

Validity of sale notices and auction under SARFAESI Act: DRAT KOLKATA

Dhanpal Singh

...Appellant

M/s. Sree Haricharan Granite Exports India Private Limited

...Respondent

Case No: Appeal No.27 of 2021

Date of Judgement: 19th July, 2022

Judges:

Anil Kumar Srivastava, J – Chairperson

For Appellant: Mr. Soudip Pal Choudhuri, Ms. Saswati Sikder, Advocates.

For Respondent: Mr. P. Sreenivas, Advocate.

Facts:

SARFAESI applicant (respondent 1) was a borrower of appellant bank. It requested a Rs. 15 crore working capital limit but was sanctioned less than half. Instalments were irregular. Account classified as NPA. SARFAESI applicant challenged bank's SARFAESI actions on grounds that demand notice was not properly served, loan wrongly classified as NPA, possession notice not affixed properly on property, actions not as per Act and Rules, property undervalued and sale illegal. Bank submitted all actions were as per law. DRT allowed application on grounds that bank didn't follow Rules 8(6) and 9(1); and income tax dues not mentioned in notice. Set aside 20 June 2019 sale. Bank and auction purchaser filed appeals against DRT order.

Arguments:

Appellant bank and auction purchaser:

DRT erroneously held Rules 8(6) and 9(1) were violated. Income tax dues were not related to secured assets so not required to be mentioned in sale notice.

Respondent 1 (SARFAESI applicant):

There was violation of Rules 8(6) and 9(1). Income tax dues were an encumbrance on assets which should have been mentioned in notice. Non-disclosure violates Rules.

Court's Opinions:

DRT findings against SARFAESI applicant attained finality as it hasn't appealed. Only bank and auction purchaser have challenged DRT order on grounds sale was set aside. Income tax dues needn't be mentioned in sale notice. Supreme Court has held secured creditors dues have preference over crown debts unless statute provides otherwise. No preference given to income tax dues of SARFAESI applicant over secured assets. Hence non-mention doesn't make notice illegal. Income tax dues weren't a charge over secured assets either. DRT relied on Telangana HC judgment in Sri Sai Annadhatha Polymers to hold two notices under Rules 8(6) and 8(6)+(9)(1) violate Rules. But this judgment held as bad law subsequently in Adhya Industries case. As per recent judgments, only overall 30 days gap needed between 8(6) notice and auction sale. 8(6) and 9(1) notices can be simultaneous. Statute doesn't require 30 days gap between 8(6) notice to borrower and sale date. What's important is overall 30 days period maintained before sale. Notices under 8(6) and 9(1) are not separate but refer to same notice. Reference to notice served to borrower in 9(1) can't be construed as additional notice. As per SC, 'or' between public notice and notice to borrower should be read as 'and' implying no second notice under 9(1). In present case, over 30 days gap maintained between notice under Rule 8(6) and auction date. Hence Rules not violated.

Sections Referred:

SARFAESI Act 2002 – Sections 13(2), 13(4), 13(8), 17

Security Interest (Enforcement) Rules 2002 – Rules 3(5), 8(6), 8(7), 9(1)

Cases Referred:

Connectwell Industries Pvt. Ltd. v. Union of India (2020)

Sri Sai Annadhatha Polymers v. Canara Bank (2018)

Adhya Industries v. Vijaya Bank (2020)

Indian Overseas Bank v. RA Pure Life Science Ltd (2023)

Vinayak Steels Ltd v Om Vishnu Pipes Pvt Ltd (2023)

Concern Readymix v. Authorised Officer, Corporation Bank (2018)

Conclusion/Order:

DRT erred in holding Rules 8(6) and 9(1) were violated and income tax dues should have been mentioned in sale notice.

Appeals allowed. DRT order set aside. SARFAESI application dismissed.

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Full Text of Judgment:

1. Both these appeals have arisen against a common judgment and order hence they are being disposed of by a common judgment.

