

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Judgment Reserved on July 28, 2014
Judgment Delivered on August 19, 2014

+ **W.P.(C) 1135/2014**

ANIL KUMAR BATLA AND ANR.

..... Petitioner

Through: Mr.Sanjiv Kakra, Mr.Amrendra
K.Singh, Mr.Irfan Ahmed,
Advocates

Versus

ALLAHABAD BANK AND ORS.

..... Respondents

Through: Ms.Puja Dewan, Advocate for R1
Mr.Mithilesh Kumar, Advocate
for R2
Mr.S.S.Tripathi, Advocate for R3
to R5

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE V.KAMESWAR RAO

V.KAMESWAR RAO, J.

1. The challenge in this writ petition is primarily to the judgment dated January 13, 2014 passed by the Debt Recovery Appellate Tribunal ('Appellate Tribunal' in short), Delhi, disposing of two appeals, numbers being 447/2010 and 50/2011 in S.A. 47/2008 filed by the petitioners herein namely Anil Kumar Batla and Randhir Singh Yadav and Smt. Archana Mishra, the respondent No.2 herein, respectively, whereby the Appellate Tribunal allowed the Appeal No. 50/2011 and S.A.No. 47/2008 in favour of the respondent No. 2 and consequently,

dismissed the Appeal No. 447/2010.

2. Some of the relevant facts are, in the month of February, 2004, the respondent No. 1-bank has sanctioned a credit facility of Rs. 2.10 Crores to M/s. Sudha Fashions Pvt. Ltd. Smt. Archana Mishra, respondent No. 2 herein stood as a guarantor and mortgaged her property bearing No. 353, Sector 19, Faridabad, Haryana. One Ashok Kumar Dubey, also stood guarantor and mortgaged his property. On failure to repay the loan amount, the respondent No. 1-bank had declared the Account as Non-Performing Asset (NPA) on May 31, 2006 and thereby issued a demand notice under Section 13(2) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ('SARFAESI Act', in short) to the borrower, guarantors/mortgagers, claiming an amount of Rs. 1,72,14,846/-. Symbolic possession of property was taken on July 04, 2007 by the respondent No. 1-bank. On July 22, 2008, the respondent No. 1-bank issued notice for sale of property with reserve price of Rs. 75 lakhs and invited bids by August 29, 2008. The sale notice was published on July 26, 2008 in Delhi Edition of Newspapers namely 'Economic Times' and the 'Rashtriya Sahara'. Smt. Archana Mishra, respondent No. 2 filed S.A. No. 47/2008 before the Debt Recovery Tribunal-II, Delhi (DRT-II, Delhi in short) on August 19, 2008, challenging the notice and actions of the bank. Since there was no restraint order by the DRT, auction took place as per schedule on August 29, 2008. The petitioners herein were the highest bidders having bid the property for Rs. 84.2 lakhs. Their bid was accepted and after confirmation of sale and deposit of the consideration amount, the sale certificate was issued in their favour on October 03, 2008. The physical possession of the property was taken. As the

property had been sold, sale consideration received by the bank, the sale certificate had been issued, the Bank filed IA 880/2008 in S.A. No. 47/2008 for dismissing the S.A. as having become infructuous. Smt. Archana Mishra, respondent No. 2 also filed an application being IA 887/2008 challenging the action, confirmation of sale and also sought a direction for de-sealing of the property. Simultaneously, it appears, the respondent No. 2 had filed a writ petition bearing No. 8968/2008 before this Court, which was dismissed as withdrawn with liberty to approach the DRT for relief available under law and a direction that status quo of the property in question be maintained. Respondent No. 2 filed IA 14/2009 before the DRT in S.A. No. 47/2008 for setting aside the sale as well as for restoring the possession of the property and redemption of mortgage on payment of Rs. 95 lakhs against the sale price of Rs. 84.20 lakhs. She simultaneously sought impleadment of the auction purchasers, the petitioners herein and for restraining the bank from handing over the possession to them. The IA 14/2009 was disposed of by the DRT with a direction that if the respondent No. 2 herein, deposits Rs. 95 lakhs within a period of 15 days, possession of the property in question be restored to her. She deposited the money on 9.6.2009. Against this order, the petitioners herein filed an appeal before the Appellate Tribunal i.e. Appeal No. 164/2009. The Appellate Tribunal, vide order dated July 2, 2009 directed the respondent No. 2 Smt. Archana Mishra, not to create any third party interest, but, the prayer for delivery of possession was not granted in favour of the petitioners herein. Thus, it is apparent that the petitioners never came in physical possession of the property. It may be stated here, the bank restored the possession to Smt. Archana Mishra, the respondent No. 2 herein. Being aggrieved by the order dated July 2,

