

**IN THE HIGH COURT AT CALCUTTA
CIVIL REVISIONAL JURISDICTION
APPELLATE SIDE**

PRESENT:

THE HON'BLE JUSTICE AJOY KUMAR MUKHERJEE

**C.O. 3067 of 2019
NRSKL Health Care Private Limited
Vs.
The authorized Officer, State Bank of India & anr.**

For the petitioner : Mr. Radhashyam Tewary

For the Respondent Bank : Mr. Shiv Mangal Singh
Ms. Jahan Ara Keelsum
Ms. Moriam Sanfei

Heard on : 20.09.2023

Judgment on : 21.12.2023

Ajoy Kumar Mukherjee, J.

1. Being aggrieved and dissatisfied with the order dated August 08, 2019 passed by the Debts Recovery Appellate Tribunal, Kolkata (in short DRAT) in appeal no. 140 of 2018 arising out of SA no 137 of 2018, present application has been preferred under Article 227 of the Constitution of India.

2. Petitioners case in brief is that the opposite party no. 1 herein had issued an e-auction sale notice dated September, 20, 2017 for sale of a commercial space comprising of an area of 6040 square feet. Pursuant to said e-action sale notice, the petitioner herein expressed his interest to participate in e-auction sale to be held on October 10, 2017 and he also

deposited money in terms of sale notice. Upon inspection of the certified copy of the title deed, it was found by the petitioner that the certified copy does not have proper endorsement. The petitioner by a letter dated October 06, 2017 informed the opposite party that the petitioner is not satisfied with the title documents and intends to withdraw from the earnest money deposit (E.M.D.). A meeting was held with the authorized officer of the opposite party no. 2/ Bank and it was assured that necessary steps would be taken for making necessary endorsement on the certified copy of the title deed. Pursuant to such assurance the petitioner by its letter dated October, 9 2017 agreed to participate on e-auction on the basis of assurances given by the opposite party that the opposite party would get the defects rectified.

3. The petitioner participated e auction held on October 10, 2017 and was adjudged as highest bidder for a value of Rs. 5.76 crores which was informed by the opposite party no.1 by its letter dated 10th October, 2017. The petitioner on the assurance of the opposite party no. 1 had deposited 25% of the bid amount on October 18, 2017. The petitioner paid a total sum of Rs. 1crore 44 lakhs to the opposite party on the assurance that the opposite party would take steps to get the certified copy of the title deed duly endorsed from the Registrar of Assurance, recording that the original title deed was destroyed by fire.

4. The petitioner contended that he requested the opposite party to expedite and takes steps for making necessary endorsement on the certified copy and it is alleged that on that ground petitioner requested for extension of time to pay the balance amount. The respondent bank extended the time

to deposit the balance consideration till December, 28 2017. The opposite party bank by its letter dated 15th September, 2017 and December 20, 2017 called upon the petitioner to make payment of the balance consideration. The opposite party no. 1 by its letter dated December, 20, 2017 had forwarded copy of the letter dated December 16, 2017 to the Registrar of the Assurance requesting for the endorsement on the certified copy.

5. The petitioner thereafter by a letter dated December, 26, 2017 replied to the letter dated December, 15 2017 and in the said letter the petitioner had alleged that the opposite party has violated the undertaking given by them prior to participating in the e-auction and the necessary endorsement ought to be made on the certified copy of the title deed stating that the original title deed was destroyed by fire.

6. The petitioner thereafter filed a writ petition being WP No. 471 of 2017 before this High Court but the said writ petition was dismissed on the ground that alternative remedy is available to the petitioner. Thereafter on May 13, 2018 the opposite party no. 1 had issued another e-auction sale notice in respect of the same subject property and consequent to the issuance of the said sale notice dated May 13, 2018, the sale of the said property was confirmed and a sale certificate was issued in favour of one Radder Vision Limited and a sale deed was executed in their favour.

7. Thereafter the petitioner filed an application under section 17 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (in short SARFAESI Act 2002) being SA no. 137 of 2018 before the learned Debts Recovery Tribunal (in short DRT). The

learned Debts Recovery Tribunal by an order dated June, 25, 2018 had dismissed the petitioner's application under section 17 of the SARFAESI Act 2002. Being aggrieved by that order petitioner preferred appeal before the learned DRAT, Kolkata but the said appeal was also dismissed by the impugned order by the learned DRAT on August 8 2018.

