

SUPREME COURT SETTLES THE CONFLICT ON THE RIGHT OF REDEMPTION OF MORTGAGED PROPERTY UNDER THE SARFAESI ACT

1. INTRODUCTION

A two-judge bench of the Supreme Court of India, comprising of Chief Justice D.Y. Chandrachud and Justice J. B. Pardiwala, in a landmark judgment on 21 September 2023, in *Celir LLP v. Bafna Motors (Mumbai) Pvt. Ltd. and Ors*¹ while interpreting the amendment to Section 13(8) of the Securitization and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 (**the SARFAESI Act**),² held that the amendment has drastically curtailed the right of redemption of a mortgaged property available to a borrower, only till the date of publication of the notice for auction of the said mortgaged property.

2. BACKGROUND

Bafna Motors (Mumbai) Private Limited (**Borrower**) had availed a credit facility of INR 100 Crore (**Loan**) from Union Bank of India (**UBI**), which was secured against a simple mortgage over a parcel of land in Navi Mumbai, Thane, Maharashtra (**Mortgaged Property**). As the Borrower defaulted in timely repayment of the credit facility, its loan account was declared as a Non-Performing Asset (**NPA**) by UBI.

Thereafter, UBI issued a demand notice (**Demand Notice**) under Section 13(2) of the SARFAESI Act for repayment of the principal amount along with interest, costs and charges, etc. As the amount was not repaid by the Borrower, UBI made several attempts to auction the Mortgaged Property between April 2022 and June 2023. Concurrently, the Borrower preferred a securitization application (**SA**) before the Debts Recovery Tribunal, Mumbai (**DRT**) challenging the issuance of the Demand Notice, and for quashing the auction notice for the Mortgaged Property, which SA remained pending as on the date of this judgment.

On 14 June 2023, UBI published an auction notice for the sale of the Mortgaged Property, for a reserve price of INR 105 Crore. Celir LLP (**Auction Purchaser**) participated in the said auction and submitted its bid of INR 105.05 Crore, and INR 10.5 Crore as earnest money. Pursuant to the same, UBI declared the Auction Purchaser as the highest bidder and called upon it to deposit 25% of the bid amount, which was duly deposited by the Auction Purchaser. Thereafter, the Borrower filed an interim application (**Redemption Application**) before the DRT for redemption of the Mortgaged Property and offered repayment of the total outstanding sum of INR 123.83 Crore.

Subsequently, the Auction Purchaser deposited the balance amount, which was received and accepted by UBI, and on the very same day, the DRT heard the Redemption Application which was opposed by UBI

¹ Civil Appeal Nos. 5542-5543 of 2023, Supreme Court of India.

² Enforcement of Security Interest and Recovery of Debt Laws and Miscellaneous Provisions (Amendment) Act, 2016.

and the Auction Purchaser. After hearing arguments, the DRT reserved orders on the Redemption Application.

Before the DRT could pronounce orders on the Redemption Application, the Borrower, apprehending that the DRT would dismiss the Redemption Application, approached the High Court of Bombay (**High Court**) in a writ petition under Article 226 of the Constitution of India, 1950 (**Constitution**) seeking directions to UBI to allow it to redeem the Mortgaged Property, and offered to pay a sum of INR 129 Crore to redeem the same. In contrast to the stand taken before the DRT and instead of issuing a sale certificate in favour of the Auction Purchaser, UBI now expressed its desire to accept the offer of the Borrower. As the Auction Purchaser had not been impleaded as a party to the writ petition, it preferred an application (**Impleadment Application**) to be impleaded in the same. The High Court allowed the Borrower to redeem the Mortgaged Property subject to payment of INR 25 Crore on that day itself, and the balance payment within two weeks, failing which, sale of the Mortgaged Property to the Auction Purchaser was to be confirmed. UBI was also directed by the High Court to keep the amount deposited by the Auction Purchaser in a “No Lien Interest Bearing Account”, and to refund the same along with interest, in case the Borrower paid the balance amount within two weeks.

Aggrieved by the judgment of the High Court, the Auction Purchaser preferred a special leave petition before the Supreme Court.

