

Setting aside of sale of mortgaged property by DRT upheld, direction to restore possession to borrower set aside: DRAT KOLKATA

IDBI Bank Limited

...Appellant

Sri Bijendra Kumar Singh

...Respondent

Case No: Appeal No. 63 of 2019

Date of Judgement: 14th March, 2023

Judges:

Anil Kumar Srivastava, J – Chairperson

For Appellant: Mr. Debasish Chakraborty, Ms. Sarmistha Pal, Advocates.

For Respondent: Mr. Souritra Ganguly, Mr. B. P. Subba with Mr. T. Kumai, Advocates.

Facts:

IDBI Bank had sanctioned a mortgage loan of Rs. 92,42,454/- to the respondent Bijendra Kumar Singh. Further loan of Rs. 50 lakhs was disbursed. The respondent created an equitable mortgage of his immovable property in Gangtok by deposit of title deeds. The respondent failed to repay the loan. The account was classified as NPA on 10.04.2018. Notice under Section 13(2) was issued on 27.07.2018 claiming Rs. 1,47,64,843/-. Symbolic possession was taken on 09.10.2018. DM passed order on 02.11.2018 under Section 14(1) of SARFAESI Act. The SARFAESI Application challenging bank's action was

filed by the respondent. The DM's order was stayed by the DRT on 17.12.2018. Fresh DM order was passed on 08.01.2019. Based on this, the bank took physical possession on 10.01.2019. The secured assets were put to sale on 30.03.2019 fixing reserve price of Rs. 1,70,37,920/- based on valuation report dated 10.01.2019. Sale certificate was issued on 31.03.2019. The respondent challenged the sale by filing an application that the property was sold at a low price compared to its market value. The DRT set aside the sale and directed the bank to refund sale proceeds with interest to auction purchaser and restore possession to the borrower.

Arguments by Bank:

The DRT misdirected itself in setting aside sale and directing restoration of possession when it already held that possession taken was legal. The DRT considered oral submissions regarding property value without perusing records. There is no proof that property value is Rs. 5 crores. Reserve price was properly fixed based on valuation report. There was no prayer in the application for restoration of possession. The application was not maintainable after issuance of sale certificate.

Arguments by Borrower:

The impugned order was passed based on materials on record. The hurried manner of DM's order shows collusion between bank and auction purchaser. Bank's own valuation in 2014 assessed property value as Rs. 3 crores while as per 2019 report it is shown as Rs. 2 crores. There was no notice under Rule 8(6) for making representation against price. Opportunity for redemption of mortgage as per Section 13(8) was denied by returning cheques and not providing account statement.

Court's Opinion:

Law requires proper valuation report, application of mind by authority in fixing reserve price and ensuring no collusion between bidders. Valuation must be done fairly and reasonably. Rule 8(5) mandates valuation by approved valuer and consultation with secured creditor in fixing reserve price. Rule 8(6) provides borrower an opportunity to raise objections regarding valuation and price. It was the duty of authorized officer to fix reserve price to fetch maximum value of

secured assets. As per various judgments, it is the Court's duty to ensure price fetched is adequate even if there is no irregularity or fraud in auction. There are discrepancies in the valuation reports of 2014 and 2019 regarding land area and calculations. This shows failure to properly value the assets. If both reports are considered, it is apparent that reserve price fixed is on lower side. There is no proof of service of notice under Rule 8(6) to enable borrower to raise objections. While the DRT was right in setting aside the sale for low value, the direction to restore possession cannot sustain since the earlier DRT order upholding taking over of possession was not challenged. The appeal is partly allowed setting aside only the direction for possession while confirming setting aside of sale.

Sections:

Section 13(2) of SARFAESI Act: Demand Notice

Section 14(1) of SARFAESI Act: Assistance by District Magistrate

Section 17 of SARFAESI Act: Application against measures to recover secured debts

Section 13(8) of SARFAESI Act: Redemption of mortgage

Referred Laws:

Security Interest (Enforcement) Rules 2002

Rule 8(5) and Rule 8(6) – valuation and fixing reserve price

Referred Cases:

Ram Krishun & Ors Vs. State of UP & Ors

Sea Poly Plast India Pvt. Ltd. Vs. Union of India

Kanha International Vs. Union of India

Divya Manufacturing Company Vs. Tirupati Woollen Mills

Conclusion:

The DRT was justified in setting aside the sale of the mortgaged property as the price fetched was inadequate. However, its direction to restore possession could not sustain since the earlier order upholding the taking over of possession was not challenged. Hence, the appeal was partly allowed, setting aside only the direction for possession while confirming setting aside of the sale.

