

Non-compliance with mandatory notice publication requirements under SARFAESI Act: DRAT KOLKATA

Rousonara Begum Islam

...Appellant

Punjab National Bank

...Respondent

Case No: Appeal No. 244 of 2018

Date of Judgement: 1st September, 2023

Judges:

Anil Kumar Srivastava, J – Chairperson

For Appellant: Mr. Rakesh Dubey, Advocate.

For Respondent: Ms. Aparajita Rao, Advocate.

Facts:

Appellant Rousonara Begum Islam filed an appeal against order of DRT Guwahati dismissing her SARFAESI application challenging the sale notice dated 02.07.2018 issued by Respondent Punjab National Bank. Appellant's son availed loan from Respondent bank which he could not repay. The account was classified as NPA. Bank issued notice u/s 13(2) on 09.02.2017, took symbolic possession on 03.04.2017. First sale notice was issued on 18.01.2018 fixing sale on 28.02.2018. Sale could not materialize due to lack of bids. Fresh e-auction notice was issued on 02.07.2018, published in English newspaper 'The Telegraph' on 08.07.2018 and vernacular newspaper 'Dainik Agradoot' on 07.07.2018 fixing sale on 30.07.2018. Appellant challenged the sale notice mainly on grounds that clear 30 days notice was not given as per Rule 8(6)

and 9(1); vernacular newspaper notice was in English violating mandatory rules; and property was sold for lesser value. DRT held that relevant rules were complied and notices were properly published. Hence it dismissed the SARFAESI application.

Court's Opinions:

Compliance of Rule 8(6) and 9(1) was made since fresh notice was issued on 02.07.2018 with sale on 30.07.2018, giving more than 15 days gap. For subsequent sales, 15 days notice is sufficient as per amended Rule 9(1) proviso, as held in recent Telangana High Court judgment of 02.03.2023. Rule 9(1) does not require separate notice from Rule 8(6). The disjunction 'or' should be read as conjunction 'and' as held by Supreme Court. Statutory provisions require strict compliance. Notice has to be published in vernacular language in vernacular newspaper to serve the purpose as per Orissa High Court judgment. Non-compliance with mandatory notice requirement vitiates the proceedings, as held by Supreme Court. Violation cannot be taken lightly merely because no prejudice is shown.

Arguments:

Appellant:

Clear 30 days notice was not given between Rule 8(6) and Rule 9(1) notices. Vernacular newspaper notice was published in English violating mandatory rules.

Respondent:

Compliance with rules was made and notices were properly published.

Sections & Rules:

Section 13(2), 13(8) of SARFAESI Act

Rule 3(5), 8(6), 8(7), 9(1) of Security Interest (Enforcement) Rules

Cases cited:

Vinayak Steels Ltd (2023 SCC OnLine TS 665)

Adhya Industries

Concern Readymix (2018 SCC Hyd 783)

Mathew Varghese v. M. Amritha Kumar

Swastik Agency v State Bank of India (AIR 2009 Orissa 147)

S.L. Kapoor v Jagmohan (AIR 1981 SC 136)

State of UP v Shatrughan Lal (AIR 1998 SC 3038)

Referred laws:

SARFAESI Act 2002

Transfer of Property Act: Section 60

Registration Act: Section 17

Land Acquisition Act: Section 4(1)

Conclusion:

There was violation of mandatory notice publication requirements under the SARFAESI Rules by publishing vernacular newspaper notice in English language. This vitiates the auction sale proceedings. The DRT order dismissing the SARFAESI application is set aside. Auction purchaser will be refunded the purchase amount with interest.

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Court

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Full Text of Judgment:

1. Instant appeal has been filed against an order dated 31.07.2018 passed by the Learned DRT Guwahati in I.A. No. 94 of 2018 arising out of SA No. 56 of 2018 whereby the Learned DRT dismissed the SARFAESI Application filed by the Appellants.

2. I have heard the Learned Counsel for the Appellants as well as Respondent No. 1 and 2. Despite notice, Respondent No. 3 is not present.

