



IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 19TH DAY OF DECEMBER, 2023

BEFORE

THE HON'BLE MR. JUSTICE K. V. ARAVIND

WRIT PETITION No.23327/2022(GM-RES)

BETWEEN:

SRI. KALYANAMURTHY. K.,

...PETITIONER

(BY SRI D.V. VENKATESH, ADVOCATE)

AND:

STATE BANK OF INDIA,
ASSET RECOVERY MANAGEMENT BRANCH,
2ND FLOOR,
STATE BANK OF INDIA BUILDING,
(MYSORE BANK CIRCLE),
1ST BLOCK, K.G. ROAD,
BENGALURU 560 009.

...RESPONDENT

(BY MS. CHITHRA NIRMALA P., ADVOCATE)

THIS WRIT PETITION IS FILED UNDER ARTICLES 226 AND 227 OF THE CONSTITUTION OF INDIA PRAYING TO DIRECT THE RESPONDENT TO CONSIDER THE REQUISITION OF THE PETITIONER AS PER ANNEXURE-J DATED 20.07.2022 CONSEQUENTLY TO REFUND OF Rs.31,73,750/- (RUPEES THIRTY

ONE LAKHS SEVENTY THREE THOUSAND SEVEN HUNDRED AND FIFTY ONLY), TO THE PETITIONER.

THIS WRIT PETITION HAVING BEEN HEARD AND RESERVED FOR ORDERS ON 01.12.2023, THIS DAY THE COURT PRONOUNCED THE FOLLOWING:

ORDER

This petition seeking *mandamus* to the respondent to refund a sum of Rs.31,73,750/- forfeited due to non-compliance of conditions of Sale Notice dated 16.12.2021, Annexure-B.

2. Brief facts:

The respondent issued statutory notice for sale under Security Interest (Enforcement) Rules, 2002 (for short 'Rules') for sale of immovable property bearing Site No.43, Katha No.195/1/06, Property No.106, II Block, Dasappa Layout, Kowdenahalli, Ramamurthy Nagar, K.R.Puram Hobli, Bengaluru. In terms of the sale notice, auction was held on 08.12.2021. The petitioner participated in the auction and declared successful bidder with highest quoted amount of Rs.86,95,000/-. The petitioner deposited 25% in compliance of the terms and

conditions of e-auction. As per the conditions of the auction, 75% of the sale price is to be deposited on or before 15th day of confirmation of sale or within such extended period. Sale confirmation is on 16.12.2021. Fifteen days to make payment of 75% expires on 31.12.2021.

3. Rule 9 of the Rules provides for extension of time as agreed between the parties with an outer limit of extension not exceeding three months. The petitioner by letter dated 29.12.2021 made a request for extension to make payment till 20.01.2022. Time was extended by the respondent accordingly. On 20.01.2022, further extension was requested till 20.02.2022. The respondent accepted and extended the time accordingly. As there was no response subsequent to extension of time till 20.02.2022, the respondent issued letter dated 04.03.2022 requesting the petitioner to make payment of the difference amount on or before 08.03.2022. The letter further indicated,

failure to pay the amount would result in forfeiture of amount already paid.

4. The petitioner through e-mail dated 08.03.2022 requested two weeks' time to make the payment on the ground that he is suffering from age related health issues and hence not able to pay the remaining amount within the stipulated time.

5. The respondent by letter dated 16.03.2022 addressed to the petitioner forfeited the amount of Rs.31,73,750/- for failure to comply with the terms and conditions of auction in terms of Rule 9(4) of the Rules.

6. Sri.D.V.Venkatesh, learned counsel for the petitioner submits that the petitioner has deposited a sum of Rs.31,73,750/- and deposit of 25% stands complied with. Remaining amount of Rs.55,21,250/- was not deposited within the extended period as agreed by the respondent in view of financial difficulties due to Covid-19 pandemic. Learned counsel further submits that the petitioner was

suffering from Kidney disease and was undergoing treatment. In support of his contention has filed medical records along with memo dated 04.12.2023. The bid amount offered by the petitioner was Rs.86,95,000/-. In view of cancellation of auction, the property has been re-auctioned and has been sold for a sum of Rs.87,79,000/-. There is no financial loss caused to the respondent. Forfeiture of amount paid by the petitioner would amount to unjust enrichment. On the above submissions prays for direction to the respondent to release the forfeited amount.