2009, the petitioners filed a writ petition before this Court number being 10262/2009, which was disposed of by this Court with a direction to the Appellate Tribunal to dispose of appeal No. 164/2009. The Appellate Tribunal allowed the appeal filed by the petitioners herein vide order dated July 05, 2010 and Smt. Archana Mishra, the respondent No. 2 herein was directed to surrender possession of the property in question to the petitioners. Smt. Archana Mishra filed a writ petition being W.P.(C.) No. 4434/2010 before this Court against order dated July 05, 2010, on which, this Court stayed the direction for delivery of possession. Since the DRT had reserved its order in the Securitization Application for orders, this Court disposed of the writ petition on November 16, 2010 with directions which is reproduced as under:

“Learned counsel for R-2 and R-3 states that the DRT has concluded hearing in the matter and reserved judgment for which a date has been fixed as 19.11.2010.

It is agreed that the interim arrangement arrived at by this Court on 07.07.2010 will continue to operate till the pronouncement of the judgment by the DRT.

The petition and the application stand disposed of.

Dasti to learned counsel for the parties.”

The DRT, in its judgement dated November 19, 2010 upheld the notices issued under Sections 13(2) and 13(4) of the SARFAESI Act, with the following directions:

“(i) that upon making payment of the entire dues of Rs.1,72,14,846/- plus future interest w.e.f. 31.8.2006 together with all costs, charges and expenses (minus the amount deposited by any other borrower(s) or received from any other borrower(s) and after service of the notice) within 30 days hereof, the impugned sale shall be

cancelled. The sale certificate shall also stand cancelled. The applicant is in possession of the property under the orders and she will continue to be in possession.

(ii) in the event of non-payment of the amount within 30 days as directed above, the applicant shall handover the possession to the Bank who may in turn deliver the possession to the Auction Purchasers as per rules. If need be, the Bank shall be entitled to take police assistance also.

(iii) In the eventuality, the payment is made by the applicant, as directed above, the sale proceeds deposited with the Bank shall be refunded to the highest bidders/auction purchasers along with interest @ 9% p.a. as per banking norms applicable in relation to term deposit.

(iv) Costs of the SA shall be borne out by the respective parties.

(v) All pending I.As. stand disposed off.”

3. It is against this order, as mentioned above, two appeals were filed, before the Appellate Tribunal, the details of which, have been given above. The Appellate Tribunal disposed of the appeals in terms of the following observations:

“17. Since the sale of the property in question in favour of the appellant/ auction purchasers is bad in law, therefore, no right of the auction purchasers had accrued in that property on the basis of such sale. They are, however, entitled to get their sale price back from the bank along with interest from the date of deposit, at the rate directed by the Tribunal below, which appears to be reasonable.

18. in view of the aforesaid discussion, Appeal No. 50/2011 and the S.A. No. 47/2008 filed by the guarantor/mortgagor are allowed and the actions of the respondent bank taken qua the sale of the property in question are held to be not in accordance with the rules made under the SARFEASI Act. The order impugned as well as the sale certificate issued in favour of the auction purchasers are accordingly set aside. Consequently, Appeal No. 477/2010 filed by the auction purchasers is dismissed. They are entitled

to get back the amount of sale consideration deposited by them with interest. The respondent bank is, accordingly, directed to refund the sale consideration of Rs.84.2 Lacs to the appellant/auction purchasers along with interest @ 9% p.a. from the date of its deposit until the date of payment. Parties shall bear their own cost of these appeals.”

