

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 16TH DAY OF OCTOBER, 2024



PRESENT

THE HON'BLE MR. N.V. ANJARIA, CHIEF JUSTICE

AND

THE HON'BLE MR. JUSTICE K V ARAVIND

WRIT APPEAL NO.349 OF 2024 (GM-RES)

BETWEEN:

1. CANARA BANK
ARM-1 BRANCH,
NO.86, SPENCER'S TOWER,
M.G. ROAD, BANGALORE – 560 001
REPRESENTED BY ITS SENIOR MANAGER,
MR.B. RAVIPRASAD

... APPELLANT

(BY SRI SHETTY VIGNESH SHIVARAM, ADVOCATE)

AND:

1. MR. SUBRAMANYA RAO K
S/O LATE K. NARAYANA RAO,
AGED ABOUT 58 YEARS,
JAYANTHI NAGARA,
2ND CROSS, NEAR TALUK OFFICE,
KARKALA – 574 104
UDUPI DISTRICT.
2. MRS. H.N. NAGARATHNA
W/O SUBRAMANYA RAO K,
AGED ABOUT 56 YEARS,
JAYANTHI NAGARA,
2ND CROSS, NEAR TALUK OFFICE,
KARKALA – 574 104
UDUPI DISTRICT.

... RESPONDENTS

(BY SRI ADITYA SONDHI, SENIOR ADVOCATE A/W
SRI A.S. RAVI KUMAR, ADVOCATE)

THIS WRIT APPEAL IS FILED UNDER SECTION 4 OF THE KARNATAKA HIGH COURT ACT, 1961, PRAYING TO ALLOW THE ABOVE WRIT APPEAL AND SET ASIDE THE ORDER DATED 12.01.2024 PASSED BY THE LEARNED SINGLE JUDGE OF THIS HON'BLE COURT IN WRIT PETITION No.3677/2022 AND ETC.

THIS WRIT APPEAL HAVING BEEN HEARD AND RESERVED FOR JUDGMENT, COMING ON FOR PRONOUNCEMENT THIS DAY, JUDGMENT WAS PRONOUNCED AS UNDER:

CORAM: HON'BLE THE CHIEF JUSTICE MR. JUSTICE
N.V. ANJARIA
and
HON'BLE MR. JUSTICE K.V. ARAVIND

C.A.V. JUDGMENT

(PER: HON'BLE THE CHIEF JUSTICE
MR. JUSTICE N.V. ANJARIA)

Heard learned Advocate Mr. Shetty Vignesh Shivaram for the appellant, learned Senior Advocate Mr. Aditya Sondhi with learned Advocate Mr. A.S. Ravikumar for respondent Nos.1 and 2 appearing on caveat, at length.

2. The appellant herein is the Canara Bank-original respondent No.1 in the writ petition filed by the respondents herein. The appellant-Bank has challenged the judgment and order dated 12th January 2024 passed by learned Single Judge.

2.1 Allowing the petition in part, a mandamus came to be issued to the respondent-appellant Bank to refund the amount of Rs.3.25 crores to the petitioner. It was directed to pay the interest on the

said amount if the Bank fails to provide the details of second auction and confirmation of sale in favour of the auction purchasers, to the petitioner.

3. The facts in the back drop may be noticed in a nutshell. The appellant Bank conducted e-auction on 29th November 2021 of the property described as No.19, 11th Cross, Wilson Garden, Bengaluru. The auction was conducted by the appellant Bank under the provisions of Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, seeking to recover the amount due. The petitioners participated and purchased the property as successful bidder paying Rs.3.25 crores which was 25% of the bid amount. The balance 75% amount to the extent of Rs.9.75 crores was to be paid within 15 days as per the condition of the bid towards final bid amount.

3.1 As the sale was confirmed in favour of the petitioners, they were intimated on 14th December 2021 to pay the said remainder amount. On 13th January 2022, a communication was sent by the petitioners seeking extension of 30 days to pay the amount. The Bank replied asking the petitioner to remit the balance amount on or before 28th January 2022. On the said date, the petitioners again sent a communication asking for further extension for 30

days. It was stated by the petitioners that they were in the process of securing the amount and the loan process was underway with the HDFC Bank. By way of reply of even date, the Bank intimated that if the amount is not paid by 10th February 2022, the sale in favour of the petitioners will be cancelled and the amount paid will be forfeited without further notice.

