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Between:

Sri Sai Annadhatha Polymers and another ... Petitioners

and

The Canara Bank rep. by its Branch
Manager, Madanapalle ... Respondent

DATE OF JUDGMENT PRONOUNCEMENT: 27th JUNE, 2018

THE HON'BLE SRI JUSTICE SANJAY KUMAR
AND
THE HON'BLE SRI JUSTICE T.AMARNATH GOUD

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|----|---|--------|
| 1. | Whether Reporters of Local newspapers may be allowed to see the judgment? | Yes/No |
| 2. | Whether copies of the judgment may be marked to Law Reporters/Journals | Yes/No |
| 3. | Whether His Lordship wishes to see the fair copy of the judgment? | Yes/No |

SANJAY KUMAR, J

T.AMARNATH GOUD, J

* THE HON'BLE SRI JUSTICE SANJAY KUMAR
AND
THE HON'BLE SRI JUSTICE T.AMARNATH GOUD

+ WRIT PETITION No.8155 OF 2018

% DATED 27th JUNE, 2018

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Sri Sai Annadhatha Polymers and another ... Petitioners

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< Gist:

> Head Note:

! Counsel for petitioners : Sri N.Pramod

^ Counsel for respondent : Sri Deepak Battacharjee and
Sri Dikshit Battacharjee

? CASES REFERRED:

1. MANU/SC/0263/2018 = 2018 SCC OnLine SC 237
2. (2014) 5 SCC 610
3. (2017) 4 SCC 735



THE HON'BLE SRI JUSTICE SANJAY KUMAR
AND
THE HON'BLE SRI JUSTICE T.AMARNATH GOUD

WRIT PETITION NO.8155 OF 2018

ORDER

(*Per Sri Justice Sanjay Kumar*)

By way of this writ petition, the first petitioner firm and its Managing Partner, the second petitioner, assail the possession notice dated 11.09.2017, issued under Rule 8(1), and the sale notice dated 01.03.2018, issued under Rule 8(6), of the Security Interest (Enforcement) Rules, 2002 (*for brevity*, 'the Rules of 2002'), by the Canara Bank, Madanapalle Branch, Chittoor District, Andhra Pradesh, (*hereinafter*, 'the bank'). Interim order dated 14.03.2018 was granted by this Court and it reads as under:

'Though Sri Deepak Bhattacharjee, learned senior counsel representing Sri Dishit Bhattacharjee, learned counsel for the respondent bank, would argue that this writ petition ought not to be entertained as an efficacious alternative remedy is provided to the petitioners under Section 17(1) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short, 'the SARFAESI Act'), and place reliance on the recent judgment of the Supreme Court in *State Bank of Travancore v. Mathew K.C.* (2018 SCC OnLine SC 55) in that regard, as to whether a writ petition should be entertained or not is ultimately a matter of discretion and this Court would exercise the same judiciously, keeping in mind the principles of self-imposed restraint adumbrated in cases where alternative remedies are available.

Be it noted that in *United Bank of India v. Satyawati Tondon* [(2010) 8 SCC 110], the Supreme Court pointed out that it is ultimately for the High Court to decide in a given case as to whether it should exercise discretion under Article 226 of the Constitution, despite the availability of an alternative remedy. The observations made in this regard were referred to by the Supreme Court in its recent judgment in *Agarwal Tracom Pvt Ltd. v. Punjab National Bank* [(2018) 1 SCC 626].

Each case would turn upon its own individual facts.

In the case on hand, we find that the impugned sale notice does not satisfy the requirements of the amended provisions of the SARFAESI Act and the Rules made thereunder. A notice under Rule 8(6) of the Security Interest (Enforcement) Rules, 2002 (for short, 'the Rules of 2002'), was issued by the bank on 01.03.2018. A notice under Rule 9 of the Rules of 2002, bearing the same date, was also communicated to the petitioners informing them that the date of auction was fixed as 03.04.2018. We are informed that this notice under Rule 9 of the Rules of 2002 was published in the newspapers on 03.03.2018.

