

Dismissal of SARFAESI appeal on grounds of no pleading about notice under Section 13(2): DRAT KOLKATA

Biswajit Ghosh

...Appellant

Tripura Gramin Bank

...Respondent

Case No: Appeal No. 37 of 2021

Date of Judgement: 21st June, 2023

Judges:

(Anil Kumar Srivastava, J – Chairperson

For Appellant: Mr. Prabhat Sil, Ms. Kakali Samajpaty, Mr. Subhranil Ray,
Ms. Pratima Burman, Advocates.

For Respondent: Ms. Poetry Dutta, Mr. Durgadas Purkayastha
Mr. Sagar Chowdhury, Advocates.

Facts:

Appellant Biswajit Ghosh availed two loans of Rs. 70 lacs and Rs. 65 lacs from Respondent Bank. Appellant repaid Rs. 65.89 lakhs against first loan and Rs. 54.69 lakhs against second loan. Bank statements showed outstanding of Rs. 42.18 lakhs and Rs. 47.04 lakhs against the two loans. Bank issued sale notice on 20.02.2019 for auction of mortgaged property on 29.03.2019. Appellant filed SARFAESI application to set aside sale notice as illegal, without 60 days notice under Section 13(2). DRT dismissed application; Appellant filed appeal.

Arguments by Appellant:

Findings of DRT perverse and against record. Notice under Section

13(2) never served, hence sale proceedings illegal. Plea on validity of sale notice not considered by DRT. Burden on Bank to prove service of notice when denied. Non-compliance of Rules 8(6) and 9(1) of Security Interest Rules.

Arguments by Respondent Bank:

Notice under Section 13(2) duly served. Appellant himself submitted compromise proposal accepting liability. Auction held as per law after due procedure.

Court's Observations and Opinions:

Sections:

Analyzes SARFAESI provisions under Section 13(2) and 13(4)

Discusses pleading requirements under Section 17 and scope of pleadings

Refers to Bachhaj Nahar judgment on no evidence without pleading

Exception in paragraph 17 of Bachhaj Nahar judgment

Distinguishes National Textile Corporation case judgment

Cases Referred:

Bachhaj Nahar v. Nilima Mandal on scope of pleadings

National Textile Corporation v. Nareshkumar Badrikumar Jagad on raising new legal pleas

Ram Sarup Gupta judgment on evidence without pleading

Sanghvi Reconditioners judgment on new legal pleas

Vinayak Steels v. Om Vishnu Pipes on Rules 8(6) and 9(1) compliance

Other Laws:

Order 14 CPC on framing issues

SARFAESI Act Section 13(2) 60 days notice

Section 13(4) measures on borrower's default

Security Interest Rules on sale notice

Court's Decision:

Pleas not taken in SARFAESI application cannot be argued later. Plea of no Section 13(2) notice not raised earlier, cannot be considered now. Facts not pleaded cannot be looked into by Court. New plea has to be legal plea not requiring inquiry. Pleas of no valid auction etc. are mixed questions of fact and law. Notice under Section 13(2) stated to be sent by Bank on 09.07.2014. Sale notice per Rules 8(6) and 9(1) as per Telangana HC judgment. Impugned order does not suffer from any illegality. Appeal held not maintainable on above grounds and dismissed.

So in summary, the DRAT dismissed the SARFAESI appeal, not going into the merits of the bank's sale/auction on technical ground of no pleading earlier about notice under Section 13(2), limiting itself to what was pleaded in the Section 17 application before DRT.

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Court

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Full Text of Judgment:

- 1. Instant Appeal has arisen against judgment and order dated 21st June, 2019 passed by Learned Debts Recovery Tribunal, Guwahati (hereinafter referred to as 'Tribunal') in S.A. 29 of 2019 (Biswajit Ghosh -vs- Tripura Gramin Bank & Another) dismissing the SARFAESI Application.**
- 2. Feeling aggrieved, Appellant preferred the appeal.**
- 3. As per pleadings of the parties Appellant availed two loans of Rs.70.00 lac and Rs.65.00 lac from the Respondent Bank. An amount of Rs.65,89,883.30 was repaid against the loan of Rs.70.00 lac while an**

