

Non-compliance with mandatory notice provisions under SARFAESI Act and Rules: DRAT KOLKATA

Aadhar Housing Finance Limited

...Appellant

S. Rajesh

...Respondent

Case No: Appeal No. 13 of 2023

Date of Judgement: 20th September, 2023

Judges:

Anil Kumar Srivastava, J- Chairperson

For Appellant: Mr. Proshit Deb, Chaitali Acharjee, Learned Advocate.

For Respondent: Mr. N. Srinivas, Learned Advocate.

Facts:

Appeal filed by Aadhar Housing Finance Limited against order of DRT-II Hyderabad allowing SARFAESI application filed by respondents (borrowers) directing re-delivery of possession of secured assets. Housing loan of Rs. 19 lacs taken by respondents. Necessary documents executed. Possession notice issued by appellant on 09.01.2019 u/s 13(4) SARFAESI Act without notice u/s 13(2). Auction date fixed on 26.02.2019 without notice under Rules 8(6) and 9(1) of Security Interest (Enforcement) Rules, 2002. Appellant objected stating default committed in payment. Account classified as NPA. Notice u/s 13(2) sent on 12.07.2018. As acknowledgement not received, published in newspaper on 28.07.2018. Possession notice published on 10.10.2018. Physical possession taken. Sale notice dated 28.01.2019 published and affixed.

Elaborate Opinions of the Court:

Appellant failed to prove service of notice u/s 13(2) upon respondents. Possession notice also not served. Compliance of Rules 8(6) and 9(1) also not made. Application under Order 41 Rule 27 CPC by appellant to bring notice u/s 13(2) on record allowed. Service of notices u/s 13(2) and 13(4) mandatory. Non-service vitiates proceedings. Receipts of service not filed to show notices served upon respondents. Actions against law. No 30-day gap between notice and sale date as per Rules 8(6) and 9(1). Sale bad. Valuation reports not properly obtained as per Rule 8(5). Impugned order concluding non-compliance with mandatory SARFAESI provisions correct.

Arguments by Appellant:

All mandatory requirements under law complied with. Notice u/s 13(2) published in newspaper as not served by post. Notice u/s 13(2) issued. Initially only sale notice challenged. Cannot travel back to challenge notice u/s 13(2) and 13(4). Possession taken over secured assets. Sale completed. Reliance on Shakeena Vs. Bank of India.

Arguments by Respondents:

Notices u/s 13(2) and 13(4) never served upon respondents. Even receipts of service not filed. No compliance of Rules 8(6) and 9(1).

Sections Referenced:

Section 13(2) of SARFAESI Act: Demand notice by secured creditor.

Section 13(4) of SARFAESI Act: Possession notice by secured creditor.

Rule 8(6) of Security Interest (Enforcement) Rules 2002: 30 days notice before sale.

Rule 9(1) of Security Interest (Enforcement) Rules 2002: Sale not less than 30 days from public notice.

Rule 8(5) of Security Interest (Enforcement) Rules 2002: Obtaining valuation report.

Cases Cited and Referred:

Civil Appeal No. 8097-8098 of 2009 – Shakeena Vs. Bank of India

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Full Text of Judgment:

1. Instant appeal has been preferred against a judgment and order dated 01.06.2020 passed by Learned DRT -2 Hyderabad allowing the S.A. No. 60 of 2019 filed by the Respondent Nos. 1 and 2.

2. Feeling aggrieved, Appellant Financial Institution preferred the Appeal.

3. As per the pleadings of the parties, a housing loan of Rs. 19 lacs was availed by the Respondent Nos. 1 and 2 and necessary documents were executed. EMIs were being paid regularly. A possession notice was issued by the Appellant herein Financial Institution on 09.01.2019 under Section 13(4) of the SARFAESI Act, 2002 (hereinafter referred to as the Act) without any notice under Section 13(2) of the SARFAESI Act. The auction date was fixed on 26.02.2019 without notice under Rule 8(6) 9(1) of the Security Interest (Enforcement) Rules, 2002 (hereinafter referred to as the Rules). Loan account was never classified as NPA. All the notices were issued illegally. They have never been served upon the SARFAESI Applicants. Compliance of Section 13(2) 13(4) of SARFAESI Act is not made. Compliance of Rule 8(6) 9(1) of Security Interest (enforcement) Rules 2002 is also not made.

4. Respondent Financial Institution objected to the SA application and submitted that default was committed by the borrowers in payment of the loan amount and the account was classified as NPA. Demand notice u/s 13(2) of SARFAESI Act dated 12.07.2018 was sent by registered post. Since the acknowledgment were not received, it was published in the newspapers on 28.07.2018 followed by possession notice dated 15.10.2018 which was published in newspapers on 10.10.2018. Physical possession was taken. Sale notice dated 28.01.2019 was also published in the newspapers and was affixed on the scheduled property.

