

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

Reserved on: February 19, 2015

Pronounced on: April 17, 2015

+ **W.P.(C) 8920/2014, CM Nos.20420/2014 & 2783/2015**

M/S. NUPUR ENTERPRISES THROUGH PROPRIETOR

PRADEEP KUMAR GOEL & ORS.

..... Petitioners

Through: Mr. Ravi Gupta, Sr. Advocate with
Mr. Ajay Gulati, Advs.

versus

PUNJAB NATIONAL BANK & ORS.

..... Respondents

Through: Mr. Manik Ahluwalia, proxy counsel
for Mr. V P S Ahluwalia, Adv. for
R-1

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE R.K.GAUBA

MR. JUSTICE R.K.GAUBA

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1. This writ petition brings a challenge to the order dated 19.11.2014 passed by Debts Recovery Appellate Tribunal (DRAT), Delhi in IA Nos.567/13 and 832/14, Appeal No.436/12 arising out of Securitisation Application (SA) No.1/2009 (Delhi-III).

2. The case has had a long history which needs to be noted at this stage.

3. For the purpose of this narrative, the petitioners shall be referred to as “the borrowers” or “the guarantors”, which include the third petitioner being the owner of land described as Khasra 1722 admeasuring 1145

sq.yds, village Pasodna, pargana Loni, Tehsil and Distt. Ghaziabad, U.P. (“the mortgaged property”).

4. The first respondent (referred to hereinafter as “the bank”) had extended loan facility in the nature of cash credit to the extent of ₹25 lakhs in favour of the first petitioner. The abovementioned property (hereinafter referred to as “the subject property”) was offered by its owner (“the third petitioner”), and accepted by the bank as a security and, thus, stood mortgaged upon deposit of the original title deeds with the bank. It may be added that the other respondents (respondent Nos.2 to 5) entered the fray later, in the course of steps taken by the bank (“the secured creditor”) to recover its dues by invoking provisions of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (“SARFAESI Act”). The bank having failed to sell by public auction (for which steps were initially taken), the subject property was sought to be sold in SARFAESI proceedings (by private treaty) to the said other respondents. It appears that a revised offer of purchase for consideration of ₹61.10 lakhs had been made by the second respondent on behalf of self and others (respondent Nos. 3 to 5). These respondents have been referred to by the authorities below in their various orders as the auction-purchaser. Since the mode of the intended transfer of the subject property in favour of the said respondents was not public-auction, but by private treaty or tender, and since the sale in their favour had not been confirmed by the time the final round of appeals before the DRAT began, they shall hereinafter be referred to as “the intending purchasers”.

5. That the bank finds itself embroiled in this litigation with resolution eluding it for so long is for reasons for which it will have to blame itself.

This would be clear from the chronology of events, starting with the initial demand notice issued on 21.1.2003, as set out hereinafter.

6. The borrower made a default in payment of the liability under the cash credit facility. The bank treated the account of the borrower as non-performing asset (NPA). It issued the demand notice on 21.1.2003 in terms of Section 13(2) of SARFAESI Act calling upon the borrower to pay its dues within the statutory period. It appears that no objection was taken to the demand under Section 13(3A). At least, there is no pleading made to such effect. Concededly, no payment was made in compliance with the demand notice.

7. In July, 2007, the bank moved DRT under the Recovery of Debts due to the Banks and Financial Institutions Act, 1993 (RDDBFI Act) by instituting OA No. 102/07 against the petitioner (defendant in OA) claiming a sum of ₹47,81,053.76 with interest @ 13.5% per annum from 1.3.2003 to 15.7.2007 till realisation and costs. On 5.3.2008, the parties in the OA entered into a compromise with the bank to the following effect :

“(a). All the defendants admit, accept, acknowledge and absolutely confirm their indebtedness to the appellant bank as claimed in the original suit/application No. 102/2007 for recovery of Rs.47,81,053.76 with interest @ 13.5% per annum from 01.03.03 to 15.08.07 till realization and cost and for sale of hypothecation/mortgaged securities by passed/issued in favour of the appellant/plaintiff bank.

(b) A compromise of Rs.36.00 lacs has been approved by the bank, Rs.2,50,000/- has already been deposited by the defendants as upfront amount : has been appropriated in the account by the appellant bank.

(c) The balance amount of Rs.33.50 lacs is to be paid by the defendants within a period of three months from the date of

conveying approval. If the compromise amount is not paid within a period of three months from the date of conveying approval, interest @ BRPL (simple) will be charged on reducing balance on the compromise amount from the date of conveying approval i.e. 29.12.2007. However, in no case the compromise would be valid for six months.