amount of Rs.54,69,645.00 was repaid against the loan of Rs.65.00 lac. However, as per Bank Statement, an amount of Rs.42,18,119.70 was shown as outstanding against the loan of Rs.70 lac while an amount of Rs.47,04,128.00 was shown as outstanding against the loan of Rs.65.00 lac. Sale Notice was issued on 20th February, 2019 calling upon the Applicant to discharge the liability within thirty days. It was a general Sale Notice which appeared at serial number 7 of the notice for the auction of the mortgaged property on "as in where and as is whatever basis and whatever there is basis and without recourse basis". Sale was fixed on 29th March, 2019. SARFAESI Application was filed by the SARFAESI Applicant stating that the sale notice is illegal as sixty days time, as required under Section 13 (2) of the SARFAESI Act, is not given. Sale was in violation of Section 13 (2) of the SARFAESI Act while in the notice dated 20th February, 2019 sale date was fixed on 29th March, 2019. Period of sixty days should have been exhausted from the date of issue of the notice, hence notice dated 20th February, 2019 is illegal. It is further stated in the SARFAESI Application that Applicant is willing to make full payment which is outstanding and some time may be granted to him.

4. Reply to SARFAESI Application was filed by the Respondent Bank wherein it is stated that admittedly over limit of Rs.1,35,00,000.00 was sanctioned by the Bank to the Appellant which was disbursed after execution of security documents. Mrs. Mina Rani Ghosh and Sri Gupta Narayan Deb Barma were the guarantors. Due to irregularity in the operation of the Loan Account, OD loan Account was classified as N.P.A. from 30th March, 2014 and Term Loan Account became N.P.A. on 30th June, 2014.

5. On 9th July, 2014 Authorised Officer of the Respondent Bank served notice under Section 13 (2) of the SARFAESI Act upon the Applicant along with Guarantors. No objection against the notice was submitted. On 13th March, 2017, SARFAESI Applicant submitted a compromise proposal before the Bank wherein it is admitted that his total liability as on that date was Rs.1,78,23,982.70p which was not accepted by the Bank. On failing to pay back the amount by the Applicant, Respondent Bank approached the District Magistrate, Ambassa

Dhalai District for taking physical possession and the physical possession was taken on 10th March, 2017 by handing over possession notice to the Applicant wherein it is specifically mentioned that Demand Notice was served on 9th July, 2014. Possession Notice was also sent to the Guarantor on 14th March, 2017. Possession Notice was also affixed in a conspicuous part of the secured assets. Inventory was prepared.

6. Valuation report of the secured asset was prepared on 9th April, 2017. Accordingly, the secured asset was put up on auction. Auction sale notice was sent to the Borrower by registered post and was also affixed on a conspicuous part of the secured asset. Secured asset was auctioned in favour of Mantosh Deb for Rs.2,40,00,255.00. Accordingly, sale was confirmed. Excess amount was adjusted towards the loan amount. All the proceedings were conducted in accordance with law. SARFAESI Application is liable to be dismissed.

7. Learned DRT dismissed the SARFAESI Application by the impugned order holding that the sale was conducted in accordance with law. Notice under Section 13 (2) was duly served. Compliance of Rule 8 (6) and 9 (1) of the Security Interest (Enforcement) Rules, 2002 was made. Learned DRT has also observed that during the hearing in the written arguments certain pleas were raised regarding challenge to the Demand Notice dated 9th July, 2014 and Possession Notice dated 10th March, 2017. It was held by the Learned DRT that these pleas were not taken in the SARFAESI Application and the Court/Tribunal is required to adjudicate the issues which arises out of the pleadings of the parties. Accordingly, SARFAESI Application was dismissed. I have heard the Learned Counsel for the Appellant as well as the Bank and the Auction Purchaser and perused the record.

8. Learned Counsel for Appellant mainly submits that the findings recorded by the Learned DRT are perverse and against the record. It is a specific case of the Appellant that notice under Section 13 (2) of the SARFAESI Act was not served upon the Appellant hence all the subsequent proceedings are vitiated. Learned Counsel further submits that the plea of validity of the sale notice and possession notice have not been looked into by the Learned DRT and those pleas goes to

the root of the matter. It is further submitted that when there is denial of the service of the notice under Section 13 (2) by the Appellant, burden lies upon the Respondent Bank to prove the service which was not discharged by the Respondent Bank. Compliance of Rule 8 (6) and 9 (1) of the Security Interest (Enforcement) Rules, 2002 is also not made. Accordingly, impugned order is bad in law.

