Both the Acts though complementary to each other are independent in their operation as per their own laid down procedure.

21. Doctrine of precedents and stare decisis are the core values of legal system. When substantial judicial time and resources are spent on references the same should not be made in a casual manner. It is only when a proposition is contradicted by a subsequent judgment of the same Bench or it is shown that the proposition laid down has become unworkable or contrary to any well-established principle or when there is an irreconcilable conflict, the matter may be referred to a larger Bench. We do not find any compelling or strong reasons to depart from the order passed by the Division Bench in *Ballyfabs International Limited (supra)*.

22. Accordingly, the order impugned in the present appeal is set aside and the registering authority is directed to quantify the stamp duty on the basis of the price being Rs.39,00,000/-, as detailed in the sale certificate and intimate the same to the appellant within a period of two weeks from the date of communication of this order. Within two weeks thereafter the appellant shall deposit the stamp duty and registration charges, so that the follow up steps may be taken by the registering authority thereafter.

23. With the above observations and directions the appeal and connected application, if any, are disposed of.

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

25. Urgent Photostat certified 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.)**