

**IN THE HIGH COURT AT CALCUTTA
CIVIL REVISIONAL JURISDICTION
APPELLATE SIDE**

PRESENT:

THE HON'BLE JUSTICE AJOY KUMAR MUKHERJEE

C.O. 2438 of 2019

**Sri Sukumar Banaerjee
Vs
State of Bank of India & Ors.**

For the petitioners : Mr. U.N. Betal
Mr. Suman Saha
Mr. Soumadip Saha

For the O.P. No.1 to 3 : Ms. Deblina Lahiri
Mr. Mrinmoy Chatterjee

Heard on : 20.06.2023

Judgment on : 03.08.2023

Ajoy Kumar Mukherjee, J.

1. Debts Recovery Appellate Tribunal's judgment and order dated 28.06.2019 passed in Appeal No. 177 of 2018, has been assailed in the present application. By the order impugned learned Appellate Tribunal has set aside the order dated 29.09.2016 passed by learned Debts Recovery Tribunal, Kolkata dated 26.02.2018, thereby remanding the matter to the Tribunal below to decide the SARFAESI application (SA) afresh.

2. Petitioners case in brief is that in 2005 he availed cash credit facility of Rs. 40,00,000/- from respondent no.1/bank. On 09.12.2014 as per the statement of account debit balance in loan account was Rs. 35,10,287.33/- which was under the total credit limit. Bank issued demand notice dated

02.02.2015 under section 13(2) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act) and claimed outstanding amount of Rs. 35,63,076.86/- as on 14.01.2015 plus further interest and cost charges. Petitioner made a representation on 29.07.2015 to the bank praying time for repayment, but the bank did not give reply to the same, though the bank under the law is bound to give reply to the representation within 15 days under section 13(3A) of the Act. On 08.01.2016 opposite party (bank) had taken physical possession of the secured asset without delivering the possession notice to the borrower as per rule 8(1) of the Security Interest (Enforcement) Rules, 2002 and only affixed the possession notice. Petitioner submits that after receiving notice under section 13(2), he deposited Rs. 26,07,740/- in between 18.12.2014 to 28.01.2016 and as such as on 28.01.2016, the loan account balance was only Rs. 9,74,172.33/-.

3. On 22.02.2016 the petitioner being the borrower challenging the aforesaid SARFAESI actions, preferred an application under section 17 of the Act of 2002 being SA No. 94 of 2016 before the Debts Recovery Tribunal-II (DRT-11), Kolkata. It is alleged that during pendency of the said application, the respondent/bank was trying to sell the secured asset. The petitioner was served a sale notice on 21.08.2016 which was sent on 18.08.2016 by the opposite party/bank. In fact Bank sent the sale notice on 18.08.2016 by registered Post with A.D. and it was delivered to the petitioner on 21.08.2016 but the sale was conducted on 15.09.2016 and on 21.09.2016 respondent/bank issued sale certificate in favour of auction purchaser. Petitioners specific case is that there is no clear 30 days notice

given to the borrower by the secured creditor. The impugned sale came into knowledge of the petitioner after eight months from the date of sale, as and when the bank disclosed such fact before the Tribunal on 02.06.2017. In such view of the matter, the bank has clearly violated Rule 8 (6) of the Security Interest(Enforcement) Rules 2002 for not giving clear 30 days notice from the date of sale to the borrower and/or guarantor. Accordingly the sale notice is illegal. The petitioner herein preferred an interim application being I.A. No. 518 of 2016 to stay the operation of the aforesaid sale notice dated 11.08.2016.

4. Petitioner contended that Tribunal below did not consider the fact that on 29.09.2016, in presence of one Shri S.Gupta, Chief Manager for the respondent bank and learned counsel appeared on behalf of the petitioner, the DRT-2 disposed of SARFAESI application as well as interim application and passed an order to defer the sale subject to payment of Rs. 2,00,000/- by the petitioner within two weeks from the date of order and subject to total payment of Rs. 7.50 Lakhs within 4 weeks from the date of order and respondent/bank was directed to hand over the physical possession of the property to the petitioner.