9. Learned Counsel for the Respondent Bank submits that the notice under Section 13 (2) of the SARFAESI Act was duly served upon the Appellant but the Appellant is a defaulter who himself submitted a compromise proposal accepting his liability. Learned Counsel would submit that all the actions were taken in accordance with the provisions of law. Property has already been sold, sale certificate issued, accordingly, the appeal is liable to be dismissed.

10. SARFAESI Application was filed by the Appellant for a relief to set aside the Sale Notice dated 20th February, 2019. Perusal of SARFAESI Application would reveal that challenge was made on the ground that in the Sale Notice dated 20th February, 2019 compliance of Section 13 (4) of the SARFAESI Act was not made. Further it is stated in paragraph 5 (ix) that the Sale Notice is illegal for violation of the provisions of Section 13 (2) of the SARFAESI Act. Relevant paragraph 5 (viii), (ix), (x) and (xii) of the Application under Section 17 of the SARFAESI Act, reads as under:

“viii That the defendant bank issued sale notice on 20.02.2019 as per section 13 (4) of the

SARFAESI Act, 2002 to discharge in full liabilities amounting to Rs.1,70,06,419.00 within 30 days from the date of the notice dated 20.02.2019, thus the said notice is per se illegal and is liable to be struck down in the eye of law and facts. The defendant bank ought to have given sixty days time and not thirty days as per section 13 (2) of the SARFAESI Act, 2002.

ix. That the defendant bank issued sale notice on 22.02.2019 whereby the bank acting through the authorised officer has decided to put up for auction the mortgaged property in respect of the applicant where the intending buyers may submit their offers on or before 27.03.2019 by 5.00 PM and the said tender will be open on 29.03.2019 at 2:30 PM

at the Tripura Gramin Bank Head Office, Abhaynagar, Agartala. The said sale notice issued by the authorised officer Tripura Gramin Bank on 22.2.2019 is per se illegal as the defendant bank intended to go sell process in violation of section 13 (2) of the SARFAESI Act, 2002 categorically states that the secured creditor should require to give the borrower by notice in writing to discharge in full liabilities to the secured creditor within sixty days from the date of notice. From the notice dated 22.02.2019 transparently indicates that the defendant bank intends to complete the sell process on or before 29.03.2019 which is immoveable secured assets. The authorised officer, Tripura Gramin Bank while issued the sale notice on 22.02.2019 ought to have reflected the proviso of Rule 8 (6) of the Rules, 2002 where it prescribes 30 days. But in the instant sale notice nothing is mentioned thus, the same requires to be interfered with by this Hon'ble Tribunal.

x. That the defendant Bank ought to have exhausted period of 60 days from the date of issue of notice on 20.02.2019 as laid down in section 13 (2) of SARFAESI Act, 2002 and thereafter the authorized officer ought to have issued the sale notice but in the instant case the Tripura Gramin Bank issued notice on 20.02.2019 and 22.02.2019. Hence, both notices are illegal. Thus, sale notice dated 20.02.2019, 22.02.2019 issued by the authorized officer, Tripura Gramin Bank are illegal, contrary to law which requires to be interfered by this Tribunal.

xi. That Rule 6 (2) of the Security Interest (Enforcement) Rules, 2002 provides that the authorized officer shall secure to the borrower a notice of 30 days for sell of the moveable secured assets. In the instant case the secured asset is immoveable which pertains to land thus, section 6 (2) of Rules 2002 does not apply in the instant case.

Xii That the applicant undertakes that he shall make repayment of full amount that ever is outstanding and therefore a reasonable time preferably six months may please be afforded so that he could pay the entire amount. The applicant is yet to get a huge amount money being a class-I a contractor from the Government of Tripura and such amount is likely to be released shortly. The defendant may please be directed to reduce interest amount as per provision of law."

