

ARCE POLYMERS PRIVATE LIMITED

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v.

M/S. ALPHINE PHARMACEUTICALS PRIVATE LIMITED
AND OTHERS

(Civil Appeal No. 7372 of 2021)

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DECEMBER 03, 2021

**[L. NAGESWARA RAO, SANJIV KHANNA AND
B. R. GAVAI, JJ.]**

Waiver: Meaning and applicability of – Held: Waiver is an intentional relinquishment of a known right – Waiver applies when a party knows the material facts and is cognizant of the legal rights in that matter; and yet for some consideration consciously abandons the existing legal right, advantage, benefit, claim or privilege – Waiver can be contractual or by express conduct in consideration of some compromise – However, a statutory right may also be waived by implied conduct, like, by wanting to take a chance of a favourable decision – The fact that the other side has acted on it, is sufficient consideration – SARFAESI Act.

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SARFAESI Act : ss.13(2) and (4) – Failure of Borrower to repay loan as per payment schedule – Loans declared NPA – Notice issued by Bank under s.13(2) calling upon Borrower to discharge its liability – However, Borrower neither made any payment nor responded by way of reply – Thereafter, Borrower wrote letter in which while accepting defaults and non payment enlisted reasons for not being able to adhere to payment schedule and requested to grant further moratorium – Bank granted further moratorium and deferred action under SARFAESI Act to enable Borrower to submit detailed project/viability report – Borrower failed to fulfill promise made – Post this default also there were negotiations with assurances and promises by the Borrower – Displaying forbearance, the Bank granted indulgence as action under the SARFAESI Act was deferred for nearly one year – Thereafter Bank issued notice under s.13(4) and took symbolic possession of subject property – After several attempts to auction the property, fourth attempt was successful and property was sold and sale certificate issued – Before auction, Borrower was given notice of auction – Thereafter borrower filed

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- A *petition before DRT challenging the enforcement proceedings in respect of the subject property including all steps taken right from issue of notice under s.13(2) of the SARFAESI Act – DRT dismissed borrower’s application – Borrower preferred writ petition – Meanwhile auction purchaser sold the property to second purchaser – High Court held that the Borrower can challenge the possession*
- B *notice, taking of symbolic possession notice, taking of physical possession, sale notice and sale certificate as they all form part of the same cause of action – High Court concluded that compliance with s.13(3A) being mandatory, Bank had failed to respond with reasons to the representations made by the Borrower – Instant appeal*
- C *filed by second purchaser – Held : It is correct that waiver being an intentional relinquishment is not to be inferred by mere failure to take action, but the instant case is of repeated positive acts post the notices under ss.13(2) and (4) of the SARFAESI Act – Not only did the Borrower not question or object to the action of the Bank, but it*
- D *by express and deliberate conduct had asked the Bank to compromise its position and alter the contractual terms – The Borrower wrote repeated request letters for restructuring of loans, which prayers were considered by the Bank by giving indulgence, time and opportunities – The Borrower, aware and conscious of its rights, chose to abandon the statutory claim and took its chance*
- E *and even procured favourable decisions – Borrower’s conduct had put the Bank in a position where they have lost time, and suffered on account of delay and laches, which aspects are material – Action on the subject property was delayed by more than a year as at the behest of the Borrower, the Bank gave them a long rope to regularise the account – To ignore the conduct of the Borrower would not be*
- F *reasonable to the Bank once third party rights have been created – In this background, the principle of equitable estoppel as a rule of evidence bars the Borrower from complaining of violation – The Borrower challenged the actions taken by the Bank after the Subject Property had changed hands and third party interests had been*
- G *created – Thus, the Borrower waived and is estopped from challenging violation of s.13(3A) of the SARFAESI Act.*

Judgment/Order: Remedy/relief – Grant of, scope – Held: Power of the courts/judicial authorities to mould relief – While holding that the general approach is that the claimant who succeeds

H *in establishing the unlawfulness of administrative action is entitled*

*to grant of remedial order, the general proposition does not A
undermine the discretion which the courts or judicial authorities
have in assessing “what is fair and just to do in the particular case
to withhold the remedy altogether or to mould the remedy by grant
of a declaration rather than a more coercive quashing, prohibiting
or mandatory order or injunction which may have been sought” – B
Relief may be granted in respect of one aspect and not others – The
general approach, therefore, is that a complainant who succeeds in
establishing unlawfulness of an action is entitled to a remedial order,
but the court has discretion in the sense of determining what is fair
and just to do in a particular case.*

Allowing the appeals, the Court C

**HELD: 1. Waiver is an intentional relinquishment of a known
right. Waiver applies when a party knows the material facts and
is cognizant of the legal rights in that matter, and yet for some
consideration consciously abandons the existing legal right, D
advantage, benefit, claim or privilege. Waiver can be contractual
or by express conduct in consideration of some compromise.
However, a statutory right may also be waived by implied conduct,
like, by wanting to take a chance of a favourable decision. The
fact that the other side has acted on it, is sufficient consideration.
It is correct that waiver being an intentional relinquishment is E
not to be inferred by mere failure to take action, but the present
case is of repeated positive acts post the notices under Sections
13(2) and (4) of the SARFAESI Act. Not only did the Borrower
not question or object to the action of the Bank, but it by express
and deliberate conduct had asked the Bank to compromise its F
position and alter the contractual terms. The Borrower wrote
repeated request letters for restructuring of loans, which prayers
were considered by the Bank by giving indulgence, time and
opportunities. The Borrower, aware and conscious of its rights,
chose to abandon the statutory claim and took its chance and G
even procured favourable decisions. Even if we are to assume
that the Borrower did not waive the remedy, its conduct had put
the Bank in a position where they have lost time, and suffered on
account of delay and laches, which aspects are material. Action
on the Subject Property was delayed by more than a year as at**

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A the behest of the Borrower, the Bank gave them a long rope to regularise the account. To ignore the conduct of the Borrower would not be reasonable to the Bank once third party rights have been created. In this background, the principle of equitable estoppel as a rule of evidence bars the Borrower from complaining of violation. [Para 14][1076-G-H; 1077-A-E]

B *ITC Limited v. Blue Coast Hotels Limited and Others* (2018) 15 SCC 99 : [2018] 5 SCR 516 – relied on.

