IN THE HIGH COURTAT CALCUTTA
CIRCUIT BENCH AT JALPAIGURI
CIVIL REVISIONAL JURISDICTION

BEFORE:
HON'BLE JUSTICE RAJA BASU CHOWDHURY

CO 134 of 2023

The Authorized Officer, Punjab National Bank & Anr.
Versus
Bikash Saha

For the petitioners	:	Mr. Ratan Banik Mr. Saptarshi Banik
For the opposite party:		Mr. N. Srinibas
Heard on	:	28.11.2024
Judgment on	**:**	**20th February, 2025.**

RAJA BASU CHOWDHURY, J:

1. The instant revisional application has been filed, inter alia, challenging the judgment and order dated 11th July, 2023 passed by the Debts Recovery Appellate Tribunal, Kolkata, in Appeal No.66 of 2022 arising out of the order dated 5th July, 2022 passed in S.A. 24 of 2022 whereby, the forfeiture made by the petitioner (herein after referred to as the bank) vide letter dated 8th November, 2021 forfeiting the deposit made by the opposite party in pursuance of a notice inviting sale of a secured asset has been held to be invalid.
2. To understand the scope of the aforesaid revisional application it is necessary to briefly note down the facts. The opposite

party herein had participated in a sale of a secured asset, initiated vide notice dated 21st February, 2020 published by the bank and upon making a bid of Rs.58,15,000/-, had deposited the requisite earnest money. It would appear from the record that the bank had issued an e-mail on 30th March 2020 confirming that the opposite party is declared as the highest bidder and was accordingly directed to make a further deposit equivalent to 25 percent of the bid amount after giving credit to the EMD of Rs.5,80,000/-. Pursuant to the aforesaid, the opposite party on 24th March, 2020 had deposited a sum of Rs. 8,74,000/-, and by a letter dated 9th April, 2020 sought for additional 15 days time to deposit the remaining 75%. It appears that vide letter dated 23rd March, 2020, the bank expressed its inability to accept further payment of the remaining 75% of the sale value, in view of the order passed by the Debts Recovery Tribunal, Siliguri, in S.A. 40 of 2020. The sale proceeding thus, ended at that stage.

3. Subsequently, in response to a further sale notice issued on 4th June, 2021 published by the bank in respect of the selfsame secured asset, the opposite party participated in an e-auction sale on 29th June, 2021, and had also made deposit of earnest money of Rs.6,63,000/- against bid of Rs.66,53,000/-. The aforesaid bid was beyond the reserved price of Rs.66,28,000/-. As would corroborate from the record the opposite party on 30th June, 2021 had deposited the remaining

amount constituting 25 percent of the bid amount. It would appear from the record that vide email dated 2nd July, 2021 the opposite party was called upon by the bank to make further payment of Rs.49,89,750/- constituting 75% of the entire bid amount within 15 days i.e. on or before 14th July, 2021. Acting on the basis of the aforesaid letter, the opposite party had deposited a further sum of Rs. 5,00,000/- only on 11th August, 2021 with a request vide representation dated 24th September, 2021 to provide the opposite party a further 15 days time to deposit the remaining amount on the ground of illness of the opposite party's father. It would, however, transpire that the bank had granted extension only upto 27th September, 2021. The factum of such extension would corroborate from the endorsement made on the aforesaid request letter dated 24th September, 2021.

4. On 29th September, 2021 the father of the opposite party passed away and the aforesaid fact was brought to the notice of the bank vide letter dated 2nd November, 2021, with a request to allow two months time to deposit the balance amount. Neither any payment was made by the opposite party thereafter nor was this letter responded to by the bank. On the contrary vide a letter dated 8th November, 2021 the bank communicated its decision to forfeit the amount of Rs. 21,63,250/- which had been deposited by the opposite party. Challenging such forfeiture effected vide communication dated