8. Mr. Tiwary learned counsel appearing on behalf of the petitioner submits that the petitioner had agreed to participate only on the assurance of the opposite party/Bank that the certified copy of the title deed would be necessarily endorsed by the Registrar of Assurance endorsing that the original title deed was destroyed by fire, as without the necessary endorsement the mortgage could not have been created in favour of the opposite party/Bank and no step on behalf of bank could have been taken in the absence of valid mortgage. Mr. Tiwari strenuously argued that a mortgage cannot be created by deposit of certified copy of the title deed unless it is being endorsed by the registering authority that the original is lost or destroyed. There is a defect in the title deed and the mortgage by deposit of title deed cannot be created without such endorsement and said contentions of the petitioner was accepted by the bank as would be evident from their letter dated December, 16 2017, written by opposite party no.1 to the Registrar of Assurance for endorsing the same. According to the petitioner when the e-auction sale notice was issued, no mortgage was created in favour of the opposite parties which would entitle them to take steps under the SARFAESI Act, 2002 and since there was no valid mortgage, the Bank could not have taken steps to sell the property under the Act and

therefore the entire steps of selling of the property under the Act is bad. In this context petitioner placed reliance upon judgment in ***K.J. Nathan Vs. S.V. Maruthi Rao & other*** reported in **AIR 1965 SC 430**.

9. Petitioner further contended that as there was no creation of valid mortgage under section 58 F of Transfer of Property Act, the question of forfeiture of 25% of the sale proceeds does not and cannot arise under the Act and the question of invoking SARFAESI Act or Rules does not and cannot arise. Mr. Tiwary further contended that the intention of the petitioner was always to purchase the said property and upon assurance of the opposite party he had deposited 25% of the bid amount which is Rs. 1.44 crores. But said fact was never considered either by learned Debts Recovery Tribunal or by the Appellate Tribunal. In fact learned DRAT has misconstrued the proposition laid down by the Apex Court in the case of the ***Kailash Nath Associates Vs. Delhi Development Authority and another*** reported in **(2015) 4 SCC 136**. According to petitioner the court below did not record the arguments of the petitioner and as such the order impugned is perverse.

10. The other limb of arguments advanced on behalf of Mr. Tiwari is that the petitioner has deposited an amount of Rs. 1.44 crores and the opposite party/ Bank has violated the provisions of Section 73 and 74 of The Indian Contract Act, 1872. The opposite party/ bank has not suffered any damage, for the petitioner not proceeding with the sale, after depositing 25% of the bid amount, because the bank has subsequently sold the said property to the aforesaid Radder Vision Limited for a sum of Rs. 5.12 crores. The

forfeiture of earnest money is in the nature of penalty and as such cannot be accepted. In the present case the opposite party bank has forfeited the entire amount, deposited without sustaining any loss. He further contended that the basic principle on which the forfeiture would lie is upon the quantum of damages suffered by the opposite parties and such quantum has to be assessed with reference to any loss, which has actually taken place. In the instant case as the opposite parties have sold the said property, and as such they have not sustained loss nor the opposite parties have assessed any loss that they have suffered. Petitioners in support of their contention relied upon:-

(a) (2015) 4 SCC 136, (MBL Infrastructure Limited Vs. Rities Limited and others).

(b) AIR 2020 Cal 155, (Kailash Nath Associates Vs. Delhi Development Authority and another).

(c) AIR 1965 SC 430 (K.J. Nathan Vs. S.V. Maruthi Rao & other).

(d) (2006) 1 SCC 697 (R. Janakiraman Vs. State).

11. Mr. Singh learned counsel appeared on behalf of the opposite party submits that the petitioner being a mere participant in the e-auction process, has no locus standi to challenge the mortgage after being default in payment of 75% of the bid amount. In fact the alleged grievance of the petitioner hit by the principles of doctrine of Caveat Emptor. The e auction sale notice dated 20.09.2017 was issued by the opposite parties in terms of

the relevant provisions and Rules of the SARFAESI Act, 2002. The forfeiture of EMD done by the Bank is mandatory in terms of Rule 9 (5) of the Security Interest (Enforcement) Rules 2002.

