

Setting aside of possession notice under SARFAESI Act for non-mortgaged property: DRAT KOLKATA

Union Bank of India

...Appellant

M/s. Sonovision Enterprises,

...Respondent

Case No: Appl. No. 78 of 2019

Date of Judgement: 24.04.2023

Judges:

Anil Kumar Srivastava, J – Chairperson

For Appellant: Mr. Soudip Pal Chowdhury, Ms. Swasati Sikdar, Advocates.

For Respondent: Mr. N. Srinivas, Advocate.

Facts:

The appeal arises against the Debt Recovery Tribunal (DRT)'s order setting aside the possession notice dated 12.04.2016 issued by the Bank under Sec 13(4) of SARFAESI Act. The DRT held that no mortgage was created over the scheduled property mentioned in the notice. The borrower challenged the possession notice stating that the scheduled property was never mortgaged with the bank. The leasehold rights were also cancelled. Hence, bank cannot proceed under SARFAESI Act against non-mortgaged property. The bank contended that the notice was only an intimation to handover possession and not a 13(4) notice. Reliance was placed on two Calcutta HC judgments to state that such an intimation cannot be set aside. The DRT set aside the possession notice by

treating it as 13(4) notice. It held that no mortgage was created over scheduled property.

Court's Opinion:

The expression in an enactment should be followed in the manner mandated. SARFAESI Act prescribes specific procedures which need to be adhered to by the banks. No new procedures can be adopted. The impugned notice dated 12.04.2016 directed the borrower to handover possession on 26.04.2016. The subject mentioned it as a 13(4) notice. Hence, it was in nature of a 13(4) notice and not just an intimation. Reliance was placed on Allahabad HC's Division bench judgment which held that a 13(4) notice with date for taking over possession meets requirements under SARFAESI Rules. Mere statement by bank's counsel cannot term it as just an intimation. As the scheduled property was admittedly not a mortgaged asset, the DRT rightly held the notice illegal and set it aside.

Arguments:

Arguments by Bank:

The notice was merely an intimation to handover possession and not a 13(4) notice. Hence, it could not have been set aside. Reliance was placed on two Calcutta HC single bench judgments to state that such intimation is valid.

Arguments by Borrower:

The notice was clearly a 13(4) notice directing handing over of possession, hence covered under SARFAESI Act. As property was not mortgaged, bank cannot proceed under SARFAESI Act. Reliance was placed on Allahabad HC's division bench judgment to state that the notice meets requirements of 13(4) notice under Rules.

Sections:

Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest (SARFAESI) Act, 2002

Section 13(2): Demand Notice

Section 13(4): Possession Notice

Section 14: Assistance of Chief Metropolitan Magistrate for taking possession

Cases Referred:

Cases cited by Bank:

Adya Pipes Pvt. Ltd. Vs. Central Bank of India [CO No. 446 of 2011] – Calcutta HC

M/s. Mitra Medical Enterprise & Anr. Vs. State Bank of India & Ors. [WP No. 19567(W) of 2012] – Calcutta HC

Cases cited by Borrower:

Smt. Pushpa Pathak Vs. State of U.P. & Ors – Allahabad HC

Laws Referred:

SARFAESI Act and Rules – Prescribe procedures for banks

Security Interest (Enforcement) Rules, 2002 – Rules 4(1) regarding steps under 13(4) notice

Conclusion:

Expression in enactments need to followed strictly as mandated. Notice dated 12.04.2016 was clearly a 13(4) possession notice. Scheduled property was not mortgaged, hence bank couldn't proceed under SARFAESI Act. DRT rightly held the notice illegal and set it aside.

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Court

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Full Text of Judgment:

1. Instant appeal has arisen against the order dated 20.12.2018 passed by learned DRT, Visakhapatnam in S.A. 106 of 2016 [M/s. Sonovision Enterprise Vs. Union Bank of India] whereby notice dated 12.04.2016 was set aside including all subsequent actions against the scheduled property. Further, it was held that SA applicant is entitled to get refund of the amount of Rs.1.55 crores together with accrued interest. Feeling aggrieved the appellant bank preferred the appeal.

2. S.A. was filed by the respondent herein challenging the notice u/s 13(4) of the SARFAESI Act, 2002 (hereinafter referred to as the 'Act of 2002') dated 12.04.2016 whereby S.A. applicant was informed that bank shall take possession of the secured asset on 26.04.2016 between 11-00 am and 05.00 pm. It is further stated that the secured asset was

not mortgaged, but notice u/s 13(4) was issued. In the meantime challenge was made before Hon'ble High Court at Andhra Pradesh wherein a direction was issued to deposit Rs.1.55 crores which was complied.

