Sr.No.203

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

CWP No. 3850 of 2015
Date of decision:29.03.2017

M/s Sawan Land Developers Pvt.
.........Petitioner

versus

Debt. Recovery Appellate Tribunal and others
..........Respondents

Coram: Hon'ble Mr.Justice Rakesh Kumar Jain

Present: Mr. V.K.Sachdeva, Advocate
for the petitioner.

Mr. Atul Mahajan, Advocate
for respondent No. 2.

Mr. Atul Sharma, Advocate
for respondent No. 3.

Rakesh Kumar Jain, J.(Oral)

The petitioner has challenged the order passed by the Debts Recovery Appellate Tribunal Delhi(for short, 'the Appellate Tribunal') dated 15.12.2014 vide which it has set aside the order dated 20.03.2014 passed by the Debts Recovery Tribunal-I, Chandigarh(for short, 'Tribunal') passed in favour of the petitioner.

Shorn off the unnecessary details, the immovable properties mortgaged by the petitioner/borrower with the secured creditors were put to public auction on 25.03.2010 after serving upon a notice dated 8.2.2010 in terms of Rule 8(6) of the Security Interest(Enforcement) Rules, 2002(for short, 'the Rules'). There is no dispute that the publication in two newspapers was also effected on 22.03.2010 for the auction which was to take place on 25.03.2010. The said auction proceedings were challenged by the petitioner in SA No. 31 of 2010 before the Tribunal. The said application was allowed and the auction proceedings were set aside and the secured creditor Bank was directed to restore the possession to the petitioner. Aggrieved against the said order, the respondent bank filed appeal No. 156 of 2014 before the Appellate Tribunal. The said appeal was allowed vide impugned order in which the following findings were recorded by the Appellate Tribunal:-

> *"Even in regard to the objection that 30 days sale notice was not served or that there were violations of Rule 9(1) of the Rules would appear to be a strained view formed by the Tribunal. The sale notice dated 18.02.2010 was sent under a postal certificate which was stated to be not a prescribed mode of service. The stand of the bank was that 30 days public notice was issued on 18.02.2010 and was served upon the respondents. It was also published in two newspapers."*

At the time of notice of motion, this Court recorded the following orders on 3.03.2015:-

> *"Learned counsel for the petitioner contends that in terms of Rule 9 of Security Interest (Enforcement) Rules, 2002 sale of property could not be conducted before the expiry of 30 days from the date of issuance of public notice. It is contended that notice of sale was published on 22.03.2010 and the sale conducted on 25.03.2010 i.e. within three days and, therefore, the sale conducted is in violation of the statutes rules.*
>
> *Mr. Sachdeva, points out that learned Appellate Tribunal while remanding the case has given categorical findings against the petitioner, therefore, the Debt Recovery Tribunal will not option*

but bound by the findings recorded.

Notice of motion for 07.04.2015.

The Tribunal is directed to adjourn the matter beyond the date fixed by this Court."

Counsel for the petitioner has argued that if the sale is conducted by way of public auction, in terms of Rule 8(6) of the Rules, it is incumbent upon the secured creditor to serve a 30 days prior notice to the borrower and also make publication of the said notice 30 days prior thereto. In this regard, he has referred to Rule 8(6) and Rule 9(1) of the Rules in support of his contention and has also relied upon a decision of the Supreme Court in the case of *Mathew Varghesevs. M.Amritha Kumar 2014(5) SCC 610* to contend that the word used in Rule 9(1) as 'or' between the publication of notice and the notice to be served on the borrower has been read by the Supreme Court as 'and'.

On the other hand, counsel for the respondents have argued that the borrower/petitioner was properly informed by way of notice dated 18.02.2010 of the public auction which was fixed after a period of 30 days on 25.03.2010 and proviso to Rule 8(6) of the Rules does not say that 30 days notice is also required for making the publication in two leading newspapers as well. It is also submitted that there would be practical difficulty in restoring the possession because of the much time has spent in the mean time and the property must have been in possession of various other persons as the property in dispute belongs to the developer.

