

**WRIT PETITION NO: 21974 of 2024**

Dutta Umamaheswara Rao

...Petitioner

Vs.

M/s. VST Constructions and others

...Respondents

Advocate for Petitioner : Mr. Ravi Kondaveeti, Sr. Counsel
appeared vice
Mr. Hemanth Kumar Vemuri

Advocate for Respondents : Mr. Y. N. Vivekananda &
Mr. T. B. L. Murthy

**CORAM : THE CHIEF JUSTICE DHIRAJ SINGH THAKUR
SRI JUSTICE RAVI CHEEMALAPATI**

DATE : 20.05.2025

Per DHIRAJ SINGH THAKUR, CJ:

The present writ petition has been filed challenging the order passed by the Debts Recovery Appellate Tribunal, Kolkata, dated 12.08.2024, whereby the auction of the property by the respondent Canara Bank under the provisions of the SARFAESI Act made in favour of the auction purchaser from whom the petitioner had purchased the property subsequently was set aside on the ground that the sale conducted by the bank in the year, 2005, was in clear violation of Rule 8(6) as also the first proviso to Rule 9(1) of the Security Interest (Enforcement) Rules, 2002.

2. With a view to understand the background, in the light of which the present controversy has arisen, it is necessary to state briefly the material facts:

3. M/s. V.S.T.Constructions/respondent No.1 herein, availed a loan of Rs.10 lakhs in the year, 1999, from the Canara Bank to meet its working capital requirements. Respondent No. 2/Mrs. V. Vijayamma, is stated to have stood as a guarantor in regard to the said loan and mortgaged her house property with the bank.

4. Defaults having occurred in repayment of the loan by respondent No.1, the loan was declared as NPA and proceedings initiated under the SARFAESI Act. A demand notice was issued under Section 13(2) on 25.11.2002 calling upon the borrowers to pay an amount of Rs.14.59 lakhs. The respondent No.1 is stated to have approached the respondent Bank proposing to pay an amount of Rs.12 lakhs as full and final settlement of loan by 30.06.2003.

5. However, it is stated that except depositing a paltry amount of Rs.25,000/- on 29.06.2003, did not make any further payment till 04.11.2004. The bank then issued a possession notice under Section 13(4) of the SARFAESI Act on 23.09.2003. Challenging the notice under Section 13(2) as also the possession notice issued under Section 13(4), writ petition was filed by respondent No.1 before the High Court bearing W.P.No.22072 of 2003, wherein an interim order came to be passed on 27.10.2003, directing the

bank not to create any third-party interest during the pendency of the writ petition. No further steps were thus taken by the bank in regard to the property in question. Subsequently, writ petition was dismissed on 21.04.2004.

6. After the dismissal of W.P.No.22072 of 2003, the respondent Bank issued a notice, dated 22.09.2004, calling upon respondent No.1 to pay the amount due under the loan account, failing which, it was informed that, mortgaged property would be brought to sale. Having received the said notice, since respondent No.1 failed to pay the loan amount, the respondent Bank issued auction notification, dated 12.10.2004, and the same was published on 13.10.2004 in two newspapers.

7. It is stated that as there was no response to the auction notification, dated 12.10.2004, notice of sale, dated 03.11.2004, was issued inviting sealed tenders which was to be submitted by 23.11.2004. This notice was published on 11.11.2004.

8. At this stage, the borrower approached the bank to postpone the sale and offered to pay a sum of Rs.13.88 lakhs as one-time settlement. An amount of Rs.90,000 was remitted on 25.11.2004 and made commitment to pay an amount of Rs.4.90 lakhs on 02.12.2004 and Rs.6.90 lakhs on 31.12.2004.

9. The bank, it is stated, agreed to receive the said amount only after it paid 50% of the amount payable under the OTS. According to the

stand of the bank, the principal borrower committed defaults in making payment of the amounts even after its own commitment and the schedule fixed by it.

10. The third sale notice is then stated to have been issued by the bank on 10.01.2005 and published on 18.01.2005, fixing 24.01.2005 as the date of auction. The tenders submitted were opened by the bank and after conducting the *inter-se* bidding amongst the tenders, one, Mr. S. Satyanarayana was declared as a successful bidder for an amount of Rs.12,70,000/-. The bid was then confirmed in his favour on 24.01.2005. Respondent No.1 herein challenged auction notification, dated 10.01.2005, before the High Court in writ petition No.778 of 2005.

