

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 01.07.2019

CORAM

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM
and
THE HONOURABLE MR.JUSTICE N.SATHISH KUMAR

Review Application No.528 of 2017
and
W.M.P.Nos.24309 and 24310 of 2017
in
Writ Petition No.5654 of 2017

P.Rajendran,
S/o.C.Perumal,
No.169/252, Near Golden Park School,
Vellakkalpatti Village,
Salem-630 162.

.. Review Petitioner/Petitioner

-vs-

1. The Union of India,
Rep., by its Secretary,
Ministry of Finance Department of
Economic Affairs, New Delhi-110 001.
2. The Chief Manager & Authorised Officer,
Bank of India, No.624, Fort Main Road,
Shevapet, Salem-636 002, Salem District.
3. The Chief Manager & Authorised Officer,
Assets Recovery Department, Star House,
No.224, Oppanakara Street,
Coimbatore-641 001,
Coimbatore District.

.. Respondents/Respondents

Review Application under Order 47, Rule 1 read with Section 114 of Code of Civil Procedure to review the order dated 19.04.2017 made in W.P.No.5654 of 2017.

W.P.No.5654 of 2017:-

Writ Petition filed under Article 226 of the Constitution of India, seeking issuance of a Writ of declaration declaring Rule 8 (1) of Rule 2002 of SARFAESI Act as unconstitutional and consequently to declare the possession taken on 28.12.2016 and

03.01.2017 by the 2nd respondent under section 13 (4) of the Act as null and void in respect of the petitioners property in Survey No.32/7-A, 32/7-A1 to an extent of 2618 sq.ft. at Vellakalpatty Village, Omalur Taluk.

For Petitioner : Mr.M.Elango

ORDER

(Order of the Court was made by T.S.Sivagnanam, J.)

Heard Mr.M.Elango, learned counsel appearing for the petitioner.

2.This petition has been filed to review the order dated 19.04.2017, passed in W.P.No.5654 of 2017 filed by the petitioner seeking for issuance of a Writ of Declaration to declare Rule 8(1) of the Security Interest (Enforcement) Rules, 2002 (for brevity, "the Rules") of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as "the SARFAESI Act"), as unconstitutional and consequently, to declare the decision taken, on 28.12.2016 and 03.01.2017, by the second respondent-Bank under Section 13(4) of the SARFAESI Act as null and void in respect of the petitioner's property.

3.The learned counsel for the petitioner submitted that though the petitioner had sought for a declaratory relief, the writ petition itself was disposed of without deciding as to the contention raised by the petitioner and directing the petitioner to approach the bank directly to settle the dues.

4.It is the submission of Mr.M.Elango that there is an apparent error on the face of the order, since the Court did not consider the declaratory relief sought for by the petitioner.

5.We have perused the order passed by the Division Bench dated 19.04.2017. In paragraph 2 of the order, the Court has noted the prayer sought for and in paragraph 3, the Court has recorded the submission of the learned counsel with regard to the interpretation given concerning Rule 8(1) and the Court has observed that it is not convinced on the point raised by the learned counsel appearing for the petitioner. Therefore, it cannot be stated that the point canvassed by the petitioner was not considered by the Division Bench in its order. In any event, we have heard Mr.M.Elango on his submission.

6.It is submitted that Rule 4 of the Rules deals with

"procedure after issue of notice" under Section 13(4) of the SARFAESI Act for taking possession of the movable property. It is submitted that sub-rule (1) of Section 4 specifically mandates that possession of such movable property should be taken in the presence of two witnesses after Panchnama is drawn and signed by the witnesses as nearly as possible in Appendix I to the Rules.

7. Referring to Rule 8(1) of the Rules, which deals with 'sale of immovable secured assets', it is submitted that insofar as the case where the secured asset is an immovable property, the authorised officer shall take or cause to be taken possession, by delivering a possession notice prepared as nearly as possible in Appendix IV to the Rules to the borrower and by affixing the possession notice on the outer door or at such conspicuous place of the property.

8. It is the submission of the learned counsel that the procedure requiring a Panchnama to be recorded as contained in Rule 4(1) of the Rules has not been incorporated in Rule 8(1) and is against Article 14 of the Constitution, arbitrary and irrational.