I have heard both the learned counsel for the parties and perused the available record with their able assistance. In order to appreciate their respective submissions it would be relevant to refer to Rule 8(6) and Rule 9(1) of the Rules which are reproduced as under:-

"Rule 8(6):Sale of immovable secured assets

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 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.

Rule 9(1) Time of sale, issue of sale certificate and delivery of possession, etc.

No sale of immovable property under these rules shall take place before the expiry of thirty days from the date on which the public notice of sale is published in newspapers as *referred to in the proviso to sub-rule (6) or notice of sale has been served to the borrower."*

There is no dispute that Rule 8(6) provides that the authorised officer shall have to serve to the borrower a notice of 30 days for sale of the immovable secured assets, if the sale is being effected either by inviting tenders from the public or by holding public auction. Proviso to Rule 8(6) further provides that 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 the sale. There is no dispute that the publication was made in two leading newspapers one in 'Indian Express' and other one in the vernacular namely, 'Desh Sewak'. Rule 9 of the Rules further provides that no sale of immovable property under these rules shall take place before the expiry of thirty days from the date on which the public notice of sale is published in newspapers as referred in Rule 8(6) of the Rules or notice of sale has been served upon the borrower. According to the respondents, the word used 'or' in Rule 9(1) of the Rules satisfies the compliance on their part because they had served the notice upon the borrower before 30 days of the intending sale by way of public auction. However the word 'or' used in Rule 9(1) of the Rules has been interpreted by the Supreme Court in the case of Mathew Varghese(supra) as 'and'. The relevant observations of the Supreme Court in this regard found in para No. 28 of the said judgment which is reproduced as under:-

"Once the said legal position is ascertained, the statutory prescription contained in Rules 8 and 9 have also got to be examined as the said rules prescribe as to the procedure to be followed by a SECURED CREDITOR while resorting to a sale after the issuance of the proceedings under Section

13(1) to (4) of the SARFAESI Act. Under Rule 9(1), it is prescribed that no sale of an immovable property under the rules should 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. Sub-rule(6) of Rule 8 again states that the authorized officer should serve to the borrower a notice of 30 days for the sale of the immovable SECURED ASSETS. Regarding Sub-rule(6) of Rule 8 and Sub-rule(1) of Rule 9 together, the service of individual notice to the borrower, specifying clear 30 days time gap for effecting any sale of immovable SECURED ASSET is a statutory mandate. It is also stipulated that no sale should be affected before the expiry of 30 days from the date on which the public notice of sale is published in the newspapers. Therefore, the requirement under Rule 8(6) and Rule 9(1) contemplates a clear 30 days individual notice to the borrower and also a public notice by way of publication in the newspapers. In other words, while the publication in newspaper should provide for 30 days clear notice, since Rule 9(1) also states that such notice of sale is to be in accordance with proviso to Sub-rule(6) of Rule 8, 30 days clear notice to the borrower should also be ensured as stipulated under Rule 8(6) as well. Therefore, the use of the expression 'or' in Rule 9(1) should be read as 'and' as that alone would be in consonance with Section 13(8) of the SARFAESI ACT."

The aforesaid interpretation of the Supreme Court does not require any further interpretation by this Court as it has been held that the word 'or' in Rule 9(1) of the Rules has to be read as 'and' which means that prior notice of 30 days has not to be issued only to the borrower but also prior 30 days notice has to be published in the leading two newspapers including one in vernacular having circulation in the area.

Admittedly, in the present case, the publication was made only 03 days prior to the date on which the auction took place and thus, there is clear violation of Rules 8(6) read with Rule 9(1) of the Rules which are held to be mandatory in the case of Mathew Varghese(supra). As a result thereof, I am of the considered opinion that the order passed by the Appellate Tribunal setting aside the order of the Tribunal is patently illegal. The Appellate Tribunal has committed an error in setting aside the order of the Tribunal and in remanding the case back to the Tribunal to pass a fresh order. Thus, the present writ petition is hereby allowed.

[Rakesh Kumar Jain]
Judge

29th March, 2017
Shivani Kaushik

Whether speaking/reasoned *Yes/No*

Whether Reportable *Yes/No*