12. Mr. Singh further submitted that the prayer of the petitioner before this High Court is contrary to the prayers made by the petitioner before both the Tribunals below. Before the Tribunals below, petitioner never challenged the legality or validity of the mortgage and as such the petitioner is legally debarred from challenging the legality and validity of the mortgage for the first time before this court. The materials on record of the instant application revealed that the petitioner prior to participate in the e auction sale notice dated 20.09.2017 with the schedule date of the e-auction fixed on 10.10.2017, had carefully perused the contents of aforesaid e-auction sale notice and on being fully satisfied about the contents and terms and conditions of the same, had voluntarily made a declaration on 04.10.2017, whereby it unconditionally agreed to abide and bound by the terms and conditions of the aforesaid e-auction sale notice dated 20.09.2017. After admitted default being made in payment of balance 75% of the bid amount within stipulated time-frame and extended date, forfeiture was made in terms of the provisions of Rule 9 (4) of the Security Interest (Enforcement) Rules 2002. The petitioner herein is legally debarred from disputing the forfeiture of 25% of the earnest money deposit by the opposite parties in accordance with the provisions 9 (4) and 9 (5) of the Rules of 2002 which is mandatory in nature. Furthermore the e-auction notice was issued in terms of the provisions and Rules of the SARFAESI Act 2002 on various terms and

conditions as stipulated in the e-auction sale notice dated 20.09.2017, which terms and conditions has been duly accepted by the petitioner unconditionally which is evident from the letter of declaration dated 04.10.2017.

13. It is specific case of the opposite party that the petitioner voluntarily participated in the bid process after being well aware about the terms and conditions of e-auction sale notice dated 20.09.2017 and the relevant provisions of SARFAESI Act, 2002. Since the petitioner has failed to deposit the entire bid amount within the statutory period as prescribed in rule 9 (4) and 9(5) of the Security Interest (Enforcement) Rules 2002, the bank has rightly forfeited 25% of the earnest money deposit in terms of Rule 9(5) of the Rules of 2002 which cannot be the subject matter of challenge in this application. Petitioner further contended that the judgment relied by the opposite parties is not applicable in the present context as much as said judgments were not on similar facts and circumstances as the issue and facts regarding the issuance of the e auction notice and forfeiture of earnest money deposit in those cases were not guided and conducted by the authorities in terms of Rules of the Act of 2002. Accordingly the opposite parties have contended that the concurrent finding of both the Tribunals below do not call for any interference, exercising supervisory jurisdiction and accordingly prayed for dismissal of the instant application.

DECISION WITH REASONS

14. Admittedly the petitioner has voluntarily participated in the e-auction sale in respect of the immovable property in question, being the secured asset of the bank, conducted by the Bank/opposite parties, thereby issuing e-auction sale notice on 20.09.2017 and published the same in the newspaper on certain terms and condition as mentioned in the aforesaid notice for sale of immovable property in question.

15. In the said e-auction notice under the column description of property it has been clearly mentioned that

“original title deed of the property bearing no. I-1392 dated 12.03.1979 was destroyed by fire and valid equitable mortgage was created with certified copy of deed after completion of necessary formalities and paper publication etc.”

16. Be it also mentioned that said E-Auction notice dated 20.09.2017 also contains terms and conditions. Some of the relevant conditions may be reproduced below.

1) E-Auction is being held on “AS IS WHERE IS BASIS” and “AS IS WHAT IS BASIS” and will be conducted “On Line”. The auction will be conducted through the Bank’s approved service provider M/S ANTARES SYSTEMS LIMITED at the web portal (<https://www.tenderwizard.com/SBIEAUCTIONS>). E-Auction tender document containing online e-auction bid form, Declaration, General Terms and Conditions of online auction sale are available in websites (<http://www.tenderwizard.com/SBIEAUCTIONS>).

2) To the best of knowledge and information of the Authorised Officer, there is no encumbrance on the property/ies. However, the intending bidders should make their own independent inquiries regarding the encumbrances, title of property/ies put on auction and claims/rights/dues/affecting the property, prior to submitting their bid. The e-Auction advertisement does not constitute and will not be deemed to constitute any commitment or any representation of the bank. The property is being sold with all the existing and future encumbrances whether known or unknown to the bank. The Authorised Officer/ Secured Creditor shall not be responsible in any way for any third party claims/rights/dues.

7) It shall be the responsibility of the interested bidders to inspect and satisfy themselves about the property before submission of the bid.