In terms of the amended provisions of Section 13(8) of the SARFAESI Act, the right of redemption given to the borrower would expire upon publication of such a notice. However, Rule 8(6) of the Rules of 2002, as interpreted by the Supreme Court in *Mathew Varghese v/ s. M.Amritha Kumar* [(2014) 5 SCC 610], stipulates that the thirty day notice period mentioned therein is for the purpose of enabling the borrower to redeem his property. Significantly, this provision remains unaltered. Therefore, this statutory notice period of thirty days is sacrosanct and deviation therefrom would curtail the statutory right of redemption available to the borrower. However, in terms of the amended Section 13(8) of the SARFAESI Act, once the notice under Rule 9 of the Rules of 2002 is published, the said right stands extinguished.

In effect, in the case on hand, though the notice under Rule 8(6) of the Rules of 2002 was issued on 01.03.2018 stipulating a thirty day notice period, it is of no practical utility to the petitioners as the opportunity to exercise the right of redemption given to them thereunder stood extinguished on 03.03.2018 when the notice under Rule 9 of the Rules of 2002 was published. Hence, a flagrant violation of the statute is, *prima facie*, manifest.

This aspect of the matter requires further examination given the fact that after amendment of the SARFAESI Act and the Rules of 2002, there seems to be no clarity on the part of banks as to how they should go about complying with the statutory mandate thereunder. Be it noted that the law laid down in *Canara Bank v. M.Amarender Reddy* [(2017) 4 SCC 735] in the context of the unamended provisions of the SARFAESI Act and the Rules framed thereunder may not hold good in the new regime that has been put in place by such amendments.

Though an argument is advanced by the learned counsel for the bank that no specific pleading has been raised in relation to these aspects, we are of the opinion that once this Court is sensitized as to any failure in scrupulously adhering to the statutory mandate of the

SARFAESI Act and the Rules of 2002, which has been put in place to safeguard the interest of the borrower, as clearly enunciated by the Supreme Court in Mathew Varghese, this Court cannot be a silent spectator to the perpetration of such illegalities notwithstanding the fact that clear and precise pleadings have not been put forth by the borrower.

There shall accordingly be interim stay of all further proceedings, including the auction scheduled to be held on 03.04.2018, pursuant to the impugned sale notice dated 01.03.2018.'

I.A.No.2 of 2018 was filed by the bank to vacate the aforesaid interim order. No reply affidavit was filed in response thereto till date.

The petitioner firm availed a term loan along with overdraft facilities to the tune of Rs.30,00,000/- and Rs.40,00,000/- respectively from the bank in the year 2015. These accounts became irregular and were classified as non-performing assets by the bank on 31.03.2017, leading to a demand notice being issued under Section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (*hereinafter*, 'the SARFAESI Act') on 11.07.2017. The petitioners claim that this demand notice was received by them on 17.07.2017 and thereupon, a representation was made to the bank on 01.09.2017 requesting it either to reschedule or to postpone the action proposed to be taken as they were making efforts to regularize the loan accounts if time was extended up to 31.10.2017. The petitioners allege that even before expiry of the sixty days stipulated in the demand notice dated 11.07.2017 and without considering the representation dated 01.09.2017, the bank issued possession notice dated 11.09.2017 under Rule 8(1) of the Rules of 2002. The petitioners further contend that despite part-payment of the outstanding dues, the bank issued the sale notice dated 01.03.2018 under Rule 8(6) of the Rules of 2002 and also the sale notice under Rule 9(1) of the Rules of 2002 bearing the same date. The latter sale notice was published in the newspapers on

03.03.2018 and the date of the auction sale was fixed thereunder as 03.04.2018. The grievance of the petitioners as set out in the writ affidavit is that the bank did not obtain proper valuation of the secured assets which it proposed to sell. This, in essence, was the case put-forth by the writ petitioners.

