

Dismissal of appeal against order dismissing SARFAESI application filed by educational institution challenging bank's notice and auction sale of mortgaged property: DRAT KOLKATA

M/s. Harshini Educational Society

...Appellant

Indian Bank

...Respondent

Case No: Appeal No. 229 of 2013

Date of Judgement: 28th April, 2023

Judges:

Anil Kumar Srivastava, J – Chairperson

For Appellant: Mr. V.R. Machavaran, Advocate.

For Respondent: Mr. Debasish Chakrabarti, Ms. Sharmistha Pal, Mr. Nemani Srinivas, Advocates.

Facts:

Para 2: Appellant educational institution availed loan from respondent bank by mortgaging school building premises. Appellant defaulted and account classified as NPA. Bank issued notice u/s 13(2) demanding Rs. 56 lakhs. Auction notice published fixing reserve price of Rs. 1.02 crores. Appellant challenged notice as not published in vernacular language. Appellant deposited Rs. 5 lakhs as per Tribunal's order

which was later set aside by High Court. Further auction notices published, property finally sold to respondents 2 to 6 for Rs. 81.85 lakhs.

Para 3: Another auction notice not published in vernacular language, no notice u/s 13(4) issued initially. Later u/s 13(4) notice claimed Rs. 56 lakhs but published only in English.

Para 4: Appellant deposited Rs. 5 lakhs as per Tribunal direction. High Court set aside Tribunal's order.

Para 5: Another sale notice issued reserving price of Rs. 1.02 crores. Sale scheduled thrice but postponed for want of bidders. Finally sold on 27.12.2011 for Rs. 81.85 lakhs.

Para 6: DRAT dismissed appellant's SARFAESI application, appeal filed challenging dismissal order.

Court's Opinion:

Para 7: Appeal dismissed as appellant educational institution cannot bypass provisions of law by delaying proceedings through objections. Auction postponed thrice before property finally sold. Appellant did not comply with deposit directions, not a bonafide borrower.

Para 8: Grounds regarding violation of rules 8(6), 8(1) & (2) and 9(1) are incorrect. All grounds in SARFAESI application were considered. Auction not vitiated, was for proper value. Account rightly classified as NPA though amounts continued to be received.

Para 9 & 10: Property taken in possession before auction notice which was as per valuation report. Appeal barred by limitation as possession notice challenged beyond 45 days.

Para 11: Account rightly classified as NPA. Notice u/s 13(2) duly served upon appellant. Auction done on basis of notice dated 23.11.2011 which was also duly served.

Para 12: Valuation done by approved valuer, auction scheduled four times before property finally sold.

Para 13: In earlier SARFAESI applications, directions to deposit 40% and 50% of dues were not complied by appellant.

Para 14: Sale certificate issued after adjusting refunded amount of Rs. 24 lakhs to appellant.

Para 15: Appellant did not object to reserve price after receipt of notice u/s 8(6). Consent of borrower not required for reducing reserve

price which was as per rules.

Para 16: Of three SARFAESI applications disposed by common order, appeal filed only against one. Findings in other two attained finality.

Para 17: Notice duly served upon appellant with 30 days gap as per SC judgement in S. Karthik case.

Para 18: Prayer only for notice to be declared illegal but date of notice not mentioned. Notice dated 23.11.2011 was published on 27.11.2011 with auction on 27.12.2011, hence 30 days gap maintained.

Para 19: Valuation reports were obtained from approved valuers, reserve price fixed in consultation with bank. Distressed value assessed at Rs. 90 lakhs in last valuation report.

Para 20: Appellant contends valuation reports unreliable as values decreasing in reports.

Para 21: Rules do not require consent of borrower for fixing reserve price which has to be done by Authorised Officer in consultation with bank. Officer was vigilant to get maximum price, auction postponed thrice before property finally sold.

Para 22 & 23: Appellant did not object to reserve price mentioned in notice u/s 8(6). Failed to make deposits as per directions in earlier SARFAESI applications. Attempt only to delay proceedings. Hence no irregularity in auction as property sold for proper value after four attempts.

Arguments by Parties:

Arguments by Appellant:

Para 8: Violation of Rules 8(6), 8(1), 8(2) and 9(1). All grounds in SARFAESI application not considered. Property sold for undervalue. Account wrongly classified as NPA.

Para 9: Auction notice published without taking possession. Valuation after initiating auction proceedings.