(d) In case of default, all concessions shall stand withdrawn and bank shall be entitled to recover the entire amount as per prayed in the suit, after adjusting the amount received in the meanwhile and sell the securities or realization of amount dues through legal/SARFAESI action.

(e) Defendants will give an undertaking that they do not have any claim against the bank and its officials.

(f) Charge on the property would be released only after payment of the entire compromise amount”

(emphasis supplied)

8. The DRT accepted the joint application for compromise submitted on 26.2.2008 and, by order dated 5.3.2008, issued a certificate of recovery in its terms.

9. It is clear from the above extract of the compromise terms quoted in the order dated 05.03.2008 passed by DRT that the petitioners had admitted and acknowledged their liability towards the bank to the tune of ₹47,81,053.76 together with interest calculated @ 13.5% per annum for the period 01.03.2003 to 15.08.2007 till realization and in the event of default also the liability for sale of the mortgaged property, as claimed in the OA. Though the bank had agreed to settle its claim for an amount of ₹36 Lacs only (apparently as one-time settlement or OTS), its concession was conditional upon the OTS resulting in the payment of the balance amount (after giving credit for ₹2.50 Lacs deposited at that stage by the petitioners)

within a period of three (or maximum six) months. The recovery certificate, thus, would lead to either of the two consequences; one, wherein the petitioners would get absolved of the remaining claim of the bank should they honour the commitment in OTS and, two, the recovery certificate for the amount as originally claimed in the OA would become enforceable if the compromise terms were not complied with.

10. No payment was made even in terms of the compromise entered before the DRT. As a consequence, the recovery certificate in favour of the bank in terms of the claim in the OA became enforceable. For reasons that have not been explained, the bank did not approach the recovery officer under RDDBFI Act to execute the recovery certificate dated 05.03.2008. As would be seen from the narration of facts that follow, the bank instead reverted back to the procedure under SARFAESI Act taking it further on the basis of demand notice dated 21.01.2003.

11. Since no payment was made pursuant to the demand notice, or the recovery certificate issued by DRT, the bank issued possession notice on 20.8.2008 in respect of the subject property in terms of Section 13(4) of SARFAESI Act. There is no dispute that on 22.8.2008, the guarantors (including the mortgagor) were informed about the intent of the bank to put the property to sale for realizing dues. Auction sale notice was issued on 15.10.2008 indicating reserve price of ₹70 lakhs, this in terms of the valuation made. The efforts to sell the property by auction on 18.11.2008, as scheduled, however, failed as no bid was received.

12. On 15.12.2008, the bank informed the borrower that since no bid had been received on 18.11.2008 for the price reserved, it intended to sell the

subject property through “private treaty” for ₹61.10 lakhs. The notice thus sent solicited co-operation for disposal/possession of the secured assets to the purchaser. It appears that offer to purchase the property for ₹61.10 lakhs had been made to the bank by way of tender by the intending purchasers, in the course of its endeavour to dispose of the property “by private treaty”.

13. The petitioners questioned before DRT the above move of the bank by moving SA No.01/2009, *inter alia*, referring to the valuation conducted by Shri K L Bhardwaj and Shri Rajesh Batra, the bank’s empanelled valuer on 23.06.2000 “at the fair market price of rupees one crore thirty three thousand sixty two.”

14. It appears that the SA was allowed by DRT without notice to the bank. The DRT by its order dated 1.1.2009, *inter alia*, found that the value of the asset was higher than the liability to the bank. It was of the view that if the bank proceeds to sell the subject property, it shall have to (“necessarily and unavoidably”) comply with Section 13(7) of SARFAESI Act and that the purpose of the said provision of law could not be defeated by the exorbitant interest leviable on the real recoverable amount.

15. The order of DRT was challenged by the bank through appeal No.133/09, which was allowed by DRAT by judgment dated 24.9.2010, observing, *inter alia*, that the questions arising for determination had not been addressed. It may be added here that in the challenge brought to DRT by SA No.01/2009, the petitioners had also raised the issue of permissibility of disposal of the property by private treaty without the consent of the mortgagor. Noticeably, both DRT (in its order dated

1.1.2009) and DRAT (in order dated 24.9.2010) failed to examine this issue. The matter was remanded by DRAT to DRT for fresh adjudication in terms of directions in the decision rendered on 24.9.2010.