5. Although aforesaid order was known to the respondent/bank and it was passed in presence of chief manager of the Bank, but the bank did not prefer any appeal challenging the said order dated 29.09.2016. Petitioner contended that on 13.10.2016 and on 31.10.2016, petitioner visited the branch office of the respondent/bank to deposit the respective demand draft in terms of the order dated 29.09.2016, but due to non-availability of the certified copy of the order, the respondent bank refused to receive the said

demand drafts from the petitioner. The petitioner states that he sent two original demand drafts of one Rs. 2,00,000/- being no. 861183 and Rs. 5.50 Lakhs being no. 861211, drawn on United Bank Of India along with Advocates letter on 17.11.2016 to the authorized officer of the bank. Despite the acknowledgement of delivery of such letter as per the postal track record, the respondent bank without giving any justified reason is now illegally denying the receipt of such letter as well as receipt of original demand drafts. As respondent/bank did not comply the directions passed by the learned Tribunal on 29.09.2016 petitioner filed a Miscellaneous Application being MA No. 1/2017 before the Tribunal for enforcement of the order dated 29.09.2016. Subsequently due to alteration of territorial jurisdiction the said MA No. 1/2017 was transferred to Siliguri DRT and renumbered as TSA 2 of 2017. On 02.06.2017 leaned counsel for the respondent appeared along with the Senior Manager of the Bank and without filing affidavit in opposition, only submitted that the secured assets has already been sold on 15.09.2016 for Rs. 23, 55,00/- and sale certificate has been issued on 21.09.2016. Petitioner on the same date filed an application before the Siliguri, DRT for setting aside the sale conducted on 15.09.2019 alleging violation of the provisions under Rule 8(6) of the Security Interest (Enforcement) Rules 2002.

6. Bank filed written objection and petitioner also filed reply to such objection. Learned DRT on 26.02.2018, considering the written objections and arguments advanced by both the parties, have been pleased to set aside the impugned sale conducted on 15.09.2016 interms of the sale notice dated 18.08.2016 and directed the respondent bank to hand over the

possession of the secured asset to the borrower/petitioner and also directed to return the amount to the successful bidder deposited with the bank. Petitioner contended that opposite party/bank neither challenged the order dated 29.09.2016 nor assailed the order passed by Siliguri DRT on 02.06.2017 whereby the sale was set aside and physical possession of the secured asset was directed to be restored to the borrower.

7. On 28.06.2009 the Debts Recovery Appellate Tribunal , Kolkata has been pleased to allow the aforesaid Appeal being Appeal being No. 177 of 2018 and thereby set aside the aforesaid order dated 26.02.2018 and 29.09.2016 and the matter was remanded back to the Tribunal below to decide the said SARFAESI Application afresh.

8. Mr. Betal learned Counsel appearing on behalf of the petitioner submits that the order is perverse and not sustainable in the eye of law. Learned Appellate Tribunal failed to appreciate that if the statute requires a particular act/thing to be performed or done in a particular manner, it has to be performed/done in that manner alone or not at all. In the present case, the respondent/bank authority concerned has acted beyond the provision under Rule 8 (6) of the Rule of 2002. The respondent/bank never challenged the order dated 29.09.2016 nor they have raised any objection in the aforesaid MA proceeding initiated by the petitioner. Learned court below failed to appreciate that at the time of passing the order dated 29.09.2016, chief Manager of the respondent bank was present. The petitioner was all along tried to pay the amount to the bank by making several attempts but the respondent bank whimsically and without any valid reason disregarded the direction of the Tribunal, which was passed in presence of both the

parties. Appellate tribunal further failed to appreciate that opposite party/Bank had issued sale notice dated 11.08.2016 to the petitioner which was sent on 18.08.2016 and was delivered on 21.08.2016. Tribunal below failed to appreciate that no question was left for adjudication of the impugned sale and restoration of possession before the Siliguri DRT. The Tribunal further failed to appreciate that the order for remanding the matter to the learned tribunal cannot give any scope to the bank for correcting the sale held on 15.09.2016 and therefore remand of the matter to the Tribunal regarding the adjudication of legality of sale is unnecessary. The Tribunal below should have considered that in the event of setting aside of the sale held on 15.09.2016, the respondent bank will not be prejudiced as they have every right to issue a sale notice afresh but if the sale is sustained the petitioner herein shall suffer irreparable loss and injury which cannot be compensated with money, as the security asset is a residential house.