Now it is to be looked into whether grounds taken in the SARFAESI

Application are sufficient to set aside the Sale Notice? Whether the impugned order suffers from any illegality?

11. Impugned order shows that apart from the pleadings made by the Applicant in the SARFAESI Application, various other arguments were raised during the course of arguments which are repelled by the Learned DRT on the ground that the pleadings which have not been pleaded or that the facts which are not pleaded, could not be looked into and such issues cannot be adjudicated by the Tribunal. Even during the hearing of the appeal, argument is made that the notice under Section 13 (2) of the SARFAESI Act was never served upon the Appellant hence the whole action of the Respondent Bank is illegal. As would appear from the SARFAESI Application, no such plea was raised by the Appellant in the SARFAESI Application. In *Bachhaj Nahar – vs- Nilima Mandal & Another* [(2008) 17 SCC 491] it was held in paragraphs 12 and 13 that:

“12. The object and purpose of pleadings and issues is to ensure that the litigants come to trial with ll issues clearly defined and to prevent cases being expanded or grounds being shifted during trial. Its object is also to ensure that each side is fully alive to the questions that are likely to be raised or considered so that they may have an opportunity of placing the relevant evidence appropriate to the issues before the court for its consideration. This Court has repeatedly held that the pleadings are meant to give to each side intimation of the case of the other so that it may be met, to enable courts to determine what is really at issue between the parties and to prevent any deviation from the course which litigation on particular causes must take.

13. The object of issues is to identify from the pleadings the questions or points required to be decided by the courts so as to enable parties to let in to seek a particular relief, are not found in the plaint, the court cannot focus the attention of the parties, or its own attention on that claim or relief, by framing an appropriate issue. As a result the defendant does not get an opportunity to place the facts and contentions necessary to repudiate or challenge such a claim or relief. Therefore, the court cannot, on finding that the

plaintiff has not made out the case put forth by him, grant some other relief. The question before a court is not whether there is some material on the basis of which some relief can be granted. When there is no prayer for a particular relief and no pleadings to support such a relief, and when the defendant has no opportunity to resist or oppose such a relief, and when the defendant has no opportunity to resist or oppose such a relief, if the court considers and grants such a relief, it will lead to miscarriage of justice. Thus it is said that no amount of evidence, on a plea that is not put forward in the pleadings, can be looked into to grant any relief.”

12. When the plea of non-service of notice under Section 13 (2) of the SARFAESI Act is not taken in the SARFAESI Application then Respondent Bank had no opportunity to place the facts and contentions necessary to repudiate or challenge such claim. Therefore, the question arises as to whether any relief can be granted? When the defendant had no opportunity to counter the relief proposed by the Appellant; such relief could not be granted. Hence a plea which is not pleaded could not be looked into by the Court. It has rightly been held by the Leaned DRT that the ground which is not taken in the SARFAESI Application could not be adjudicated by the DRT.

13. An exception to this universal rule is given in paragraph 17 of the case of Bachhaj Nahar (supra) which reads as under :

“17. It is thus clear that a case not specifically pleaded can be considered by the court only where the pleadings in substance, though not in specific terms, contain the necessary averments to make out a particular case and the issues framed also generally cover the question involved and the parties proceed on the basis that such case was at issue and had led evidence thereon. As the very requirements indicate, this should be only in exceptional cases where the court is fully satisfied that the pleadings and issues generally cover the case subsequently put forward and that the parties being conscious of the issue, had led evidence on such issue. But where the court is not satisfied that such case was at issue, the question of resorting to the exception to the general rule does not arise. The principles laid down in Bhagwati Prasad and Ram Sarup Gupta referred to above an

several other decisions of this Court following the same cannot be construed as diluting the wellsettled principle that without pleadings and issues, evidence cannot be considered to make out a new case which is not pleaded. Another aspect to be noticed, is that the court can consider such a case not specifically pleaded, only when one of the parties raises the same at the stage of arguments by contending that the pleadings and issues are sufficient to make out a particular case and that the parties proceeded on that basis and had led evidence on that case. Where neither party put forth such a contention, the court cannot obviously make out such a case not pleaded, suo motu.”

14. If we look into the pleadings, we find that the pleadings and issues do not cover the issue which the Appellant is now trying to raise. Accordingly, Appellant cannot take advantage of any exceptional cases. A fact not pleaded cannot be looked into by the Court.