C *Commissioner of Customs, Mumbai v. Virgo Steels, Bombay and Another* (2002) 4 SCC 316 : [2002] 2 SCR 934; *AL.AR. Vellayan Chettiar (Decd.) and Others v. Government of the Province of Madras, Through the Collector of Ramnad at Madura, and Another* AIR 1947 PC 197; *S. Raghbir Singh Gill v. S. Gurcharan Singh Tohra and Others* (1980) Supp SCC 53 : [1980] SCR 1302; *Krishan Lal v. State of J&K* (1994) 4 SCC 422 : [1994] 2 SCR 149; *Martin & Harris Ltd. v. VIth Additional Distt. Judge and Others* (1998) 1 SCC 732 : [1997] 6 Suppl. SCR 380; *Bank of India and Others v. O.P. Swarnakar and Others*, (2003) 2 SCC 721 : [2002] 5 Suppl. SCR 438; *Shri Lachoo Mal v. Shri Radhey Shyam* (1971) 1 SCC 619; *Pravesh Kumar Sachdeva v. State of Uttar Pradesh and Others* (2018) 10 SCC 628 : [2018] 11 SCR 504 – referred to.

2. In consideration of the facts of the present case, another important aspect to be duly noted is the power of the courts/ judicial authorities to mould relief. While holding that the general approach is that the claimant who succeeds in establishing the unlawfulness of administrative action is entitled to grant of remedial order, the general proposition does not undermine the discretion which the courts or judicial authorities have in assessing “what is fair and just to do in the particular case – to withhold the remedy altogether or to mould the remedy by grant of a declaration rather than a more coercive quashing, prohibiting or mandatory order or injunction which may have been sought.” Relief may be granted in respect of one aspect and not others. The general approach, therefore, is that a complainant who

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succeeds in establishing unlawfulness of an action is entitled to a remedial order, but the court has discretion in the sense of determining what is fair and just to do in a particular case. [Para 17][1078-F-G; 1079-A-B]

Beg Raj Singh v. State of U.P. and Others (2003) 1 SCC 726 : [2002] 5 Suppl. SCR 530; *Rameshwar and Others v. Jot Ram and Another* (1976) 1 SCC 194 : [1976] 1 SCR 847 – referred to.

3. In the present case, it is clear from a bare perusal of the letter dated 7th November 2016 sent by the Bank to its Zonal Manager that the Bank actively considered the Borrower's request for extension of the moratorium period. The Borrower did not submit the viability report and failed to bring in Rs. 45,00,000/- (Rupees forty five lakhs only). Post this default also there were negotiations with assurances and promises by the Borrower. Displaying forbearance, the Bank granted indulgence as action under the SARFAESI Act was deferred for nearly one year from 7th November 2016 till 6th October 2017. Thereafter, negotiations were held on 30th October 2017, 6th November 2017 and 8th November 2017. The email dated 30th November 2017 addressed by the Bank to the Borrower highlights the dilatory and tricky approach of the Borrower as it had failed to submit details of the additional collateral security offered along with the legal opinion and the engineer's valuation report. Even visit to the proposed collateral security property was not arranged. The Borrower again tried its luck and submitted a restructuring proposal *vide* communication dated 18th December 2017, but this did not fructify into an acceptable settlement. The Bank having lost faith could not rely on the Borrower. Only thereafter, the Bank proceeded with the auctions under the SARFAESI Act on 28th March 2018 and 14th June 2018. The Borrower then kept silent. As the earlier auctions failed, the Bank issued notice dated 20th August 2018 informing the Borrower about the fourth auction to be held on 11th September 2018 at a reduced reserve price. The Borrower challenged the actions taken by the Bank after the Subject Property had changed hands and third party interests had been created. Taking into consideration the entire facts of the case, which perspicuously reflect disingenuous conduct on

A part of the Borrower to gain indulgence, unfulfilled assurances and promises, their unwillingness to pay, the Borrower has waived and is estopped from challenging violation of Section 13(3A) of the SARFAESI Act and hence, the first issue is decided in favour of the Bank. [Para 18][1080-A-G]

B 4. With regard to the issue of the valuation of the machinery and the adverse finding of the High Court on the question of valuation before the machinery was sold in auction, it is to be noticed that the valuation report which has been placed on record is dated 19th February 2018, values the land, the building and the machinery separately. The machinery has been valued with specific reference to as many as 55 separate items under the Heading ‘Description of Machinery’. The valuation report itself has not been disputed or challenged. We do not agree with the High Court that the machinery should have been separately auctioned or sold. This would be putting fetters and restrictions on the Bank by barring the Bank from selling the machinery along with the building and the land. Prejudice and loss caused to the Borrower is not shown and established. Auction sale as confirmed was at a price higher than the fair market valuation of the land, the building and the machinery. Whether or not the price of the machinery should be accounted for the purpose of payment of stamp duty on a composite sale wherein the land, the building and the machinery located in the building are sold, would not be of any relevance and importance as the issue in question does not concern payment of stamp duty and the principles applicable. On the other hand, the law recognises that the lender knows its interests and how to secure best value of the property given the fact that the mortgaged property had to be sold for recovery of the debts due and payable to the Bank. [Para 19][1081-B-F]

G 5. The next issue relating to the date of the valuation report also does not help the Borrower. The valuation certificate or report is dated 19th February 2018. As held above, attempts to sell the property were made thereafter on 28th March 2018 and 14th June 2018 but without success as there were no bidders. Accordingly, it was decided to reduce the reserve price from Rs.2,78,10,000/- to Rs.2,60,00,000/-. However, in the fourth

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auction the successful bid given by Basa Chandramouli was for Rs.2,91,20,000/-, which is much higher than the reserve price of Rs.2,60,00,000/- or the fair market value of Rs.2,73,80,000/- in terms of the valuation report. [Para 20][1081-F-H; 1082-A]

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Blue Coast Hotels Limited v. IFCI Limited and Another
2016 SCC OnLine Bom 2663; *Authorised Officer,*
Indian Overseas Bank and Another v. Ashok Saw Mill
(2009) 8 SCC 366 : [2009] 11 SCR 599 – referred to.