7. Miss Chithra Nirmala P., learned counsel appearing for the respondent submits that the entire procedure and discretion of the Bank has been provided under Rule 9 of the Rules. The petitioner has been provided with extension to the outer limit provided under Rule 9 of the Rules. In view of failure to comply with the terms and conditions of the auction, order of forfeiture has been rightly made which is in conformity with Rule 9(5) of the Rules. Merely

because property has been sold subsequently for a higher price would not entitle the petitioner to seek refund of forfeited amount. In support of her contention, she places reliance on the judgment of the Hon'ble Supreme Court in the case of ***Authorised Officer, State Bank of India vs. C. Natarajan and another***¹.

8. Heard learned counsels for the parties and perused the records.

9. On consideration of the pleadings, submissions, relevant provision and records, the following questions would arise for consideration;

i) Whether forfeiture of deposit by the Authorized Officer is justified?

ii) Whether forfeiture of deposit in excess of 25% is justified in view of Rule 9 of the Rules?

¹ 2023 SCC OnLine SC 510

10. There is no dispute regarding payment of Rs.31,73,750/- by the petitioner between 10.12.2021 to 29.12.2021. Further no dispute regarding the total consideration agreed by the petitioner at Rs.86,95,000/- as a successful bidder. The petitioner has paid 10% of the reserve price within the stipulated time. The auction has been held on 08.12.2021. Sale confirmation has been made on 16.12.2021. The required deposit of 25% has been deposited within the stipulated time.

11. Sale of secured asset and procedure for sale through auction is in terms of Rule 9 of the Rules. Rule 9 of the Rules reads as under:

"9. Time of sale, issue of sale certificate and delivery of possession, etc. - [(1) No sale of immovable property under these rules, in first instance shall take place before the expiry of thirty days from the date on which the public notice of sale is published in newspapers as referred to in the proviso to sub-rule (6) of rule 8 or notice of sale has been served to the borrower:

Provided further that if sale of immovable property by any one of the methods specified by sub rule (5) of rule 8 fails and sale is required to be conducted again, the authorized officer shall serve, affix and publish notice of sale of not less than fifteen days to the borrower, for any subsequent sale.]

(2) The sale shall be confirmed in favour of the purchaser who has offered the highest sale price in his bid or tender or quotation or offer to the authorized officer and shall be subject to confirmation by the secured creditor:

Provided that no sale under this rule shall be confirmed, if the amount offered by sale price is less than the reserve price, specified under sub-rule (5) of [rule 8]:

Provided further that if the authorized officer fails to obtain a price higher than the reserve price, he may, with the consent of the borrower and the secured creditor effect the sale at such price.

[(3) On every sale of immovable property, the purchaser shall immediately, i.e. on the same day or not later than next working day, as the case may be, pay a deposit of twenty five per cent. of the amount of the sale price, which is inclusive of earnest money deposited, if any, to the authorized officer conducting the sale and in default of such deposit, the property shall be sold again;]

(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 the secured creditor, in any case not exceeding three months].

(5) In default of payment within the period mentioned in sub-rule (4), the deposit shall be forfeited [to the secured creditor] 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.

(6) On confirmation of sale by the secured creditor and if the terms of payment have been complied with, the authorized officer exercising the power of sale shall issue a certificate of sale of the immovable property in favour of the purchaser in the Form given in Appendix V to these rules.

(7) Where the immovable property sold is subject to any encumbrances, the authorized officer may, if he thinks fit, allow the purchaser to deposit with him the money required to discharge the encumbrances and any interest due thereon together with such additional amount that may be sufficient to meet the contingencies or further cost,

expenses and interest as may be determined by him;

[Provided that if after meeting the cost of removing encumbrances and contingencies is any surplus available out of the money deposited by the purchaser such surplus shall be paid to the purchaser within fifteen days from the date of finalization of the sale.]

(8) On such deposit of money for discharge of the encumbrances, the authorized officer [shall] may issue or cause the purchaser to issue notices to the persons interested in or entitled to the money deposited with him and take steps to make the payment accordingly.

(9) The authorized officer shall deliver the property to the purchaser free from encumbrances known to the secured creditor on deposit of money as specified in sub-rule (7) above.

(10) The certificate of sale issued under sub-rule (6) shall specifically mention that whether the purchaser has purchased the immovable secured asset free from any encumbrances known to the secured creditor or not."

12. On bare perusal of the aforesaid provisions, Rule 9(4) of the Rules provides for payment of balance amount

of 75% of purchase price on or before 15th day of confirmation of sale. The period of fifteen days is on or before 31.12.2021. Further sub-rule (4) to Rule 9 of the Rules provides for extension of said period of 15 days on mutual agreement in writing between the purchaser and secured creditor. However, such extended period cannot exceed three months. In the present case, extension provided is up-to three months, outer limit provided under Rule 9(4) of the Rules. In view of statutory bar, the respondent has no authority to extend time for making payment exceeding three months.