Full Text of Judgment:

1. Instant Appeal has arisen against an order dated 10.07.2019 passed by Ld. DRT Siliguri in I.A. No. 148 of 2019 arising out of S.A. No. 117 of 2018 Bijendra Kr Singh and another versus IDBI Bank and another whereby the Ld. DRT set aside the sale conducted on 30th March, 2019.

2. As per the pleadings a mortgage loan of Rs.92,42,454/- was sanctioned by the Appellant IDBI Bank to Respondent No. 1, Bijendra Kr. Singh and further loan of Rs.50 lacs was disbursed. Respondent No. 1 created equitable mortgage of the immovable property lying and situated at Upper Sicho, Sai Niwas Gangtok, Khatiyon No. 273m Okit Bi,631/1324 Gangtok, East Sikkim with site area 3484.8 sq.ft. and 41/2 (four and half) strd Building. Loan was not repaid. Accordingly, it was classified as NPA on 10.04.2018. Notice under Section 13(2) was issued on 27.07.2018 claiming a sum of Rs.1,47,64,843/-. Symbolic possession was taken on 09.10.2018. District Magistrate passed an order dated 02.11.2018 on an application under Section 14 (1) of the SARFAESI Act. Challenging the action of the Bank SARFAESI Application was filed by the Respondent No. 1. Application for stay of the order of DM was filed on 02.11.2018. DM order was stayed by DRT vide order dated 17.12.2018. On 08.01.2019, a fresh order was passed by Ld. District Magistrate. On the basis of said order, Appellant had taken physical possession on 10.01.2019. I.A. No. 15 of 2019 was filed by Respondent No. 1 challenging the order of DM dated 08.01.2019 which was dismissed.

3. Secured assets were put to sale vide notice dated 19.01.2019 which was challenged before DRT and the sale notice was set aside. Property was sold on 30.03.2019 fixing the reserve price on the basis of the valuation which was fixed as Rs.1,70,37,920/-. Sale Certificate was issued on 31.03.2019. It was challenged by Respondent No. 1 by filing I.A. No. 148 of 2019 on the ground that property was sold for a low value. Ld. DRT set aside the sale by impugned order holding that the property has been sold for a low price in comparison to the value of

the property. Further direction was given to the Bank to refund the sale proceeds with interest at the rate of 9% per annum to the auction purchaser and to restore the physical possession of the property to the borrower.

4. Feeling aggrieved, Appellant Bank preferred the Appeal. I have heard the Learned Counsel for the Appellant as well as Respondent and perused the record.

5. Admittedly, SARFAESI Application u/s 17 of the SARFAESI Act was pending challenging the Demand Notice, Possession Notice and all other subsequent proceedings. Pending SARFAESI Application. I.A. No. 148 of 2019 was filed by the Respondent No. 1 for all reliefs to declare the auction sale illegal and to set aside the same and to consider the settlement offer given by him and not to confirm the sale. Sale fixed on 26.02.2019 was set aside by the Ld. DRT and it was observed that the borrower is still willing to settle the claim, accordingly, he was afforded an opportunity to settle it. Subsequently thereto auction notice was published on 26.02.2019 and sale was conducted on 30th March, 2019. No notice under Rule 8(6) was ever served. Further, it is stated that the property is sold at a very low price of Rs.1,70,37,920/- while the empanelled valuer of the Bank in October 2014 had assessed the price of the said secured assets as Rs. 3 crore while reserve price was fixed only at Rs.1,70,12,920/-

6. Ld. DRT considered the Application and passed the impugned order. Learned Counsel for the Appellant submits that the Ld. DRT has misguided itself in setting aside the sale and further to direct the Appellant to restore the possession while DRT vide order dated 10.07.2019 has held that 4 Appeal. No. 63 of 2019-DRAT-Kolkata possession taken by the Appellant is legal, Challenge to Section 14 of SARFAESI Act order was not accepted by the DRT.