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Case Law Reference

[2018] 5 SCR 516	relied on	Para 10
[2009] 11 SCR 599	referred to	Para 11
[2002] 2 SCR 934	referred to	Para 15
[1980] SCR 1302	referred to	Para 15
[1994] 2 SCR 149	referred to	Para 15
[1997] 6 Suppl. SCR 380	referred to	Para 15
[2002] 5 Suppl. SCR 438	referred to	Para 15
(1971) 1 SCC 619	referred to	Para 15
[2018] 11 SCR 504	referred to	Para 16
[2002] 5 Suppl. SCR 530	referred to	Para 17
[1976] 1 SCR 847	referred to	Para 17

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CIVIL APPELLATE JURISDICTION: Civil Appeal No. 7372
Of 2021.

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From the Judgment and Order dated 24.01.2020 of the High Court
for the State of Telangana in Writ Petition No.13936 of 2019.

With

Civil appeal No. 7373 of 2021.

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S. Niranjan Reddy, Sr. Adv., Raavi Venkata Yogesh, Ms. Snigdha
Singh, K. Anirudh Reddy, Advs. for the Appellant.

Dhruv Mehta, Sr. Adv., P. B. A. Srinivasan, Parth D. Tandon,
Ms. Chandralekha, Ms. Ichchha Kalash, Avinash Mohapatra, Ms. Nikitha

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- A Ross, Ms. Sneha R. Iyer, Keith Varghese, Amit K. Nain, G. K. Deshpande, A. V. S. Raju, Somanath Padhan, Aabhas Parimal, Advs. for the Respondents.

The Judgment of the Court was delivered by

SANJIV KHANNA, J.

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1. Leave granted.

- C 2. The impugned judgment dated 24th January 2020 passed by the Division Bench of the High Court of Telangana at Hyderabad allows Writ Petition No. 13936 of 2019 preferred by M/s. Alphine Pharmaceuticals Private Limited and Bejjenki Bhaskara Chary (collectively referred to as the ‘Borrower’) and thereby sets aside and quashes the proceedings initiated by M/s. Andhra Bank (the ‘Bank’, for short) for sale of the mortgaged asset, namely, plot No. 66/B-1, Phase-I, IDA Jeedimetla, Quthbullapur Mandal, Medchal Malkajgiri District, Hyderabad, Telangana (hereinafter referred to as the ‘Subject Property’) as being in violation of the provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 and the Security Interest (Enforcement) Rules, 2002 (hereinafter referred to as the ‘SARFAESI Act’ and the ‘Rules’ respectively).

- E 3. Aggrieved by the said judgment, the present appeals have been preferred by M/s. Arce Polymers Private Limited, (for convenience, we would refer M/s. Arce Polymers Private Limited as the ‘Second Purchaser’) who had purchased the property from the original auction purchaser, namely, Basa Chandramouli; and by the Bank.

- F 4. The impugned judgment had formulated five points for consideration, which read:

- G “(a) Whether the 1st respondent Bank had an obligation to comply with Section 13(3A) of the Act and give a response to the petitioners’ representation dt.01.11.2016 and whether the Debts Recovery Tribunal was correct in holding that there was no such obligation on the part of the 1st respondent Bank?

(b) Whether any of the reliefs claimed in the O.A. by the petitioners is barred by limitation?

- H (c) Whether it was proper for the 1st respondent Bank not to separately value the machinery in the subject property when it

obtained the valuation before it sold the property to the 2nd respondent? A

(d) Whether it was incumbent on the part of the 1st respondent to obtain a fresh valuation certificate dt.19.02.2018 in view of the long gap between the valuation report and the e-auction sale held on 11.09.2018? B

(e) Whether the petitioners are entitled to any relief?”

The impugned judgment decided the first four points in favour of the Borrower and restored the physical possession of the Subject Property to the Borrower *inter alia* recording that the secured creditor, namely the Bank, was at liberty to act, in order to recover its dues from the Borrower, strictly in accordance with the SARFAESI Act and the Rules. C

5. Before we delve into the legal aspects and issues with reference to the above quoted five questions, we would like to refer to the facts of the case as we believe that they portray a different story and this factual background has not been duly reckoned and considered in the impugned judgment. We, therefore, proceed to narrate the facts in some detail: D

(i) The Borrower was sanctioned working capital limit of Rs.35,00,000/- (Rupees thirty five lakhs only) and granted term loan of Rs.1,52,00,000/- (Rupees one crore fifty two lakhs only) by the Bank in March 2015 with moratorium period of six months to enable the Borrower to purchase M/s. Alphine Pharmaceuticals Pvt. Ltd. from its erstwhile promoters. E

(ii) In accordance with the terms of the loan, the Subject Property was mortgaged by the Borrower with the Bank. F

(iii) The Borrower failed to repay the loan as per the payment schedule as a result of which, on 31st July 2016, the loans were declared as a Non-Performing Asset.