13. Rule 9(5) of the Rules provides for consequences of failure to deposit within the period mentioned in sub-rule (4). The failure to make payment would follow forfeiture of the deposit in favour of the secured creditor and authorizes the secured creditor to re-sell the property.

14. On perusal of sub-rules (3) (4) and (5) of Rule 9 of the Rules, the discretion conferred on the respondent secured creditor is only to the limited extent of extension

to make payment not exceeding three months. As the Rules provide for extent of benefit to the auction purchaser and discretion of the secured creditor, forfeiture by the respondent cannot be said to be in violation of Rule 9 of the Rules or as arbitrary. The power of forfeiture under sub-rule (5) of Rule 9 of the Rules is statutorily conferred. Hence, there is no scope for judicial review.

15. The petitioner has not placed any material to demonstrate fund flow to make the remaining payment either during the extended period or as on the date of this petition to show *bona fides*. Even the medical records placed by the petitioner are relatable to October 2022 i.e. subsequent to forfeiture. Hence, has no relevance to the case.

16. The Hon'ble Supreme Court in the case of ***Authorized Officer, State Bank of India*** (*supra*) has held as under:

"18. Having regard to the terms of rule 9, the notice for auction constitutes the 'invitation to

offer'; the bids 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 honour 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 a penal consequence. 'Forfeiture' referred to in sub-rule (5) of rule 9, in the setting of the SARFAESI Act and the 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 to him by the authorized officer of a 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. Drawing from our experience on the Bench, it can safely be observed that in many a case the borrowers themselves, seeking to frustrate auction sales, use their own henchmen as intending purchasers to participate in the auction but thereafter they do not choose to carry forward the*

transactions citing issues which are hardly tenable. This leads to auctions being aborted and issuance of fresh notices. Repetition of such a process of participation-withdrawal for a couple of times or more has the undesirable effect of rigging of the valuation of the immovable property. In such cases, the only perceivable loss suffered by a secured creditor would seem to be the extent of expenses incurred by it in putting up the immovable property for sale. However, what does generally escape notice in the process is that it is the mischievous borrower who steals a march over the secured creditor by managing to have a highly valuable property purchased by one of its henchmen for a song, thus getting such property freed from the clutches of mortgage and by diluting the security cover which the secured creditor had for its loan exposure. Bearing in mind such stark reality, sub-rule (5) of rule 9 cannot but be interpreted pragmatically to serve twin purposes – first, to facilitate due enforcement of security interest by the secured creditor (one of the objects of the SARFAESI Act); and second, to prohibit wrong doers from being benefited by a liberal construction thereof."

"28. *Also, the terms of the auction notice made it clear that the auction sale would be conducted in*

terms of the provisions contained in the SARFAESI Act. All prospective bidders were, therefore, put on guard as to what could follow in case of a default or neglect. Notwithstanding the proceedings that were initiated before the DRT by Stallion of which the contesting respondent became aware on 10th October, 2017, nothing prevented him from making full payment of the balance amount and have the sale certificate issued in his favour. It can be inferred from the facts and circumstances that the contesting respondent was seeking to buy time. Counsel for the contesting respondent has not shown how the Authorized Officer acted in derogation of the statute. Indeed, it was open to the Authorized Officer to extend the time further; equally, he was also free not to grant further extension having regard to the conduct of the contesting respondent. When two options are legally open to be exercised in a given set of facts and circumstances and one option is exercised, which does not appear to be wholly unreasonable, it is not for the writ court to find fault on the specious ground that the secured creditor has not suffered any financial loss. That such creditor had not suffered financial loss cannot be the sole determinative factor in view of the special law that the SARFAESI Act is. ..."

17. In view of the law laid down by the Hon'ble Supreme Court in the case referred to *supra* and applying the same to the facts of the present case, it is not open to the petitioner to seek refund of the forfeited amount on the ground that the property has been re-sold at a higher price. Petitioner has not placed any evidence to demonstrate flow of funds to demonstrate his genuine attempt to make payment of the remaining amount. As forfeiture is statutory action, in view of non-compliance of Rule 9(4) of the Rules leaving no discretion with the secured creditor, forfeiture is just and proper. In view of the above, the health condition of the petitioner in not making the payment would be irrelevant while examining correctness of forfeiture under Rule 9(5) of the Rules.

18. Insofar as the hardship claimed by the petitioner, the same has been considered by the Hon'ble Supreme Court in the judgment referred to *supra* which reads as under;

37. *The question under consideration can also be addressed from a different perspective. In the present case, the Authorized 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 scrutinized wearing the glasses of misplaced sympathy. Law is well settled that a result flowing from a statutory provision is never an evil and that a 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 a court likes the result or not. This is the statement of law in the decision of this Court in Martin Burn Ltd v. The Corporation of Calcutta.