4. It is the submission of Mr. Sanjiv Kakra, learned counsel for the petitioners is that the findings arrived at by the Appellate Tribunal is based on presumptions and conjectures and contrary to the law. It is also his submission that the conclusion of the Appellate Tribunal that the newspaper ‘Rashtriya Sahara’ has no East Delhi edition and its Delhi edition does not have sufficient circulation in Faridabad was on a mere statement of the counsel for the respondent No.2. He states that a newspaper published in Delhi is also circulated in Delhi-NCR and no newspaper has special publication/edition for Delhi-NCR. According to him, the conclusion of the Appellate Tribunal that the Delhi edition of ‘Rashtriya Sahara’ did not apparently have sufficient circulation in Faridabad locality is perverse. He states that the requirement of the proviso to Rule 8(6) of the Security Interest (Enforcement) Rules, 2002 [‘Enforcement Rules’, in short] has sufficiently been complied and the contrary finding is unsustainable. He would also state that the Appellate Tribunal has not considered in proper perspective, the certificate issued by the Sales and Marketing Department of the ‘Rashtriya Sahara’, New Delhi that the Delhi edition had circulation in Faridabad which is a proof to show that the notice was properly published. He would further state that the respondent No. 2 herein had filed an amended Securitization Application, wherein, she has specifically admitted that she has knowledge about the sale of the mortgaged property by sale notice dated July 22, 2008 and as such, she cannot agitate the issue that newspaper

containing the sale notice had no circulation in Faridabad inasmuch as the purpose of the notice was only to inform public at large about sale of the property.

5. On the other hand, Mr. Mithilesh Kumar, learned counsel for the respondent No. 2 would justify the order of the Appellate Tribunal and states; (1) that the requirement under Rule 8(6) of the Enforcement Rules specifically stipulates that sale of the immovable secured assets is to be effected by either inviting tenders from the public or by holding public auction and the secured creditors has to issue the public notice in two leading newspapers, one in vernacular language having sufficient circulation in the locality, which has not been complied with in the present case inasmuch as ‘Rashtriya Sahara’, apart from having Delhi edition, has Haryana/Rajasthan editions as well; (2) there is no proof that the Delhi edition of the said newspaper had a sufficient circulation in the locality i.e. Faridabad. According to him, it is a case where the respondent No. 2 has exercised her right to redemption by offering an amount of Rs. 95 lakhs which was much higher than the purchase price offered by the petitioners and the same was a sufficient reason for the Appellate Tribunal, to pass the order now questioned.

6. Having heard the learned counsel for the parties, before dealing with the submission of the counsel, we, for the sake of convenience, reproduce Sub-Rule 6 of Rule 8 of the Enforcement Rules, as under:

“(6) The authorised officer shall serve to the borrower a notice of thirty days for sale of the immovable secured assets, under sub-rule (5): PROVIDED that if the sale of such secured asset is being effected by either inviting tenders from the public or by holding public auction, the secured creditor shall cause a public notice in two leading newspapers; one in vernacular language having sufficient

circulation in the locality by setting out the terms of sale, which shall include,-- (a) the description of the immovable property to be sold, including the details of the encumbrances known to the secured creditor;

(b) the secured debt for recovery of which the property is to be sold;

(c) reserve price, below which the property may not be sold;

(d) time and place of public auction or the time after which sale by any other mode shall be completed;

(e) depositing earnest money as may be stipulated by the secured creditor;

(f) any other thing which the authorised officer considers it material for a purchaser to know in order to judge the nature and value of the property”.

7. A perusal of the aforesaid would reveal that for effecting a sale of immovable secured asset, the following are necessary:

(i) Public notice to be published in two leading newspapers;

(ii) One in vernacular language;

(iii) Having sufficient circulation in the locality, setting out the terms of sale.

8. Suffice to state here, there is no dispute between the parties that the word ‘locality’ has a reference to the area where the property is situated. It is also an admitted case that the property is situated in Faridabad. The question raised before the Appellate Tribunal was whether the newspaper namely ‘Economic Times’ (in English) and ‘Rashtriya Sahara’ (in Hindi) had sufficient circulation in Faridabad? It can be inferred from the perusal of the aforesaid Rule that both the newspapers must have sufficient circulations in the locality where the