3.2 By filing writ petition on 10th February 2022, the petitioners prayed to direct the Bank to consider the aforementioned communication/ representation dated 28th January 2022 whereby further extension of time was prayed for. A further prayer was made to set aside the reply of the Bank dated 28th January 2022 aforementioned. The prayer was made to direct the respondent Bank to refund the amount of Rs.3.25 crores.

3.3 The case of the petitioners was *inter alia* that the respondent Bank was statutorily obliged under sub-rule (4) of Rule 9 of the Security Interest (Enforcement) Rules, 2002 (hereinafter referred to as "Rules of 2002") to extend the time upto three months, which was not considered by the Bank. It was the further case that as per the communication received by them from the Bank dated 14th December 2021, they were intimated that they had to pay an amount of Rs.3.10 crores within fifteen days. The petitioners when

visited the Bank, it is the case, the Bank did not respond properly nor did they disclosed anything about the proceedings under which the property in question was sold to SVC Credit Cooperative Bank.

3.4 By filing affidavit-in-reply, the case and the claim of the petitioners was contested by the bank to submit that the petitioners were supposed to pay the remaining auction price as per the terms of the sale. However, the petitioners went on to pray for extension of time which was even extended to the benefit of the petitioners. It was stated that in extending time, special consideration was bestowed upon the petitioners. Yet the petitioners failed to deposit the balance amount. It was stated that the respondent-bank proceeded with fresh sale of the property which was sold on 19th March 2022 in public auction for an amount of Rs.11.02 crores only and the bank was put to loss. It was also stated that the bank had to incur extra interest to the tune of Rs.25.13 crores. It was therefore contended that the petitioners having failed to adhere to the conditions of sale, cannot claim any right or equity in respect of the schedule property.

3.5 Learned Single Judge observed that the projected loss of Rs.1.98 crores by the Bank was not backed by any document.

Therefore, also the Bank was obliged to refund the amount to the respondents-petitioners. The following observations were made,

“...Therefore, in the cross fire between the borrower and the Bank who at all times have spoken for OTS and closed the loan, the petitioner is caught and his amount of `3.25 crores is forfeited by the Bank. It would have been an altogether different circumstance if the Bank had not spoken to the borrower and negotiated for OTS. The situation now is that the Bank has initiated OTS and closed the entire loan amount recording full and final settlement, on the borrower paying the entire loan amount. This is the admission in the statement of objections. But, what is projected now is loss of `1.98 crores by the Bank for putting up the property to second sale.

No document is produced by the Bank along with the objections to the application, except making averment that the Bank sold the property in the subsequent sale by issuing a sale notice on 02-03-2022 and the sale was held on 19-03-2022.”

3.5.1 The reasoning of learned Single Judge travelled further as under in paragraph 12,

“Therefore, when the documents produced by the petitioner demonstrate that the Bank has not registered confirmation of sale in favour of any auction purchaser, it cannot be said that the Bank has suffered any loss for it to forfeit the amount. What the Bank has done is keeping the petitioner in the dark, as also this Court, by not divulging any documents with regard to the second sale and confirmation of sale in favour of any subsequent auction purchaser. Therefore, it is construed that there is no such sale and if there is no such sale, it

is axiomatic that there is no loss caused to the Bank. The Bank then initiates OTS and closes the loan of the borrower. Therefore, according to the Bank all was well and ended well. It is only the petitioner who is now shown end of the stick by forfeiture in the circumstances. In the considered view of the Court, the Bank being a State under Article 12 of the Constitution of India, has conducted itself in a manner which does not behove its status. The petitioner thus becomes entitled to the refund of the amount deposited by him on the date of auction.”

4. Learned advocate for the appellant at the outset submitted that learned Single Judge ought not to have entertained the writ petition in exercise of powers under Article 226 of the Constitution and that the remedy was before the Debt Recovery Tribunal. In this regard, reliance was placed on the judgment of the Supreme Court in **Agarwal Tracom Pvt. Ltd. v. Punjab National Bank and others [(2018) 1 SCC 626]**. It was held that in view of Section 17(2) of Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 and Rule 9(5) of the Security Interest (Enforcement) Rules, 2002 an action of secured creditor in forfeiting the deposit made by the auction purchaser is a part of measures taken by the secured creditor under Section 13(4) of the Act. The auction purchaser, it was held, would fall within the expression ‘person’ specified under Section 17(1) of the Act.