3. ANALYSIS OF THE COURT

The Court began its analysis by discussing the general statutory right of a borrower to redeem mortgage under Section 60 of the Transfer of Property Act, 1882 (**TPA**). It was considered by the Court that generally, a mortgagor’s right to redeem will extinguish only after the sale of the said mortgaged asset has been completed by a *registered* contract of sale, as the equity of redemption is not extinguished by a mere contract of sale. A mortgagor does not lose its right of redemption due to the mere fact that the asset was put up for auction.³

The Court then embarked on a detailed comparison of the pre-amendment and post-amendment Section 13(8) of the SARFAESI Act. With regard to the pre-amendment position, the Court referred to *Matthew Varghese v. M. Amritha Kumar*⁴, wherein it was held that the above principles under the TPA, would be applicable to transactions between mortgagors and secured creditors under the SARFAESI Act, especially as Section 13(8) (pre-amendment) of the SARFAESI Act contemplated that a secured asset should not be sold or transferred by the secured creditor when a tender is made by the borrower at the last moment before the sale/transfer. Another decision of the Supreme Court in *Allokam Peddabbayya & Anr. v. Allahabad Bank & Ors.*⁵, was also considered by the Court in which it was held that once a mortgaged property was put to auction-sale and sale certificate was issued, there remained no property mortgaged to be redeemed. The Court thus, observed that prior to amendment of Section 13(8), there was no inconsistency between the said provision and Section 60 of TPA. Therefore, the two could be easily harmonised, as was done by the Supreme Court in *Matthew Varghese*.

It was then observed by the Court that post amendment, the legislature had brought about a paradigm shift in the scheme of Section 13(8) of the SARFAESI Act, by which it intentionally curtailed the right of

³ *Narandas Karsondas v. S.A. Kamtam and Another*, 1977 (3) SCC 247; *L.K. Trust v. EDC Limited and Others*, (2011) 6 SCC 780.

⁴ (2014) 5 SCC 610.

⁵ (2017) 8 SCC 272.

redemption of a mortgagor till the date of publication of notice for public auction or inviting quotations. In this regard, it was also observed that the approach taken by various High Courts, after the amendment of Section 13(8) of the SARFAESI Act, was varied and conflicting. The Supreme Court analysed the judgment of the Andhra Pradesh High Court in *Sri. Sai Annadhatha Polymers & Anr. v. Canara Bank rep. by its Branch Manager, Mandanapalle*⁶, as well as that of the Telangana High Court in *K. V. V. Prasad Rao Gupta v. State Bank of India*⁷ which held that the amendment to Section 13(8) of the SARFAESI Act brought in a radical change as the right to redemption would stand extinguished on the very date of publication of the notice for public auction, and not till completion of sale/transfer. On the other hand, the Court also took into consideration conflicting judgments of the Telangana High Court in *Amme Srisailam v. Union Bank of India*⁸, *Concern Readymix v. Corporation Bank*⁹, and the Punjab and Haryana High Court in *Pal Alloys and Metal India Private Limited and Ors. v. Allahabad Bank and Ors.*¹⁰ which held that Section 13(8) of the SARFAESI Act, even after being amended, did not exclude the application of Section 60 of the TPA, even after applying Sections 35 and 37 of the SARFAESI Act.

The Court then deemed it appropriate to analyse Sections 35 and 37 of the SARFAESI Act. While Section 35 stipulates that provisions of the SARFAESI Act shall have an overriding effect notwithstanding anything inconsistent contained in “any other law”, which the court interpreted to mean “any other law operating in the same field”. Section 37 further clarifies that the provisions of the SARFAESI Act shall be in addition to and not in derogation of “any other law”, which in *Madras Petrochem Ltd. and Anr. v. Board for Industrial and Financial Reconstruction and Ors.*¹¹, was held to mean only those laws which operate in the same field.

The Supreme Court, thus, noted that Section 13(8) of the SARFAESI Act, after amendment, achieved supremacy over Section 60 of the TPA, and any interpretation which discourages an auction purchaser from participating fairly, directly impacts implementation of the law. The Court also observed that without such a reading of Sections 13(8), 35 and 37 of the SARFAESI Act and Section 60 of the TPA, no auction conducted would have any sanctity, and any other interpretation would discourage any person from participating in auctions due to the fear that despite being declared a successful bidder, the borrower could, at any time, redeem the mortgage and render the auction process nugatory. This would defeat the overarching objective of enactment of the SARFAESI Act of enabling banks to recover dues in a timely manner without intervention of courts.

Based on the above analysis, the Court overruled the judgments of the High Courts in *Amme Srisailam*, *Concern Readymix*, and *Pal Alloys* (supra), and held that the judgments of the Andhra Pradesh High Court in *Sri. Sai Annadhatha Polymers*, as well as that of the Telangana High Court in *K. V. V. Prasad Rao Gupta* (supra), laid down the correct position of law.