9) *The Earnest Money Deposit (EMD) of the successful bidder shall be retained towards part sale consideration and the EMD of unsuccessful bidders shall be refunded. The Earnest Money Deposit shall not bear any interest. The successful bidder shall have to deposit 25% of the sale price, on the day of E-Auction acceptance of bid price by the Authorised Officer and the balance of the sale price on or before 15th day of sale or within such extended period as agreed upon in writing and solely at the discretion of the Authorised Officer. Default in deposit of amount by the successful bidder would entail forfeiture of the whole money, already deposited and property shall be put to re-auction and the defaulting bidder shall have no claim/right in respect of property/ amount.*

14) *The sale shall be subject to rules/conditions prescribed under the Securitisation and Reconstruction of Financial Assets and enforcement of Security Interest Act. 2002.*

15) *This publication is also a 15 days' notice to all borrower/guarantors required under Rule 9(1) /8(6) /6(2) of Security Interest Enforcement Rules 2002.*

17. The petitioner prior to participate in the aforesaid E-Auction sale on the schedule date of E-Auction on 10.10.2017 after perusing the contents of the said notice and on being satisfied about the contents of terms and condition of the said notice had voluntarily made a declaration on 4.10.2017 with the opposite parties and thereby unconditionally agreed to abide by and therefore bound by the terms and condition of the aforesaid E-Auction sale notice.

18. In the said declaration date 4.9.2017 petitioner made certain averments and the relevant averments may be reproduced below

1) *I/We, the bidder/s do hereby state that, I/We have read the entire terms and conditions of the sale and have understood them fully. I/We, hereby unconditionally agree to abide with and to be bound by the said terms and conditions and agree to take part in the Online Auction.*

2) *I/We understand that in the event of me/us being declared as successful bidder by the Authorised Officer in his sole discretion, I/We are unconditionally bound to comply with the Terms and Conditions of Sale. I/we also agree that if my/our bid for purchase of the asset/s is accepted by the Authorised Officer and thereafter if I/We fail to comply or act upon the terms and conditions of the sale or am/are not able to complete the transaction within the time limit specified for any reason. Whatsoever and/or fail to fulfil any/all of the terms and conditions, the EMD and any other amounts paid by me/us along with the bid and thereafter, is/are liable to be forfeited by the Authorised Officer.*

3) I/e also agree that in the eventually of forfeiture of the amount by Authorised Office defaulting bidder shall neither have claim on the property nor on any part of the sum for which may be subsequently sold.

19. The petitioner after participated in the aforesaid e-auction became the highest bidder in respect of the property described in the notice and the opposite parties herein had issued letter of sale conformation on 10.10.2017 in favour of the petitioner with the request to deposit/remit the balance amount of bid within stipulated time as mentioned in the said letter with further caution regarding forfeiture clause.

20. Accordingly the petitioner deposited 25% of the bid amount and made a request to the opposite party vide its latter dated 23.10.2017 for extension of time for making payment of the balance bid amount. The opposite parties herein extended time to deposit the residual amount of Rs. 4,26,24,000/ by the petitioner till 28.12.2017 and in the said latter it has been specifically mentioned that in case of failure in depositing the said amount within 28.12.2017, the sale of the property will be cancelled and the earnest money deposited (EMD) amount will be forfeited as per the terms and condition of e-auction with further caution that no extra time will be granted. On 15.12.2017 the opposite parties wrote a letter to the petitioner once again asking the petitioner to deposit the said amount within the said date. On 20.12.2017, the opposite parties again wrote a letter to the petitioner and in all those letters specific request was made to the petitioner for deposit of said money and it was cautioned that in case of failure to deposit of money, the sale of the property will be cancelled and amount paid will be forfeited as per terms of the e-auction. Opposite party's

case is inspite of receipt of repeated reminders, the petitioner had failed and neglected to deposit the aforesaid 75% balance bid amount within the extended period of 28.12.2017 and as such the opposite parties cancelled the aforesaid e-auction sale held on 10.10.2017, in respect of the immovable property in question and forfeited said amount of Rs. 1,64,00000/-in terms of the provisions of Rule 9 (4) & 9 (5) of the Security Interest (Enforcement) Rules 2002. After cancelling said e-auction sale dated 10.10.2017, the opposite parties issued fresh e-auction sale notice on 13.05.2018.