8th November, 2021 by claiming the same to be *de hors* the provision of Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, (SARFAESI)(hereinafter referred to as the "said Act"), an application under Section 17 of the said Act was filed before the Debts Recovery Tribunal, Siliguri, which was registered as S.A. 24 of 2022. Although, amongst other points the factum of the secured asset being once again put up for sale vide sale notice dated 19th November, 2021 was urged, however, the Tribunal by noting that the opposite party had not participated in response to the sale notice dated 19th November, 2021 and having not deposited any amount for the subsequent sale in which pendency of the SARFAESI application had not been disclosed by the secured creditor, had disregarded such objection. However, on the issue as to whether the bank was competent to forfeit the entire amount of Rs.21,63,250/- deposited by the opposite party in the auction sale, by noting that the bank did not disclose whether the secured asset of the borrower had been sold in the subsequent auction and by relying on the judgment delivered in the case of ***Alisha Khan v. Indian Bank (Allahabad Bank)*** Civil Appeal Nos. 15960 of 2021 held that since, no loss was caused to the bank, 25 percent of the bid amount could be forfeited as the same could not be equivalent to the loss, if any, incurred by the secured creditor. Further the subsequent sale having not been brought to the notice of the Tribunal and noting that an amount of Rs. 21,63,250/- was lying with the bank, the tribunal had set aside the order of forfeiture with a direction on the bank to refund the deposit amount to the applicant within four weeks after deducting Rs. 50,000/- towards the expenditure.

5. On an appeal being carried before the Debts Recovery Appellate Tribunal at Kolkata, the bank held out that although, a sale confirmation letter was issued to a subsequent bidder only 25 percent of the auction sale amount had been realized. Still later after conclusion of hearing the bank held out by filing a supplementary affidavit affirmed on 10th April, 2023 that the aforesaid sale could not materialize by reasons of order of injunction passed by the learned Tribunal on 25th February, 2022 and the entire amount had been refunded to the subsequent applicant. It was, however, the case of the bank before the Debts Recovery Appellate Tribunal that the subsequent sale could not materialize in respect of the sale notice dated 19th November, 2021.

6. On contested hearing, the Debts Recovery Appellate Tribunal by judgment and order dated 11th July, 2023 by concluding that the bank had waived its right under the Provisions of Rule 9(5) of the Security Interest (Enforcement) Rules, 2002 (hereinafter referred to the "said Rules") to forfeit the deposit amount, dismissed the appeal thereby affirming the order passed by the Debts Recovery Tribunal, Siliguri.

7. Mr. Banik, learned Advocate appearing in support of the aforesaid revisional application would submit that when the opposite party participated in the auction sale initiated pursuant to the sale notice dated 4th June, 2021 the opposite party was aware with regard to the factum of SARFAESI application being S.A. 40 of 2020. The opposite party not only put in a bid along with earnest money, however, upon the factum of such confirmation being communicated orally on 30th June 2021 had deposited the balance amount constituting 25 percent of the bid amount after giving credit to the earnest money already deposited. Thereafter an email communication was issued on 2nd July, 2021 calling upon the opposite party to make payment of 75 percent of the balance amount within 15 days as is statutorily required in terms of rule 9(4) of the said rules. He would submit that in compliance of the aforesaid the opposite party had deposited a further sum of Rs. 5,00,000/- on 11th August, 2021. Subsequently, a representation was made on 24th September, 2021 to provide additional 15 days' time to make payment of the balance deposit. He would submit that time was mutually extended upto 27th September, 2021. According to him, since, the opposite party did not comply with the mandatory provision as regards deposit of the balance amount and since, it was beyond the authority of the bank to extend the period beyond 90 days, extension for a limited period had been granted. Admittedly, the opposite party did

not comply with the above as such the letter of forfeiture followed on 8th November, 2021. He would submit that the judgment delivered in the case of ***Alisha Khan*** (supra) was delivered during the pandemic. Law on the subject has since been interpreted by the Hon'ble Supreme Court in detail by the judgment delivered in the case of ***Authorised Officer State Bank of India v. C. Natarajan & Anr.,*** reported in **[2023] 5 S.C.R. 1067**. He would submit that the Tribunal, at the first instance, committed an error of jurisdiction in attempting to interpret the provision of SARFAESI Act and the rules framed thereunder so as to set aside the forfeiture on the ground that the bank did not suffer any loss. The findings returned by the appellate authority are also unsustainable since, the appellate authority had returned a finding that the bank had waived its right conferred under the provisions of Rule 9(5) of the said Rules. The case of waiver does not find mention in the pleadings before the Tribunal. The opposite party having not filed any cross-objection or any cross appeal ought not to have permitted the opposite party to raise such an issue. The judgment delivered by the Debts Recovery Tribunal is perverse and should be set aside.