(iv) On 1st August 2016, the Bank issued notice to the Borrower under Section 13(2) of the SARFAESI Act calling upon the Borrower to discharge its liability within sixty days failing which the Bank would be entitled to exercise all or any of its rights under sub-section (4) to Section 13 of the SARFAESI Act. G

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- A (v) The Borrower neither made any payment nor responded by way of a reply within sixty days of the notice under Section 13(2) of the SARFAESI Act.
- (vi) On 1st November 2016 and 6th November 2016 the Borrower wrote letter(s) in which, while accepting defaults and non-payment, it had enlisted reasons for not being able to adhere to the payment schedule, namely, delay in commencement of production of pharmaceuticals due to the requirement of renewal of licenses from different statutory bodies, and policy changes by M/s. Singareni Collieries Company Limited, their prime customer, disqualifying them from participating in the tenders. The bank was requested to grant further moratorium of twelve months.
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- D (vii) The letters dated 1st and 6th November 2016, do not profess being a reply or objection to the notice dated 1st August 2016 issued by the Bank under Section 13(2) of the SARFAESI Act.
- (viii) On 7th November 2016, the Bank informed the Zonal Manager of the Recovery Management Department, in *re* the proposal submitted by the Borrower for restructuring the term loan, extension of the moratorium period and induction of fresh capital, with the following stipulations:
- E “Sub : NPA A/c M/s Alphine Pharmaceuticals Pvt Limited – Request for restructuring of Term Loan and extension of moratorium period.
- F Ref : Company Letter dated 06.11.2016.
- G With reference to the above, we inform you that the company was sanctioned OCC limit of Rs. 35.00 lakhs and Term Loan limit of Rs.152.00 lakhs vide SME.Sn.Lr.No.2265/52/SMECP/ 2236/S-197 dated 10.03.15 to acquire the unit. The unit was acquired by the company on 19.06.2015 and due to change in the constitution of the company from proprietary to Private Limited company, the company had to get all the approvals / licenses modified in the name of the company which had taken time and production was started in the month of Sept. 2015. The limits are fallen due for renewal on 09.03.16.
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ARCE POLYMERS PVT. LTD. v. M/S. ALPHINE
PHARMACEUTICALS PVT. LTD. [SANJIV KHANNA, J.]

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As per sanction gestation for the Term Loan was 6 months from the date of disbursement and accordingly repayment was started in the month of Dec 2015. Meanwhile M/s Singareni Collieries Company Ltd which is to place orders to erst while firm M/s Alphine Pharmaceuticals stopped placing orders to the company stating that the entity should have Rs.10.00 crore turnover as per the change in their procurement policy which disqualified the company in participation of tenders. This hampered the company orders and they had to look for other clients for new business.

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During the period the company had serviced the interest and instalment payments by which they had liquidity problem in the working capital and could not execute orders obtained from the new clients.

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The account was identified as NPA on 31.07.2016 and we have issued Notice under SARFAESI Notice under Section 13(2) was issued on 01.08.2016 and the acknowledgement of notice from the borrower and guarantors has been received on 12.08.16.

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The company earlier informed that they are entering MOU with an investor group for infusion of Rs.1.00 crore and the liquidity problem will be solved and they can revive the production activity at higher level. It is informed that the investors have invested only Rs.15.00 lakhs from which the company had remitted Rs.10.00 lakhs into OCC account and utilized Rs.5.00 lakhs for payment of salary and other dues. The investors have opted out without investing further amount.

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The present position of limits and liabilities is as under:

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14. BALANCE OUTSTANDING: (Liability with our bank)					(Rs. in Crs)
FACILITY	LIMIT SANCTIONED	OUTSTANDING BALANCE			RECOVERY AFTER NPA
		REAL	SHADOW	PROVISION	
Term Loan 021230100009479	1.52	1.39	1.50		Nil
OCC 021213100000502	0.35	0.40	0.41		0.10
Total	1.87	1.79	1.91		0.10

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Company informed that though they are running the unit with low capacity production i.e. Rs. 3 to 4 lakhs per month the fixed expenses and interest charges are amounting to nearly Rs.5.00 lakhs per month by which they are incurring losses. Company vide their letter dated 06.11.16 informed that they will to remit