3. It is further submitted that S.A. was filed on the ground that leasehold right of the borrower is unsustainable. Respondent having found that borrower had not executed any document mortgaging the lease hold rights and said registered lease was cancelled. S.A. applicant is in physical possession of the property. Neither in the demand notice nor in the possession notice scheduled property was described as mortgaged property. The respondent bank, appellant herein, has issued the possession notice dated 12.04.2016 which is illegal. Scheduled property was never mortgaged with the bank. Bank cannot proceed under the SARFAESI Act of 2002 against it. Accordingly it was prayed that bank be directed not to proceed under the SARFESI Act.

4. Learned DRT recorded its finding that contention of the bank is not maintainable. Further, it held notice dated 12.04.2016 is a notice u/s 13(4) of the Act of 2002. It was further held that no mortgage was created in respect of the schedule property. Accordingly, notice u/s 13(4) dated 12.04.2016 was set aside.

5. Heard learned counsel for the parties and perused the records.

6. Learned counsel for the appellant bank submits that learned DRT has erred in holding that notice dated 12.04.2016 is a notice under the Act of 2002, rather it was an intimation for taking possession which cannot be held to be a notice u/s 13(4) of the Act of 2002. Learned counsel has placed reliance upon the Single Bench judgement of Hon'ble Calcutta High Court in the case of Adya Pipes Pvt. Ltd. Vs. Central Bank of India [CO No. 446 of 2011] decided on 19.10.2012 and another Single Bench judgement of Hon'ble Calcutta High Court in the case of M/s. Mitra Medical Enterprise & Anr. Vs. State Bank of India & Ors. [WP No. 19567(W) of 2012] decided on 09.03.2011. Learned counsel submits that impugned notice was not a notice u/s 13(4) of the Act of 2002 which cannot be set aside by the learned DRT. No further point was raised by the learned counsel for the appellant.

7. Per contra, learned counsel for the respondent submits that notice dated 12.04.2016 is a notice u/s 13(4) of the Act of 2002. Learned counsel has placed reliance of the Judgement of the Division Bench of Hon'ble Allahabad High Court in Civil Misc. Writ Petition No. 30440 of 2012 in the case of Smt. Pushpa Pathak Vs. State of U.P. & Ors. decided on 20.06.2012. On the strength of the judgement of the Division Bench learned counsel submits that impugned notice dated 12.04.2016 is a notice u/s 13(4) of the Act of 2002. Learned counsel further submits that appeal deserves to be dismissed.

8. Impugned notice dated 12.04.2016 goes to state as under : "Sub: Notice to take possess of assets u/s 13(4) of the Act of 2002 Loan A/c. KML Shopping Mall with our Ongole Branch. Please refer to our demand notice dated 31.12.2015 issued u/s 13(2) of the Act of 2002 calling upon you to discharge in full a sum of Rs.10,94,47,,150.20 together with interest mentiokend therein. In spiteo f the notice issued by us, you failed to discharge your total liability even after the expiry of 60 days notice period, hence, the bank has no other way but to take further action by way of enforcement of securities by taking possession and selling the securities for realizing the bank dues as contemplated under Act of 2022. We do hereby call upon you to handover / surrender possession of the below mentioned secured asset to the officials and representatives of the bank on the date and time mentioned herein and we require you to cooperate in taking over of the possession of the secured asset and in drawing inventory by the bank. We do hereby inform you that officials and representatives of the bank shall take or cause for taking possession of the secured assets wherever it may be situated / stored on the date and time mentioned below

Date : 26.04.2016 Time between 11-00am and 5-00pm"

9. A bare perusal of the notice will show that the Bank called upon the noticee to hand over possession of the secured assets on the date and time mentioned therein (Date 26.04.2016 and time between 11-00 am and 05-00 pm). In the subject of the notice it was mentioned "Notice to take possession of assets u/s 13(4) of the Act of 2002 Loan A/c KML shopping Mall with our Ongole Branch."

10. Learned counsel for the appellant submits that it was itself an intimation by the Bank for handing over possession and hence, it cannot be treated as a notice u/s 13(4) of the Act of 2002. I am unable to accept the contention made by the learned counsel. It is categorically held in a catena of judgement that procedures as provided in an enactment should be followed in the way it is provided or mandated.