2. Both these appeals have arisen against a common judgment and order dated 30th September, 2020 passed by Learned DRT, Visakhapatnam allowing S.A. 253 of 2019 (M/s. Haricharan Granite Exports India Private Limited -vs- State Bank of India & Another) whereby sale notices dated 16th February, 2019 and 13th May, 2019 and sale dated 20th June, 2019 were set aside. Feeling aggrieved the Secured Creditor/Bank preferred the Appeal No. 07 of 2021 while the Auction Purchaser, namely, Dhanpal Rishi, preferred Appeal No. 27 of 2021.

3. As far as facts are concerned SARFAESI Applicant, who is Respondent No. 1 in the appeal, filed a SARFAESI Application under Section 17 of the SARFAESI Act, 2002 (hereinafter referred to as "the Act"). SARFAESI Applicant was Borrower of the Appellant Bank who requested the Bank for a limit of Rs.15.00 crore as Working Capital to establish a Granite Polishing and Cutting Unit but not even half of the limit was provided by the Bank as requested by the Applicant. Instalments were not regular. Accordingly, the account was classified as N.P.A. SARFAESI Applicant challenged the SARFAESI measures taken by the Bank

on the ground that the Demand Notice under Section 13 (2) of the Act was wrongly issued. No notice was served upon the Borrower. Loan account was wrongly classified as N.P.A. Provisions of Section 13 (4) of the Act were not duly complied. Possession Notice was not affixed on the property as per Rule 8 (7) of the Security Interest (Enforcement) Rules, 2002 (hereinafter referred to as 'the Rules'). It was also not served upon the remaining Guarantors. SARFAESI actions were not taken in accordance with the Provisions of the Act as well as Rules. Rules 8 (6) and 9 (1) of the Security Interest (Enforcement) Rules, 2002 were violated. The property was undervalued. Sale was illegally made.

4. Secured Creditor/Bank submitted that all the actions were taken in accordance with law.

5. Learned DRT, after hearing the Learned Counsel for the parties, recorded a finding that there was no violation of Rule 8 (5) of the Rules. The other grounds, taken by the SARFAESI Applicant, also did not find favour with the Learned DRT. However, Learned DRT allowed the SARFAESI Application on the ground that the Bank has not followed Rules 8 (6) and 9 (1) of the Rules; as well as claim of the Income Tax Department was not mentioned in the Notice, accordingly, Learned DRT allowed the SARFAESI Application and set aside the sale conducted on 20th June, 2019. I have heard the Learned Counsel for the parties and perused the records.

6. At the very outset, it would be appropriate to mention that the SARFAESI Applicant, i.e. Respondent No. 1, has not preferred any appeal against the impugned judgment passed by Learned DRT. Accordingly, as far as findings recorded by the Learned DRT against the SARFAESI Applicant are concerned, they attained finality. Only the Secured Creditor Bank as well as the Auction Purchaser have challenged the impugned order challenging the grounds on which the SARFAESI Application was allowed.

7. Learned Counsel for Appellant submits that Learned DRT has recorded a finding against law to the effect that there is violation of Rules 8 (6) and 9 (1) of the Rules. Further as far as the encumbrances, i.e.

the claim of the Income Tax Department, is concerned, it is not related to the secured assets and it was not necessary to mention the same in the sale notice.

8. Per contra, Learned Counsel for Respondent No. 1, SARFAESI Applicant, submits that there is violation of Rules 8 (6) and 9 (1) of the Rules. Further balance of Income Tax was encumbrance over the secured assets which should have been mentioned in the sale notice. Non-mentioning the details of encumbrance is a violation of the Rules.