19. In view of the aforesaid law laid down by Hon'ble Supreme Court, the petitioner is not entitled for refund even on the ground of hardship. Such a ground is also not available to the default auction purchaser. First question is answered accordingly.

20. While examining the second question, the following aspects need to be considered.

21. Total undisputed bid amount is Rs.86,95,000/-. The petitioner has paid EMD of Rs.6,79,500/- and

Rs.14,94,250/- on 10.12.2021 which constituted 25% of the bid amount as per the terms and conditions of sale.

22. The petitioner was entitled to seek extension by 90 days in terms of Rule 9(4) of the Rules, which has been extended in the present case. Rule 9(3) of the Rules provides for deposit of 25% of the sale price. Rule 9(4) of the Rules refers to balance amount of purchase price and extension of period for making the said balance purchase price. Rule 9(5) of the Rules provides for forfeiture of the deposit in default of payment under sub-rule (4).

23. Oxford Dictionary defines 'DEPOSIT' as:

" A sum payable as a first installment on the purchase of something or as a pledge for a contract, the balance being payable later."

Wharton's Law Lexicon defines 'DEPOSIT' as:

"In the case of contracts, for sale of land, a deposit is regarded, not only as a part payment of the purchase money, but also as a

guarantee that the contract shall be completed by the purchaser, and may be forfeited, if he make default."

Cambridge Dictionary defines 'DEPOSIT' as:

" A deposit is also a sum of money that is given in advance as part of a total payment for something."

" An amount of money that you pay as the first part of the total payment for something."

24. The Hon'ble Supreme Court in case of ***Shree Hanuman Cotton Mills and others vs. Tata Aircraft Limited*** in ***(1969) 3 SCC 522***, has held as follows;

" 17. Regarding "deposit", the author states at p. 946, that a deposit is not recoverable by the buyer, for a deposit is a guarantee that the buyer shall perform his contract and is forfeited on his failure to do so and if a contract distinguishes between the deposit and instalments of price and the buyer is in default, the deposit is forfeited.

18. *Halsbury, in Laws of England, Vol. 34, 3 Edn., in para 189 at p. 118, dealing with deposit, states:*

"Part of the price may be payable as a deposit. Apart payment is to be distinguished from a deposit or earnest.

A deposit is paid primarily as security that the buyer will duly accept and pay for the goods, but, subject thereto, forms part of the price. Accordingly, if the buyer is unable or unwilling to accept and pay for the goods, the seller may repudiate the contract and retain the deposit."

Earl Jowitt, in his Dictionary of English Law says:

"Giving an earnest or earnest-money is a mode of signifying assent to a contract of sale or the like, by giving to the vendor a nominal sum (e.g., a shilling) as a token that the parties are in earnest or have made up their minds."

19. *In Hove v. Smith [LR (1884) Ch D 89] Fry, L.J., discussed the history of "earnest", which is identical with a deposit. In that case, the*

plaintiff agreed to purchase a property for the price mentioned in the agreement and paid £500 on the signing of the agreement "as a deposit and in part payment of the purchase-money". There were other stipulations in the agreement regarding title to the property and the payment of the balance of the purchase money. The plaintiff, apprehending that the defendant-vendor would re-sell the property, brought an action against him for specific performance of the agreement; but the suit was dismissed on the ground that there had been inordinate delay on the plaintiff's part in insisting on the completion of the contract. The plaintiff appealed. Before the Court of Appeal a request was made on his behalf for leave to amend the plaint that if specific performance could not be decreed, he should get a return of the deposit of £500. Leave was granted by the appellate court and the question hence arose as to whether the plaintiff was entitled to get a refund of the said amount. In dealing with the deposit claimed back by the plaintiff. Cotton, L.J., at p. 95, observes:

"What is the deposit? The deposit, as I understand it, and using the words of Lord Justice James (in LR 10 Ch 512), is a guarantee that the contract shall be performed. If the sale goes on, of course, not only in accordance with the words of the contract, but in accordance with the intention of the parties in making the contract, it goes in part payment of the purchase money for which it is deposited; but if on the default of the purchaser the contract goes off, that is to say, if he repudiates the contract, then, according to Lord Justice James, he can have no right to recover the deposit."