3. From the pleadings of the parties, it appears that an application under Section 17(1) of the SARFAESI Act, 2002 (hereinafter referred to as the Act) was filed by the Appellant challenging the sale notice dated 02.07.2018 with the assertions that the Appellant is mortgagor. His son, Md. Rafiqul Islam availed the loan from the Respondent Bank. He could not pay the instalments in time as per the sanction letter. Accordingly, the same was classified as NPA. The Bank proceeded under the SARFAESI Act. Notice under Section 13(2) of the Act was issued on 09.02.2017. Symbolic possession was taken on 03.04.2017. First sale

notice was issued on 18.01.2018. E-auction sale notice dated 20.01.2018 and the date of sale was fixed on 28.02.2018. Notices were published in two newspapers one in English and the other in vernacular language on 24.01.2017. But the sale could not be held due to absence of any bid. Thereafter, fresh e-auction sale notice was issued on 02.07.2018 which was published in the English newspaper 'The Telegraph' on 08.07.2018 and in vernacular language 'Dainik Agradoot' dated 07.07.2018 and the date of sale was 30th July, 2018. SARFAESI action was challenged mainly on the ground that a clear 30 days notice was not issued as per the provisions of Rule 8(6) and 9(1) of the Security Interest (Enforcement) Rules 2002. Further notice in vernacular language newspaper was in the English language which was violation of the mandatory provisions of the Rules. A plea of violation was also taken that the property was sold for a lesser amount. Learned DRT recorded the finding that the compliance of Rule 8(6) and 9(1) of the Security Interest (Enforcement) Rules 2002 was duly made. Notices were published in two newspapers in accordance with Rules. Accordingly, SARFAESI Application was dismissed.

4. Feeling aggrieved Appellant preferred the Appeal. Learned Counsel for the Appellant mainly raised the arguments and submits that the compliance of Rule 8(6) and 9(1) of the Security Interest (Enforcement) Rules, 2002 was not made in accordance with Rules read with Section 13(8) of the SARFAESI Act. Subsequently it is argued that the notice in vernacular language in the newspaper namely 'Dainik Agradoot' dated 07.07.2018 was published in English language which is in violation of the mandatory provisions of the Security Interest (Enforcement) Rules 2002.

5. Per contra, Learned Counsel for the Respondent submits that the compliance of Rule 8(6) and 9(1) of the Security Interest (Enforcement) Rules, 2002 was duly made. It is further submitted that the publication of notices were made in accordance with the Rules.

6. Admittedly it is a case of second sale. Proviso attached to Rule 9(1) of the Security Interest (Enforcement) Rules provides that in case of subsequent sale, notices of not less than 15 days to the borrower is mandatory.

7. In recent judgement of Hon'ble High Court at Telangana in Hyderabad decided on 02.03.2023 in Vinayak Steels Ltd. Vs. Om Vishnu Pipes Pvt. Ltd. reported in 2023 SCC OnLine TS 665, Hon'ble High Court has held in Para 29 as under :

"From the reading of these provisions, it is apparent that by 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."

8. Further reliance was placed in the case of Adhya Industries (supra) wherein it was held that the statute nowhere requires that there should be a 30 days gap between service of notice by the authorised officer on the borrower and the date fixed for sale of the immovable secured assets.

9. Reliance was also placed upon judgement of Hon'ble Telengana High Court in case of Concern Readymix Vs. The Authorised Officer, Corporation Bank, reported in 2018 SCC Hyd 783 wherein Hon'ble High Court in Para 13 to 18 and Para 21 to 23 was held as under :

"13. What is important to note both from the amended and unamended provisions of Section 13(8) and Rule 9(1) is that both of them do not speak in express terms, about the equity of redemption available to the mortgagor. The amended Section 13(8) merely prohibits the secured creditor from proceeding further with the transfer of the secured assets by way of lease, assignment or sale. A restriction on the right of the mortgagee to deal with the property is not exactly the same as the equity of redemption available to the mortgagor. The payment of the amounts mentioned in Section 13(8) ties the hands of the mortgagee (secured creditor) from exercising any of the powers conferred under the Securitisation Act, 2002. Redemption comes later. But unfortunately, some Courts, on a wrong reading of the decision of the Supreme Court in Mathew Varghese v. M. Amritha Kumar³, have come to

the conclusion as though Section 13(8) speaks about the right of redemption. The danger of interpreting Section 13(8) as though it relates to the right of redemption, is that if payments are not made as per Section 13(8), the right of redemption may get lost even before the sale is complete in all respects. But in law it is not. It may be seen from paragraphs-34 to 36 of the decision of the Supreme Court in Mathew Varghese that the Supreme Court took note of Section 60 of the Transfer of Property Act and the combined effect of Section 54 of the Transfer of Property Act and Section 17 of the Registration Act to come to the conclusion that the extinction of the right of redemption comes much later than the sale notice. Therefore, we should first understand that the right of redemption is not lost immediately upon the highest bid made by a purchaser in an auction being accepted.

