

Compliance with mandatory procedure under SARFAESI Act and Rules: DRAT KOLKATA

Nampally Kishan

...Appellant

Telengana Grameena Bank

...Respondent

Case No: Appeal No. 134 of 2018

Date of Judgement: 12th October, 2023

Judges:

Anil Kumar Srivastava, J- Chairperson

For Appellant: Mr. Nemani Srinivas, Advocate.

For Respondent: Mr. Soudip Pal Chowdhuri, Ms. Saswati Sikder, Advocates.

Facts:

Appellant Nampally Kishan availed a loan of Rs. 3 lakhs from Telengana Grameena Bank (Respondent 1) for house construction. He mortgaged the house property in favor of the bank. Appellant paid loan installments regularly till 2013 with slight irregularities. He received demand notice dated 15th June 2016 from the bank for payment of Rs. 3,70,292 within 60 days. Appellant paid Rs. 1,20,000 but received auction notice dated 13th Dec 2016 from the bank fixing auction on 24th Jan 2017 with reserve price of Rs. 10.75 lakhs. Appellant did not receive notice u/s 13(4) of SARFAESI Act or possession notice or notice u/s 8(6) and 9(1) of Security Interest (Enforcement) Rules, 2002. Sale notice was also not affixed on a conspicuous part of property as required u/s 8(7) of the Rules. In auction on 24th Jan 2017, property was sold to Respondent 2 Syed Azmath Pasha for Rs. 11.77 lakhs.

Appellant's SARFAESI application u/s 17 before Debt Recovery Tribunal (DRT) was dismissed on 28th Feb 2018. The present appeal arises against this order of DRT.

Arguments by Appellant:

Notice u/s 13(4) was not served. Mandatory notices like possession notice, notice u/s 8(6) and 9(1) of Rules were not received. Sale notice was not affixed on conspicuous part of property violating Rule 8(7). DRT erred in holding that notices were duly served and Rule 8(7) was complied.

Arguments by Respondent Bank:

Notices u/s 13(2) and 13(4) were duly served upon Appellant. Notice u/s 13(4) was affixed on property and publication in newspaper was done on 9th Sep 2016. Sale notice was served personally upon Appellant on 17th Oct 2016. Valuation was done properly based on approved valuer's report. Auction was done properly and sale was confirmed. Sale certificate was issued. Balance sale amount was sent to Appellant who refused to accept.

Court's Observations and Reasons

Non-compliance of Rule 8(2) of Security Interest (Enforcement) Rules, 2002:

As per Rule 8(2), possession notice should have been published within 7 days. Bank admitted notice was published in newspapers only on 9th Sep 2016 violating the rule.

Non-compliance of Rule 8(7) of Rules:

Rule 8(7) mandatorily requires notice of sale to be affixed on a conspicuous part of property. Supreme Court has held that banks have to follow the law like any other litigant. When procedure is prescribed in statute, act should be performed only in manner prescribed. Compliance of Rule 8(7) being mandatory, burden lies on bank to prove compliance. Bank failed to prove compliance of Rule 8(7) as date of affixing notice is not shown in documents.

Validity of valuation report and deposited amount by Appellant:

Bank's valuation based on approved valuer found to be valid.

Appellant's valuation report lacked necessary details, hence unacceptable. Fact of deposit of Rs. 1.2 lakhs by Appellant is admitted by bank but DRT failed to consider this.

Conclusion and Order:

As mandatory Rule 8(7) was not complied, appeal allowed on this ground. Impugned order of DRT set aside. Appellant's SARFAESI application allowed. Auction sale set aside. Respondent 2 entitled for refund. Possession to be restored with Appellant.

Sections referred:

Section 13(2) of SARFAESI Act

Section 13(4) of SARFAESI Act

Section 17 of SARFAESI Act

Rule 8(2) of Security Interest (Enforcement) Rules, 2002

Rule 8(6) of Security Interest (Enforcement) Rules, 2002

Rule 8(7) of Security Interest (Enforcement) Rules, 2002

Rule 9(1) of Security Interest (Enforcement) Rules, 2002

Cases cited:

CELIR LLP vs Bafna Motors (Mumbai) Pvt Ltd & Ors. [Civil Appeal Nos. 5542-5543 of 2023]

Krushna Chandra Sahoo vs Bank of India [AIR 2009 Ori 35]

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Court

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Full Text of Judgment:

1. Instant appeal has arisen against the judgment and order dated 28th February, 2018 passed by Learned DRT, Hyderabad dismissing the SARFAESI Application No. 79 of 2017 (Nampally Kishan -vs- Telengana Grameena Bank & Another).