11. In the writ petition so filed, respondent Nos.1 and 2 herein had sought a writ of mandamus declaring the sale notification, dated 10.01.2005, as being illegal, arbitrary, violative of principles of natural justice, contrary to OTS proposal submitted by the petitioner. The petition was dismissed vide the order, dated 08.06.2005, by observing and holding thus:

“Having regard to the material available on record as well as the un rebutted averments of the respondents in their counter-affidavit, I do not find any substance in the allegation of the petitioners that they were not given adequate opportunity to repay the loan amount. Since admittedly, the 1st petitioner has committed default in payment of amounts as per his own offer under the one time settlement, the mortgaged property was sold by the respondents on 24-1-2005 and the sale was already confirmed. The offer now made by the petitioners to pay the amounts due and to

cancel the sale cannot be accepted at this stage. Since the sale in favour of Mr. S.Satyanarayana Rao was already confirmed, the Writ Petition is devoid of any merit and the same is accordingly dismissed.”

12. The judgment and order passed by the learned single Judge, dated 08.06.2005, was challenged in Writ Appeal No.1096 of 2005, which was dismissed as withdrawn with liberty to the appellants/respondent Nos.1 & 2 herein to prefer an appeal under Section 17 of the Act, 2002, questioning the legality of the sale notification, dated 10.01.2005. Liberty was also granted by the Division Bench to file an application for amendment in the pending appeal instead of filing a fresh appeal.

13. S.A.No.107 of 2005, however, came to be dismissed by the DRT, Visakhapatnam, vide its order, dated 14.12.2018. The order of DRT was further challenged before the DRAT, Kolkata, which has been allowed by virtue of its order, dated 12.08.2024, which is the order impugned in the present proceedings before us. It has been held by the DRAT that the sale notice which was issued on 10.01.2005 and published on 18.01.2005 by virtue of which auction sale was fixed on 24.01.2005 was clearly in violation of Rule 8(6) and first proviso to Rule 9(1) of the Rules, 2002.

14. It was held that even in the case of subsequent sale, the authorized officer was required to issue a 30 day notice under Rule 8(6) and thereafter 15 days notice under the *proviso* attached to Rule 9(1) of the Rules, 2002.

What was held by the DRAT in paragraph Nos.34, 35 & 36 is reproduced hereunder:

“34. Accordingly, it is incumbent upon the Authorised Officer, even in case of subsequent sale, to comply the provisions of Rule 8 (6) as well as proviso to Rule 9 (1). Law nowhere curtails the right to redemption available to the Borrower under Section 13 (8) of the Act in case of a subsequent sale. Accordingly, I am of the considered view that even in case of subsequent sale, Authorised Officer is required to issue 30 days notice... under Rule 8 (6) and thereafter 15 days notice under Proviso attached to Rule 9 (1).

35. On the basis of the discussion made above, I am of the considered opinion that in the present case, as has been noted earlier, It is a case of subsequent sale wherein Sale Notice was issued on 10.01.2005 which was published in newspaper on 18.01.2005 and the date of auction sale was fixed on 24.1.2005 which is clearly in violation of Rule 8 (6) and Proviso 1 of Rule 9 (1) of the Rules.

36. Having considered the submissions, I am of the considered view that Learned Counsel for Respondent Bank has not complied the provisions of Rules 8 (6) and 9 (1) of the Rules. Accordingly, Learned DRT has wrongly arrived at the finding. Appeal deserves to be allowed.”

15. While recording the finding *supra*, reliance was placed *inter-alia* upon the Apex Court judgments in the cases of **Celir LLP. Vs. Baffna Motors (Mumbai) Private Limited¹** and **Mathew Vargese Vs. M. Amritha Kumar and others²**.

¹ (2024) 2 SCC 1

² (2014) 5 SCC 610

16. The present petition has been filed by the petitioner, Sri Dutta Umamaheswara Rao, to whom the property in question was sold by the legal representatives of the auction purchaser, late Sri S. Satyanarayana.

17. Learned counsel for the petitioner challenges the order passed by the DRAT, Kolkata, on the ground that the DRAT could not have recorded a finding contrary to the view expressed by the High Court in W.P.No.778 of 2005, which had dismissed the petition on the ground that M/s. VST Industries had committed default in payment of the amounts as per the OTS proposal and also that the mortgaged property has since been sold and the sale confirmed.

The second limb of the argument of the learned counsel for the petitioner was that the DRAT could not have relied upon the amended provisions of the Rule 9(1) of the Rules framed under the Rules, 2002, which came into effect much after the sale was confirmed in favour of the auction purchaser.

Reliance was also placed upon the judgment rendered by a three judge Bench of the Apex Court in **S. Karthik and others Vs. N. Subash Chand Jain and others**³ to bring home the point that if the sale could not be held on account of reasons solely attributable to the principal borrowers/guarantors, there would be no necessity to provide 30 days period in the second sale notice.