14. Perhaps the Courts were tempted to think that Section 13(8) speaks about redemption, only on account of what is found in Rule 3(5) of the Security Interest (Enforcement) Rules, 2002. Rule 3(5) inserted by way of amendment with effect from 04-11-2016 states that the demand notice issued under Section 13(2) should invite the attention of the borrower to the provisions of Section 13(8), in respect of the time available to the borrower to redeem the secured assets. Today, it may be convenient for one borrower to contend that the right of redemption will be lost immediately upon the issue of notice under Rule 9(1). But if it is held so, the same would tantamount to annulling the relevant provisions of the Transfer of Property Act, which do not stand expressly excluded, insofar as the question of redemption is concerned.

15. Keeping the above distinction in mind, if we come back to the contention with regard to the notice period of 30 days between the publication under Rule 8(6) and the sale under Rule 9(1), it may be seen that the Rules do not contemplate two different notices, one under Rule 8(6) and another under Rule 9(1). We have already extracted both the Rules. Rule 8(6) mandates – (i) the service of a notice of sale on the borrower, (ii) publication of a public notice in two leading Newspapers, of which one should be in vernacular language and (iii) affixture of the notice of sale on a conspicuous part of the

immoveable property. This is in addition to the option available to the Authorised Officer under Rule 8(7) to put the notice on the website of the secured creditor.

16. All that Rule 9(1) says is that no sale of immoveable property in the first instance shall take place before the expiry of 30 days from the date on which the public notice of sale is published in the Newspapers as referred to in the proviso to sub-rule (6) of Rule 8 or notice of sale has been served to the borrower.

17. Rule 9(1) does not stipulate a separate notice to be published. This Rule merely makes a reference to the notice of sale served on the borrower. The words "notice of sale has been served to the borrower" appearing towards the end of the main part of sub-rule (1) of Rule 9, cannot be construed as one more notice of sale, apart from the notice of sale to be served on the borrower under Rule 8(6). If this is so construed, then the borrower should have 60 days time, with the first 30 days following the notice of sale under Rule 8(6) and the second period of 30 days following the notice under Rule 9(1). In fact, the proviso to sub-rule (1) of Rule 9 steers clear of any doubt. The proviso speaks about the failure of the first attempt of the secured creditor. Once the secured creditor fails in his first attempt, then the Authorised Officer should "serve, affix and publish notice of sale of not less than 15 days to the borrower, for any subsequent sale".

18. Therefore, the number of notices of sale required to be issued actually depend upon the number of times the property is put to sale. If Rule 9(1) is construed in such a manner as to oblige a secured creditor to issue one more notice apart from the notice under Rule 8(6), the first sale will be preceded by 2 notices and the subsequent sales will be preceded by one notice each. The correct way of looking at the rules is to say that in respect of the first auction, there has to be only one notice under Rule 8(6). But the date of the auction should fall beyond 30 days from the date of publication of sale. If no sale takes place on the first occasion, a second notice is mandated only under the proviso to subrule (1) of Rule 9 and this second notice shall be of a duration of 15 days. If the second attempt also fails, a third notice may be issued under the proviso to sub-rule (1) of Rule

9, of a duration of not less than 15 days for the third auction.

21. It may be seen from Rule 8(6) that the main part of the sub-rule speaks about service of notice of 30 days to the borrower. The proviso to sub-rule (6) of Rule 8 speaks about the publication of notices in Newspapers. Since Rule 9(1) makes a reference to the proviso to Rule 8(6), in the context of public notice and also since there is no reference to Rule 8(6) in Rule 9(1) (except with reference to the proviso) when it speaks about notice of sale served to the borrower, Courts have come to think that two notices are required to be served on the borrower, one under Rule 8(6) and another under Rule 9(1).

22. In fact, the disjunction between – (i) a public notice of sale as referred to in the proviso to sub-rule (6) of Rule 8 and (ii) a notice of sale served to the borrower, maintained in Rule 9(1) by the use of the word “or”, was explained in Mathew Varghese by the Supreme Court. In paragraph-31 of the report, the Supreme Court held in Mathew Varghese that this disjunction should be read as a conjunction. The Court said that the word “or” should be read as “and”.