9. As far as non-mentioning of balance of the Income Tax on the sale notice is concerned, it was held by The Hon'ble Apex Court in *Connectwell Industries Private Limited -vs- Union of India* [(2020) 5 SCC 373] that "9. It is trite law that, unless there is preference given to the Crown debt by a statute, the dues of a secured creditor have preference over Crown debts. [See: *Dena Bank -vs- Bhikhabhai Prabhudas Parekh & Company*, [(2000) 5 SCC 694], *Union of India -vs- SICOM Limited* [(2009) 2 SCC 121], *Bombay Stock Exchange -vs- V.S. Kandalgaonkar*, [(2015) 2 SCC 1: (2015) 1 SCC (Civ) 694] and *CIT -vs- Monnet Ispat & Energy Limited* [(2018) 18 SCC 786: (2019) 3 SCC (Civ) 252]." Accordingly there was no preference given to the Income Tax of the SARFAESI Applicant over the secured assets. Hence non-mentioning of the same will not make the sale notice illegal. Further the dues of Income Tax were not a charge over the secured assets. Hence there was no necessity to mention those dues in the Sale Notice.

10. As far as issue of violation of Rules 8 (6) and 9 (1) of the Rules is concerned, notice under Section 8 (6) was issued on 16th February, 2019 thereafter another notice under Section 8 (6) and 9 (1) of the Rules was issued on 13th May, 2019 which was published in two newspapers. Learned DRT recorded a finding that two notices; one under Section 8 (6) on 16th February, 2019 and another under Section 8 (6) and 9 (1) of the Rules on 13th May, 2019, was against the Rules. Learned DRT has placed reliance upon a judgment of the Division Bench of the Hon'ble High Court of Judicature at Hyderabad for the State of Telangana and the State of Andhra Pradesh in Writ Petition No. 8155 of 2018 in between *Sri Sai Annadhatha Polymers & Another -vs- Canara*

Bank. On the basis of the judgment of the Hon'ble High Court it was held that thirty days time period is to be maintained in between issuance of notice under Rule 8 (6) of the Rules and paper publication under Rule 9 (1) so as to enable the Borrower to redeem its property.

11. Reliance is placed upon the judgment of Sri Sai Annadhatha Polymers case (supra) which has been held as not a good law in subsequent judgment in the case of Adhya Industries & Others -vs- Vijaya Bank & Others, reported in Manu/TL/0049/2020 equivalent citation 2020 SCC OnLine TS 3449.

12. As far as issue of validity and violation of Rules are concerned the judgement of Sri Sai Annadhatha Polymers (supra) which was held to be not a good law in subsequent judgement of Adhya Industries case (supra). Subsequent thereto in a recent judgement in Indian Overseas Bank -vs- M/s. R.A. Pure Life Science Limited case decided on 10th February, 2023 (2023 SCC OnLine TS 634), Hon'ble Telangana High Court held that it is sufficient that 30 days notice is issued before sale of secured asset is conducted and notices under Rule 8(6) and Rule 9(1) can be issued simultaneously. In other words, it is not necessary that there must be a 30 days gap after notice under Rule 8(6) is issued and before notice under Rule 9(1) is issued.

13. In another recent judgement of Hon'ble High Court at Telangana in Hyderabad decided on 2nd March, 2023 in Vinayak Steels Ltd. Vs. Om Vishnu Pipes Private Limited 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."

14. Further reliance is 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.

15. Reliance is 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 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)."

16. In the present case there is clear thirty days gap between publication of notice under Rule 8 (6) of the Rules and the date of auction sale. Accordingly, I am of the considered opinion that Learned DRT has committed illegality in holding that there was violation of Rules 8 (6) and 9 (1) of the Rules. On the basis of the discussion made above, I am of the view that Learned DRT has erred in holding that there is violation of Rules 8 (6) and 9 (1) of the Rules. Further there was no requirement for mentioning the dues of the Income Tax in the sale notice. Accordingly, the judgment and order passed by Learned DRT is liable to be set aside and appeal deserves to be allowed.

Both the appeals, being Appeal No. 27 of 2021 and Appeal No. 07 of 2021, are allowed. Judgment and order dated 30th September, 2020 passed by Learned DRT, Visakhapatnam is hereby set aside. Consequently S.A. 253 of 2019 stands dismissed.

No order as to costs.

Copy of this judgment be placed in the records of Appeal No. 07 of 2021.

Copy of the order be supplied to Appellant and the Respondents and a copy be also forwarded to the concerned DRT.

File be consigned to Record room.

Order dictated, signed, dated and pronounced in open Court.