³ AIR 2021 SC 4559

It was urged that in the present case also the second sale could not be carried forward only on account of the OTS proposal submitted by the respondents and, therefore, failure to sell the property would be attributable only to the respondents and thus applying the ratio of the judgment in **S. Karthik's** case, there would be no necessity to give a 30 day notice to the respondents for the sale conducted in the year, 2005, as the said sale would be deemed to be in continuation of the earlier sale notice of 2004.

18. Mr. Y. N. Vivekananda, learned counsel for the respondent Nos.1 & 2, on the other hand, urged that each of the sale notices should have prescribed a minimum 30 day period as per the unamended provisions of the Act and the Rules which were applicable to the sale conducted then.

It was further urged that the notices issued in the year, 2005, prior to amendment to Rule 9(1) could not be deemed to be a 'subsequent notice', and therefore the 30 day period prescribed was mandatory and further that the 3rd sale notice, dated 10.01.2005, which was published on 18.01.2005 for auction to be conducted on 24.01.2005 did not subscribe to the statutory period and therefore the sale was rightly held to be contrary to the provisions of the Act and the Rules and therefore set aside.

Legal Position:

19. It will be pertinent to refer to some of the amendments incorporated in the SARFAESI Act and the Rules framed thereunder.

Section 13(8) before amendment read as under:

“13(8) - If the 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.”

whereas after amendment incorporated by Act No.44 of 2016 with effect from 01.09.2016, Section 13(8) 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.”

20. Similarly, the Rules of 2002 were amended with effect from 04.11.2016 by virtue of G.S.R. 1046(E), dated 03.11.2016. While no change was made to Rule 8(6), however, Rule 9(1) of the said Rules stood amended.

Rule 9(1) prior to its amendment read as under:

“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.”

and post the amendment, Rule 9(1) 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.”

21. A perusal of the aforementioned provisions would clearly show that, as per the unamended provisions of Section 13(8), while the principal borrower would redeem the secured asset at any time before the date fixed for sale or transfer, as per the amended provisions, the right to redeem the secured asset would stand extinguished on the very date of publication of notice for public auction under the amended provisions of Section 13(8) of the Act, 2002, r/w Rule 9(1) of the Rules, 2002.

22. Rule 8(6) of the Rules, 2002, however, continues to be retained in its original form and obliges the secured creditor to serve upon the borrower

a notice of 30 days for sale of the immovable secured asset before resorting to any of the provisions of Rule 8(5) of the Rules, 2002.

23. In the present case, however, the position of law as it existed before the amendment in 2016 would be applicable as the sale in question was affected in the year, 2005. The two important pre-requisite conditions which have thus to be fulfilled before a secured creditor proceeds to sell the secured asset *inter-alia* is firstly a 30 days' notice to the borrower in terms of Rule 8(6) and in case the borrower fails to take steps to pay its dues within the prescribed period and in terms of Rule 9, a public notice for sale is required to be published in news papers as envisaged under the *proviso* to Rule 8(6).

24. It needs to be made clear that the issuance of a public notice for sale in terms of Rule 9 of the Rules, 2002, need not necessarily be after the expiry of 30 day period prescribed in terms of Rule 8(6) of the Rules, 2002, and both can be simultaneous. This has been held by the Apex Court in ***Canara Bank Vs. M. Amarender Reddy and another***⁴.

In the aforementioned case, the Apex Court was considering the legality of the view expressed by the Division Bench of the High Court of Judicature at Hyderabad for the State of Telangana and for the State of Andhra Pradesh to the extent it held that Rule 8(6) r/w Rule 9 of the Rules, 2002, mandates that the secured creditor must put the borrower on a

⁴ (2017) 4 SCC 735

separate individual notice prior to deciding on the mode of sale of the secured asset and further that such notice should be in addition to the notice of 30 days duration to be given to the **secured creditor** conveying its intention to put the secured asset on sale. The Apex Court in those facts and circumstances held that the view expressed was not sustainable as under:

“15. We hold that the High Court has committed a manifest error in assuming that the notice of intention of sale to be given to the borrower and a public notice for sale cannot be simultaneously issued. The High Court was also not right in observing that after a notice regarding intention to sell the secured asset under sub-rule (6) of Rule 8 is given by the authorised officer to the borrower, only on expiry of 30 days therefrom can the secured creditor take a decision about the mode of sale referred to in sub-rule (5) of Rule 8 after giving notice to the borrower and then issue a public notice after expiry of further thirty days. By this interpretation, the High Court has virtually re-written the provisions and inevitably extended the time-frame of 30 days specified in sub-rule (6) of Rule 8 (at least in relation to the sale of secured asset by inviting tenders from the public or by holding public auction).