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- A Rs.6.00 lakhs by 15th of this month in the OCC account to bring the liability in the OCC account within the limit and infuse Rs.60.00 lakhs within three months by which the Working capital liquidity problem will be solved and can execute the orders on hand / to be procured. It is also informed that they have approached M/s Singareni Collieries Company Ltd authorities to reconsider the eligibility of the company in participation of tenders as the erst while firm M/s Alphine Pharmaceuticals was acquired by them and converted to limited company. Now the company is requesting us to restructure the Term Loan limit with further gestation of 12 months and is planning to remit Rs.6.00 lakhs by 15th of this month in the OCC account to bring the liability in the OCC account within the limit and permit them to operate the OCC account.
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- D We have vide our letter dated 06.11.16 advised the company to submit Detailed Project Report / Techno Economic Viability Report with regard to restructuring of the loan and extension of moratorium period along with ABA as on 31.03.16 and Provisional Balance Sheet as on a latest date at the earliest, to assess the viability of the project and advise to remit Rs.6.00 lakhs into OCC account as promised.
- E On receipt of the Detailed Project Report / Techno Economic Viability report, we shall take up the matter with our Zonal office.
- F In view of the above and considering that the production of the unit is continuing at a minimum level, which can be increased to the full extent by infusing Rs.60.00 lakhs within three months by the company as promised and payment of Rs.10.74 lakhs into OCC account after NPA date, we recommend for deferring action under SARFAESI till the TEV Report is appraised and viability of the company is established by our approved agency and allow operations in the OCC account after bringing the liability to within the limit in OCC account.”
- G Thus, the action under the SARFAESI Act was recommended to be deferred to enable the Borrower to submit detailed project/viability report, bring OCC account within limit and increase production to the fullest extent by infusing Rs.60,00,000/- (Rupees sixty lakhs only) towards the working capital. The Borrower was to be allowed operations in their bank account after bringing the OCC liability within the prescribed limit.
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- (ix) The third party investor brought in Rs.15,00,000/- (Rupees fifteen lakhs only), out of which Rs.5,00,000/- (Rupees five lakhs only) was utilised for payment of salary and Rs.10,00,000/- (Rupees ten lakhs only) was remitted to the OCC account. Thereafter, the third party investor opted out and did not bring in the balance Rs. 45,00,000/- (Rupees forty five lakhs only). Detailed project/viability report was not submitted. A B
- (x) On failure of the Borrower to translate its promise into action, the Bank issued notice under Section 13(4) of the SARFAESI Act read with Rule 8(1) of the Rules and took symbolic possession of the Subject Property *vide* possession notice dated 3rd March 2017. C
- (xi) Thenceforth, the Bank filed CrI.M.P.No.343/2017 under Section 14 of the SARFAESI Act before the Chief Metropolitan Magistrate, Cyberabad, Ranga Reddy District and took physical possession of the secured asset on 3rd May 2017 through Advocate Commissioner appointed by the court. D
- (xii) On 1st June 2017, the Bank issued notice under Rule 6(2) read with Rule 8(6) of the Rules informing the Borrower that the Subject Property was being put to auction with a reserve price of Rs.2,78,10,000/- (Rupees two crores seventy eight lakhs ten thousand only). The Borrower was given an option to repay the amount due along with interest so that the auction could be halted. E
- (xiii) The Borrower did not respond to this letter. It neither protested nor made any payment. F
- (xiv) The auction held on 6th October 2017 did not fructify as no bidder came forward to purchase the Subject Property.
- (xv) On 20th October 2017, 8th November 2017 and 17th November 2017, the Borrower made representations for regularisation of the account. The last letter dated 17th November 2017 refers to meetings with senior officers of the Bank on 30th October 2017, 6th November 2017 and 8th November 2017 and that the Bank had agreed to restructure the Borrower's account upon furnishing of additional H

- A collateral security of Rs.50,00,000/- (Rupees fifty lakhs only) for which the Borrower had been advised to furnish documentation. To establish *bona fides*, the Borrower had furnished an undated cheque of Rs.25,00,000/- (Rupees twenty five lakhs only) which could be presented upon approval of the restructuring proposal. The Borrower would furnish techno economic viability study-cum-restructuring proposal. The Bank on consideration of the restructuring proposal would allow the Borrower to reopen the factory. The Bank was requested to handover keys to enable the Borrower to assess the stock and build the unit for commercial production.
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- (xvi) The Bank *vide* letter dated 30th November 2017, recapped the Borrower the need to submit the restructuring proposal in the prescribed format along with the details of additional collateral security as well as legal opinion and valuation report. The documentation, it was stated, was not received. Also, visit of the Bank officers to the proposed collateral security property had not been arranged. The Borrower was informed that the Bank would take a call on Borrower's request for opening the factory, which was in the Bank's possession, after receipt of the aforementioned papers etc. along with realisation of cheque presented by the Borrower. The Borrower was advised to comply with the terms immediately to enable the Bank to consider the proposal for restructuring, with a warning that in case of delay, the Bank would set into motion the proceedings under the SARFAESI Act which had been temporarily halted.
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- (xvii) On 18th December 2017, the Borrower again wrote seeking regularisation of the account and waiver of penal charges levied in terms of the loan agreement. A restructuring proposal was submitted as per the format with a request that the same should be considered and the Borrower be permitted to bring the unit to commercial operation as a one-time opportunity.
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- (xviii) As per the Bank there was non-compliance and failure. No payment was made. In these circumstances, the Bank made second and third attempts to sell the Subject Property by
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way of auctions held on 28th March 2018 and 14th June 2018. Both the attempts failed as no bidder came forward to participate in the auction. A

(xix) Importantly, the attempts to sell the Subject Property remained unchallenged by the Borrower.

(xx) On 20th August 2018, the Bank issued the fourth notice for auction, regarding which the Borrower was duly informed. Given the fact that in the earlier auctions no bidder had participated, the Bank reduced the reserve price from Rs.2,78,10,000/- (Rupees two crores seventy eight lakhs ten thousand only) to Rs.2,60,00,000/- (Rupees two crores sixty lakhs only). Yet again, the Borrower did not respond. It neither questioned the sale notice, the reduction in reserve price, nor made any payment. B C

(xxi) In the auction held on 11th September 2018, two bidders had participated and the Subject Property was sold at a bid price of Rs.2,91,20,000/- (Rupees two crores ninety one lakhs twenty thousand only) to Basa Chandramouli. On 14th September 2018, sale confirmation letter was issued to Basa Chandramouli. On 27th September 2018, after Basa Chandramouli had made the total payment, the sale certificate was issued. D E

6. In October 2018, the Borrower approached and filed a petition before the Debts Recovery Tribunal challenging the enforcement proceedings in respect of the Subject Property including all steps taken right from issue of notice under Section 13(2) of the SARFAESI Act. F

7. The Debts Recovery Tribunal, Hyderabad by its judgment dated 1st July 2019 dismissed the Borrower's application holding that the Bank had followed the prescribed procedure under the SARFAESI Act and the sale was valid.