9. Firstly, we need to take note of the scheme of the SARFAESI Act more particularly, Chapter III, which deals with 'enforcement of security interest'. Section 13(1) of the Act states that notwithstanding anything contained in Section 69 or Section 69-A of the Transfer of Property Act, 1882 (Act 4 of 1882), any security interest created in favour of any secured creditor may be enforced, without the intervention of the Court or Tribunal, by such creditor in accordance with the provisions of the SARFAESI Act. Thus, the basic intent of Chapter III commencing with Section 13 is to enforce the security interest created in favour of the secured creditor without the intervention of the Court. Bearing this in mind, we need to examine the other provisions of the SARFAESI Act and the Rules.

10. Sub-section (4) of Section 13 empowers the secured creditor to recourse to anyone or more of the following measures to recover his secured debt, namely:-

(a) take possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset;

(b) take over the management of the business of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset;

Provided that the right to transfer by way of lease,

assignment or sale shall be exercised only where the substantial part of the business of the borrower is held as security for the debt;

Provided further that where the management of whole of the business or part of the business is severable, the secured creditor shall take over the management of such business of the borrower which is relatable to the security for the debt;

(c) appoint any person to manage the secured assets, the possession of which has been taken over by the secured creditor;

(d) require at any time by notice in writing, any person who has acquired any of the secured assets from the borrower and from whom any money is due or may become due to the borrower, to pay the secured creditor, so much of the money as is sufficient to pay the secured debt.

11.Sub-section (6) of Section 13 states that any transfer of secured asset after taking possession thereof or take over of management under sub-section (4) by the secured creditor or by the manager on behalf of the secured creditor shall vest in the transferee all rights in, or in relation to, the secured asset transferred as if the transfer had been made by the owner of such secured asset.

12.There may be situation where the borrower or any other person claim under him or on his behalf may resist taking over actual possession. While interpreting the nature of Section 6, it can be referred as a 'symbolic possession, though such expression is not found in the Act. In case of resistance or where the secured asset is not transferred by the borrower, or there is any other resistance, then Section 14 has to be invoked by the creditor.

13.To be noted that Section 14 specifically distinguish or differentiate between a movable property and immovable property as deals only with possession of "secured asset" which is defined under Section 2(zc) of the SARFAESI Act to mean property on which security interest is created.

14.Rule 4 of the Rules deals with contingencies pertaining to movable property. The petitioner is required to read the entire Rule 4, that is, all the sub-rules to be read together to know the legislative intent. Firstly, movable property has to be divested from the borrower and actual physical possession need to be taken. In such circumstances, the procedure as contemplated under the Code of Civil Procedure for recording the Panchnama become imminent. Thereafter, inventory has to be prepared, in terms of Appendix II, safe custody of properties

has to be retained and in case of preservation, steps to be taken etc. There are also contingencies where secured asset is in the possession of somebody else or with the Court. Thus, the procedure under Rule 4 is specifically incorporated in the legislation noting that taking over possession of movable property cannot be vested in the same pedestal as that of taking over possession of an immovable property. Rule 8(1) deals with sale of immovable secured assets and the secured creditor is required to deliver a possession notice prepared in terms of Appendix IV to the Rules to the petitioner and affix the possession notice on the outer door or at such conspicuous place of the property. Rule 8(1) contemplates a different contingency where the possession notice is being taken, the immovable property is deemed to be vested with the company. Therefore, we find that there is absolutely no error, arbitrariness in Rule 8 (1), inasmuch as, it does not provide for recording a Panchnama while delivering a possession notice. We are of the view that the procedure for movable property and immovable property though at the stage of issuance of Section 13(4) and (6) will be, similar there has to be definitely a distinction when it comes to taking over possession.

15. For the above reasons, we hold that Rule 8(1) is neither unconstitutional, nor arbitrary, nor irrationale.

16. For all the above reasons, we find the petitioner has not made out any ground to interfere with the order passed by the Division Bench. No costs.

Sd/-
Assistant Registrar(CO)

//True Copy//

Sub Assistant Registrar

abr

To

1. The Secretary,
The Union of India,
Ministry of Finance Department of
Economic Affairs, New Delhi-110 001.
2. The Chief Manager & Authorised Officer,
Bank of India, No.624, Fort Main Road,
Shevapet, Salem-636 002, Salem District.

3. The Chief Manager & Authorised Officer,
Assets Recovery Department, Star House,
No.224, Oppanakara Street,
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+1cc to Mr.M.Elango, Advocate, S.R.No.54796

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RSK(CO)
CS/03/09/2019