11. In the case of Swastik Agency and Others -vs- State Bank of India, Bhubaneswar & Others reliance is placed on Nazir Ahmed -vs- King Emperor , AIR 1936 PC 253 Raja Ram Pal-vs- Hon'ble Speaker Lok Sabha, 2007 (s) SCC 184, it was held in para 38 :

“When the statute provides for a particular procedure, the authority has to follow the same and cannot be permitted to act in contravention of the same. It has been hitherto uncontroverted legal position that, where a statute requires to do a certain thing in a certain way, the thing must be done in that way or not at all. Other methods or mode of performance are impliedly and necessarily forbidden. The aforesaid settled legal proposition is based on a legal maxim “Expressio unius est exclusion alterius’ meaning thereby that if a statute provides for a thing to be done in a particular manner, then it has to be done in that manner and in no other manner and following other course is not permissible.”

12. SARFAESI Act is a special enactment wherein special procedures are prescribed under the Act and Rules made thereunder and Bank is required to follow the procedures as prescribed under the Act and Rules. No new formula or procedure can be evolved by the Bank which is not prescribed under the Act and Rules made thereunder. Specific provisions are made in Section 13(4) of the Act of 2002 and connected Rules framed thereunder for issuing notice. There is no provision to issue any intimation prior to it. Accordingly, there was no requirement for issuing any intimation to hand over possession.

13. In the case of Smt. Pushpa Pathak (supra) the Division Bench of Hon'ble Allahabad High Court has held in Para 17 and 18 as under :

“ 17. In our opinion the order of DRT dated 7.9.2011 is not based on the facts as they were presented to the Tribunal and the language of

the notice under Section 13 (4) in which the bank not only expressed clear intention to take over possession but also fixed a date on which the officers and representatives of the bank shall take or cause to take possession of the secured assets, wherever they may be situated. The date was fixed on 29.12.2010. The notice dated 21.12.2010 under Section 13 (4) is not a mere intimation, communication or letter to the petitioner to hand over possession. It is a notice giving directions to hand over possession for which date was also fixed. Nothing more is required to be done under Rule 4 (1) of the Security Interest (Enforcement) Rules, 2002, in pursuance to the notice under Section 13 (4) of the Act. The measures taken in pursuance to Section 13 (4) were, therefore, in accordance with law and that it can not be said by any kind of reasoning that the bank has only intimated the borrower for taking over possession. The SARFAESI Act of 2002 and the Security Interest Enforcement Rules, 2002 provide for procedure for taking over possession after notice under Section 13 (2) by giving a notice and adopting the measures namely for fixing a date on which officers of the bank will proceed to take over possession. Since the bank does not have police powers, the Act provides for sufficient provisions under Section 14 to approach the District Magistrate or Chief Metropolitan Magistrate to secure possession and for that purpose take such steps and use or cause to use such force as may be necessary. We find that since the bank was unable to take possession on its own through its officers it applied for taking over possession under Section 14 of the Act on which the Collector has passed the orders and after noticing the litigation in which the petitioner had pursued and had failed.

18. The reasoning given by the DRT in its order dated 7.9.2011 is not correct. The notice dated 21.12.2010 under Section 13 (4) of the Act is on record. The statement of the counsel for the bank that it was a letter and not a notice is a misreading of the document on record. It is a notice to take over possession to be given in accordance with the provisions of Rule 4 of the Security Interest (Enforcement) Rules, 2002.”

14. In view of the judgement of the Hon'ble Division Bench of Allahabad High Court, I am of the view that notice issued by the Bank

is a notice u/s 13(4) of the SARFAESI Act, 2002.

15. Bare reading of the notice dated 12.04.2016 apparently made it clear that it was a notice u/s 13(4) of the Act of 2002 which was set aside by the learned DRT holding that no mortgage was created over the scheduled mentioned property. Accordingly, learned DRT set aside the impugned notice treated it to be a notice u/s 13(4) of the Act of 2002 which cannot be said to be an illegal finding. Notice dated 12.04.2016 by its nature is a notice u/s 13(4) of the Act of 2002. Accordingly, learned DRT has rightly set aside the impugned notice. It is an admitted fact that secured asset is not a mortgaged property which is conceded by the learned counsel for the appellant bank. Accordingly I am of the view impugned order passed by learned DRT cannot be found to be illegal. The appeal is liable to be dismissed.

15. Appeal is dismissed. Order dated 20.12.2018 passed by learned DRT Visakhapatnam is hereby affirmed. No order as to costs.

File be consigned to record room.

Copy of the order be supplied to the appellant and the respondents and a copy be also forwarded to the concerned DRT.

Copy of the judgement/Final Order be uploaded in the Tribunal's website.

Order dictated, signed and pronounced by me in the open Court on this the 24th day of April, 2023.