In its counter-affidavit filed in support of the vacate stay petition, the bank admitted the essential facts set out hereinabove. It acknowledged that the petitioner firm addressed letter dated 01.09.2017 in response to the demand notice dated 11.07.2017. It also admitted that a possession notice was issued under Section 13(4) of the SARFAESI Act read with Rule 8(1) of the Rules of 2002 on 11.09.2017. Further, the bank admitted that the notice under Rule 8(6) of the Rules of 2002 was issued on 01.03.2018 which was followed by the e-auction sale notice bearing the same date, which was published in two newspapers, whereunder the auction sale date was fixed as 03.04.2018. The bank claimed that all the aforestated notices and actions were strictly as per the provisions of the SARFAESI Act and the Rules framed thereunder. As regards the claim of the petitioners that the secured assets were undervalued, the bank stated that the valuation thereof was obtained from an official valuer before issuing the sale notice and the reserve price was fixed in respect of both the secured assets on the strength of such valuation.

Reference was made by the bank to case law in support of its contention that it had followed the due procedure.

It is true that the petitioners did not make any specific allegation in their writ affidavit in relation to violation of the mandatory provisions of the Rules of 2002 and more particularly, Rules 8(6) and 9(1) thereof in the context of the amended Section 13(8) of the SARFAESI Act. However, when

a scheduled bank seeks to exercise the extraordinary and far-reaching power vesting in it under the provisions of the SARFAESI Act and the Rules framed thereunder, it must necessarily abide by and obey the due procedure prescribed thereunder. This Court, being the *sentinel on the qui vive*, would be quick to react in the event a secured creditor, such as the bank, seeks to exercise such power in violation of the mandatory procedure. Be it noted that a secured creditor, by virtue of the powers created by and vesting in it under the SARFAESI Act, is empowered to dispense with the ordinary legal process of taking recourse to the competent civil Court for foreclosure and unilaterally bring the secured/mortgaged assets to sale by simply adhering to the procedure prescribed thereunder. In the event a secured creditor fails to follow such binding procedure, it would adversely impact the borrower's right to property under Article 300A of the Constitution. Therefore, notwithstanding the fact that the writ petitioners did not specifically raise a ground in this regard, this Court is entitled, nay, bound to examine as to whether the bank followed the due procedure while issuing the notices in question. Merely because sufficient pleading is not put forth is no ground for a Constitutional Court to condone or turn a blind eye to patent illegality.

In this regard, it may be noted that certain amendments were made to the SARFAESI Act and the Rules of 2002 in recent times. Act No.44 of 2016 brought in certain amendments to the SARFAESI Act with effect from 01.09.2016. Significantly, Section 13(8) of the SARFAESI Act was also amended. Prior to its amendment, Section 13(8) read as under:

‘13(8). If the of dues of the secured creditor together with all costs, charges and expenses incurred by him are tendered to the secured creditor at any time before the date fixed for sale or transfer, the secured asset shall not be sold or transferred by the secured creditor, and no further step shall be taken by him for transfer or sale of that secured asset.’

After its amendment with effect from 01.09.2016, Section 13(8) of the SARFAESI Act presently reads as under:

‘13(8). Where the amount of dues of the secured creditor together with all costs, charges and expenses incurred by him is tendered to the secured creditor at any time before the date of publication of notice for public auction or inviting quotations or tender from public or private treaty for transfer by way of lease, assignment or sale of the secured assets,--

- (i) the secured assets shall not be transferred by way of lease, assignment or sale by the secured creditor; and
- (ii) in case, any step has been taken by the secured creditor for transfer by way of lease or assignment or sale of the assets before tendering of such amount under this sub-section, no further step shall be taken by such secured creditor for transfer by way of lease or assignment or sale of such secured assets.’

In so far as the Rules of 2002 are concerned, amendments were made with effect from 04.11.2016, by way of G.S.R.1046(E) dated 03.11.2016. No amendment was made to Rule 8(6) of the said Rules but Rule 9(1) thereof stood amended. Rule 8(6), as it stands, then and now, to the extent relevant, reads as under:

‘8(6). The authorized officer shall serve to the borrower a notice of thirty days for sale of the immovable secured assets, under sub-rule (5).

.....’

Rule 9(1) prior to its amendment read thus:

‘9(1). 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.’