4.1 It was therefore submitted that learned Single Judge failed to appreciate that the extraordinary writ jurisdiction under Article 226 of the Constitution could not have been exercised by learned Single Judge. It was submitted that the decisions are consistent that the High Courts would normally not entertain the writ petition in the matters of SARFAESI action by the Bank. Inasmuch as the alternate remedy is provided under Sections 17 and 18 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 of filing an appeal to the Debts Recovery Tribunal.

4.1.1 Learned advocate for the appellant assailed the judgment and order of learned Single Judge to submit that since the respondents-petitioners failed to pay the balance of bid amount, the Bank had to proceed with fresh sale of the property which was held on 19.03.2022 in public auction for an amount of Rs.11.02 crores which resulted in loss of Rs.1.98 crores to the Bank. It was submitted that serious loss was caused in respect of recovery of dues of the Bank as in the account, the total dues were approximately Rs.259 crores.

4.1.2 It was further submitted that under Rule 9(4) of the Rules of 2002, the balance of purchase price was required to be paid by the

purchaser to the authorised 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 parties. Rule 9(5) of the Rules, 2002 contemplated forfeiture of the earnest deposit, it was highlighted.

4.2 Learned Senior Advocate Mr. Aditya Sondhi for the respondents-original petitioners, on the other hand, highlighted the facts and circumstances of the case while reiterating the grounds raised before learned Single Judge to submit that the Bank was under statutory obligation in view of Rule 9(4) of the Rules, 2002 to extend the time up to three months.

4.2.1 It was next submitted that the petitioners received communication that an amount of Rs.3,10,00,000/- was required to be paid within fifteen days from 14.12.2021. However, no clarification or details were given in relation to the said communication and nothing further was disclosed, it was stressed.

4.2.2 Learned Senior Advocate for the respondents-originals petitioners relied on the judgment of this High Court in **P.Balaji Babu Vs. State Bank of India [(2022) 3 Kar. L.J. 535]**. In that case, it was submitted, the petitioner bidder sought for direction for

refund of sum of Rs.24.10 lakhs deposited by him towards bid amount which was forfeited by respondent No.1-Bank. It was held by the Court that that there was a suppression of material fact by the Bank in the sale notification that the borrower was not having title over the mortgaged property, which was owned by his wife. Further more, the loan amount was ultimately settled to the full satisfaction of the Bank by receiving the payment favouring the account of the borrower by third party. The contention of the Bank that it had suffered loss was not found sustainable and that the refund of the amount was directed.

4.2.3 Another decision of **S.L. Ispat Private limited and another Vs. Punjab National Bank, (2023 SCC OnLine Cal 33)** as well as the decision of Andhra Pradesh High Court in **Syed Hidayathulla Vs. Authorised Officer, Canara Bank, (2023 SCC OnLine AP 1048)** were pressed into service to highlight that in those cases also, the High Courts directed refund of the amount interpreting Rule 9(5) in the context of operative facts.

4.2.4 Learned Senior Advocate for the respondents relied on decision of the Supreme Court in **Alisha Khan Vs. Indian Bank (Allahabad Bank) and others (2021 SCC OnLine SC 3340)** to press his submissions. In that case, the Supreme Court opined that

High Court ought to have allowed the refund of 25% of the amount deposited by the auction purchaser towards sale consideration, subsequently, the auction purchaser could not deposit balance 75% due to COVID-19 pandemic. Therefore, auction was conducted in that case and the property was sold and further, it was not the case of the Bank that in the subsequent sale, lesser amount was received and no loss was caused to the Bank.

4.2.5 Learned Senior Advocate submitted that in Section 13(2) of the Act, 2002, “the word liable mean that once the Bank accepted one time settlement from the other party, the liability is discharged and there is nothing to be recovered towards that”. Therefore, the petitioners were entitled to the refund of Rs.3.25 crores towards the earnest money by him and the operation of Rule 9(5) of the Rules, 2002 would not become impediment for refund.