15. Learned Counsel for the Appellant has placed reliance upon the judgment of National Textile Corporation Limited -vs- Nareshkumar Badrikumar Jagad & Others, (2011) 12 SCC 695. On the strength of the judgment, Learned Counsel argued that the legal pleas raised by the Applicant before the Learned DRT should have been considered. Paragraphs 12 to 19 of the judgment reads as under :

“12. Pleadings and particulars are necessary to enable the court to decide the rights of the parties in the trial. Therefore, the pleadings are more of help to the court in narrowing the controversy involved and to inform the parties concerned to the question in issue, so that the parties may adduce appropriate evidence on the said issue. It is a settled legal proposition that “as a rule relief not founded on the pleadings should not be granted”. A decision of a case cannot be based on grounds outside the pleadings of the parties. The pleadings and issues are to ascertain the real dispute between the parties to narrow the area of conflict and to see just where the two sides differ. (Vide Trojan & Co. -vs- Nagappa Chettiar, State of Maharashtra -vs- Hindustan Construction Co. Limited and Kalyan Singh Chouhan -vs- C.P. Joshi).

13. In Ram Sarup Gupta v. Bishun Narain Inter College this Court held as under: (SCC p. 562, para 6) “6. in the absence of pleading,

evidence, if any, produced by the parties cannot be considered. no party should be permitted to travel beyond its pleading and that all necessary and material facts should be pleaded by the party in support of the case set up by it.”

Similar view has been reiterated in Bachhaj Nahar -vs- Nilima Mandal.

14. In Kashi Nath -vs- Jaganath (SCC page 745, para 17) this Court held that where the evidence is not in line with the pleadings and is at variance with it, the said evidence cannot be looked into or relied upon. Same remains the object for framing the issues under Order 14 C.P.C. and the court should not decide a suit on a matter/point on which no issue has been framed. (Vide Biswanath Agarwalla -vs- Sabitri Bera and Kalyan Singh Chouhan)

15. In Syed and Co. -vs- State of J&K this Court held as under: (SCC pp. 423-24, paras 7-8) “7. ... Without specific pleadings in that regard, evidence could not be led in since it is a settled principle of law that no amount of evidence can be looked unless there is a pleading.

8. Therefore, without amendment of the pleadings merely trying to lead evidence is not permissible.”

16. In Chinta Lingam -vs- Government of India this Court held that unless factual foundation has been laid in the pleadings no argument is permissible to be raised on that particular point.

17. In J. Jermons -vs- Aliammal while dealing with a similar issue, this Court held as under: (SCC p. 398, paras31-32):

“31. ... there is a fundamental difference between a case of raising additional ground based on the pleadings and the material available on record and a case of taking a new plea not borne out by the pleadings. In the former case no amendment of pleadings is required whereas in the latter it is necessary to amend the pleadings. ... 32. ... The respondents cannot be permitted to make out a new case by seeking permission to raise additional grounds in revision.”

18. In view of the above, the law on the issue stands crystallised to

the effect that a party has to take proper pleadings and prove the same by adducing sufficient evidence. No evidence can be permitted to be adduced on an issue unless factual foundation has been laid down in respect of the same.

19. There is no quarrel to the settled legal proposition that a new plea cannot be taken in respect of any factual controversy whatsoever, however, a new ground raising a pure legal issue for which no inquiry/proof is required can be permitted to be raised by the court at any stage of the proceedings. [See Sanghvi Reconditioners (P) Limited -vs- Union of India and Greater Mohali Area Development Authority -vs-Manju Jain]”.

In a recent judgment in Mrs. Ahella Lalitha -vs- Sri Konda Hanumantha Rao, 2022 Live Law (SC) 630 it is held that court cannot grant any relief not sought by the party.

16. As far as the issue of new pleas, raising a pure legal issue for which no enquiry/proof is required to be permitted to be raised by the Court at any stage of the proceedings. We have to look into as to what issues are being raised by the Appellant; whether they are purely legal in nature or factual in nature?