Arguments by Respondent Bank:

Para 10: Auction not done on basis of notice dated 08.09.2011 challenged in application, so it became infructuous. No prayer for cancellation of sale. Appeal barred by limitation as possession notice challenged after 45 days.

Para 11: Account rightly classified as NPA. Notice u/s 13(2) duly served. Auction done on basis of notice dated 23.11.2011 which was also duly served.

Para 12: Valuation done properly, auction scheduled four times before property finally sold.

Para 13: Directed to deposit 40% and 50% in earlier SARFAESI applications which was not complied.

Para 14: Sale certificate issued after adjusting refunded amount.

Arguments by Auction Purchasers:

Para 15: No objection raised to reserve price after notice u/s 8(6). No need for consent to reduce reserve price which was properly reduced.

Sections and Rules:

Sections 13(2), 13(4) and 8(6) of SARFAESI Act

Rules 8(5), 8(6), 8(1), 8(2) and 9(1) of Security Interest (Enforcement) Rules

Case Laws Cited/Referred:

S. Karthik v. Shubhas Chand Jain (2020) 10 SCC 641

Mathew Varghese v. M. Amritha Kumar (2014) 5 SCC 610

Ram Kishun v. State of U.P. (2012) 6 SCR 105

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Full Text of Judgment:

1. Instant Appeal is preferred against a judgment and order dated 5th July, 2012, passed by Learned DRT, Vishakhapatnam, dismissing SARFAESI Applications No. 98 of 2011, 151 of 2011 and 179 of 2011. Since the facts were common in all the three SARFAESI Applications, all the three SARFAESI Applications were decided by a common judgment. However, appeal is filed only challenging the dismissal of SARFAESI Application No. 179 of 2011.

2. As per the pleading of the parties, facts of the case are that the SARFAESI Applicant, Appellant herein, is running an English Medium

High School at Nellore. Appellant availed loan facilities from the Respondent Bank wherein the school building and premises in an extent of 440 square yards together with plinth area of 6163 square feet comprising of three floors was offered as collateral security. Appellant was making regular payments of the instalments but illegally Respondent Bank classified the loan account as Non Performing Asset (N.P.A.). Notice under Section 13 (2) of the SARFAESI Act 2002 (hereinafter referred to as the Act) was issued demanding a sum of Rs.56,53,861.00 on 10th January, 2011 which was not published in the newspaper in vernacular language, accordingly this was bad in law. Auction notice was published on 30th March, 2011 fixing Reserve Price of Rs.102.25 lac and auction scheduled to be held on 3rd June, 2011. This notice was not published in newspaper in vernacular language. No notice under Section 13 (4) of the Act was issued. Subsequently, Notice under Section 13 (4) of the Act was issued on 16th April, 2011. An amount of Rs.56,53,861.74 was claimed. Again this notice was published in Telugu paper Andhra Bhoomi, in English but not in vernacular language. Accordingly, there was violation of Rule 8 (2) of the Security Interest (Enforcement) Rules, 2002 (hereinafter referred to as Rules). Notice under Section 13 (2) of the Act was not served upon the Appellant.

3. Another Auction Notice dated 30th March, 2011 was published in Hindu paper on 1st May, 2011 fixing the Reserve Price of Rs.102.25 lac and auction dated 3rd June, 2011. Notice under Section 8 (6) of the Rules was not served; amount of property was not mentioned in the Auction Notice and it was not published in the newspaper in vernacular language.

4. In compliance of the order of the DRAT in M.A. (S.A.)208 of 2011 an amount of Rs.5.00 lac was deposited by the Appellant on 2nd June, 2011. Order of the DRAT was set aside by the Hon'ble High Court of Judicature of Andhra Pradesh at Hyderabad vide order dated 7th September, 2011 in W.P.MP. No. 22315 of 2011.

5. Another Sale Notice was issued on 22nd July, 2011 with a Reserve Price of Rs.102.05 lac and sale date fixed on 24th August, 2011. In the said notice due amount was wrongly mentioned. Further, there was

violation of Rule 8 (6) (b) and 8 (2). Sale was further fixed on 24th August, 2011 and 13th October, 2011 which could not be done for want of bidder. Ultimately, schedule property was sold on 27th December, 2011 for Rs.81.85 lac in favour of Respondents No. 2 to 6.

6. SARFAESI Application was ultimately dismissed by the Learned DRT vide order dated 5th July, 2012 which is under challenge.

7. I have heard the Learned Counsel for the Appellant as well as Respondent No. 1 and Respondents No. 4 to 6 and perused the record.