5. The question of entitlement of the petitioners for refund of the earnest money deposit of Rs.3.25 crores was required to be addressed in light of operative nature of Rule 9 of the Rules, 2002.

5.1 Rule 9 deals with time of sale, issue of sale certificate and delivery of possession etc. Rule is reproduced herein,

“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] [Inserted by Notification No. G.S.R. 1046 (E), dated 3.11.2016 (w.e.f. 20.9.2002).] 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.

(8) On such deposit of money for discharge of the encumbrances, the authorized officer 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.”

5.2 The Rule contemplates that no sale of immovable property shall take place after expiry of thirty days and it shall be by way of auction. As per sub-Rule 3 upon sale of immovable property, the purchaser shall on the same day or not later than next working day, deposit of 25% amount towards sale price would be earnest money deposit. The balance amount as per sub-Rule 4 still have to be paid within fifteen days from the confirmation of sale or within extended time which shall not be extended within three months. As per sub-Rule 5, the default in payment of the balance amount as contemplated in Rule (5) shall result in forfeiture of security deposit and the property shall be liable to be resold and the defaulting purchaser shall forfeiture all claim to the property.

5.3 The mandatory character of Rule 9(5) of the Rules, 2002 was highlighted in **Agarwal Tracom Pvt. Ltd.** (*supra*) to observe that Rule 9(5) confers express power on the secured creditor, to forfeit the deposit made by the auction purchaser in case the

auction purchaser commits any default in paying the instalment of sale money to the secured creditor,

“We also notice that Rule 9(5) confers express power on the secured creditor to forfeit the deposit made by the auction-purchaser in case the auction-purchaser commits any default in paying instalment of sale money to the secured creditor.”

(para 28)

5.4 Adverting to merits of impugned judgment, learned Single Judge noticed to observe certain developments which took place during the pendency of the writ petition about which, stated learned Single Judge, the petitioner was kept in dark. The second sale took place about which the petitioners knew upon on filing the application under Right to Information Act and that the property was sold for a lesser price than the amount offered in the bid by the petitioners.

5.5 Now, the recent judgment in Supreme Court in **Authorised Officer, Central Bank of India v. Shanmugavelu [(2024) 6 SCC 641]** leaves no room of doubt about the mandatory application of Rule 9(5) of 2002 Rules. The Supreme Court clarified the law on the applicability of the Rule in extenso, to set aside the judgment of the High Court which directed refund of the earnest money amount.

5.5.1 The facts in **Shanmugavelu (supra)** were akin to one involved here. Respondent Shanmugavelu having fared successful in the auction, paid 25% bid amount of Rs.3,06,75,000/- as earnest money deposit upon which the appellant Bank confirmed the sale of the secured assets in his favour stipulating that non-payment of the balance amount would lead to cancellation of sale. Respondent by email dated 19th December 2016 requested for extension of time of three months to pay the balance amount on the ground that its term loan was still under process. The request was acceded to by the bank and three months time was granted till 7th March 2017 under Rule 9(4) of the Rules. The respondent was unable to pay and wanted further extension of fifteen days, which was turned down, the sale was cancelled and the security deposit amount was forfeited by the Bank.

5.5.2 The High Court held that Rule 9(5) of the Rules should yield to the principles of Section 73 of the Indian Contract Act, 1872. A further view was taken by the High Court that the forfeiture of the amount of deposit by secured creditor under the SARFAESI Act cannot be more than the loss or damage suffered by it and that Rule 9(5) cannot override the ethos of Section 73 of the Contract Act.

5.5.3 The Supreme Court held that Rule 9(5) cannot be regarded as penal provision, therefore provisions of Section 73 and 74 of the Contract Act will have no application to forfeiture of earnest money deposit of the successful auction purchaser for its failure in depositing the balance consideration within statutory period. The consequence of forfeiture, it was held, was on account of operation of statutory provision.

5.5.4 The Supreme Court held,

“Legislature through Rule 9(5) of the 2002 Rules, has made a conscious departure from the general law by statutorily providing for the forfeiture of earnest money deposit of the successful auction-purchaser for its failure in depositing the balance consideration within the statutory period. No doubt, the forfeiture is a result of a breach of obligation, but the consequence of forfeiture in such case is taking place not because of the breach but because of operation of the statutory provision providing for forfeiture that is attracted as a result of the breach.”