7. It is further submitted that the Ld. DRT had considered the oral submission made by Respondent No. 1 without perusing the records. There is no material on record to show that the value of the property is of Rs.5 crore. Reserve Price was fixed after considering the Valuation Report. It is further submitted that there is no prayer in

the I.A. for restoration of the possession. I.A. was filed after issuance of the Sale Certificate and hence, is not maintainable.

8. Per contra, Learned Counsel for the Respondent No. 1 submits that impugned order was passed on the basis of materials available on record. It is submitted that the order of the Ld. District Magistrate under Section 14 was passed in very haste which shows a collusion between the Bank and the auction purchaser. It is further submitted that the Valuation Report of empanelled Valuer of the Bank in 2014 shows that the value of the property was Rs. 3 crore. In the Valuation Report of 2019 area of land is shown as 2450 sq.ft. while in the Valuation Report of 2014 the area shown was 3480 sq.ft.

9. It is further submitted that if both the reports are taken together it will be apparent that the value of the secured assets as fixed by the Authorised officer is at a very low side.

10. It is further submitted that as far as Rule 8(6) is concerned, there is no scope for the Respondent for making a representation. Even the notice under Rule 8(6) was not served upon the Respondent. It is further submitted that the Ld. DRT has given an option to the Respondent for redemption of mortgage under Section 13(8), but the same was not permitted to be completed by the Appellant as the cheques were returned to the Respondents and the updated Statement of Account was not provided to the Respondent as per the directions of the Ld. DRT.

11. Learned DRT set aside the Sale merely on the ground that the value of the secured assets was much more than the reserved price i.e. Rs.1,70,37,920/-. Ld. DRT has also placed reliance upon a judgment of the Hon'ble Apex Court in Ram Krishun & ors Vs. State of UP & ors (JT 2012 (5) SC 483, Appeal No. 6204 of 2009) wherein it was held that: "It is evident that law requires a proper valuation report, its acceptance by the authority concerned by application of mind and then fixing the reserve price accordingly and acceptance of the auction bid taking into consideration that there was no possibility of collusion of the bidders. The authority is duty bound to decide as to whether sale of part of the property would meet the outstanding demand.

Valuation is a question of fact and valuation of the property is required to be determined fairly and reasonably.”

12. It is admitted that Law requires a proper valuation report, its acceptance by the authority concerned by application of mind and then fixing the reserve price accordingly and acceptance of the auction bid taking in consideration that there was no possibility of collusion between the bidders. The Authority is duty bound to decide as to whether sale of part of the property would meet the outstanding demand. Valuation is a question of fact and valuation of the property is required to be taken fairly and reasonably.

13. Rule 8(5) of Security Interest Enforcement Rules 2002 provides as under:

“Before effecting sale of the immovable property referred to in sub-rule (1) of rule 9, the authorized officer shall obtain valuation of the property from an approved valuer and in consultation with the secured creditor, fix the reserve price of the property and may sell the whole or any part of such immovable secured asset by any of the following methods:-

- (a) by obtaining quotations from the persons dealing with similar secured assets or otherwise interested in buying the such assets; or
- (b) by inviting tenders from the public;
- (c) by holding public auction including through e-auction mode; or
- (d) by private treaty;

14. Reliance is placed by the Learned Counsel for the Respondent on a judgment of Hon’ble Division Bench of Bombay High Court in Sea Poly Plast India Pvt. Ltd. and others V. Union of India and ors W.P. No. 1956 of 2011 SCC ONLINE BOM 1458 wherein constitutional validity of Rule 8 (5) of the Rules of 2002 was upheld. Further, reliance was placed upon a judgment of the Hon’ble Gujarat High Court in Kanha International V. Union of India, AIR 2011 Guj. wherein it was held that:

“13. According to us, Rule 8(6) of the Rules of 2002 provides the necessary safeguard if the action is taken in arbitrary and unreasonable manner and if the valuation of the property is not properly fixed. The whole object of Rule 8(6) of the Rules of 2002

appears to be that the borrower gets clear thirty days notice before the sale takes place'. During this period, the borrower can raise objections and can also point out before the appropriate forum as regards the correct and true valuation of the property. The essential purpose of Sub-rule (5) of Rule 8 of the Rules of 2002 is to see that there is proper valuation by an approved valuer, who would be considered as an expert, and the view of the secured creditor on the aspect of fixation of reserved price is taken into consideration by the authorized officer. Just because the borrower is excluded from Rule 8(5) of the Rules of 2002 or has no voice at the time when the valuation is fixed and the reserved price is also fixed, by itself will not render Rule 8(5) unconstitutional."