21. Petitioners herein challenged the aforesaid fresh e-auction sale notice dated 13.05.2018 before learned DRT-1 Kolkata being SA No. 137 of 2018 under section 17(1) of the SARFAESI Act 2002.

22. In the meantime the property in question was sold to one Radder Vision Limited and after the receipt of entire sale consideration, the opposite parties had issued certificate of sale on 14.06.2018 in favour of aforesaid Radder Vision Limited. While disposing aforesaid SA 137 of 2018 DRT held as follows:-

“on detailed hearing it is evident that the Applicant is very much aware that the original title deed of the auction sale property was destroyed by the fire and thereafter a valid equitable mortgage is created with certified copy of the Deed and the Defendant bank has followed the due procedure by completion of necessary formalities and the Applicant was given several opportunities by the Defendant Bank as he was the successful bidder in the e-auction held on 10.10.2017 and upon remitting the EMD of Rs. 51,00,000/- and the Defendant Bank has also extended further time for making the remittance of the balance payment amount of Rs. 4,32,00,000/- further dt. 28.12.2017 the Applicant has failed to comply the said condition and has been agitating repeatedly without making the balance payment within the extended time granted by the Defendant bank.

The Defendant Bank has no other alternative except to go for fresh sale after forfeiting the Applicant's bid as per the auction norms. Therefore the Applicants have failed to adhere to the conditions of the auction sale norms, inspite of availing several opportunities. This application is devoid of merits and the Applicant does not deserve any reliefs and the amounts paid have already

been forfeited and the sale has been cancelled and the EMD amount has been forfeited, as per the terms and conditions of the e-auction. It is also submitted by the Ld. Counsel for the respondent Bank that Certificate of sale dated 14-6-2018 in respect of the scheduled property is already issued to the auction purchaser, who is the highest bidder after receipt of the entire sale proceeds.

The Defendant bank is at liberty to proceed further with the fresh sale taken place on 29.05.2018. Accordingly the IA No. 1081 & 1082/18 and SA 137 of 2018 are disposed off.”

23. The aforesaid judgment and order dated 25.06.2018 passed by the DRT-1 Kolkata in SA No. 137 of 2018 was challenged by the petitioner herein before the learned DRAT Kolkata being Appeal No. 140 of 2018, under section 18(1) of SARFAESI Act 2002.

24. While disposing said appeal learned Appellate Tribunal held that it is apparent that the original documents of the property in question were destroyed in fire and the equitable mortgage was created in favour of the bank on the basis of certified copy which has been clearly mentioned in auction sale notice dated 20.09.2017, confirmation letter dated 10.10.2017 and in the letter of extensions dated 23.10.2017 issued by the bank. He further observed that having knowledge of the said fact the petitioner gave undertaking to the effect that he was unconditionally bound to comply with the terms and condition of the sale and as such it cannot be said that the bank had concealed any fact or misrepresented the parties. It was further observed that there is no evidence on record in support of the contents of the letter dated 09.10.2017 of the appellant to infer that any of the bank officers had assured the appellant for making any endorsement on the title deed of the property and mere writing a letter to the Registrar is not sufficient to infer that the bank has agreed to get such endorsement done on the certified copy. The Appellate Tribunal ultimately concluded by saying

“The Appellant has not deposited the amount till 28.12.2017 thus failed to comply with the terms and conditions of the e-auction and hence the Bank has rightly forfeited the amount deposited by the Appellant and put the property for fresh auction. The Hon’ble Madras High Court has held in CA Nos. 1953 to 1956 of 2008 in CA No. 1983 of 2007 in CP No. 526 of 2000 decided on 13.04.2009 that ‘the purchaser at auction sale takes the property subject to all the defects of title and the doctrine of caveat emptor applies to such purchaser’ and also that ‘if the property is sold on ‘as is where is and whatever there is basis’ the auction purchaser having got sufficient time to investigate the title ought to have been more vigilant while participating in the auction’. The principle laid down in this judgment is applicable in the facts and circumstances of this case. I respectfully agree with the proposition laid down by the Hon’ble Supreme Court in Kailash Nath Associates Vs. Delhi Development Authority and Another case but it does not render any assistance to the Appellant as the same is distinguishable on the facts. The Appellant had breached the terms and conditions of the auction sale notice which is a valid ground for forfeiture of deposited amount.”