property is situated. The reason is obvious, best possible price can be secured, if the persons who would be interested in purchase are informed and made aware. Insofar as the 'Economic Times' is concerned, there was nothing on record that it has sufficient circulation in Faridabad. The learned counsel for the respondent No. 2 had, before the Appellate Tribunal submitted that the said newspaper was known for business ventures but its circulation was limited to a specific class which had interest in financial matters. Even though, no finding has been returned by the Appellate Tribunal as to whether, the 'Economic Times' had sufficient circulation in Faridabad, it primarily gave a finding on 'Rashtriya Sahara' wherein, it had concluded that it did not have sufficient circulation in the locality. There is some merit in the submission of the learned counsel for the respondent No. 2 that the newspaper 'Economic Times' is generally purchased by a specific class of people who are interested in financial matters. The intent of Sub-Rule 6 of Rule 8 of the Enforcement Rules, is to ensure a widest publicity in order to get a best price for the property. The word "sufficient" has been defined in the Oxford Dictionary to mean 'adequate' (esp. in quantity or extent) for a certain purpose; enough (for a person or thing, to do something). There is no evidence on record that there is sufficient or adequate circulation of this newspaper (Economic Times) in Faridabad. Further, the property in question is a residential house and not a commercial property. However, we would not primarily rest our finding for publication in the Economic Times.

9. Insofar as the newspaper 'Rashtriya Sahara' is concerned, the Appellate Tribunal was of the following view:

"The perusal of the original copies of both the Delhi and Haryana/Rajasthan editions of 'Rashtriya Sahara'

newspaper dated 11.3.2013 to 18.3.2013 filed by the S.A. applicant/appellant shows that Delhi edition was mainly related to the local news of Delhi but on some days it had specific page for Ghaziabad and Noida. It had no page for any other area of NCR, including Faridabad, whereas the Haryana/Rajasthan edition besides having the local news of those States had, on some dates, specific pages for western U.P., Madhya Pradesh, Punjab and Himachal Pradesh. The Haryana/Rajasthan edition did not contain any local news of Delhi. The certificate issued by the Sales and Marketing Department of Rashtriya Sahara, New Delhi though says that Delhi edition of the newspaper has circulation in Faridabad but, in my view, the said certificate cannot be accepted as proof of sufficient circulation of Delhi edition in Faridabad, as no circulation detail has been mentioned in it to show whether or not the circulation is sufficient. The said certificate is general in nature and does not appear to satisfy the requirement of rule 8(6) of the Enforcement Rules. I am also of the view that when the said newspaper had an independent edition for the State of Haryana, it appears unlikely that the edition meant for Delhi would have any circulation in Faridabad. The respondent bank has not come up with any explanation as to why the notice was not published in Haryana edition of 'Rashtriya Sahara' and was published in Delhi edition and that too on such a page which was meant for east Delhi. I, however, agree with the bank's counsel that the said newspaper does not have any east Delhi edition, but it does not appear that the Delhi edition has a specific page for east Delhi as is reflected from the copy of the original newspaper filed by the bank along with its application. In view of above, I am of the considered view that by publishing the sale notice in Delhi edition of 'Rashtriya Sahara' on 26.7.2008, which does not appear to have sufficient circulation in Faridabad locality, where the property in question is situated, the requirement of the proviso to rule 8(6) of the Enforcement Rules has not been sufficiently complied with. The main purpose of publication of the sale notice in a newspaper of vernacular language having sufficient circulation in the locality is that the residents of the locality may know about the intending

sale and participate in the sale process. The said purpose is not achieved by publishing the notice in a newspaper which has no sufficient circulation in the locality. It is a well established principle that if a law requires a thing to be done in a particular manner, it should be done in that manner alone and in no other manner. Since the respondent bank has failed to comply with the requirement of the aforesaid rule 8(6), as such the sale of the said property on the basis of such notice cannot be held to have been conducted in accordance with the provisions of the law.”

10. We agree with the aforesaid conclusion of the Appellate Tribunal. There is a specific finding that ‘Rashtriya Sahara’ has an independent edition for the State of Haryana. There is also a finding that the public notice was published in the Delhi Edition of ‘Rashtriya Sahara’, that too, on a page which was meant for “East Delhi”. It is a matter of knowledge that East Delhi is a Trans Yamuna area, abutting the city of Ghaziabad and Noida in U.P., and is in the other direction to Faridabad which abuts Badarpur, South Delhi.