The Division Bench of the Gujarat High Court further clarified the matter thus:

"18. We would like to clarify while upholding the constitutional validity of Rule 8 (5) of the Rules of 2002 that Rule 8(6) of the Rules of 2002 protects the interest of the borrower. The whole idea of the Legislature in giving thirty days' clear notice to the borrower regarding the sale of the mortgaged property is to give him an opportunity to redress any grievance as regards the fixation of the valuation of the property and the upset price. We clarify that if any action under Rule 8(5) is arbitrary and unreasonable, such action can be gone into by appropriate forum and if in a given case the borrower is having the valuation of the property by another approved valuer having substantial difference, he may forward the copy of the valuation report to the authorized officer to take into consideration the said aspect and such material may also be considered by the authorized officer even after fixation of the reserved price."

15. It was held that in every case it is the duty of the Court to satisfy itself that having regard to the market value of the property, the price offered is reasonable. Further it was held that it will be not only proper but necessary that the Court is exercising the discretion which is undoubtedly of accepting or refusing highest bid at the auction held in pursuance of its orders should see that the

price fetched at the auction is adequate price even though there is no suggestion of irregularity or fraud. In Divya Manufacturing Company (P) Ltd. Tirupati Woollen Mills Shramik Sangharsha Samity and another versus Union Bank of India and ors (2000) 6 SCC 69 it was held in Para 13 that: "it is abundantly clear that the court is the custodian of the interests of the company and its creditors. Hence, it is the duty of the Court to see that the price fetched at the auction is an adequate price even though there is no suggestion of irregularity or fraud.

16. Hence, it was the duty of the Authorised Officer to fix the reserved price so as to fetch the maximum value for the secured assets.

17. It is submitted that the reserved price was fixed on the basis of the valuation Report of Sri Engineer Vaskar Biswas dated 11.01.2019 wherein he has recommended value of the property as Rs. 2,00,15,200/-. Distress value of the property was Rs.1,60,12,160/- (80% of market value) while the realizable value of the property was Rs.1,70,12,920/-. In assessing the value of the property he gave the following calculation:

<p>As per Current Fair Market Rates:-</p>	<p style="text-align: center;">Land Value</p> <p style="text-align: center;">-3480Sq.Ft.@Rs.3500.00/Sq.Ft. - Rs. 1,21,80,000.00</p> <p>Ext. Basement Flr.(1) Value-1794 Sq.Ft. @Rs.700,00/-Sq.Ft. Rs.12,55,800.00</p> <p>Ext. Basement Flr.(2) Value-2263 Sq.Ft. @Rs.700,00/-Sq.Ft. Rs.15,84,400.00</p> <p>Ext. Ground Floor Value-2447 Sq.Ft. @Rs.900,00/-Sq.Ft. Rs.22,02,300.00</p> <p>Ext. First Floor Value-2447 Sq.Ft.@ Rs.900.00/- Sq.Ft. Rs.22,02,300.00</p> <p>Ext. Second Floor Value-1312 Sq.Ft.@ Rs.450.00/-Sq.Ft. Rs.5,90,400.00</p> <p style="text-align: center;">Total Value of The Existing Property- Rs.2,00,15,200.00 (Rupees -Two Crore fifteen thousand two hundred only)</p>
<p style="text-align: center;">Recommended value of the property:-</p>	<p style="text-align: center;">Rs.2,00,15,200.00</p>
<p style="text-align: center;">Recommendation:</p>	<p style="text-align: center;">100%</p>
<p>Distress value of the property:-</p>	<p>Rs.1,60,12,160.00 (80% of Market Value)</p>

Realizable value of the property:-	Rs.1,70,12,920.00 (85% of Market Value) 170
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18. Per contra, there is another valuation report of the C.S. Singhi & Associates dated 14th October 2014 which is as under:

Value of land :2450.00 sq.ft x Rs.3500.00 sq.ft

=Rs.85,75,000.00

Value of Land Development and

Protection Works 95% of 2450.00 sq.ft x Rs.500.00 sq.ft =
Rs.11,63,750.00/-

Value of R.C.C. building 10263.00sq.ft x
Rs.1800.00/sq.ft.=Rs.184,73,400.00

Rate and amount of depreciation Depreciation calculated as:-

Rs.184.73,400.00 x (100-1/100)^19 =Rs.32,11,300.00/-(app.)

