

Quashing of possession notice under SARFAESI Act due to non-compliance of mandatory notice requirements: DRAT KOLKATA

Sree Infotec,

...Appellant

Asset Reconstruction Company (India) Limited,

...Respondent

Case No: Appeal No. 107 of 2022

Date of Judgement: 5th September, 2023

Judges:

Anil Kumar Srivastava, J- Chairperson

For Appellant: Ms. Aruna Ghosh, Advocate.

For Respondent: Ms. Sonal Agarwal, Advocate.

Facts:

Appellant No. 1, M/s Sree Infotec, is a partnership firm of Appellant No. 2, Smt. Sakalabhaktulla Padmashree, and Appellant No. 3 is the husband of Appellant No. 2. Appellants availed an OCC Limit of Rs.45 lacs from Indian Bank, Seethampeta Branch, Visakhapatnam. Appellants were regularly paying the repayment installments. However, Indian Bank illegally classified the Account as NPA. Appellants offered One Time Settlement wherein substantial amount was paid and offered to pay the balance amount. Indian Bank assigned the property to the Respondent, Asset Reconstruction Company (India) Limited, which was not in accordance with law according to the Appellants. Appellants claimed

Rs.3 lacs was paid on 30th January 2014 which was not reflected in the statement of account. Rs.10,35,000 was also paid which was also not credited. Appellants filed a reply against notice under Section 13(2) which was not disposed of. Possession Notice was not published in newspapers or affixed at conspicuous place of secured assets as required under Rule 8(1) and (2). Respondent opposed the Appellants' contentions. It stated notices under Section 13(2) and 13(4) were served which were received back unserved. Notice was then published in newspapers.

Arguments:

Appellants:

Property assigned to Respondents against law. No opportunity given before assigning to Respondents. Account wrongly classified as NPA. Statement of Account incorrect. Notice under Section 13(4) not properly served.

Respondents:

Notice under Section 13(4) duly served. OTS not finalized by Appellants. No proof of payment of Rs.3 lacs. Account rightly classified as NPA. Appellants are willful defaulters. Appeal should be dismissed.

Court's Reasoning and Conclusions:

On objection disposal under Section 13(3A), proviso bars filing appeal under Section 17 on this ground. Hence cannot be considered. On assignment, Section 5 does not require notice to borrower. Hence no force in this contention. NPA classification not pleaded in SARFAESI Application. New plea cannot be raised now relying on Bachhaj Nahar case. On notice compliance under Section 13(4) read with Rule 8(1) and (2): Admitted by Respondents that Possession Notice not affixed on property. No assertion of service upon borrowers. Only vague statement of newspaper publication without proof. Thus mandatory notice requirements not met. As per Swastik Agency case, this vitiates proceedings. Accordingly, possession notice and subsequent actions are quashed.

Sections Explained:

Section 13(3A): Representation against demand notice and communication of reasons for non-acceptance.

Section 13(4): Enforcement measures available if demand notice not complied.

Section 17: Filing of application before DRT challenging any action under Section 13(4).

Section 5: Acquisition of rights and interests over financial assets.

Cases Referred:

Bachhaj Nahar v. Nilima Mandal: New pleas cannot be taken which are not pleaded.

Swastik Agency v. State Bank of India: Mandatory statutory provisions must be strictly adhered to. Non-compliance vitiates proceedings.

Order:

Appeal allowed. DRT's order dismissing SARFAESI Application set aside. Possession Notice dated 25th May 2015 quashed. Respondents at liberty to proceed afresh as per law.

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Court

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Full Text of Judgment:

1. Instant Appeal has been preferred by the Appellants against judgment and order dated 20th November, 2019 passed by Learned Debts Recovery Tribunal, Visakhapatnam (hereinafter referred to as 'Tribunal') in S.A. 167 of 2015 (M/s. Sree Infotec -vs- Asset Reconstruction Company (India) Limited) whereby the Learned DRT dismissed the SARFAESI Application.

2. As per the pleadings of the parties, SARFAESI Application, under Section 17 of the SARFAESI Act, 2002 (hereinafter referred to as the Act) was filed by the Appellants challenging the Possession Notice dated 25th May, 2015 issued by the Respondent and for declaration that the notice is illegal and without any authority.