8. Thereupon, the Borrower had preferred a writ petition before the High Court of Telangana. The Borrower did not go in appeal to the Debts Recovery Appellate Tribunal, Kolkata as it was not functioning due to want of members. In the meanwhile, on 8th July 2019, the auction purchaser Basa Chandramouli sold the Subject Property to the Second Purchaser, the appellant herein. Before this sale, Basa Chandramouli had already sold machinery and equipment. It is the case of the Second H

- A Purchaser that he had no information or knowledge about the writ petition preferred by the Borrower on 6th July 2019. The Second Purchaser had acquired the plot with the bare structure, which the Second Purchaser claims was in a dilapidated condition. The Second Purchaser had an existing industrial establishment on a plot of land adjacent to the Subject Property. After the purchase, the structure standing on the Subject Property was demolished and the Second Purchaser has constructed a new structure, as per the Second Purchaser at the cost of over Rs.70,00,000 (Rupees seventy lakhs only).

- C 9. After a detailed perusal of the facts in the present matter, we would like to refer to the findings of the High Court and our findings on the legal issues with reference to the points formulated by the High Court, as set out in paragraph 4 above. For convenience, we would like to simultaneously deal with points (a) and (b).

- D 10. In brief, the impugned judgment upholds the contention on violation of Section 13(3A) of the SARFAESI Act relying on the judgment of this Court in *ITC Limited v. Blue Coast Hotels Limited and Others*,¹ that compliance with Section 13(3A) being mandatory, the Bank had failed to respond with reasons to the representations made by the Borrower dated 1st/6th November 2016. The stance of the Bank that these representations were not in response to the notice under Section E 13(2) dated 1st August 2016 was rejected as the Borrower through representations had pleaded difficulties being faced by it in repaying the loan instalments and sought extension of moratorium/more time for repayment. The High Court held that it was not necessary for the Borrower to specifically mention that the representations were in response to the notice under Section 13(2) of the SARFAESI Act. Further, F relying upon the decision of the Bombay High Court in *Blue Coast Hotels Limited v. IFCI Limited and Another*,² which decision on challenge became the subject matter of the appeal and decision of this Court in *ITC Ltd.* (supra), the High Court held that there is no specific provision or mandate under Section 13(3A) of the SARFAESI Act that the G representation of the Borrower to the demand notice under Section 13(2) should be filed within a period of sixty days from the date of notice. The impugned judgment also refers to the letter dated 7th November 2016 to observe that the Chief Manager of the Bank had recommended deferring

¹ (2018) 15 SCC 99

H ² 2016 SCC OnLine Bom 2663

of action under the SARFAESI Act with the intent that the unit running in the Subject Property should be granted benefit of deferment of action. The Bank had proceeded to issue possession notice on 3rd March 2017 under Section 13(4) of the SARFAESI Act long after receipt of the representations dated 1st/6th November 2016, but without making any reference to the aforesaid representation. Accordingly, on the first point, the High Court concluded that there had been a violation by the Bank of its mandatory statutory duty under Section 13(3A) of the SARFAESI Act.

11. On the second question, reference was made to Section 17(1) of the SARFAESI Act which deals with the right of appeal by a party aggrieved by the measures referred to in sub-section (4) to Section 13. Relying on the decision of this Court in *Authorised Officer, Indian Overseas Bank and Another v. Ashok Saw Mill*,³ it was held that the series of steps from the date of action by the secured creditor under Section 13(2) of the SARFAESI Act up to the date of auction and sale confirmation can be challenged by the Borrower when it challenges the measures referred to in the sub-section (4) to Section 13 under Section 17 of the SARFAESI Act. In this view of the matter, the High Court with respect to the second issue held that though the O.A. was filed on 1st October 2018, the Borrower can challenge the possession notice issued on 3rd March 2017, taking of symbolic possession, taking of physical possession in May 2017, the sale notice issued on 2nd July 2018, and the sale certificate dated 27th September 2018 as they all form part of the same cause of action. Consequently, it was observed that challenge to the actions/measures prior to 2nd July 2018 would not be barred by limitation.

12. In view of the factual matrix of the present case, which has been set out in detail above and the aspect of waiver and estoppel discussed subsequently, it is not necessary for us to examine the question of violation of Section 13(3A) of the SARFAESI Act and also whether the cause of action from the date of issue of notice under Section 13(2) of the SARFAESI Act till the issuance of the sale certificate is a continuing cause of action. Suffice it would be to observe that in the case of *ITC Ltd.* (supra), this Court in spite of holding that there was violation of Section 13(3A) of the SARFAESI Act and consequently the notice of possession under Section 13(4) was vitiated, had allowed the

³ (2009) 8 SCC 366

- A appeal in view of the attendant circumstances set out in sub-paragraphs of paragraph 30 on the ground that the debtor, post the notice under Section 13(4) of the SARFAESI Act, had given proposals with assurances, letter of undertaking for repayment of the mortgage debt, pursuant to which time was granted and consequently the sale notice was deferred.
- B Only when payments were not made as promised that the creditor had proceeded to recover the dues. Paragraph 31 and 32 of the decision in *ITC Ltd.* (supra) record as under:

- C “31. From the above, it is clear that the creditor was induced by the debtor not to take action against them through assurances and promises. The creditor appeared to have entered into negotiations for the settlement of the dues and even accepted cheques in repayment much after the notice [Dated 26-3-2013] under Section 13(2) and after the debtor’s letter of representation [Dated 27-5-2013] . Many opportunities were granted by the creditor to the debtor to repay the debt which were all met by proposals for extension of time. Eventually, the debtor even executed “A Letter of Undertaking [On 25-11-2013] “acknowledging the right of IFCI to sell the assets in the case of default.
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- E 32. In these circumstances, we have no doubt that the failure to furnish a reply to the representation is not of much significance since we are satisfied that the creditor has undoubtedly considered the representation and the proposal for repayment made therein and has in fact granted sufficient opportunity and time to the debtor to repay the debt without any avail. Therefore, in the fact and circumstances of this case, we are of the view that the debtor is not entitled to the discretionary relief under Article 226 of the Constitution which is indeed an equitable relief.”
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- G 13. We would like to elaborate on the aforesaid principle as the dictum, as declared in *ITC Ltd.* (supra), will equally apply to proceedings before the Debts Recovery Tribunal and the Appellate Tribunal under the SARFAESI Act. The principle applied is that of waiver and estoppel.