11. Insofar as the submission of the learned counsel for the petitioners that the respondent No. 2 had sufficient knowledge about the sale of the property through sale notice and as such, cannot agitate the issue that the newspaper containing the sale notice had no circulation in Faridabad, is concerned, suffice to state that the said submission would be inconsequential inasmuch as Sub-Rule 6 contemplates maximum coverage to intending sale is given, so that the secured creditor gets the best price for the property and the loan amount to the maximum is recovered which is also in the interest of the borrower. After the auction was effected, the respondent No. 2 had offered a higher amount of Rs. 95 lakhs for redeeming the mortgage. She had specifically pleaded in her

application that this request of her, was not accepted by the bank. It is not the case of the petitioners herein that they were also ready to offer higher price than Rs. 95 lakhs. Meaningfully read, the conclusion of the Appellate Tribunal was that the sale was not effected in accordance with Sub-Rule 6 of Rule 8 of the Enforcement Rules. That apart, we also take note that during his submissions, Mr. Kakra has stated that the petitioners are in the business of sale and purchase of the properties and some of the properties purchased have been rented out to the Bank itself. We also note, that only five bids were received pursuant to notice dated July 26, 2008. The auction was held in the bank premises in Delhi. The bids show a narrow movements marginally and just above the reserved price. These facts affirm the view and finding of the Appellate Tribunal regarding non compliance of Rule 8(6) of the Enforcement Rules. If that be so, such a sale cannot be validated. The Supreme Court, in its recent opinion reported as **(2014) 5 SCC 610, Mathew Varghese Vs. M. Amritha Kumar and Ors.**, interpreting the provisions of the SARFAESI Act, Transfer of Property Act, in para 43 and 53, has held as under:

“43. The above principles laid down by this Court also makes it clear that though the recovery of public dues should be made expeditiously, it should be in accordance with the procedure prescribed by law and that it should not frustrate a Constitutional Right, as well as the Human Right of a person to hold a property and that in the event of a fundamental procedural error occurred in a sale, the same can be set aside.

X X X X

53. We, therefore, hold that unless and until a clear 30 days notice is given to the borrower, no sale or transfer can be resorted to by a SECURED CREDITOR. In the event of any such sale properly notified after giving 30

days clear notice to the borrower did not take place as scheduled for reasons which cannot be solely attributable to the borrower, the SECURED CREDITOR cannot effect the sale or transfer of the SECURED ASSET on any subsequent date by relying upon the notification issued earlier. In other words, once the sale does not take place pursuant to a notice issued under Rules 8 and 9, read along with Section 13(8) for which the entire blame cannot be thrown on the borrower, it is imperative that for effecting the sale, the procedure prescribed above will have to be followed afresh, as the notice issued earlier would lapse. In that respect, the only other provision to be noted is sub-rule (8) of Rule 8 as per which sale by any method other than public auction or public tender can be on such terms as may be settled between the parties in writing. As far as sub-rule (8) is concerned, the parties referred to can only relate to the SECURED CREDITOR and the borrower. It is therefore, imperative that for the sale to be effected under Section 13(8), the procedure prescribed under Rule 8 read along with 9(1) has to be necessarily followed, inasmuch as that is the prescription of the law for effecting the sale as has been explained in detail by us in the earlier paragraphs by referring to Sections 13(1), 13(8) and 37, read along with Section 29 and Rule 15. In our considered view any other construction will be doing violence to the provisions of the SARFAESI Act, in particular Section 13(1) and (8) of the said Act”.

12. In view of our reasons and in view of the conclusion arrived at by the Appellate Tribunal, with which we have agreed to, the position of law as opined by the Supreme Court in *Mathew Varghese's case (supra)*, we do not see any reason for this Court to interfere with the impugned judgment in exercise of our discretionary jurisdiction under Article 226 and 227 of the Constitution of India. We accordingly dismiss the writ petition, with no order as to costs.

CM No. 2362 /2014 (stay)

In view of the order passed in the writ petition, this application is disposed of as infructuous.

(V.KAMESWAR RAO)
JUDGE

(SANJIV KHANNA)
JUDGE

AUGUST 19, 2014
akb