9. Ms Debalina Lahiri learned counsel on behalf of opposite party/bank contended that the order dated 29.09.2016 passed by the Tribunal was prima facie bad in as much as on the date of passing such order the opposite party no. 1 to 3 had conducted sale of the secured asset in terms of the sale notice dated 11.08.2016 on 15.09.2016. The said order dated 29.09.2016 was also not complied by the petitioner herein. The Hon'ble Debts Recovery Appellate Tribunal Kolkata rightly observed that the order dated 29.09.2016 reflects that such notice regarding the day's hearing had been sent to the respondent/bank but there is no mention that the notices were delivered to the bank. She further contended that the name of one S. Gupta, Chief Manager of respondent bank is appearing in the order, but the

presence of such officer was disputed by the bank and even no argument or any submission of the said officer was recorded in the said order. Thus, said order dated 29.9.2016 was passed virtually on the basis of the submissions made on behalf of the borrower.

10. Ms Lahiri further contended that Issue for consideration before the Tribunal below on 29.09.2016 was as to whether the proposed sale was liable to be stayed or not and nothing more. The Tribunal below had not pondered over on this issue nor has taken note of the fact that sale has already been conducted on 15.09.2016. In this context, she stressed that the bank can only consider the proposal given by the borrower regarding payment, in connection with one time settlement, as per the guidelines of the Reserve Bank of India. Since the sale was conducted and sale certificate was issued prior to the order dated 29th September, 2016, so the issue of redemption of property was also involved in the matter, which was not taken care of. Thus the order dated 29th September, 2016 passed by Tribunal cannot be said to be justified and SARFAESI Application was disposed of in utter disregard to the established procedure of law, since no opportunity was given to the bank to contest the SARFAESI Application and there were directions on payment by the petitioner followed by handing over possession of the property back to be petitioner without appreciating the point of fact and point of law on merit. The Appellate Tribunal was absolutely right in remanding the entire SARFAESI application, granting equal opportunity to both the parties to contend their respective cases including grant of liberty to amend their respective pleadings.

11. The opposite party/bank strenuously argued that the issue as to whether the proceedings under section 17 of the SARFAESI Act has been undertaken by the bank in a proper manner or not cannot be adjudicated by this High Court as First Forum.

12. In fact the Forum below had found that there was no adjudication of their respective cases of the parties on merit. Unless the case is sent back on remand the disputed questions regarding service of notice, payment/non-payment, service of bank drafts upon bank etc. could not be adjudicated by the Appellate Forum, as a First Forum because in such event either of the parties would have lost a Forum.

13. Ms. Lahiri further contended that under section 13(8) of the Act of 2002, the right of redemption of the property is available only 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 asset. Therefore, there was no power of the DRT to direct restoration of possession on the terms it had so directed and thereby the Tribunal has exceeded its jurisdiction. This court in exercising jurisdiction under Article 227 of the Constitution of India in essence, cannot sit to hear second appeal and cannot act as a First Forum to adjudicate on the said facts, in absence of proper evidence before this court. Examination of evidence and appreciation of facts to answer those disputed questions is the task entrusted upon the Debts Recovery Tribunal which has not been done at all in the present context.

14. In fact DRAT has rightly noted all the aforesaid irregularities in the proceeding conducted by DRT and rightly sent the matter back in remand which is sustainable in the eye of law because such order will not prejudice either of the parties. Accordingly she has prayed for dismissal of the present application.

15. From the aforesaid rival contentions, various conflicting factual as well as legal issues have emerged, some of which may be stated hereunder:-

- (a)** Whether opposite party/bank violated provisions under Rule 8(6) and 9(1) and 9(4) of the Securing Interest(Enforcement) Rule 2002.
- (b)** Whether bank has intentionally suppressed the fact about sale of the secured property when the order dated 29.09.2016 was passed.
- (c)** Whether notice regarding days hearing on 29.09.2016 were duly served upon the Bank or not.
- (d)** Whether on 29.09.2016, the Bank was represented at all or not.
- (e)** Whether Tribunal was erred in deciding entire SARFAESI application, while the issue for consideration before the Tribunal on 29.09.2016 was as to whether the proposed sale was liable to be stayed or not.
- (f)** Whether at the time of passing the order, the Tribunal duly analysed that the steps taken by Bank, are in accordance with law.
- (g)** Whether sufficient opportunity was granted to the Bank to contest the SARFAESI application at the time of passing orders by the DRT under challenge.