16. It is against the above backdrop that the matter came up before DRT leading to the order passed on 16.10.12, whereby the OA and SA were disposed off, *inter alia*, giving time to the petitioners, as requested, for three months to clear the outstanding dues towards Punjab National Bank (the first respondent herein), calculated at that stage at ₹40,33,067.26 (inclusive of cost of ₹1,05,561/-), computed on the basis of interest @ 13.5% compounded, adding the liability of interest to be paid at the said rate for the extended period, the dues thus calculated being payable by the petitioners in two equal instalments and upon such deposit being made the sale of the mortgaged property to stand set aside and in case of default on the part of the petitioners the bank being at liberty to confirm the said sale in favour of the auction-purchaser in accordance of law. Certain further directions were also given respecting release of the original title deeds by the bank and refund of the money with interest and compensation being payable to the auction purchaser.

17. The order dated 16.10.12 of DRT was challenged by the petitioners through appeal No.436/2012 which was dismissed by DRAT by the impugned order passed on 19.11.2014.

18. In the order dated 19.11.2014, the DRAT has, *inter alia*, noted that during the pendency of the SA before the DRT, substantial amount of ₹42.30 Lacs had been deposited by the petitioner which was duly reflected in the statement of account that also shows that the bank had charged interest @ 13.5% compounded. It was noted that the petitioners (appellant

before the DRAT) had not made the deposit of ₹40,33,06,726/- along with interest @ 13.5% compounded within the period of three months for which time had been allowed on their request by the DRT. The DRAT further noted that at the hearing on the appeal on 19.11.2014, the petitioners had offered to further pay an amount of ₹20 Lacs stating that they had always been willing to deposit their liability though they had been contesting only on the issue of rate of interest. The DRAT, however, found this submission to be not genuine or *bona fide* in the face of the history of earlier defaults, the first in the wake of consent decree passed on 01.01.2009 and then pursuant to the order dated 16.10.2012 of DRT on the SA.

19. The DRAT was not impressed with the objections of the petitioners against sale of the subject property “by private treaty” observing that the said issue would not arise for consideration once the sale in favour of the intending purchaser had been set aside by DRT conditional upon payment being made with interest within a period of three months which was not abided by.

20. The prime contention raised on behalf of the petitioners is that the sale by private treaty in favour of the intending purchaser for price less than the reserved price, without the consent of the mortgagor (owner) was impermissible, it being violative of Rule 8(8) of the Security Interest (Enforcement) Rules 2002 framed for the purposes of regulating the procedure of enforcement of security interest under Section 13 of SARFAESI Act. Reliance is placed on *Mathew Varghese v. M. Amritha Kumar & others* (2014) 5 SCC 610 and *J. Rajiv Subramaniyan and Another v. Pandiyas and Others*, (2014) 5 SCC 651 to argue that non-compliance with the prescribed procedure vitiates the sale of the secured asset by the

secured creditor under SARFAESI Act.

21. *Per contra*, it has been argued that due notice had been given by the bank to the mortgagor (borrower) about the intention of the bank to sell the property by private treaty, against the backdrop of the facts that public auction for sale at the reserved price had failed to evoke any response. It is the submission of the bank that the effort to sell the property over and above the reserve price on the basis of the more preferable mode of public auction having not succeeded, the bank was left with no option but resort to the other permissible modes and since the intending purchasers had volunteered the tender, the bank was within its authority under the law to take resort to the said mode for disposal of the property to realize its lawful dues and that, in spite of due communication, the owner/borrower had failed to render due assistance or come up with a better offer. It is also the submission of the bank that the chronology of events clearly demonstrates that the endeavour of the petitioners throughout has been to delay, to the extent possible, the discharge of their liability to the bank which is demonstrated not only by the fact that the recovery certificate issued by DRT on 05.03.2008 on the basis of a compromise was not respected and that, having availed of the extended period of three months by virtue of the order dated 01.01.2009 of DRT on the SA under Section 17 of SARFAESI Act, the petitioners had failed to pay the outstanding dues and have tried to engage the bank in technical issues.

Analysis & Conclusions:-

22. A mortgagee, generally (in certain specified category of mortgages), even under the general law, is empowered to sell the mortgaged property on default of payment of the mortgage money without the intervention of the

court, by Section 69 of the Transfer of Property Act, 1982. Section 13 of the SARFAESI Act is similarly conceived as the code prescribed for “enforcement of security interest” by the secured creditors for whose purposes this special law has been enacted. The non-obstante clause with which Section 13 begins as also Section 37 of the SARFAESI Act make it clear that the provisions of this law, and rules made thereunder, are legislated in addition to, “and not in derogation of” other laws which would include the Transfer of Property Act and the RDDBFI Act.