(paras 60 to 63)

5.5.5 It was held that the legislative consciously provided for only one consequence in the event of failure of auction purchaser in depositing the balance amount, that is forfeiture and any other stipulation is not imposed in the event of breach. It was observed that this was in light of the larger object of the SARFAESI Act, which is to facilitate the recovery of debt in a time bound manner.

5.5.6 Holding that provisions of Contract Act would not be brought into play to negate the mandatory effect of forfeiture of earnest money deposit under the Rule, it was observed,

“If Sections 73 and 74, respectively of the Contract Act are interpreted so as to be made applicable to a breach in payment of balance amount by the successful auction-purchaser, it would lead to a chilling effect in the following ways: First, it would be quite preposterous to suggest that in an auction which is a process meant for recovery of debt due to default of the borrower, the balance amount if not paid by the successful auction-purchaser, another recovery proceeding would have to be initiated by the secured creditor in terms of Sections 73 and 74 of the Contract Act to recoup the loss and expenditure occasioned to it by the defaulting successful auction-purchaser. Secondly, such an interpretation would allow unscrupulous borrowers being hands-in glove with the auction-purchasers to use subversive methods to participate in an auction only to not pay the balance amount at the very end and escape relatively unscathed under the guise of Sections 73 and 74 of the Contract Act, thereby gaming the entire auction process and leaving any possibility of recoveries under the SARFAESI Act at naught.”

(para 65)

5.5.7 The Supreme Court negated the contention of the auction purchaser that the Authorized Officer under Rule 9(5) of the Rules was conferred with unguided powers, stating that the SARFAESI Act is a special legislation with an overriding effect over general law and that forfeiture of earnest money deposit is statutorily provided

as a consequence of failure of the auction purchaser to deposit the balance amount.

5.5.8 It was emphasized that the forfeiture was not penal and that there is difference between the forfeiture of any amount and the forfeiture of earnest money,

“Whether a forfeiture clause is penal in nature must be decided in the specific setting of a statute. Since Rule 9 sub-rule (5) of the 2002 Rules provides for the forfeiture of only the earnest money deposit of the successful auction-purchaser i.e. only 25% of the total amount, by no stretch of imagination can it be regarded as a penal clause and as such Sections 73 and 74 of the Contract Act will have no application.”

(Paras 72 and 80)

5.6 The above dictum of law has been plainly disregarded by learned Single Judge in allowing the petition and directing the refund of the earnest money to the respondent-petitioner.

6. In view of the decision in **Shanmugavelu (Supra)** which is latest in point of time, all the earlier decisions referred to by learned Single Judge or relied on by learned advocate could be said to have denuded of its legal efficacy. What is laid down no more hold good when in **Shanmugavelu (Supra)**, the Supreme Court in terms held that the operation of Rule 9(5) regarding forfeiture of

security deposit has a mandatory effect. The security deposit is liable to be forfeited once the bidder fails to make good the balance of the bided price within stipulated time. The forfeiture of security deposit amount is a statutory consequence.

6.1 In light of the law laid down by the Supreme Court in **Shanmugavelu (supra)**, there is no escape from the position of law that Rule 9(5) of the Rules, 2002 providing for forfeiture of the earnest money has mandatory application once the auction purchaser is unable to pay the balance amount of sale consideration within statutory time limit contemplated for the purpose. The Rule 9(5) has the compulsory consequence of forfeiture of the earnest money in the event of commission of default by the auction purchaser in paying the balance amount.

6.2 In the facts of the case, no special circumstance exists which would justify the demand for return of earnest money by the petitioner. There is no unjust enrichment on the part of the Bank. When the petitioner-bidder failed to deposit the balance amount within the statutory period despite having been granted extension, the forfeiture of his earnest money deposit was a statutory consequence.

7. In light of above discussion and reasons, Judgment and Order of learned Single Judge dated 12th January 2024 cannot sustain in eye of law. The same is hereby set aside. The present appeal is allowed.

**Sd/-
(N.V. ANJARIA)
CHIEF JUSTICE**

**Sd/-
(K.V. ARAVIND)
JUDGE**

KPS