- H 14. Waiver is an intentional relinquishment of a known right. Waiver applies when a party knows the material facts and is cognizant of the legal rights in that matter, and yet for some consideration consciously abandons the existing legal right, advantage, benefit, claim or privilege. Waiver can be contractual or by express conduct in consideration of

some compromise. However, a statutory right may also be waived by implied conduct, like, by wanting to take a chance of a favourable decision. The fact that the other side has acted on it, is sufficient consideration. It is correct that waiver being an intentional relinquishment is not to be inferred by mere failure to take action, but the present case is of repeated positive acts post the notices under Sections 13(2) and (4) of the SARFAESI Act. Not only did the Borrower not question or object to the action of the Bank, but it by express and deliberate conduct had asked the Bank to compromise its position and alter the contractual terms. The Borrower wrote repeated request letters for restructuring of loans, which prayers were considered by the Bank by giving indulgence, time and opportunities. The Borrower, aware and conscious of its rights, chose to abandon the statutory claim and took its chance and even procured favourable decisions. Even if we are to assume that the Borrower did not waive the remedy, its conduct had put the Bank in a position where they have lost time, and suffered on account of delay and laches, which aspects are material. Action on the Subject Property was delayed by more than a year as at the behest of the Borrower, the Bank gave them a long rope to regularise the account. To ignore the conduct of the Borrower would not be reasonable to the Bank once third party rights have been created. In this background, the principle of equitable estoppel as a rule of evidence bars the Borrower from complaining of violation.

15. The question of waiver of mandatory requirement of a statute was considered by this Court in depth in *Commissioner of Customs, Mumbai v. Virgo Steels, Bombay and Another*,⁴ by referring to a catena of judgments beginning from the judgment of the Privy Council in *AL. AR. Vellayan Chettiar (Decd.) and Others v. Government of the Province of Madras, Through the Collector of Ramnad at Madura, and Another*⁵ wherein it was held that though notice under Section 80 of the Code of Civil Procedure, 1908 is mandatory, the suit would not be bad if the non-issuance of notice is waived by the party for whose benefit the provision has been enacted. Similarly, in *S. Raghbir Singh Gill v. S. Gurcharan Singh Tohra and Others*,⁶ the argument that the requirement of Section 94 of the Representation of Peoples Act, 1951 cannot be waived was rejected observing that a privilege conferred or a right created by a statute, if it is solely for the benefit of a party, the said party can

⁴(2002) 4 SCC 316

⁵AIR 1947 PC 197

⁶(1980) Supp SCC 53

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- A waive it. However, where a provision enacted is founded on public policy, the courts would be slow to apply the doctrine of waiver. The doctrine applies in the first situation as the right to waive inheres in the concept of personal privilege and right. Reference in this regard can be also made to the ratio in *Krishan Lal v. State of J&K*⁷ and *Martin & Harris Ltd. v. VIth Additional Distt. Judge and Others*.⁸ In *Bank of India and Others v. O.P. Swarnakar and Others*,⁹ and in *Shri Lachoo Mal v. Shri Radhey Shyam*,¹⁰ this Court elucidated the general principle that everyone has a right to waive and to agree to renounce an advantage of law or rule made solely for the benefit and protection of the person in private capacity. If a party gives up the advantage that could be taken of a particular position in law, it cannot later be permitted to change and turn around so as to avail of that advantage. However, this rule will not apply when there is a prohibition against contracting out of the statute, which prohibition would have its consequences or in case the waiver would be contrary to public policy. Further, a person cannot waive a right of a third person.
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16. This principle has been subsequently followed in *Pravesh Kumar Sachdeva v. State of Uttar Pradesh and Others*,¹¹ to hold that waiver is abandonment of a right which normally everybody is at liberty to waive. Waiver is nothing unless it amounts to release, *albeit* it can be adduced from acquiescence or may be implied. The essence of waiver is an estoppel and they are questions of conduct and, therefore, necessarily determined on the facts of each case. As a rule and judicial policy, the courts of law do not allow a litigant to take inconsistent position to gain advantage through the aid of judicial proceedings.
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17. In consideration of the facts of the present case, another important aspect to be duly noted is the power of the courts/judicial authorities to mould relief. While holding that the general approach is that the claimant who succeeds in establishing the unlawfulness of administrative action is entitled to grant of remedial order, the general proposition does not undermine the discretion which the courts or judicial authorities have in assessing “what is fair and just to do in the particular
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⁷ (1994) 4 SCC 422

⁸ (1998) 1 SCC 732

⁹ (2003) 2 SCC 721

¹⁰ (1971) 1 SCC 619

H ¹¹ (2018) 10 SCC 628

case – to withhold the remedy altogether or to mould the remedy by grant of a declaration rather than a more coercive quashing, prohibiting or mandatory order or injunction which may have been sought.”¹² Relief may be granted in respect of one aspect and not others. The general approach, therefore, is that a complainant who succeeds in establishing unlawfulness of an action is entitled to a remedial order, but the court has discretion in the sense of determining what is fair and just to do in a particular case. This discretionary aspect of grant of relief even with reference to post litigation events has been highlighted in ***Beg Raj Singh v. State of U.P. and Others***,¹³ wherein it was held as under:

“7. Having heard the learned counsel for the petitioner, as also the learned counsel for the State and the private respondent, we are satisfied that the petition deserves to be allowed. The ordinary rule of litigation is that the rights of the parties stand crystallized on the date of commencement of litigation and the right to relief should be decided by reference to the date on which the petitioner entered the portals of the court. A petitioner, though entitled to relief in law, may yet be denied relief in equity because of subsequent or intervening events i.e. the events between the commencement of litigation and the date of decision. The relief to which the petitioner is held entitled may have been rendered redundant by lapse of time or may have been rendered incapable of being granted by change in law. There may be other circumstances which render it inequitable to grant the petitioner any relief over the respondents because of the balance tilting against the petitioner on weighing inequities pitted against equities on the date of judgment. Third-party interests may have been created or allowing relief to the claimant may result in unjust enrichment on account of events happening in-between. Else the relief may not be denied solely on account of time lost in prosecuting proceedings in judicial or quasi-judicial forum and for no fault of the petitioner. A plaintiff or petitioner having been found entitled to a right to relief, the court would as an ordinary rule try to place the successful party in the same position in which he would have been if the wrong complained against would not have been done to him...”

