

**Security Interest (Enforcement) Rules, 2002, Rule 9 – Securatisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act) – Sale – Court, after interpreting the provisions of Rule 9, returned a categorical opinion that the said provision is mandatory in nature – Further held that even though this Rule is mandatory, that provision is for the benefit of the borrower – It is a settled position in law that even if a provision is mandatory, it can always be waived by a party (or parties) for whose benefit such provision has been made – The provision in Rule 9(1) being for the benefit of the borrower and the provisions contained in Rule 9(3) and Rule 9(4) being for the benefit of the secured creditor (or for the benefit of the borrower), the secured creditor and the borrower can lawfully waive their rights – These provisions neither expressly nor contextually indicate otherwise – Obviously, the question whether there is waiver or not depends on the facts of each case and no hard and fast rule can be laid down in this regard.**

*Held*, There is no doubt that Rule 9(1) is mandatory but this provision is definitely for the benefit of the borrower. Similarly, Rule 9(3) and Rule 9(4) are for the benefit of the secured creditor (or in any case for the benefit of the borrower). It is settled position in law that even if a provision is mandatory, it can always be waived by a party (or parties) for whose benefit such provision has been made. The provision in Rule 9(1) being for the benefit of the borrower and the provisions contained in Rule 9(3) and Rule 9(4) being for the benefit of the secured creditor (or for that matter for the benefit of the borrower), the secured creditor and the borrower can lawfully waive their right. These provisions neither expressly nor contextually indicate otherwise. Obviously, the question whether there is waiver or not depends on facts of each case and no hard and fast rule can be laid down in this regard.

[Para 23]

## **Facts**

This was a case where R-1 (the borrower) took a housing loan from the appellant Bank by mortgaging certain immovable property. As R-1 committed default in repayment of the said housing loan, the Bank issued a notice to him on 30.6.2005 under Section 13(2) of the Securatisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (the SARFAESI Act) informing him that if he failed to discharge the outstanding dues within 60 days, the Bank may take action under Section 13(4) and the mortgaged property shall be sold. On 18.12.2005 the Bank published the auction notice in the local newspapers and the public auction was conducted on 11.1.2006. The bid of the auction-purchaser for Rs. 8,50,000 was accepted being the highest bid. The auction-purchaser paid 25% of the sale consideration immediately but he did not make the payment of remaining 75% within 15 days of the confirmation of sale. He made the final payment on 13.11.2006 and the Bank issued the sale certificate in his favour. As the proceeds from the sale of the mortgaged property fell short of the total outstanding amount against the borrower, the Bank moved the Joint Registrar of Cooperative Societies for recovery of the outstanding amount. In those proceedings, an ex parte award for the outstanding amount was passed against the borrower R-1. It was then that R-1 challenged the sale certificate issued in favour of the auction purchaser in two writ petitions before the High Court. The Single Judge

of the High Court quashed the sale certificate issued in favour of the auction-purchaser on the ground that the mandatory requirements of Rule 9 of the 2002 Rules were not followed and, therefore, despite the remedy of appeal to the borrower provided under Section 17 of the SARFAESI Act, a case was made out for interference under Article 226 of the Constitution, which was affirmed by the Division Bench of the High Court. The Bank and the auction-purchaser had filed the appeals challenging the judgments of the High Court.

In the facts of the case it was found that the letter dated 13.11.2006 sent by the borrower to the Bank clearly depicted that the borrower had waived his right under Rule 9 (1) and the provisions contained in Rule 9(3) and Rule 9(4) as well. It was also found that at the time of auction sale on 11.1.2006, the borrower was present but did not object to the auction being held before expiry of 30 days from the date of which public notice of sale was published. Not only this, he agreed that the bid given by the auction purchaser, which was the highest bid, be accepted as the auction purchaser happened to be his known person. Another important feature which was noted was that the borrower expressly gave consent in writing that the balance sale price may be accepted from the auction purchaser even when tendered after some delay and the sale certificate be issued to him. There was a written agreement between the borrower and the Bank for extension of time upto 15.4.2006 within which the auction purchaser had made the payment. On these facts, the court came to the conclusion that condition in Rule 9(4) viz. "such extended period as may be agreed upon in writing between the parties" would be treated as substantially satisfied. Again, pertinently, the Writ Petition was filed by the borrower more than 4 years after the issuance of the sale certificate. On these facts the court concluded that there was a waiver of the aforesaid mandatory provisions by the borrower.

#### **2013 PLRonline 0102**

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