8. Learned Counsel for the Appellant submits that the Learned DRT has not arrived at a correct conclusion. It is submitted that there is violation of Rules 8 (6), 8 (1) & (2) and 9 (1) of the Rules. All the grounds taken in the SARFAESI Application were not considered. Property was sold for an under value valuation. It is further submitted that the Account was wrongly classified as N.P.A. as even after the auction of the secured assets, Bank continued to receive amounts in the account wherein an impression is given to the borrower that the account is still operative.

9. It is further submitted that Auction Notice was published without taking the secured assets in possession. Valuation Report was obtained after initiation of the auction proceedings.

10. Per contra, Learned Counsel for the Respondent Bank submits, in the SARFAESI Application there is a challenge to the notice dated 8th September, 2011. No auction was done on the basis of the notice dated 8th September, 2011 hence the SARFAESI Application became infructuous. It is submitted that no relief for cancellation of the sale was sought for; even the sale was not under challenge. Possession Notice dated 16th April, 2011 was challenged while the SARFAESI Application was filed beyond the period of limitation of 45 days. Accordingly, it is barred by time.

11. It is further submitted that the account was rightly classified as N.P.A. Notice under Section 13 (2) was issued on 10th January, 2011 which was served on 11th January, 2011; sale was conducted on the basis of the date of notice the notice, i.e. 23rd November, 2011 which

was duly served upon the Appellant on 26th November, 2011.

12. It was further submitted that the property was valued after obtaining the Valuation Report from the registered Valuer. Sale was fixed for four times, i.e. on 3rd June, 2011 for Rs.102.25 lac, 24th August, 2011 for Rs.102.25 lac, 13th October, 2011 for Rs.81.81 lac. On earlier three occasions, there was no bidder. On fourth occasion, on 27th December, 2011, the property was successfully auctioned for Rs.81.85 lac.

13. It is further submitted that the Appellant filed S.A. 98 of 2011 on 3rd June, 2011 wherein a direction for deposit of 40% of the amount due was passed which was not complied. Further, another S.A. 151 of 2011 was filed wherein a direction for deposit of 50% was passed which too was not complied. Hence, he is not a bona fide borrower.

14. Further it is submitted that the Sale Certificate was issued on 7th April, 2012; after adjustment of an amount of Rs. 24,18,458.00 which was refunded by the Bank to the Appellant on 7th April, 2012.

15. Learned Counsel for the Respondent/Auction Purchasers, in support of the submissions made by the Learned Counsel for the Bank, submits that after receipt of notice under Section 8 (6) of the Rules no objection was raised by the Appellant regarding under-value of the secured assets. It is further submitted that there is no requirement to obtain the consent of the borrower in reducing the Reserve Price. Reserve Price was reduced in accordance with law.

16. At the outset it is pertinent to mention that three SARFAESI Applications, being S.A. 98 of 2011, 151 of 2011 and 179 of 2011 were decided by the Learned DRT by a common judgment dated 5th July, 2012. Appellant chose to challenge the judgment passed in S.A. 179 of 2011. It means that the findings of the Learned DRT regarding S.A. 98 of 2011 and 151 of 2011 are not under challenge and attained finality. In the S.A. 179 of 2011 reliefs sought are as under:

- (a) The notice issued by the Respondent Bank is illegal, arbitrary and against natural justice.
- (b) Grant such other relief or reliefs as this Tribunal may deem fit

and proper in the circumstances of the case.

17. In *S. Karthik -vs- Shubhas Chand Jain*, (2020) 10 SCC 641, Hon'ble Apex Court has placed reliance upon *Mathew Varghese -vs- M. Amritha Kumar & Others*, reported in (2014) 5 SCC 610 wherein in para 50 it has been held :

"This Court in *Mathew Varghese* held that Rule 9 (1) of the said Rules prescribed that no sale of an immoveable property under the said Rules should take place before the expiry of 30 days from the date on which the public notice of sale was published in the newspapers or notice of sale has been served to the borrower. This Court further held that the expression "or" in Rule 9 (1) should be read as "and" and as such there should be clear notice of 30 days between the notice of sale to the borrower so also the publication in the newspaper and the actual date of sale."

Notice was challenged but the date of notice is not mentioned in the relief clause. Perusal of the SARFAESI Application would show that the Appellant is challenging the notice dated 11th September, 2011. As far as this notice is concerned it was published in the newspaper on 23rd November, 2011 fixing the date of auction as 27th December, 2011. This notice was served upon the borrower on 27th November, 2011 and there is clear gap of thirty days in service of the notice. Accordingly, notice was duly served upon Appellant.