25. Mr. Tewary learned counsel appearing on behalf of the petitioner strenuously argued challenging legality and validity of the aforesaid equitable mortgage contending that equitable mortgage cannot be created on the basis of certified copy of the deed. It is evident from the reliefs claimed by the petitioner herein in the SARFAESI Application being SA 137 of 2018 that the petitioner had not challenged the legality and validity of the mortgage rather in their prayer they have prayed for necessary direction upon the bank for sale of the immovable property in question in favour of the petitioner thereby to set aside the subsequent e-auction sale notice dated 13.05.2018. Even before the learned DRAT the petitioner had not challenged the legality and validity of the mortgage in the prayer portion of the appeal but the petitioner prayed for necessary direction upon the bank for the sale of the immovable property in question in favour of the petitioner thereby to set aside subsequent sale notice dated 13.05.2018 and the auction dated 29.05.2018. On the contrary learned DRAT while disposing appeal no.

140 of 2018 held in para 7 of the judgment that there is no dispute about validity of the mortgage in favour of the bank.

26. In such view of the matter and when mortgagor never questioned about legality of mortgage, petitioner hardly has any scope to raise such issue before this court exercising jurisdiction under Article 227 of the constitution of India. Learned counsel appearing on behalf of the opposite parties in this context contended that valid mortgage can also be created by depositing certified copy of deed when it is not in dispute and it is known to the parties that the original deed is destroyed by fire. In this context reliance has also been placed in the judgment reported in **AIR 1990 Kerala 157 (C. Assiamma Vs. SBI Mysore and others)**, **AIR 2007 Madras 34 (M/s. Ride Master Rims pvt. ltd. Vs. I.N.G. Vysya Bank Limited, Chennai)** judgments of Andhra Pradesh High Court passed in **Civil Revision petition no. 6022 of 2018** dated 07.08.2018 (**G. Balamani and other Vs. Parimi Manga Devi**). Accordingly the findings made by the court below in this context cannot be said to be perverse so that the interference of this court can arise exercising jurisdiction under Article 227 of the Constitution of India.

27. Mr. Tewary learned counsel appearing on behalf of the petitioner in the context of forfeiture of the earnest money deposited has heavily relied upon a Divisions Bench judgment of this court reported in **AIR 2020 Cal 155 (MBL Infrastructure Vs. Rities limited and others)** wherein referring the judgment in **Kailash Nath Associates Vs. Delhi Development Authority and another (supra)** the Division Bench held

that if the subsequent auction had fetched a lower price the previous highest bidder could have been proceeded against for the difference as that would have been the quantum of damages suffered as a consequence of the previous bidder failing to honour its bid. Accordingly present case should also be dealt with following the guideline laid down by the Division Bench of this Court.

28. In the present context parties agreed that in the event of breach by the auction purchaser, the earnest money deposited shall be forfeited. Since this sum does not relate to pre estimate damages or loss but an amount intended to secure performance of the contract, it may be called as penalty. To justify forfeiture of advance deposit being a part of price as “earnest” the terms of the contract should be sufficiently explicit and made known to the party making the deposit. Here from the auction notice as well as aforesaid correspondences, opposite party repeatedly reminded petitioner about forfeiture of earnest money in case of breach of contract, and as such it cannot be said that terms of the contract was not made known to the petitioner about the forfeiture.

29. Before the decisions of the supreme Court in ***Maula Bux Vs. Union of India***, reported in **AIR 1970 SC 1955** the law relating to earnest money was not merely a part payment but also an earnest to bind the bargain. Whether an amount paid was earnest money or advance deposit as part payment depends not on the words used but the intention of the parties and surrounding circumstances. Here the intention of the parties and surrounding circumstances, by no stretch

of imagination suggests that it was an advance deposit as part payment, but it was made as earnest to bind the bargain. In ***Shri Hanuman Cotton Mills and others Vs. Tata Air Crafts Ltd.*** reported in **AIR 1970 SC 1986** it was held that the law laid down in Fatehchand case by a Bench of five judges is that all stipulations naming amounts to be paid in case of breach would be covered by section 74 of the Contract Act.