But after its amendment, Rule 9(1) now reads as under:

‘9(1). No sale of immovable property under these rules, in first instance 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) of rule 8 or notice of sale has been served to the borrower.

Provided further that if sale of immovable property by any one of the methods specified by sub-rule (5) of rule 8 fails and sale is required to be conducted again, the authorized officer shall serve, affix and publish notice of sale of not less than fifteen days to the borrower, for any subsequent sale.'

In the light of the aforesaid changes in the statutory scheme, certain crucial aspects may be noted. As per the unamended Section 13(8) of the SARFAESI Act, the right of the borrower to redeem the secured asset was available till the 'sale or transfer' of such secured asset. Case law consistently held to the effect that a 'sale or transfer' is not completed until all the formalities are completed and there is an effective transfer of the asset sold. In consequence, the borrower's right of redemption did not stand terminated on the date of the auction sale of the secured asset itself and remained alive till the 'transfer' was completed in favour of the auction purchaser, by registration of the sale certificate and delivery of possession of the secured asset. The recent judgment of the Supreme Court in *ITC LIMITED V/ S. BLUE COAST HOTELS LIMITED*¹ also affirmed this legal position.

However, the amended provisions of Section 13(8) of the SARFAESI Act bring in a radical change, inasmuch as the right of the borrower to redeem the secured asset stands extinguished thereunder on the very date of publication of the notice for public auction under Rule 9(1) of the Rules of 2002. In effect, the right of redemption available to the borrower under the present statutory regime stands drastically curtailed and would be available only till the date of publication of the notice under Rule 9(1) of the Rules of 2002 and not till completion of the 'sale or transfer' of the secured asset in favour of the auction purchaser. However, it is significant to note that Rule 8(6) of the Rules of 2002 still continues to remain the same and thereunder,

¹ MANU/SC/0263/2018 = 2018 SCC OnLine SC 237

the authorized officer of the secured creditor must necessarily serve upon the borrower a notice of thirty days for sale of the immovable secured asset taking recourse to one of the options available under Rule 8(5) thereof.

As per the edict of the Supreme Court in MATHEW VARGHESE V/ s. M.AMRI THA KUMAR², this statutory notice period of thirty days was given to the borrower to provide him further time to redeem the secured asset. In this regard, the observations of the Supreme Court in Paras 31, 33.1 and 33.3 of the judgment are apposite of extraction:

‘31. 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 Sections 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. Reading 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 effected 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 the 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.

...

² (2014) 5 SCC 610

33.1. In the first place, as already stated by us, by virtue of the stipulation contained in Section 13(8) read along with Rules 8(6) and 9(1), the owner/borrower should have clear notice of 30 days before the date and time when the sale or transfer of the secured asset would be made, as that alone would enable the owner/borrower to take all efforts to retain his or her ownership by tendering the dues of the secured creditor before that date and time.

...

33.3. Be that as it may, the paramount objective is to provide sufficient time and opportunity to the borrower to take all efforts to safeguard his right of ownership either by tendering the dues to the creditor before the date and time of the sale, or transfer, or ensure that the secured asset derives the maximum price and no one is allowed to exploit the vulnerable situation in which the borrower is placed.'

Therefore, even after the amendment of Section 13(8) of the SARFAESI Act, a secured creditor is bound to afford to the borrower a clear thirty day notice period under Rule 8(6) to enable him to exercise his right of redemption. In consequence, a notice under Rule 9(1) of the Rules of 2002 cannot be published prior to expiry of this thirty day period in the new scenario, post-amendment of Section 13(8) of the SARFAESI Act, as such right of redemption would stand terminated immediately upon publication of the sale notice under Rule 9(1) of the Rules of 2002. The judgment of the Supreme Court in CANARA BANK V/ s. M.AMARENDER REDDY³, which was rendered in the context of the unamended provisions, would therefore have no application to the post-amendment scenario in the light of the change brought about in Section 13(8). To sum up, the post-amendment scenario inevitably requires a clear thirty day notice period being maintained between issuance of the sale notice under Rule 8(6) of the Rules of 2002 and the publication of the sale notice under Rule 9(1) thereof, as the right of redemption available to the borrower in terms of Rule 8(6) of the Rules of

³ (2017) 4 SCC 735

2002, as pointed out in MATHEW VARGHESE², stands extinguished upon publication of the sale notice under Rule 9(1).