Further, the Court also observed that the judgment of *Mathew Varghese* had been partially legislatively overruled after the amendment of Section 13(8) of the SARFAESI Act, as the amended provision contains the words “before the date of publication notice for public auction or inviting quotations or tender from public or private treaty for transfer by way of lease, assignment or sale of the secured assets”, which could not be read to be in consonance with the general rule of right to redemption under Section 60 the TPA.

⁶ 2018 SCC OnLine Hyd 178.

⁷ 2021 SCC OnLine TS 328.

⁸ W.P. No. 11435 of 2021, Telangana High Court.

⁹ 2018 SCC OnLine Hyd 783.

¹⁰ 2021 SCC OnLine P&H 2733.

¹¹ (2016) 4 SCC 1.

The Court further considered that rights created for the benefit of the borrower under the SARFAESI Act can be waived through implied conduct and once third-party rights were created, ignoring such waivers would not be reasonable. Applying this principle to the facts at hand, the Court held that failure of the borrower to tender dues including charges, costs, interest, etc., before publication of the auction notice under the amended Section 13(8), would tantamount to extinguishing the right of redemption of mortgage. To reach the above conclusion, the Court drew a parallel to the proviso to Section 60 of the TPA, which provides that such right of redemption can be extinguished by acts of the parties, which under settled law, has been interpreted as failure of parties to settle disputes through their acts and permitting a mortgaged property to be sold in auction.¹² Specific note was made of the fact that in the present case, the Borrower failed to claim their right of redemption before publication of the auction notice, and rather, entered the picture only upon becoming aware of the confirmed auction of the Mortgaged Property to the Auction Purchaser. Thus, it was held that once the stage of Section 13(8) was over and the auction stood concluded, the Borrower intentionally relinquished its of right of redemption.

The Court also held that legislative intent behind the amendment of Section 13(8) of the SARFAESI Act was to distinguish and consciously depart from Section 60 of the TPA. Given that SARFAESI Act is a special law enacted for the expeditious recovery by banks and financial institutions, Section 13(8) of the SARFAESI Act is a departure from the general right of redemption under general law. The object and purpose of the amended Section 13(8) of the SARFAESI Act would be defeated if general law was allowed to operate in such a manner.

In view of the above, the Court set aside the judgment of the High Court and observed that UBI was legally bound under Rule 9(6) of the Security Interest (Enforcement) Rules, 2002 to issue a sale certificate in favour of the Auction Purchaser after having received the full payment towards the entire bid price, as the confirmation of sale invested the Auction Purchaser with a vested right to obtain a certificate of sale of the Mortgaged Property. The Court also directed UBI to refund the amount paid by the Borrower to it, and issue a sale certificate to the Auction Purchaser, subject to the latter depositing INR 23.95 Crore to UBI.

As a parting note, the Court yet again reiterated, as it has done on numerous occasions in the past, that High Courts ought not to be entertain petitions under Article 226 of the Constitution, when an alternative efficacious remedy under the SARFAESI Act is available to a borrower/mortgagor.

The Court thus unequivocally held that as per the amended Section 13(8) of the SARFAESI Act, the right of redemption of a secured asset, stands extinguished on the very date of publication of notice for its public auction, and not till the completion of sale or transfer of the secured asset in favour of the auction purchaser.

4 **INDUSLAW VIEW**

The judgment of the Supreme Court provides a welcome sigh of relief to bidders and purchasers who participate in auctions of mortgaged properties, as it safeguards their rights and brings in a sense of certainty to the auction process. This will ensure that such auction processes are not thwarted and undone by last-minute shenanigans of errant borrowers entering the fray.

This judgment would prove to be a shot in the arm of the legislative intent behind the SARFAESI Act, which was to ensure speedy recovery of debts by banks, in line with changing commercial practices and financial sector reforms, as well as liquidity of finances for a growth-oriented economy.

¹² *Embassy Hotels Private Ltd. v. Gajraj and Company & Ors.*, (2015) 14 SCC 316.

Pertinently, while this judgment provides much needed clarity with respect to the right of redemption mortgaged assets, it appears to have left unaddressed a crucial practical issue *i.e.* whether the right of redemption of a mortgagor remains extinguished, even after a public auction is rendered unsuccessful. This crucial issue would be required to be specifically addressed in an appropriate case in the future in order to fully realize the potential gains of the SARFAESI Act.

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