30. The expression “*if the contract contents any other stipulation by way of penalty*” in section 74 widens the operation of the section so as to make it applicable to all stipulations by way of penalty whether the stipulations is to pay an amount of money or is of another character i.e. providing of forfeiture of money already paid. In fact a condition of forfeiture in a contract carrying with it an element of punishment is in the nature of penalty. Where a sum is made payable by a contract to secure the performance of stipulations, that sum is prima facie to be regarded as a penalty and not as liquidated damages. Where the auction purchaser repudiate the contract into which he has entered with the opposite parties, he will not be entitled to recover that portion of the earnest money which he has paid. However earnest money which is not in essence a penalty but a mere security for the fulfilment of an agreement is not guided by the provisions of section 63 and section 64 of the Act of 1872. Accordingly in the present case where the contract requires the buyers to deposit 25% of the total value of the property and also further provides that the deposit shall remain as earnest money to

be adjusted in the final payment and provides that no interest is payable to the buyer and that it shall be forfeited unconditionally on default by the buyer and the buyer deposits 25% of the price, the amounts so deposited is a deposit as earnest money. Where a purchaser accepted the property “as is where is” and “as is what is” basis but failed to pay the purchase money within the period stipulated, vendor under the agreement is entitled to forfeit the deposit. In view of the aforesaid circumstances and considering the intention of the parties derived from the terms of the contract, there is nothing to show that the Bank has done anything contrary to law. The judgment relied by the petitioner in **MBL Infrastructure limited (supra)** is factually distinguishable in view of the fact that from the notice till every correspondence parties agreed that the sale shall be subject to rules/conditions prescribed under the SARFAESI Act 2002. Knowing fully well about the provisions of said Act of 2002 and Rules made therein, petitioners participated in the auction purchase and accordingly the provisions of the Act and Rules 2002 is squarely applicable in the present context. The Rules of 2002 governs a sale undertaken under the SARFAESI Act 2002 and Rule 9(5) permits forfeiture of the deposit of earnest money in default of payment by the purchaser within the period mentioned in Rule 9(4) which permits payment of balance amount of purchase price on or before the 15th day of conformation of sale of the immovable property or such extended period as may be agreed upon in writing between the bank and the

intending purchaser but in no cases exceeding three months. As stated above the Bank had extended time for deposit of the rest amount till 28th December, 2017 but the petitioner herein failed to pay the balance amount of purchase price even within that extended period and for which bank proceeded to forfeit the earnest money deposited in terms of Rule 9(5) of the Rule of 2002.

31. Apex Court in a civil appeal no. (s) 9895 of 2016 (Authorized Officer, SAMB, SBI and another Vs. Raj Kumar Agarwal) supports the view that if the terms of auction notice which is made in conformity with Rule 9(5) of the Security Interest (Enforcement) Rule 2002, the amount deposited is liable to be forfeited. Madras High Court in WP No. 2765 of 2022 and WMP No. 2923 and 2924 of 2022 (**M/s. Cape Infrastructure Pvt. Ltd. Vs. the Assistant General Manager and Authorized officer SBI Chennai**) recently came to the conclusion that when the petitioner participated in the auction and paid the EMD amount on the date of sale and if the petitioner/auction purchaser failed to remit the balance amount within the time stipulated, the forfeiture of the said amount by bank under the provisions of SARFAESI Act read with Rule 2002, does not suffer from any infirmity and such order is not liable to be interfered. A co-ordinate bench of this court while disposing a writ petition being **WP No. 128 of 2016 (M/s. Poddar Commodities Pvt. Ltd. and another Vs. Arms and another)** also held that there is no infirmity in passing the forfeiture order in terms of Rule 9(5) of the Act of 2002 when the petitioner failed to deposit the

purchase money within 15th day of conformation of sale or within the extended period.

32. Last but not the least this application has been preferred under Article 227 of the Constitution of India, being aggrieved by concurrent finding of both the Tribunals below. Apex Court in several judgments discussed the scope of exercising such jurisdiction by High Court. In ***Amarjeet Athotra and another Vs. Shri Mahinder Singh and another*** reported in **(2014) SCC Online Del 1228**, Delhi High Court quoting series of judgments in this context came to a finding in para 34 as follows:-