18. As far as relief clause of the SARFAESI Application is concerned Appellant has sought only the relief to declare the notice illegal, arbitrary. Although in the grounds Appellant has taken certain grounds; one of the grounds is under valuation of the secured assets which is against the provisions of Rule 8 (5) of the Rules. Rule 8 (5) reads as under:

5) Before effecting sale of the immovable property referred to in sub-rule (1) of Rule 9, the authorized officer shall obtain valuation of the property from an approved valuer and in consultation with the secured creditor, fix the reserve price of the property and may sell the whole or any part of such immovable secured asset by any of the following methods:-

(a) by obtaining quotations from the persons dealing with similar

secured assets or otherwise interested in buying the such assets;
or

(b) by inviting tenders from the public;

(c) by holding public auction including through e-auction mode; or

(d) by private treaty:

19. A report of the Valuer, namely, Mr. C. Ravi Shankar, was obtained by the Bank on 16th February, 2011 wherein he has assessed the value of Rs.1,61,10,000.00 only. Thereafter, another report is submitted which is dated 18th April, 2011 wherein the value was assessed at Rs.1,36,35,000.00 and distressed value was assessed Rs.95,44,000.00. Thereafter, a report of Mr. K.N. Raju, Chartered Engineer, was obtained on 10th November, 2011 who assessed the value as Rs.1,28,00,000.00 and distressed value as Rs.90.00 lac. The property was sold on 27th December, 2011 for an amount of Rs.81,85,000.00.

20. Learned Counsel for the Appellant assailed the sale on the ground that the value assessed by the Engineer decreased on every valuation which raises suspicion about the veracity of the report, hence could not be accepted.

21. Rule 8 (5) of the Rules nowhere provides that in fixing the reserve price of the secured assets, Authorised Officer should take consent from the borrower rather it is incumbent upon the Authorised Officer to obtain valuation of the property from an approved valuer and in consultation with the secured creditor fix the reserve price of the property. As far as reserve price is concerned, a vague challenge is made on the valuation report of the approved valuer. Lastly, Mr. K.N. Raju, approved valuer, has assessed the distressed value of the property as Rs. 90.00 lac. It is pertinent to mention that the property was sold on the fourth occasion. In first three occasions no bidder came forward for bidding. Thereafter, on fourth attempt, property could be sold.

22. Under Rule 8(6), notice was issued to the borrower wherein, reserved price is mentioned as Rs. 81.80 lac. This notice was served upon the Appellant but no objection was raised by the Appellant regarding fixation of reserved price. Had it been so, Appellant could have very well raised objection at the very early stage which was not

done. In Ram Kishun & Others -vs- State of U.P. & Others, reported in (2012) 6 SCR 105, it was held by the Hon'ble Apex Court in para 17 that :

"In view of the above, it is evident that there must be an application of mind by the authority concerned while approving/accepting the report of the approved valuer and fixing the reserve price, as the failure to do so may cause substantial injury to the borrower/guarantor and that would amount to material irregularity and ultimately vitiate the subsequent proceedings."

Bare perusal of the record would show that the Authorised Officer made all attempts to fetch the highest value of the secured assets. Auction was postponed for three times and in the fourth attempt successful bidder was found and auction was completed. It would show that the Authorised Officer was vigilant enough to obtain the maximum price of the secured assets in auction. Accordingly, auction could not be said to be made for less amount of value.

23. If we look into the conduct of the Appellant, in this context, we may observe that on the earlier occasions directions were issued to the Appellant to make a deposit which too was not followed by the Appellant. Hence, although it is true, that Appellant is an educational institution but it could not be a ground to give undue leverage to the Appellant to bypass the provisions of law. Appellant is only interested to delay the proceedings by adopting one or the other method. Hence, it could not be held that the property was sold for less value.

24. On the basis of the discussion made above, I am of the view that the Learned DRT has rightly dismissed the SARFAESI Application. Accordingly, the appeal lacks merit and is liable to be dismissed. The appeal is dismissed. Judgment and order dated 5th July, 2022, passed by Learned Debts Recovery Tribunal, Vishakhapatnam, is affirmed.

No order as to costs.

File be consigned to Record room.

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

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

Order dictated, signed and pronounced by me in the open Court on this the 28th day of April, 2023.