Therefore value of the Building =[C] -[D] after depreciation
=Rs.152,62,100.00/-

Additional Value due to Location & Marketability :20% of
Rs.250,00,850.00/- =Rs. 50,00,170.00/-

Hence, the total market value of the property = [A] +[B]+ [E] + [F]
=Rs.300,01,020.00/

Say Rs.300,00,000.00/-

Based on the above analysis and calculations, the fair market value of the property along with the realizable value and forced sale value have been computed as under:

Market Value : Rs.300,00,000.00

Realizable Value : Rs. 262,50,000.00

Forced Sale Value : Rs. 240,00,000.00

19. On bare perusal of the reports it indicate that value of the land in 2014 was calculated for an area of 2450 sq.ft. which comes to Rs.85,75,000/-, apart from it consideration value was also calculated. It appears that depreciation was also calculated, an amount of Rs. 32,11,300/- was the depreciation value, thereafter the market value was assessed as Rs. 3 crore. This report was given by the empanelled valuer of the Bank at the time of sanction of loan.

20. As far as report of 10.01.2019 is concerned, Ld. Valuer had calculated the area of land as 3480 sq.ft. and assessed the value of

land as Rs.1,21,80,000/-. Accordingly, other consideration values were also calculated. No depreciation of value was calculated. It shows that the Ld. Valuer failed to properly value the secured assets. Had it been done properly, the value would have been much less than as assessed by the Ld. Valuer. It is also not on record to show as to how there is a difference in the area of land in two reports. Further, if we accept the valuation report of 2019, how this report can be accepted when there is another report of 2014 on record. Ld. Valuer has not considered the report of 2014 at the time of assessing the value in 2019.

21. In the interest of justice, I am of the opinion that the Ld. DRT has arrived at a correct conclusion that the property is auctioned for a low value. An argument is advanced that notice under Section 8(6) was served upon the Respondent, but he has not given any representation or challenged the assessed value of the property. There is nothing on record to show that notice under Section 8(6) was ever served upon the Respondent. Even in the counter affidavit, no date of service under Rule 8(6) is mentioned. Hence, it could not be accepted that notice under Rule 8(6) was ever served upon the Respondent.

22. Ld. DRT has issued a direction for restoration of the possession of the secured assets to the Respondent No. 1. Possession was delivered to the secured creditor on the basis of an order passed by the Ld. District Magistrate under/ Section 14 of the SARFAESI Act. It was challenged before the Ld. DRT vide order dated 24.01.2019. Ld. DRT held that the order dated 08.01.2019 passed by Ld. District Magistrate East District

Gangtok is as per Procedure of Section 14 of the SARFAESI Act and physical possession taken in pursuance of the said order is correct and valid. Thereafter by impugned order, Ld. DRT issued a direction for restoration of the possession to the borrower within two weeks. However, Bank was given a liberty to proceed further to restore its dues in accordance with law. As far as the direction for restoration of possession is concerned, it is contrary to order dated 24.01.2019 passed by Ld. DRT. It would also be appropriate to mention here that this order was not challenged in Appeal and became final. Even no

relief for restoration of possession was sought in the I.A.

23. An argument was also raised regarding settlement of the dues. This issue did not crop up in the impugned order and is accordingly left open.

24. On the basis of the discussion above, I am of the view that Ld. DRThas rightly arrived at a conclusion that the sale was conducted for low value and set aside the sale with the direction for refund of the sale proceeds to the auction purchaser but direction for restoration of possession could not sustain and is likely to be set aside. Accordingly, Appeal is liable to be partly allowed.

Appeal is partly allowed. Direction by the Ld. DRT to the Bank for restoration of the physical possession of the property to the borrower is set aside. Rest of the order passed by Ld. DRT 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 14thday of March, 2023.