¹² *De Smith's Judicial Review*, Eighth Edition (2018), at page 1006

¹³ (2003) 1 SCC 726

- A Reference in this regard can be also made to an earlier decision of this Court in ***Rameshwar and Others v. Jot Ram and Another***.¹⁴

18. In the present case, it is clear from a bare perusal of the letter dated 7th November 2016 sent by the Bank to its Zonal Manager that the Bank actively considered the Borrower's request for extension of the moratorium period. The Borrower did not submit the viability report and failed to bring in Rs. 45,00,000/- (Rupees forty five lakhs only). Post this default also there were negotiations with assurances and promises by the Borrower. Displaying forbearance, the Bank granted indulgence as action under the SARFAESI Act was deferred for nearly one year from 7th November 2016 till 6th October 2017. Thereafter, negotiations were held on 30th October 2017, 6th November 2017 and 8th November 2017. The email dated 30th November 2017 addressed by the Bank to the Borrower highlights the dilatory and tricky approach of the Borrower as it had failed to submit details of the additional collateral security offered along with the legal opinion and the engineer's valuation report. Even visit to the proposed collateral security property was not arranged. The Borrower again tried its luck and submitted a restructuring proposal *vide* communication dated 18th December 2017, but this did not fructify into an acceptable settlement. The Bank having lost faith could not rely on the Borrower. Only thereafter, the Bank proceeded with the auctions under the SARFAESI Act on 28th March 2018 and 14th June 2018. The Borrower then kept silent. As the earlier auctions failed, the Bank issued notice dated 20th August 2018 informing the Borrower about the fourth auction to be held on 11th September 2018 at a reduced reserve price. The Borrower challenged the actions taken by the Bank after the Subject Property had changed hands and third party interests had been created. Taking into consideration the entire facts of the case, which perspicuously reflect disingenuous conduct on part of the Borrower to gain indulgence, unfulfilled assurances and promises, their unwillingness to pay, and in light of the law laid down by this Court, we are of the view that the Borrower has waived and is estopped from challenging violation of Section 13(3A) of the SARFAESI Act and hence, the first issue is decided in favour of the Bank. Given the aforesaid position, we do not think we are required to examine the second point, i.e. whether in an application under Section 17 of the SARFAESI Act, which can be filed when a Borrower is aggrieved by any of the measures referred to in sub-section

H ¹⁴ (1976) 1 SCC 194

(4) to Section 13 within forty five days from the date such measures are taken, the Borrower can challenge other measures, steps and procedures which preceded the ultimate sale even if barred by the limitation period of forty five days. A

19. With regard to the third issue of the valuation of the machinery and the adverse finding of the High Court on the question of valuation before the machinery was sold in auction, it is to be noticed that the valuation report which has been placed on record is dated 19th February 2018, values the land, the building and the machinery separately. The machinery has been valued with specific reference to as many as 55 separate items under the Heading 'Description of Machinery'. The valuation report itself has not been disputed or challenged. We do not agree with the High Court that the machinery should have been separately auctioned or sold. This would be putting fetters and restrictions on the Bank by barring the Bank from selling the machinery along with the building and the land. Prejudice and loss caused to the Borrower is not shown and established. Auction sale as confirmed was at a price higher than the fair market valuation of the land, the building and the machinery. Whether or not the price of the machinery should be accounted for the purpose of payment of stamp duty on a composite sale wherein the land, the building and the machinery located in the building are sold, would not be of any relevance and importance as the issue in question does not concern payment of stamp duty and the principles applicable. On the other hand, the law recognises that the lender knows its interests and how to secure best value of the property given the fact that the mortgaged property had to be sold for recovery of the debts due and payable to the Bank. B C D E

20. The fourth issue relating to the date of the valuation report also does not help the Borrower. The valuation certificate or report is dated 19th February 2018. As held above, attempts to sell the property were made thereafter on 28th March 2018 and 14th June 2018 but without success as there were no bidders. Accordingly, it was decided to reduce the reserve price from Rs.2,78,10,000/- (Rupees two crores seventy eight lakhs ten thousand only) to Rs.2,60,00,000/- (Rupees two crores sixty lakhs only). However, in the fourth auction the successful bid given by Basa Chandramouli was for Rs.2,91,20,000/- (Rupees two crores ninety one lakhs twenty thousand only), which is much higher than the reserve price of Rs.2,60,00,000/- (Rupees two crores sixty lakhs only) F G H

- A or the fair market value of Rs.2,73,80,000/- (Rupees two crores seventy three lakhs eighty thousand only) in terms of the valuation report.

21. Resultantly, we allow the present appeals and set aside the impugned order dated 24th January 2020 passed in Writ Petition No. 13936 of 2019. The writ petition would be treated as dismissed. The
B order passed by the Debts Recovery Tribunal dated 1st July 2019 upholding the procedure and sale of the Subject Property under the SARFAESI Act is upheld.

However, in the facts of the present case, there would be no order as to costs.

Devika Gujral

Appeals allowed.