8. *Per contra*, Mr. Srinibas, learned advocate representing the opposite party by drawing attention of this Court to the email dated 2nd July, 2021 would submit that the opposite party was not granted the minimum 15 days time to make payment of 25

percent of the deposit as statutorily mandated since the time to make payment was only limited till 14th July, 2021. He would submit that there was statutory infraction as regards the period to make the deposit of the initial balance sum for constituting 25 percent of the bid amount. Such fact had also been admitted by the bank as would appear from the affidavit filed by the bank before the Debts Recovery Appellate Tribunal. He would next submit that the application made by the opposite party for extension of time was admittedly beyond the prescribed period of 15 days. Since the bank extended the period, it must be presumed that the bank had waived its right to enforce the provisions of rule 9(5) of the said rules and thus was no longer competent to forfeit the deposit. It is next submitted that even if the case of the bank is accepted that it was entitled to forfeit, there is no explanation forthcoming from the bank as to why no steps had been taken by the bank for the period between 29th September, 2021 and 7th November, 2021. Having regard thereto, it is submitted that there is no irregularity in the order passed by the learned Appellate Tribunal. The point of waiver was taken by the opposite party in the affidavit filed before the Tribunal and having regard thereto there is no irregularity in the Appellate Tribunal accepting such contention. By placing reliance on the judgment delivered in the case of ***C. Natarajan*** (supra) he would submit that from the sequence of events narrated herein it would not transpire that the opposite party had any hidden interest, to stall the sale with the object of benefitting the defaulting borrower. Having regard thereto, the bank ought not to have invoked its right of forfeiture which right it had already waived.

9. Mr. Srinivas would then submit that the bank has been taking different stands at different point of time. To negate the judgment delivered in the case of ***Alisha Khan*** (supra), a case was made out before the Appellate Tribunal that the sale was incomplete though before the Debts Recovery Tribunal it had claimed that the property had been sold. Subsequently, after conclusion of hearing an affidavit was filed contending that the subsequent bidder had been returned the entire amount by reasons of the order of stay passed in connection with S.A. 40 of 2020, which concerns the selfsame secured asset. In the aforesaid facts it would be amply clear that the sale could never have been completed in favour of the opposite party and there is no irregularity in the judgment. By placing before this Court, the judgment delivered by the Hon'ble Supreme Court in the case of ***Suzuki Parasrampuria suitings Private Limited v. Official Liquidator of Mahendra Petrochemicals Limited (in Liquidation) & Ors***., reported in **(2018) 10 SCC 707**, it is submitted that a litigant cannot take a different stand before different forum on the same dispute and cannot be permitted to change its stand before a higher forum. The

aforesaid would demonstrate the *mala fide* attitude on the part of the bank. He has also placed reliance on the judgment delivered by the Hon'ble Supreme Court in the case of ***M/s Puri Investments v. M/s Young Friends & Co. & Ors***., reported in **2022 Live Law (SC) 279** to elucidate the scope of judicial review. By placing reliance on the judgment delivered by the Hon'ble Supreme Court in the case of ***The Authorised Officer, Central Bank of India v. Shanmugavelu***, reported in **(2024) 2 SCR 12** he has tried to drive home the point that in the facts of the case the Tribunal had rightly invoked the ratio of the judgment delivered in the case of ***Alisha Khan*** (supra).