3. Appellant No. 1, M/s Sree Infotec, is a partnership firm of Appellant No. 2, Smt. Sakalabhaktulla Padmashree, Appellant No. 3 is

the husband of Appellant No. 2. Appellants availed OCC Limit of Rs.45 lac from the Indian Bank, Seethampeta Branch, Visakhapatnam. Appellants were regularly paying the repayment instalments, however, the Indian Bank illegally classified the Account as N.P.A. One Time Settlement was offered by the Indian Bank wherein substantial amount was paid by the Appellants and offered to pay the balance amount at an early date. However, the Bank assigned the property to the Respondent, namely Asset Reconstruction Company (India) Limited, which was not in accordance with law. Respondents are not entitled to proceed against the Appellants. Statement of Account was also wrong as an amount of Rs.3.00 lac was paid by the Appellants on 30th January, 2014 which was not reflecting in the Statement of Account. An amount of Rs.10,35,000.00, including Rs.3.00 lac was also paid, which is also not credited in the Appellants' account.

4. Appellants filed their reply against the Notice under Section 13 (2) of the Act which was not disposed of. Possession Notice was not published in the newspapers, as required by law. It was also not affixed on a conspicuous place of the secured assets. There was violation of Rule 8 (1) and (2) of the Security Interest (Enforcement) Rules, 2002. Possession Notice was also not served upon the Appellants. No notice was given to the Appellants before assigning the property to the Respondent by the Indian Bank.

5. Respondents opposed the prayer made by the Appellants and stated that the Respondents are registered with the Reserve Bank of India under Section 3 of the Act. It is not in dispute that the financial facility was availed by the Appellants from the Indian Bank after executing necessary documents. Indian Bank has unconditionally and irrevocably assigned transferred and released the property in favour of the Respondents in their capacity as Sole Trustee of its right, title and interest, including underlying security in the facility agreement. Security documents and all other transactional documents relating thereto in terms of Section 5 of the Act were executed. Loan Account was rightly classified as Non Performing Assets by the Indian Bank in accordance with law. On 13th February, 2015 there was total balance outstanding of Rs.40,54,333.00.

6. Notice under Section 13 (2) of the Act was served upon the Appellants who made representation under Section 13 (3A) of the Act which was rejected by the Indian Bank and communicated to the Appellants vide letter dated 22nd May, 2015. Notices issued to Appellants No. 2 and 3 were returned un-served. Notice, under Section 13 (4) of the Act, sent by the Respondents, were also received back un-served. Thereafter it was published in two newspapers, namely Praja Shakti and Business Lines, dated 5th March, 2015.

7. After considering the material available on record, Learned DRT arrived at a finding that the notices are duly served upon the Appellants. Debt was assigned to the Respondents in accordance with law. All the legal requirements were fulfilled; accordingly SARFAESI Application was dismissed. I have heard the Learned Counsel for the parties and perused the record.

8. Learned Counsel for Appellant assailed the judgment passed by the Learned DRT mainly on the ground that property was assigned to the Respondents against law. No opportunity was given to the Appellant before assigning the same to the Respondents. It is further submitted that the Account was wrongly classified as N.P.A. Statement of Account is not correct. Notice under Section 13 (4) of the Act was not served in accordance with law.

9. Per contra, Learned Counsel for Respondents submits that the Notice under Section 13 (4) of the Act was duly served upon the Appellants. Offer of OTS was not finalized by the Appellants. There is nothing on record to show that an amount of Rs.3.00 lac was ever paid by the Appellants. Account was rightly classified as N.P.A. Appellants are willful defaulters, hence there is no force either in the SARFAESI Application or the Appeal which deserves to be dismissed.

10. An application under Section 17 of the SARFAESI Act, 2002 was filed by the Appellants challenging the SARFAESI action on the ground that the objections filed by the Appellants under Section 13 (3A) of the Act was not disposed of by application of mind. Section 13 (3A) of the Act provides that on receipt of notice under Section 13 (2) of the Act borrower should make a representation raising any objection and

the secured creditor should consider the same and if it finds that the objection is not acceptable, it should communicate within fifteen days of the receipt of the representation citing reasons for non acceptance of the objections. It is not a ground that the objections were not disposed of in accordance with law. Proviso attached to under Section 13 (3A) of the Act specifically provides that the reasons, s communicated by the secured creditor, does not confer any right to the borrower to prefer an application under Section 17 of the Act. Accordingly, no such ground can be raised by the borrower as per the proviso attached to under Section 13 (3A) of the Act.