23. Section 13 of SARFAESI Act sets out at length the procedure in accordance with which the secured creditor may enforce the security interest “without the intervention of the court or Tribunal”. The process towards such end begins with notice under Section 13(2) issued by the secured creditor unto the borrower in default, giving him opportunity “to discharge in full his liabilities” within sixty days. There is provision for the borrower to take exception to the demand in such notice by submitting a representation or objection under Section 13(3A). Needless to add the response to the demand by the noticee may include objection to the very demand or the calculation on which it has been raised. In the event of failure on the part of the borrower to discharge his liability in terms of the notice under Section 13(2), the secured creditor is permitted, by Section 13(4), to take recourse to any of the measures indicated in the said clause “to recover his secured debt”. The measures permitted by Section 13(4) include taking of possession, may be with assistance of magistracy under Section 14, of the secured asset, in order to exercise the “right to transfer” by way of lease, assignment or sale “for releasing the secured asset”. The manner in which the power in the above nature given by the law is to be

exercised is prescribed, in terms of Section 13(12) read with Section 38 of SARFAESI Act, in the form of the Security Interest (Enforcement) Rules, 2002 (hereinafter referred to as “the 2002 Rules”).

24. Rule 8 of the 2002 Rules conceives of several modes of disposal of the property at the hands of the secured creditor, they including the method of obtaining quotations from the persons dealing with similar secured assets or otherwise interested in buying such assets, by inviting tenders from the public, by holding public auction or by private treaty. But then, in terms of Rule 8(8), sale by any method other than public auction or public tender, i.e. by obtaining quotations or by private treaty, must necessarily be “on such terms as may be settled between the parties in writing”. It is one of the pre-conditions for initiation of the process through any of the above-mentioned modes that the secured creditor obtains a valuation of the property from an approved valuer and fixes “the reserve price” beforehand. In terms of Rule 9(2), the sale of the property for a price less than the reserve price is not allowed except “with the consent of the borrower and the secured creditor”.

25. The hallmark of the procedure for bringing a property to sale through any of the permitted methods is the requirement of keeping the mortgagor duly informed. This is ensured by not only the initial notice under Section 13(2) but also by serving on the mortgagor a copy of the various notices at different stages of the process, including the possession notice, the sale notice etc., the principle essentially being that the right of the mortgagor to redeem the mortgaged property inures till the time the matter is ripe for sale of the mortgaged property by secured creditor to be confirmed.

26. It is in the above view that the Supreme Court in the case of *Mathew*

Varghese (supra) ruled that a sale or transfer of a secured asset “cannot take place without duly informing the borrower” and further that any “sale or transfer effected without complying with the said statutory requirement would be a constitutional violation and nullify the ultimate sale”.

27. In *J. Rajiv Subramaniyan* (supra), the sale effected by the secured creditor “by private treaty” was held to be null and void since it had been brought about without the terms to such effect being “settled between the parties” in terms of Rule 8(8) of the 2002 Rules.

28. The writ petition at hand assails the impugned order of DRAT mainly on the grounds that in absence of a settlement “in writing” within the meaning of Rule 8(8) of the 2002 Rules, the move of the bank to sell the subject property “by private treaty” is impermissible, particularly at a price less than “the reserve price”, this in view of the inhibition in second proviso to Rule 9(2) of the 2002 Rules. The petitioners, in fact, also question the validity of the reserve price referring in this context to the initial valuation made on 23.06.2000. The petitioners insist that they have been “ready and willing” to redeem the property by discharging the liability towards the bank claiming that the contest throughout has been as to the rate of interest levied rather than the principal sum demanded.

29. The background facts of the case, as set out in the earlier part of this judgment, however, show the fallacy of the above contentions and instead demonstrate that the borrower and mortgagor have abused the process of law to their advantage at every step of the way, to delay, if not thwart, the effort of the respondent bank to recover its dues. This conduct, in our view, renders them disentitled to any equitable or discretionary relief.