10. Heard the learned advocates appearing for the respective parties and considered the materials on record. In the instant case, it may be noted that the primary ground for challenge is that the Tribunal overlooked the fact that a right had been conferred on the petitioner in terms of rule 9(5) of the said rules to forfeit the deposit of 25 percent of earnest money in the event of the purchaser defaulting in making payment of the balance amount of purchase price as provided for in rule 9(4) of the said rules. In this context, it may be noted that the Debts Recovery Tribunal as also the Debts Recovery Appellate Tribunal by way of concurrent findings have found the opposite party to have committed breach insofar as payment of balance amount of purchase price as provided for in rule 9(4) of the said rules is concerned. While the Tribunal held what could be

forfeited by the bank would be equivalent to the loss incurred and having regard thereto since the subsequent factum of sale had not been brought to the notice of the Tribunal, and considering the forfeiture of huge sum of Rs.21,63,250/-, the forfeiture had been set aside with a direction to the bank to refund the same by deducting a sum of Rs.50,000/- towards costs. The above judgment had been delivered having also regard to the judgment delivered by the Hon'ble Supreme Court in the case of ***Alisha Khan*** (supra). Incidentally, the Appellate Tribunal, despite noting the breach on the part of the opposite party in making payment of the balance amount and despite recognizing that the bank had a right to forfeit had proceeded to conclude that since the forfeiture was not made by the bank immediately upon expiry of the mandatory period of 90 days, the bank has waived its right to forfeit under the provisions of rule 9(5) of the said Rules. Mr. Srinivas has urged that the point of waiver. The pleading in the application filed under Section 17 of the said Act, also reflect the primarily contentions of the opposite party to hold out that the secured asset which was put up for sale was entangled in litigation. There had been non-compliance of rule 9(4) of the said rules which required a minimum 15 days to be given for deposit of 25 percent of the amount of sale price. In fact, Mr. Srinivas, by drawing attention of this Court to the confirmation letter dated 2nd July, 2021 has stressed that the bank did not afford 15 days' time to the opposite party to make payment of the balance amount of 75 percent of the bid and such fact had also been acknowledged by the bank. In this context, it may be noted that the opposite party did not choose to question the shorter period granted by the bank for deposit of the balance amount, rather deposited a sum of Rs.5,00,000/- on 11th August, 2021. To appreciate the scope and purport of rule 9(4) of the said rules, the same is extracted hereinbelow:

> "*9(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 he secured creditor, in any case not exceeding three months]".*

11. The above would in no uncertain term provide that although, the balance amount of 75 percent is required to be paid within 15 days of the confirmation, the parties may agree to extend the time for a period not exceeding three months. Admittedly, the bank had accepted the payment made on 11th August, 2021, i.e., beyond 15 days and had also subsequently while acceding to the request of the opposite party made vide representation/request letter dated 24th September, 2021 afforded further extension till 27th September, 2021. The above, in my view was done with mutual consent and as such within the scope of rule 9(4) of the said rules. Having regard thereto, I do not find any irregularity in either the opposite

party making payment of Rs.5,00,000/- on 11th August, 2021 or the bank extending the time to make further deposit of the balance amount till 27th September, 2021, which was obviously within the outer limit of 3 months. It may be noted although, the Appellate Tribunal had affirmed conclusion reached in the judgment delivered by the Debts Recovery Tribunal yet the reasons for setting aside the forfeiture were different. To understand as to whether the bank had waived its right, it is necessary to ascertain what is meant by the term waiver. Waiver in the legal parlance is an intentional relinquish of a known right. Waiver ordinarily comes into effect when a party being challenged appraised by material facts and its legal rights, consciously abandons the same. Though the waiver may be implied from the conduct, in my view there was nothing on record based on which the Appellate Tribunal could have presumed that the bank had waived its right of forfeiture under rule 9(5) of the said rules. Though there was some delay in communicating the forfeiture/issuing the letter dated 8th November, 2021, which was communicated on 3rd December, 2021, however, it is not the case of the opposite party that beyond the period of 3 months, the opposite party had offered the balance consideration and the same or any part of such consideration was accepted by the bank. Thus, the finding of the appellate tribunal to that extent that the bank had waived its right of forfeiture is perverse. As to whether the Tribunal was right in taking note of subsequent sale proceedings, it would be relevant to refer to the judgment delivered by the Hon'ble Supreme Court in the case of ***C. Natarajan*** (supra), in paragraph 24, the Hon'ble Supreme Court has been *inter alia*, pleased to observe as follows:

> **"***The up-shot of the aforesaid discussion is that whenever a challenge is laid to an order of forfeiture made by an authorized officer under sub-rule (5) of rule 9 of the Rules by a bidder, who has failed to deposit the entire sale price within ninety days, the tribunals/courts ought to be extremely reluctant to interfere unless, of course, a very exceptional case for interference is set up. What would constitute a very exceptional case, however, must be determined by the tribunals/courts on the facts of each case and by recording cogent reasons for the conclusion reached. Insofar as challenge to an order of forfeiture that is made upon rejection of an application for extension of time prior to expiry of ninety days and within the stipulated period is concerned, the scrutiny could be a bit more intrusive for ascertaining whether any patent arbitrariness or unreasonableness in the decision-making process had the effect of vitiating the order under challenge. However, in course of such scrutiny the tribunals/courts must be careful and cautious and direct their attention to examine each case in some depth to locate whether there is likelihood of any hidden interest of the bidder to stall the sale to benefit the defaulting borrower and must, as of necessity, weed out claims of bidders who instead of genuine interest to participate in the auctions do so to rig prices with an agenda to withdraw from the fray post conclusion of the*

*bidding process. In course of such determination, the tribunals/courts ought not to be swayed only by supervening events like a subsequent sale at a higher price or at the same price offered by the defaulting bidder or that the secured creditor has not in the bargain suffered any loss or by sentiments and should stay at a distance since extending sympathy, grace or compassion are outside the scope of the relevant legislation. In any event, the underlying principle of least intervention by tribunals/courts and the overarching objective of the SARFAESI Act duly complimented by the Rules, which are geared towards efficient and speedy recovery of debts, together with the interpretation of the relevant laws by this Court should not be lost sight of. Losing sight thereof may not be in the larger interest of the nation and susceptible to interference.***”**

12. Having regard thereto, I find that the Tribunal had been swayed by a supervening event as regards the factum of non-disclosure of the future sale notice and the subsequent embargo put on the sale of the secured asset. It is extremely unfortunate for the opposite party to lose his father, however, as noted in the case of ***C. Natarajan*** (supra) the Tribunal/Courts cannot be swayed by sympathy, grace or compassion which are outside the scope of the relevant legislation. In this context it will be also relevant to note the judgment delivered by the Hon'ble Supreme Court in the case of ***Shanmugavelu*** (supra) wherein in paragraph 16, the Hon'ble Supreme Court has been inter alia pleased to observe as follows:

> "*The DRT-II vide its order dated 06.05.2019 allowed the application being SA No. 143 of 2018 and directed the appellant bank to refund the earnest money deposited by the respondent after deducting a sum of Rs.5,00,000/- towards the expenditure incurred. The DRT-II in its order observed that the respondent had requested the appellant bank to provide certain documents required for the grant of term loan which was not provided, as a result of which the term loan was not granted and the respondent failed to remit the balance amount. It further observed that as the Secured Asset had been sold for an amount higher than the initial bid, no loss was caused to the appellant.*"

13. Although by relying on paragraph 118 of the aforesaid judgment Mr. Srinivas had attempted to impress upon the Court that the opposite party by reasons of his father's death had been put to a back foot and the same ought to be considered with the advent of demonetization, though I sympathize with the opposite party, however, I am unable to accede to the contention of Mr. Srinivas in this regard. The judgment relied on by Mr. Srinibas in the case of ***Suzuki Parasrampuria Suitings Private Limited*** (supra) in the facts noted above does not assist the opposite party. Insofar as the judgment relied on in the case of ***M/s. Puri Investements*** (supra) is concerned, the instant case falls within the exceptions enumerated in the said judgment. The finding returned by the learned Debts Recovery Appellate Tribunal is perverse to say the least. The same cannot be sustained. However, at the same time I may note that the bank had

proceeded to forfeit the entire amount deposited by the opposite party which does not have the sanction of law as the forfeiture can only be in respect of the deposit of 25 percent of the bid amount.

14. In view thereof, I direct the bank to return the balance amount beyond 25 percent of the bid amount to the opposite party within four weeks from date. Since, the aforesaid amount has been illegally withheld, the same shall carry simple interest at the rate of 12 percent per annum.

15. With the above observation and directions, the revisional application, being CO 134 of 2023 stand disposed of.

16. There shall be no order as to costs.

Urgent photostat certified copy of this order, if applied for, be made available to the parties upon compliance with the requisite formalities.

(Raja Basu Chowdhury, J.)