2. As per the pleadings of the parties, Appellant is a washerman who availed a loan of Rs.3.00 lac from the first Respondent for construction of a house allotted to him by the Government under Welfare Housing Scheme. He mortgaged the house property in favour of the Bank. Appellant was paying loan instalments regularly till 2013

with slight irregularities. A Demand Notice dated 15th June, 2016 was received for payment of Rs.3,70,292.00 within sixty days from the date of receipt of the notice. Thereafter, Appellant paid Rs.1,20,000.00 but on 13th December, 2016 Auction Notice was issued by the Respondent Bank fixing 24th January, 2017 for auction with the Reserve Price of Rs.10.75 lac. No notice under Section 13 (4) of the SARFAESI Act, 2002 (hereinafter referred to as 'the Act') was served upon the Appellant. Neither Possession Notice nor any notice under Rule 8 (6) or Rule 9 (1) of the Security Interest (Enforcement) Rules, 2002 (hereinafter referred to as 'the Rules') were received by the Appellant. Sale notice was also not affixed on a conspicuous part of the schedule property which is mandatory under Rule 8 (7) of the Rules.

3. Respondent Bank filed opposition with the assertion that Notices under Section 13 (2) and Section 13 (4) of the Act were duly served upon the Appellant. Notice under Section 13 (4) of the Act was also affixed on the schedule property and also publication in newspapers dated 9th September, 2016 were made. Sale notice dated 17th October, 2016 was served personally upon the Appellant on the same date. Valuation was fixed on the basis of the report of the Valuer. Auction sale was conducted on 24th January, 2017 and was sold in favour of Respondent No. 2, Md. Azmat Pasha, at Rs. 11.77 lac. Sale was confirmed on 24th January, 2017 and Sale Certificate was issued. Balance amount was sent to the Appellant who refused to receive the same.

4. It is stated in paragraph 3 of the counter affidavit filed by the Bank before the Learned DRT that the Possession Notice was issued on 30th August, 2016 and was published in newspapers; Indian Express and Sakshi Telugu, on 9th September, 2016. I have heard the Learned Counsel for the parties and perused the record.

5. Having heard the Learned Counsel for the parties Learned DRT arrived at a conclusion that Demand Notice was duly served upon the Appellant; sale notice was also affixed on a conspicuous part of the schedule property. Publication of the notices was duly made. Accordingly, dismissed the SARFAESI Application.

6. Rule 8 (2) of Security Interest (Enforcement) Rules, 2002 reads as under:

“(2) the possession notice as referred to in sub-rule (1) shall also be published as soon as possible but in any case not later than seven days from the date of taking possession, in two leading newspapers, one in vernacular language having sufficient circulation in that locality, by the authorised officer.”

7. Rule makes it clear that the Possession Notice should be published from the date of notice within seven days in two leading newspapers. In the present case, as admitted by the Bank, notice was dated 30th August, 2016 and it was published in newspapers on 9th September, 2016 which is in violation of Rule 8 (2) of the Rules.

8. Learned Counsel for the Appellant would submit that Learned DRT has erred in recording a finding that the notices were duly affixed and compliance of Rule 8 (7) of the Rules was duly made. Rule 8 (7) of the Rules reads as under:

“(7) Every notice of sale shall be affixed on a conspicuous part of the immovable property and the authorised officer shall upload the detailed terms and conditions of the sale, on the website of the secured creditor, which shall include –

- (a) the description of the immovable property to be sold, including the details of the encumbrances known to the secured creditor;
- (b) the secured debt for recovery of which the property is to be sold;
- (c) reserve price of the immovable secured assets below which the property may not be sold;
- (d) time and place of public auction or the time after which sale by any other mode shall be completed;
- (e) deposit of earnest money as may be stipulated by the secured creditor;
- (f) any other terms and conditions, which the authorised officer considers it necessary for a purchaser to know the nature and value of the property.”

Perusal of the Rule 8 (7) of the Rules will show that it is a mandatory provision wherein it is provided that the notice shall be affixed on a conspicuous part of the immoveable property. It has been

held by The Hon'ble Apex Court in paragraph 100 of CELIR LLP -vs- Bafna Motors (Mumbai) Private Limited & Others [Civil Appeal Nos. 5542-5543 of 2023] decided on 21.09.2023 held that:

"Bank is duty bound to follow the provisions of the law as any other litigant. It is to be noted that the Bank i.e., the secured creditor acts under the SARFAESI act through the authorized officer who is appointed under Section 13(2). Thus, the authorized officer and the Bank cannot act in a manner so as to keep the sword hanging on the neck of the auction purchaser. The law treats everyone equally and that includes the Bank and its officers. The said enactments were enacted for speedy recovery and for benefitting the public at large and does not give any license to the Bank officers to act de hors the scheme of the law or the binding verdicts."

9. Further it is the settled principle of law that when a particular procedure is provided to perform an act, then that act should be performed in the prescribed manner only.