23. The moment the word “or” appearing in Rule 9(1) is read as “and”, there is no scope for concluding that Rule 9(1) requires one more notice to be served to the borrower, in addition to the notice served to the borrower under Rule 8(6).”

10. In the present case, the fresh e-auction sale notice was issued on 02.07.2018 which was published in the English newspaper ‘The Telegraph’ on 08.07.2018 and in vernacular language newspaper ‘Dainik Agradoot’ dated 07.07.2018 and the date of sale was 30th July, 2018. Accordingly, compliance of Rule 8(6) and 9(1) of the Security Interest (Enforcement) Rules 2002 was duly made.

11. It is vehemently argued by the Learned Counsel for the Appellant that the notice published in the vernacular language newspaper ‘Dainik Agradoot’ dated 07.07.2018 was not in vernacular language, rather the notice was published in the English language. It is submitted that the purpose of publication of notice in vernacular language newspaper is to the effect that the borrower should come to know about the notice

by reading the newspaper in a language which she understands. It was held by the Hon'ble High Court of Orissa in Swastik Agency and 2 others versus State Bank of India, AIR 2009 Orissa 147 that:

"Thus, the legal position remains that every statutory provision requires strict adherence, for the reason that the statute creates rights in favour of the citizens, and if any order is passed de hors the same, it cannot be held to be a valid order and cannot be enforced. As the statutory provision creates legal rights and obligations for individuals the statutory authorities are under a legal obligation to give strict adherence to the same and cannot pass an order in contravention thereof, treating the same to be merely decoration pieces."

12. Further, it was held in Para 73 that- "Rule 8(6) provides mandatorily, publication of auction notice in two leading newspapers and one of them must be in vernacular language."

13. In para No. 74 it was held that – "The distinction between the literal interpretation and purposive construction of statute has almost diminished and there could be hardly a smoke screen dividing the same. It is not permissible for the Court to change the placement of the words. However, the language used in the Rules has to be read in the context of the subject in entirety. The Rule has been engrafted to protect the persons who may be aggrieved because of depressed sale. The term "vernacular" has to be considered in a correct perspective in the context of the rural and illiterate masses of the country. If the notice is published in English in a newspaper printed in vernacular language, it would definitely not serve the purpose for which the Rule has been grafted. Therefore, notice has to be published in vernacular language in the newspaper published in vernacular language. The property mortgaged with the secured creditor may situate in rural area and the persons residing in rural area may be interested in purchasing it. Therefore, the need was considered to have the publication of the notice in vernacular language also. The concept of flexibility in the science of interpretation is to be adopted. If the provision applicable herein is given a strict literal meaning it will not be possible to subserve the purpose of giving notice to all intending

purchasers and get the maximum price for the secured assets. Section 4(1) notice under the Land Acquisition Act is always published in vernacular language.”

14. Non compliance of mandatory requirement vitiates the proceedings. There was a mandatory requirement of publication of notice in vernacular language. But the same was not done. It is a clear violation of the mandatory provisions of the Security Interest (Enforcement) Rules 2002 which cannot be said to be an empty formality. Requirement to cause publication in vernacular language in the newspaper is a fundamental and statutory requirement which cannot be compromised. It is not for the borrower or the guarantor to establish that non publication of the said notices in vernacular language has caused any prejudice to them. It is for the Respondents i.e. Financial Institution/ Bank to establish that non compliance of the mandatory provision has not caused any prejudice either to the borrower or to the guarantor at all. It was held in S.L. Kapoor V. Jagmohan & Ors. AIR 1981 SC 136 and State of U.P. v. Shatrughan Lal & Anr AIR 1998 SC 3038 that “it till comes from a person who has denied justice that the person who has been denied justice is not prejudiced”.

15. Admittedly there is a violation of mandatory provision of non publication of notice in vernacular language in a newspaper which is published in vernacular language. Accordingly, it vitiates the whole proceedings. Learned DRT has erred in recording a finding that there is no violation in the publication of the notices. Accordingly, Appeal deserves to be allowed and the impugned order is liable to be set aside.

Appeal is allowed. Impugned order dated 31.07.2018 passed by Ld. DRT is set aside. SARFAESI Application is allowed. Sale held on 30th July, 2018 is set aside. Auction purchaser is entitled for refund of the amount paid by him in the auction with interest applicable on the fixed deposit for the period from the date of deposit till the date for payment from the Bank, Respondent No. 1 and 2.

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 1st day of September, 2023.