“34. Upon careful reading of observations in the above referred cases, it can be safely said that the scope of judicial interference under Article 227 is well settled and the Court ceased of the proceedings under Article 227 cannot act as a Court of appeal and should interfere with the decision of the inferior tribunal or Court only to keep the authorities and Courts within their bounds and in the cases where it results into manifest miscarriage of justice and not in all other cases to correct mere errors. The power under Article 227 is thus discretionary in nature and can be exercised in the cases where the lower Court ignores material piece of evidence or considers some evidence which it ought not to have considered resulting into injustice and not in cases where there are two views possible and the view adopted by lower Court is reasonable and plausible one and the High Court would be unjustified to interfere in such cases merely to arrive at different view in the matter as this would be re-appreciating the evidence on finding of facts which is the role of the appellate Court and not the supervisory Court acting under Article 227 of the Constitution of India”

33. In ***M/s. India Pipe Fitting company Vs. Fakruddin M.A. Baker and another*** , **(1977) 4 SCC 587** the court held in paragraph 5 as follows:-

5. The limitation of the High Court while exercising power under Article 227 of the Constitution is well-settled. Power under Article 227 is one of judicial superintendence and cannot be exercised to upset conclusions of facts however erroneous those may be. It is well-settled and perhaps too late in the day to refer to the decision of the Constitution Bench of this

Court in Waryam Singh v. Amarnath [AIR 1954 SC 215 : 1954 SCR 565 : 1954 SCJ 290] where the principles have been clearly laid down as follows:

“This power of superintendence conferred by Article 227 is, as pointed out by Harries, **C.J., in Dalmia Jain Airways Ltd. v. Sukumar Mukherjee** [AIR 1951 Cal 193] to be exercised most sparingly and only in appropriate cases in order to keep the Subordinate Courts within the bounds of their authority and not for correcting mere errors.”

The same view was reiterated by another Constitution Bench of this Court in Nagendra Nath Bora v. Commissioner of Hills Division and Appeals, Assam [AIR 1958 SC 398 : 1958 SCR 1240 : 1958 SCJ 798] . Even recently in Bathutmal Raichand Oswal v. Laxmibai R. Tarta [(1975) 1 SCC 858] dealing with a litigation between a landlord and tenant under Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, this Court relying on its earlier decisions observed as follows:

“If an error of fact, even though apparent on the face of the record, cannot be corrected by means of a writ of certiorari it should follow a fortiori that it is not subject to correction by the High Court in the exercise of its jurisdiction under Article 227. The power of superintendence under Article 227 cannot be invoked to correct an error of fact which only a superior court can do in exercise of its statutory power as a court of appeal. The High Court cannot in guise of exercising its jurisdiction under Article 227 convert itself into a court of appeal when the Legislature has not conferred a right of appeal and made the decision of the subordinate court or tribunal final on facts.”

34. In *Boorugu Mahadeb & sons and another Vs. Sirigiri Narasing Rao and others* reported in (2016) 3 SCC 343 it was held that High Court while disposing such application should have confined its enquiry to examine as to whether any jurisdictional error was committed by the court below and if it was not done, interference is uncalled for.

35. In *Bhoj Raj Kunwarji Oil Mill and Ginning Factory and Another Vs. Yograj Sinha Shankar Sinha Parihar & others*, reported in **(1985) 1 SCC 149** Supreme Court held that High Court was not justified in interfering with the order of trial court, in exercise of

the revisional jurisdiction on the only ground that a different view on facts elicited was possible.

36. In **Jai Singh and others Vs. Municipal Corporation of Delhi and another** reported in **(2010) 9 SCC 385** it was held exercise of this power and interfering with the orders of the court or tribunal is restricted to the cases of serious dereliction of the duty and flagrant violation of fundamental principles of law or justice and if the High Court does not interfere, a grave injustice would remain uncorrected. It is also well settled that the High Court while acting under this Article cannot exercise its power as an Appellate court or substitute its own judgment in place of that of the subordinate court/Tribunal to correct an error which is not apparent on the face of the record.

37. Since there is nothing to say that the findings of both the Tribunal are perverse or illegal or that no reasonable person can possibly come to such a conclusion which the tribunals have arrived at, I find nothing to interfere with the order impugned only on the ground of mere possibility of arriving at a different view on facts and circumstances of the case.

38. C.O. 3067 of 2019 thus stands dismissed.

39. There will be no order as to costs.

Urgent Photostat certified copy of this judgment, if applied for, be supplied to the parties upon compliance with all requisite formalities.

(AJAY KUMAR MUKHERJEE, J.)