17. As has been observed in the earlier part of the judgment, plea of Section 13 (4), as enumerated in paragraphs 8 to 12, are raised by the Appellant. Apart from it, Appellant tried to raise the plea of issuance of fabricated sale certificate by the Bank; under valuation of the property; auction without any notice/representation by the Appellant being not considered by the Bank and the plea that auction was never held. All the pleas are mixed question of facts and law. They are not pure question of law and they cannot be adjudicated without looking into the facts of the case. Hence, the Appellant cannot take advantage of paragraph 19 of the National Textile case (supra). At this stage I would like to mention that certain pleas which are not pleaded by the Appellant before the Learned DRT were raised during the course of hearing of appeal. It is settled legal proposition that the plea not taken in the pleadings, could not be permitted to be raised at the time of hearing.

18. In the SARFAESI Application, as referred to in the earlier part of the judgment, it is stated that sixty days time should have been granted under Section 13 (2) of the SARFAESI Act, 2002, hence, the notice is illegal. A bare perusal of Section 13 (4) of the SARFAESI Act, 2002 would show that it deals with situation when the borrower fails to discharge its liability in full within the period the period specified in Sub-section (2). The secured creditor may take recourse to one or more measures out of the four measures, as prescribed under Section 13 (4) of the Act to recover its secured debt. There is no provision of issuance of sixty days notice under Section 13 (4) of the Act; rather, sixty days notice is required under Section 13 (2) of the SARFAESI Act, 2002, which notice was issued by the Bank on 9th July, 2014 wherein sixty days time was granted. Accordingly, the ground upon which the SARFAESI Application was filed was misconceived.

19. If we look into the pleadings, we find that the pleadings and issues do not cover the issue which the Appellant is now trying to raise. Accordingly, Appellant cannot take advantage of any exceptional cases. A fact not pleaded cannot be looked into by the Court.

20. Accordingly, I am of the considered opinion that since no pleadings is made by the Appellant regarding service of notice under Section 13 (2) of the SARFAESI Act, this fact could not be looked into by the Tribunal.

21. According to the Respondent Bank, notice under Section 13 (2) was sent on 9th July, 2014 which was duly served. Challenge is made by the Appellant regarding Sale Notice dated 20th February, 2019 which is published in newspapers; one in English and the other in vernacular language wherein tenders were invited by 27th March, 2019 by 5.00 p.m. and tender opening time was 2.30 p.m. on 29th March, 2019. It is submitted that it was against the provisions of Rules 8 (6) and 9 (1) of the Security Interest (Enforcement) Rules, 2002. In a recent judgment in Vinayak Steels Limited -vs- Om Vishnu Pipes Private Limited, (2023) SCC Online TS-655 the Hon'ble High Court at Telangana held in paragraph 29 as under:

"From the reading of these provisions, it is apparent that by the amendment to Rule 9 (1) the requirement to maintain 30 days gap

between notice under Rule 8 (6) and Rule 9 (1) is dispensed with and for second and subsequent notices of sale under Rule 9 (1), it is sufficient if 15 days time is maintained from the date of issuing notice under Rule 9 (1) and the date of auction. In the cases on hand, the first notice maintained 30 days gap and the second and third notices maintained 15 days gap. The second and third notices were issued after rule 9 (1) was amended.”

22. Accordingly, provisions of Rule 8 (6) and 9 (1) of the Security Interest (Enforcement) Rules, 2002 have been duly complied.

23. Learned Counsel for Appellant has placed reliance upon *Mardia Chemicals Limited -vs- Union of India*, (2004) 4 SCC 311, and *Mathew Varghese -vs- M. Amritha Kumar & Others*, (2014) 5 SCC 610. So far as these cases are concerned, The Hon'ble Apex Court has settled the controversy.

24. At the cost of repetition, it is pertinent to mention that the pleas raised by the Appellant before DRT and in this appeal were not pleaded before DRT. Hence, those pleas could not be considered. No finding is being recorded on those pleas.

25. Accordingly, on the basis of the discussion made above, I do not find any material illegality in the impugned order. Appeal lacks merit and is liable to be dismissed.

The Appeal is dismissed.

Copy of the order be supplied to Appellants 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.

File be consigned to Record room.

Order dictated, signed, dated and pronounced in open Court on the 21st day of June, 2023.