Bowen, L.J., at p. 98, states:

"We have therefore to consider what in ordinary parlance, and as used in an ordinary contract of sale, is the meaning which business persons would attach to the term 'deposit'. Without going at length into the history, or accepting all that has been said or will be said by the other members of the Court on that point, it comes shortly to this, that a deposit, if nothing more is said about it, is according to the ordinary interpretation of businessmen, a

security for the completion of the purchase. But in what sense is it a security for the completion of the purchase? It is quite certain that the purchaser cannot insist on abandoning his contract and yet recover the deposit, because that would be to enable him to take advantage of his own wrong."

Fry, L.J., at p. 101, observes:

"Money paid as a deposit must, I conceive, be paid on some terms implied or expressed. In this case no terms are expressed, and we must therefore inquire what terms are to be implied. The terms most naturally to be implied appear to me in the case of money paid on the signing of a contract to be that in the event of the contract being performed it shall be brought into account, but if the contract is not performed by the payer it shall remain the property of the payee. It is not merely a part payment, but is then also an earnest to bind the bargain so entered into, and creates by the fear of its forfeiture a motive in the payer to perform the rest of the contract."

Ultimately, the Court of Appeal rejected the claim of the plaintiff for refund of the deposit.

20. *In Soper v. Arnold [LR (1889) 13 AC 429] the House of Lords had to consider the right of the plaintiff therein to claim a refund of the deposit made by him. In that case the plaintiff had contracted to purchase a piece of land and entered into an agreement with the vendee. The agreement provided that the purchaser viz. the plaintiff, should make a deposit and it further provided that if the vendee failed to comply with the conditions, the deposit should be forfeited. The plaintiff, accordingly, paid the deposit but as he was not in a position to complete the contract by paying the balance purchase money, the contract could not be fulfilled. When in another litigation it was subsequently found that the vendor's title to the property was defective, the plaintiff brought an action to recover his deposit on the ground of mistake and failure of consideration. The suit was dismissed and the Court of Appeal also confirmed the said decision. The House of Lords also finally rejected the plaintiff's claim. In discussing the nature of the deposit made*

by the plaintiff under the agreement. Lord Macnaghten at p. 435 observes:

"The deposit serves two purposes — if the purchase is carried out it goes against the purchase-money — but its primary purpose is this, it is a guarantee that the purchaser means business; and if there is a case in which a deposit is rightly and properly forfeited it is, I think, when a man enters into a contract to buy real property without taking the trouble to consider whether he can pay for it or not."

... .."

"21. *From a review of the decisions cited above, the following principles emerge regarding "earnest":*

"(1) It must be given at the moment at which the contract is concluded.

(2) It represents a guarantee that the contract will be fulfilled or, in other words, 'earnest' is given to bind the contract.

(3) It is part of the purchase price when that transaction is carried out.

(4) It is forfeited when the transaction falls through by reason of the default or failure of the purchaser.

(5) Unless there is anything to the contrary in the terms of the contract, on default committed by the buyer, the seller is entitled to forfeit the earnest."

25. In view of the law laid down by the Hon'ble Supreme Court in the judgment referred to supra, the amount paid under Rule 9(3) of the Rules to the extent of 25% can be characterized as a deposit and payment over and above 25% is only a balance consideration.

26. In view of the above, any amount in excess of 25% would not constitute or retain the character of Deposit. Any payment beyond 25% would only be balance amount and cannot be considered as DEPOSIT.

27. On overall reading of sub-rule (3) (4) and (5), forfeiture of deposit contemplated under sub-rule (5) is only to the extent of deposit of 25% contemplated under sub-rule (3). Hence, any violation enabling the respondent

to forfeit is only to the extent of amount referred to in sub-rule (3) i.e. 25%.

28. The petitioner has made a payment of Rs.31,73,750/-. 25% of the total bid amount is Rs.21,73,750/-. Payment of Rs.10,00,000/- is in excess of 25% of the bid amount referred to in Rule 9 of the Rules. Sum of Rs.10,00,000/- cannot be considered as deposit under sub-rule (3) and (4) enabling the respondent to forfeit under sub-rule (5). The petitioner is entitled to refund of payment made in excess of 25 % of the total bid amount. Any retention of amount by the respondent without authority of law would amount to unjust enrichment. In the present case, the excess amount is Rs.10,00,000/-. Second question is answered accordingly.

29. In view of the aforesaid reasons and discussions, the petition succeeds in-part. Hence the following:

ORDER

- i) Writ Petition is **allowed in-part.**
- ii) Order/Letter of forfeiture dated 16.03.2022 at Annexure-H is unsustainable to the extent of Rs.10,00,000/-.
- iii) Respondent is directed to refund a sum of Rs.10,00,000/- along with applicable interest from the date of payment till refund, expeditiously not later than **eight** weeks from the date of receipt of copy of this order.

No order as to costs.

**Sd/-
JUDGE**