11. It is argued by the Learned Counsel for Appellant that assignment of the loan to the Respondents was not in accordance with law. It is submitted that no notice of assignment was given to the Appellants. Section 5 of the Act provides for acquisition of rights or interest of financial assets. Section 5 (1) provides that any Asset Reconstruction Company may acquire financial assets of any Bank or Financial Institutions. There is no provision in the statute to issue notice to the borrower or guarantor at the time of assignment by the Bank or Financial Institutions. Hence I do not find any force in the ground taken by the Appellants.

12. During the course of argument, Learned Counsel for Appellant argued that the debt was wrongly classified as N.P.A. No such plea is taken in the application under Section 17 of the Act. It is settled legal proposition that plea which is not taken in the pleadings could not be considered, as has been held by the The Hon'ble Apex Court in Bachhaj Nahar -vs- Nilima Mandal & Another [(2008) 17 SCC 491] 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." Accordingly plea which is not taken in the pleadings could not be taken into consideration. In the instant case since plea of N.P.A. is not taken by the Appellants in the application under Section 17 of the Act, now they cannot press this plea.

13. An issue is raised by the Learned Counsel for Appellants that the provisions of Section 13 (4) of the Act were not duly complied with. It is submitted that the Possession Notices are not published as required

the Act. Further, notices were not affixed on any conspicuous part of the secured assets. There is violation of Rules 8 (6) of the Interest (Enforcement) Rules, 2002 (hereinafter referred to as 'the Rules').

14. Section 13 (4) of the SARFAESI Act, 2002 reads as under: "(4) In case the borrower fails to discharge his liability in full within the

period specified in sub-section (2), the secured creditor may take recourse to one or more of the following measures to recover his secured debt, namely:-

(a) take possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured;

(b) takeover the management of the business of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset:

(c) appoint any person (hereafter referred to as the manager), to manage the secured assets the possession of which has been taken over by the secured creditor;

(d) require at any time by notice in writing, any person who has acquired any of the secured assets from the borrower and from whom any money is due or may become due to the borrower, to pay the secured creditor, so much of the money as is sufficient to pay the secured debt.

(5) Any payment made by any person referred to in clause (d) of sub-section (4) to the secured creditor shall give such person a valid discharge as if he has made payment to the borrower."

15. Rule 8 (1) and (2) of the Rules, 2002 which provides as under :

"8. Sale of immovable secured assets

(1) Where the secured asset is an immovable property, the authorised officer shall take or cause to be taken possession, by delivering a possession notice prepared as nearly as possible in Appendix-IV to these rules, to the borrower and by affixing the possession notice on the outer door or at such conspicuous place of the property.

(2) The possession notice as referred to in sub-rule (1) shall also be published, 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 soon as circulation in that locality, by the authorised officer."

16. It is admitted by the Respondents that the notices sent to the 2nd and 3rd petitioners were returned un-served. Rule 8 (1) of the Rules is mandatory which describes that the Authorised Officer shall serve

notice upon the borrower and should also affix Possession Notice on the outer door at such conspicuous part of the property. Secondly, notice should also be published in two leading newspapers; one in English and one in vernacular language. It is held by a Division Bench of the Hon'ble Orissa High Court in Swastik Agency & 2 Others -vs- State Bank of India and 3 Others (AIR 2009 Orissa 147) that :

"55. 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." Thus, non compliance of a mandatory requirement vitiates the proceedings.

17. In the objections filed by the Bank before the Learned DRT, there is no assertion that the Possession Notice was pasted at the main door or in a conspicuous part of the property. Further, sending the notice to the Appellants and date of receipt of un-served envelopes are also not indicated in the counter-affidavit. It was violation of the mandatory provisions which vitiates the whole proceedings. A vague statement is made by the Respondents that notices were served through publication without any proof of the same. Accordingly, I am of the view that the mandatory provisions of Rule 8 (1) and (2) of the Rules regarding notices under Section 13 (4) of the Act were not complied which vitiates the whole proceedings. Accordingly, the whole proceedings are liable to be quashed. Learned DRT has erred in arriving at a wrong conclusion.

18. On the basis of the discussion made above, I am of the view that the appeal is liable to be allowed and the impugned order is liable to be set aside.

Appeal is allowed. The impugned order dated 20th November, 2019 passed by Learned Debts Recovery Tribunal, Visakhapatnam (hereinafter referred to as 'Tribunal') in S.A. 167 of 2015 (M/s. Sree Infotec -vs-

Asset Reconstruction Company (India) Limited), is set aside. Consequently, the SARFAESI

Application, being S.A. 167 of 2015, is allowed. Possession Notice dated 25th May, 2015 is quashed. However, Respondents would be at liberty to proceed afresh in accordance with law.

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.