10. In Krushna Chandra Sahoo -vs- Bank of India, AIR 2009 Ori 35, Division Bench of the Hon'ble High Court at Orissa held as under:

"8. A Constitution Bench of the Hon'ble Supreme Court in Sukhdev Singh v. Bhagatram Sardar Singh Raghuvanshi, AIR 1975 SC 1331 held that the statutory authorities cannot deviate from the statutory provisions and any deviation, if so made, is required to be enforced by legal sanction of declaration by the Courts invalidating such actions in violation of the statutory Rules and Regulations. A similar view had been reiterated by the Apex Court in Ambika Quarry Works etc. v. State of Gujarat, AIR 1987 SC 1073; Purushottam v. Chairman, Maharashtra State Electricity Board, 1999) 6 SCC 49: 1999 AIR SCW 4747 and Sultan Sadik v. Sanjay Raj Subba, AIR 2004 SC 1377.

9. Therefore, it is evident that when the action of the instrumentalities of the State is not as per the Rules and Regulations and supported by the statute, the Court must exercise its jurisdiction to declare such an act illegal and invalid. It becomes the duty of the Court to ensure compliance of such Rules and Regulations for the reason that they are binding on the authorities. Any order or action done by the authority in violation of the statutory provisions is

constitutionally illegal and this cannot claim any sanctity in law. There can be no obligation on the part of the Court to sanctify such illegal act.

10. When the statute provides for a particular procedure, the authority has to follow the same and cannot be permitted to act in contravention of the same. It has been hitherto uncontroverted legal position that where a statute requires to do a certain thing in a certain way, the thing must be done in that way or not at all. Other methods or mode of performance are impliedly and necessarily forbidden. The aforesaid settled legal proposition is based on a legal maxim "Expressio unius est exclusio alterius", meaning thereby that if a statute provides for a thing to be done in a particular manner, then it has to be done in that manner and in no other manner and following other course is not permissible, Vide State of Bihar v. J.A.C. Saldanna, AIR 1980 SC 3276; Haresh Dayaram Thakur v. State of Maharashtra, (2000) 6 SCC 179: AIR 2000 SC 2281; Prabha Shankar Dubey v. State of Madhya Pradesh, AIR 2004 SC 486, and Indian Banks' Association -vs- Devkala Consultancy Service, AIR 2004 SC 2615."

11. Compliance of Rule 8 (7) of the Rules is mandatory in nature. Now it is to be seen as to whether compliance was made by the Bank? Burden lies upon the Bank to prove the compliance.

12. In the appeal as well as before the DRT an effort is made by the Bank to show that the notice was affixed on a conspicuous part of the schedule property to make the compliance of Rule 8 (7). But the photographs annexed with the affidavit would show that no date is shown on which date the notice was affixed on the conspicuous part of the schedule property. Even in the list of documents filed by the Bank before this Appellate Tribunal and annexed at Serial No. 5 and 8 no date is mentioned regarding affixation of the Possession Notice or affixation of sale notice on the conspicuous part of the schedule property. Accordingly, it could not be accepted that compliance of Rule 8 (7) of the Rules was made by the Bank. On this count alone SARFAESI Application, under Section 17 of the Act, deserves to be allowed.

13. As far as issue of valuation is concerned, value was fixed on the basis of the report of the Valuer, M. Thirupathi Reddy, approved valuer of the Bank. Appellant has also submitted a valuation report prepared by K. Dayanand wherein the value is assessed at Rs.26.45 lac but the details of property along with the ground for assessing the value are not mentioned therein. Accordingly, it could not be held that the report of the Bank could not be accepted.

14. An amount of Rs.1.2 lac was deposited by the Appellant which is also admitted by the Bank in their rejoinder before the DRT in paragraph 5. However, this amount was deposited in compliance of the orders of the DRT which was not taken into consideration by the Learned DRT at the time of final disposal of the SARFAESI Application.

15. In the appeal, additional documents are filed without leave of the Appellate Tribunal even therein no assertion is made regarding compliance of Rule 8 (7) of the Rules. Accordingly, I am of the considered opinion that compliance of mandatory provisions of Rule 8 (7) of the Rules is not made. Accordingly, on this count alone appeal deserves to be allowed.

The appeal is allowed. The impugned order dated 28th February, 2018, passed by DRT-I, Hyderabad, is set aside. Consequently the SARFAESI Application No. 79 of 2017 is allowed. Auction sale held in favour of Respondent No. 2 on 24th January, 2017 is set aside. Respondent No. 2 would be entitled for refund of the auction price from the Bank with accrued interest. Possession of secured assets, if delivered to the Auction Purchaser, should be restored in favour of the Appellant within a month.

Copy of the order be supplied to Appellant and the Respondents and a copy be also forwarded to the concerned DRT.

File be consigned to Record room.

Order dictated, signed and pronounced in open Court.

Copy of the Judgment/Final Order be uploaded in the Tribunal's Website.