30. The borrowers have never disputed the liability to pay the principal

amount or even the interest chargeable thereupon. When the bank had initiated the process of recovery by serving demand notice under Section 13(2) of SARFAESI Act on 21.01.2003, no exception was taken thereto. When the bank moved DRT under RDDBFI Act in 2007, the petitioners would not put in any contest. They rather opted to enter into a compromise having persuaded the bank to settle for an amount far less than what was due. The recovery certificate issued in the wake of compromise terms being accepted by the DRT on 05.03.2008 determined the liability of the petitioners to pay the amount claimed in the OA along with *pendente lite* and future interest at 13.5% per annum inasmuch as the balance of the amount settled was not paid within the stipulated period of three/six months. To put it simply, since there had been a default in payment of the settled amount, the amount claimed by the bank in the OA became lawfully recoverable from the petitioners on and after 05.09.2008 (i.e. six months after the compromise).

31. Curiously, the bank having secured a recovery certificate to above effect did not choose to put it into execution and instead took it upon itself to enforce the security interest under the SARFAESI Act. The fact, however, remains that the petitioners offered to settle the amount under the compromise terms nevertheless failed to honour its word or abide by their obligation. It is impermissible, against such backdrop, for the petitioners to now argue that they have been only legitimately contesting the rate of interest claimed by the bank all these years.

32. It may be that at the time of the loan facility being advanced, the mortgaged property was valued at ₹1,00,33,062/-. But when the stage came for the property to be disposed of in terms of Section 13 of the SARFAESI

Act so that the bank could realize its debt, the bank got the valuation done in terms of the 2002 Rules and on such basis fixed the reserve price at ₹70 Lacs. It is not the case of the petitioners that they were not kept in the loop as to the terms on which the property was offered for sale by public auction on 18.11.2008. Concededly, the borrowers and the mortgagor had due notice of such public auction. No objection to the valuation on the basis of which the reserve price had been fixed having been taken at that stage, the reference to the valuation of 23.06.2000 cannot be permitted to be urged now.

33. That the public auction arranged to be held on 18.11.2008 did not evoke any response (since no bid was received) undoubtedly shows that the reserve price fixed for such exercise was not realistic. In these facts and circumstances, the bank was within its rights to resort to other methods permitted by Rule 8(5) to dispose of the property so that it could realize its lawful dues. It is the case of the bank that it had decided to switch over to the method of inviting tenders from the public. But then, no public notice extending such invitation is shown to have been published. The bank instead relies upon the offer made by the intending purchasers to acquire the property for consideration of ₹61.10 Lacs. The bank, thus, was opting for disposal of the property “by private treaty”.

34. Strictly speaking, the bank could unilaterally sell the property by public auction or by public tender but to be able to sell it by private treaty, it necessarily required the consent of the mortgagor within the meaning of the clause contained in Rule 8(8) of the 2002 Rules. It is to settle terms to such effect that the bank approached the borrower by way of letter dated 15.12.2008. It is, however, clear from the conduct of the borrowers that

they were not interested in co-operating with the bank for sale in favour of the intending purchasers against the consideration that had been tendered. But, instead of responding to the bank in answer to the communication issued on 15.12.2008, or coming up with a better offer or proposal to break the impasse, the petitioners knocked at the door of the DRT by moving SA No. 01/2009.

35. The issue kept hanging fire before the DRT/DRAT for quite some time, and unnecessarily so. Eventually, when the matter had been remanded to DRT by order dated 24.09.2010 by DRAT, the petitioners again offered to discharge the liability calculated at that stage at ₹40,33,067.26. The only request pressed before the DRT at that stage was for further time of three months to be extended so that the payment of the said amount could be made in two equal instalments.

36. Having regard to the tenor of the order dated 16.10.2012 passed by DRT, at the request of the petitioners, it is clear that they had given up their resistance to the sale of the subject property in favour of the other respondents against consideration of ₹61.10 Lacs should there be another default on their part in making the payment to the bank within the three months time being granted. The sequitur of the terms of order passed by DRT on 16.10.2012 at the instance of the petitioners, thus, is that their only insistence was for yet another opportunity to redeem the mortgaged property and that they were agreeable that in case of failure on their part to honour their commitment, the property could be sold to the other respondents at the consideration offered by private treaty as per the arrangement made by the bank in terms of communication dated 15.12.2008. The requisite consent of the petitioners for purposes of Rule

8(8) and second proviso to Rule 9(2) of the 2002 Rules must be read inherent in this arrangement.

37. On above facts and in the circumstances, we are of the view that the order passed by the DRT and DRAT cannot be assailed. The petition being devoid of substance is dismissed.

38. The parties are left to bear their own costs.

**R.K.GAUBA
(JUDGE)**

**S. RAVINDRA BHAT
(JUDGE)**

APRIL 17, 2015
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