- (h)** Whether Tribunal was justified from the facts and circumstances of the case, to direct restoration of possession on the terms, it had so directed.
- (i)** Whether the direction passed by Tribunal in its order dated 29.09.2016 to receive outstanding amount in instalments was in accordance with the guidelines of Reserve Bank of India or not.
- (j)** Whether Bank has violated the provision under section 13(3A) of the SARFAESI Act by not giving reply to petitioner's representation dated 29.07.2015 or not.
- (k)** Whether Bank violated the provision under Rule 8(1) of the Security Interest (Enforcement) Rules, 2002 in taking possession of the secured asset without delivering possession notice to Borrower.
- (l)** Whether Bank has waived their right to challenge the order dated 29.09.2016 by not preferring any appeal against the order.
- (m)** Whether Bank refused to receive demand drafts from petitioner in terms of order dated 29.09.2016, on the ground of non-availability of certified copy of order, when petitioner allegedly went to tender the same on 13.10.2016 and 31.10.2016.
- (n)** Whether despite acknowledgement of delivery as per postal track report, the Bank illegally denying the receipt of the two Bank drafts.
- (o)** Whether the petitioner/borrower without complying the order dated 29.09.2016 had sought for direction upon Bank to comply with the order about restoration of physical possession of the secured asset.

16. It appears that aforesaid Appeal No. 177 of 2018 was preferred before Debts Recovery Appellate Tribunal against the order dated 26th February.

The relevant portion of order dated 26.02.2018 may be reproduced below:-

“I have heard the Ld. Counsel for parties and perused the record. It is revealed from the record that the sale has taken place on 15.09.2016. Sale notice was served upon the borrower on 21.08.2016 a such 30 days clear notice of sale was not given to him which is mandatory provision of rule 8(6) of Security Interest (Enforcement) Rule 2002. As such, I am of the view that the sale dated 15.09.2016 is in violation of the procedure prescribed under rule 8, Sub-Rule-6 of the security Interest (Enforcement) Rule 2002. Hence the sale is set aside. Successful bidder be paid the amount deposited with the bank and possession of the property in question be handed over to the borrower. The Bank is at liberty to take further steps as per Law. Issue copies of this order to the parties for compliance.”

17. From the aforesaid cryptic order passed by Tribunal on 26.02.2018, it is evident that without going through the disputed issues, some of which are extracted above, Tribunal disposed of the SARFAESI application conclusively ignoring such issues raised by the parties and which involves not only question of law but also question of fact, and which can be adjudicated only on appreciation of evidence.

18. In the context I am agreeable with the submissions made on behalf of Bank that unless the Appellate Tribunal would not have sent the matter back on remand, the disputed facts inter alia as extracted above like service of notice, payment or non-payment by petitioner in terms of direction, service of bank draft upon Bank, which has been denied by the Bank etc., could have been adjudicated by the Appellate forum as the first forum and in any such event, either of the parties would have lost a forum.

19. Furthermore this court in exercising supervisory jurisdiction under Article 227 of the Constitution of India cannot sit in Second Appeal and cannot act as first forum to determine the legality and validity of sale

certificate as well as sale , when there is no proper evidence before this court except some Xerox copies of document. In fact the Appellate Tribunal below is justified in remanding the case, as examination of evidence and appreciation of facts and the application of law to the facts as First Forum, is required to be conducted by the Tribunal in order to adjudicate the issues raised by the parties, which has not been done by the Tribunal, as appearing from the aforesaid quoted order of Tribunal. The Debt Recovery Appellate Tribunal has noted some main disputed issues, which remains unanswered in the order under challenge and DRAT has rightly remanded the mater for fresh adjudication without depriving either of the litigants to agitate their respective issues.

20. In such view of the matter the order impugned does not call for any interference.

21. C.O. 2438 of 2019 along with connected application are accordingly disposed of.

There will be no order as to the costs.

Urgent Photostat certified copy of this judgment, if applied for, be supplied to the parties upon compliance with all requisite formalities.

(AJOY KUMAR MUKHERJEE, J.)