In the case on hand, it is an admitted fact that a clear thirty day notice period was not maintained, as the notice under Rule 8(6) of the Rules of 2002 was issued on 01.03.2018 and publication of the auction sale notice in newspapers, under Rule 9(1) of the Rules of 2002, was on 03.03.2018. There is, thus, a clear violation of the statutory mandate which vitiates the exercise undertaken by the bank in the context of the aforesaid Rules.

In so far as the possession notice dated 11.09.2017 is concerned, it may be noted that in terms of Section 13(4) of the SARFAESI Act, it is only if the borrower fails to discharge his liability in full within the period specified in Section 13(2) that a secured creditor is entitled to take recourse to taking possession of the secured asset in terms of Rule 8(1) of the Rules of 2002. Section 13(2) of the SARFAESI Act makes it clear that a secured creditor may require a borrower, by notice in writing, to discharge in full his liabilities to such secured creditor within sixty days from the date of notice, failing which such secured creditor shall be entitled to exercise all or any of the rights under Section 13(4) thereof. It is therefore clear that the sixty day period is to be reckoned from the date of the demand notice under Section 13(2) of the SARFAESI Act and not from the date of service thereof.

In the case on hand, the demand notice under Section 13(2) of the SARFAESI Act was issued by the bank on 11.07.2017 and the possession notice was issued on 11.09.2017. Therefore, even if the date of the notice, i.e., 11.07.2017, is excluded, more than sixty days gap was maintained before issuance of the possession notice on 11.09.2017. The contention of the petitioners in this regard is therefore without merit and is accordingly rejected.

As regards the alleged failure on the part of the bank to consider the representation dated 01.09.2017 made by the petitioner firm, it appears that the only plea advanced thereunder was to extend time till 31.10.2017 to regularize the accounts. Even though the symbolic possession notice, under Section 13(4) of the SARFAESI Act read with Rule 8(1) of the Rules of 2002, was issued shortly thereafter on 11.09.2017, the bank did not take any concrete measures till 01.03.2018, when it issued the notice under Rule 8(6) of 2002. The petitioners did not establish before this Court that any substantial payment was made by them before the end of October 2017 as promised by them. The bank specifically stated in its counter that the petitioners made no such payment to establish their *bonafides* and the said averment remains unrebutted. In such circumstances, though compliance with Section 13(3A) of the SARFAESI Act is mandatory, as affirmed by the Supreme Court recently in BLUE COAST HOTELS LIMITED¹, the facts of the case on hand demonstrate that the representation made by the petitioner firm did not require a specific response in writing as the bank waited for more than the time requested by the petitioners before taking concrete measures. Compliance with Section 13(3A) is manifest in these circumstances. The contention of the petitioner firm in this regard therefore does not merit consideration.

However, given the clear violation of the statutory mandate of Rules 8(6) and 9(1) of the Rules of 2002 in the context of the amended Section 13(8) of the SARFAESI Act, the action of the bank in bringing the secured assets of the petitioners to sale under the notice dated 01.03.2018 issued under Rule 8(6) of the Rules of 2002 and the auction sale notice dated 01.03.2018 issued under Rule 9(1) thereof, published in the newspapers on 03.03.2018, cannot be sustained.

The writ petition is accordingly allowed to that extent, setting aside the impugned notice dated 01.03.2018 issued under Rule 8(6) of the Rules of 2002 and the consequential auction notice dated 01.03.2018 issued under Rule 9(1) thereof, published in the newspapers on 03.03.2018. This order shall however not preclude the bank from initiating action afresh under the aforesaid rules in accordance with the due procedure obtaining as on date.

Pending miscellaneous petitions, if any, shall stand closed in the light of this final order. No order as to costs.

SANJAY KUMAR,J

27th JUNE, 2018

**Note: L.R. copy to be marked
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T.AMARNATH GOUD,J