5. Having considered the submissions of the Learned Counsel for the parties, Learned DRT recorded a finding that Appellant herein failed to prove that demand notice under Section 13(2) of the SARFAESI Act were not duly served upon the respondents herein. Possession notice

were also not served. Compliance of Rule 8(6) 9(1) of Security Interest (Enforcement) Rules 2002 were also not made. Accordingly, SA application was allowed with the direction to the Financial Institution to re-deliver the possession of the secured assets to the SARFAESI Applicants. However, the Financial Institutions were granted liberty to proceed afresh in accordance with law.

6. Learned Counsel for the Appellant preferred an application under order 41 Rule 27 of Code of Civil Procedure annexing the notice under Section 13 (2) of the SARFAESI Act, 2002 and possession notice. Those documents were taken on record.

7. Learned Counsel for the Appellant submits that the Appellant has complied all the mandatory requirements as required under the law. Since the notice under Section 13(2) of the SARFAESI Act were not served through posts, hence it was published in the newspapers. The notice under Section 13(2) was also issued. It is further submitted that initially the sale notice was challenged in the SARFAESI Application but the Respondents have travelled back to challenge the notice under Section 13(2) and 13(4) of SARFAESI Act which is not legally permissible. It is further submitted that Appellant has taken the possession over the secured assets. Sale has been completed. Reliance has been placed upon the judgment of the Hon'ble Apex Court in Civil Appeal No.(s) 8097-8098 of 2009, 2019 SCC OnLine SC 1059 Shakeena V Bank of India.

8. Learned Counsel for the Respondents submits that notice under Section 13(2) and 13(4) of the SARFAESI Act were never served upon the Respondents. It is further submitted that even the receipts of service of notices were not filed by the Appellant. All the actions of the Bank are against the law. Compliance of Rule 8(6) 9(1) of the Security Interest (Enforcement) Rules, 2002 was not made.

9. As far as service of notice under Section 13(2) and 13(4) of the SARFAESI Act are concerned, nothing has been brought on record to show that these notices have ever been served upon the Respondent Nos. 1 and 2 which are the mandatory provisions. Service upon the borrower or the guarantor or mortgagor is mandatory under the law. Non service of

notices vitiates all the proceedings. No doubt, notice could be served through paper publication but initially when the notices were sent through posts, those receipts should have been brought on record. Hence, Learned DRT has rightly concluded that notice under Section 13(2) and 13(4) of the SARFAESI Act were not served upon the Respondents herein.

10. Notice under Rule 8(6) of the Security Interest (Enforcement) Rules, 2002 was published in newspaper on 28.01.2019 and date of auction was 26.02.2019. Rule 8(6) and 9(1) of Security Interest (Enforcement) Rules, 2002 reads as under: Rule 8(6) of Security Interest (Enforcement) Rules, 2002:

"The authorised officer shall serve to the borrower a notice of thirty days for sale of the immovable secured assets, under sub-rule (5):" Rule 9(1) of Security Interest (Enforcement) Rules, 2002:

"(1) No sale of immovable property under these rules shall take place before the expiry of thirty days from the date on which the public notice of sale is published in newspapers as referred to in the proviso to sub rule (6) or notice of sale has been served to the borrower."

11. It is further submitted that valuation of the secured assets are not properly made. There is violation of Rule 8 (5) of Security Interest (Enforcement) Rules, 2002. As would appear from the record that loan was sanctioned on 30th May, 2017 while Valuation Report dated 31.12.2016 was considered for fixing the reserve price. No valuation report was obtained prior to the date of auction. There is no compliance of Rule 8(5) of Security Interest (Enforcement) Rules, 2002.

12. As would appear from the record that there is no 30 days' notice gap between issuance of notice and date of sale which is mandatory. Accordingly, sale is also bad on this count. Learned DRT has rightly concluded to this effect.

13. As far as case law referred to in Civil Appeal No.(s) 8097-8098 of 2009, 2019 SCC OnLine SC 1059 Shakeena V Bank of India (supra) is concerned, it is not applicable to the facts of the instant case.

14. Having considered the submissions made above, I find that the Learned DRT has rightly arrived at a conclusion that mandatory provisions of SARFAESI Act and Rules have not been complied with. I do not find any illegality in the impugned order. Appeal is devoid of merit and is liable to be dismissed.

Appeal is dismissed. Order dated 01.06.2020 passed by DRT II, Hyderabad in SA No. 60 of 2019 is confirmed.

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 signed and pronounced by me in the open Court on this the 20th day of September, 2023.