16. To put it differently, the only restriction placed on the secured creditor is to serve a notice of 30 days on the borrower intimating him about its intention to sell the immovable secured asset and the mode and date fixed for sale; and also to issue a public notice in two leading newspapers, if the sale of such secured asset is effected either by inviting tenders or by holding public auction, notifying the date of sale after 30 clear days from such notice. There is no need to wait for the expiry of 30 days from issuance of notice of intention to sell the secured asset given to the borrower, for publication of a public notice for sale of such asset. Nor is there any requirement to give a separate individual notice prior to deciding on

the mode of sale of the secured asset. To the above extent, the opinion of the High Court in the impugned judgment will have to be overturned.”

25. The Apex Court in the case of **Mathew Varghese** dealt with the issue and held thus:

“31. 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.”

The Apex Court in the case of **Mathew Varghese** further held that if a sale was not affected despite the 30 days' notice given to the borrower, the secured creditor cannot affect the sale or transfer of the asset on any subsequent date by relying upon the notification issued earlier. The Apex Court held thus:

“53. We, therefore, hold that unless and until a clear 30 days' notice is given to the borrower, no sale or transfer can be resorted to by a secured creditor. In the event of any such sale properly notified after giving 30 days' clear notice to the borrower did not take place as scheduled for reasons which cannot be solely attributable to the borrower, the secured creditor cannot effect the sale or transfer of the secured asset on any subsequent date by relying upon the notification issued earlier. In other words, once the sale does not take

place pursuant to a notice issued under Rules 8 and 9, read along with Section 13(8) for which the entire blame cannot be thrown on the borrower, it is imperative that for effecting the sale, the procedure prescribed above will have to be followed afresh, as the notice issued earlier would lapse.”

26. Considering the facts of the present case on the touch stone of the ratio of the judgment in **Mathew Varghese** as also the provisions of the SARFAESI Act, 2002, and the Rules of 2002 framed thereunder, it needs to be seen as to whether the prescribed 30 days' notice was served on respondent Nos.1 & 2 or not; and whether the notice which was published in the news paper fulfilled the required 30 day period between the publication of sale notice in the news paper and the actual sale of the secured asset.

27. In the present case, according to the record, the 3rd sale notice was issued by the bank on 10.01.2005, which was published on 18.01.2005 fixing 24.01.2005 as the date of auction. This clearly did not satisfy the requirement of Rule 9(1) of the Rules. Apart from this, it appears that no notice was served upon the respondent Nos.1 & 2 in terms of Rule 8(6) of the Rules, 2002, giving them yet again a 30 day notice regarding the sale of the secured asset.

28. As has been held by the Apex Court in **Mathew Varghese** in paragraph No.53 above, in case the sale does not fructify pursuant to the notice under Rules 8(6) and 9(1) r/w Section 13(8) of the Act, 2002, the procedure prescribed would have to be followed afresh as the notice earlier issued would lapse.

29. Learned counsel for the petitioner, however, placed reliance upon paragraph No.53 of the judgment of **Mathew Varghese** to urge that the procedure is required to start afresh by serving a 30 day notice upon the borrower only if the sale did not fructify on account of reasons attributable to the borrower.

It was urged that in fact it was the borrower who had prevented the earlier sale from getting fructified when it had propounded a One Time Settlement to the bank which was accepted subject to certain modification in the OTS proposal made by the respondents. It was urged that the intention of respondent Nos.1 & 2 was never to repay the loan and that the bank had been approached only with a view to avoid the property mortgaged with the bank from being sold in the auction.

30. Learned counsel for the petitioner placed reliance upon the judgment rendered by a three judge Bench of the Apex Court in **S. Karthik**, where the Apex Court, while following the view expressed by the Apex Court in paragraph No.53 of **Mathew Varghese** case, had dismissed the appeal filed by the appellants/principal borrowers on the ground that there was no necessity of providing a 30 day clear notice to the principal borrowers inasmuch as the earlier sale could not be concluded on account of reasons attributable to the appellants therein. What was held in **S. Karthik** by the Apex Court is thus:

“70. As we have already discussed hereinabove, the facts in Mathew Varghese [Mathew Varghese v. M. Amritha Kumar, (2014) 5 SCC 610] and the facts in the present case are totally different. In any case, in view of the observations made in para 53 of the judgment of this Court in Mathew Varghese, we are of the view that since the sale scheduled on 27-2-2012 in pursuance to the notice dated 21-1-2012 could not be held on account of the reasons solely attributable to the appellants/guarantors, there was no necessity to provide 30 days' period in the second sale notice dated 9-7-2012, which was in continuation of the first sale notice dated 21-1-2012.”

31. It is in the light of the aforementioned argument advanced by learned counsel for the petitioner that we are required to consider whether the bank was at all under any obligation to serve upon the petitioner yet again a 30 day notice before putting the secured asset to sale by view of any of the modes prescribed under Rule 8(5) of the Rules, 2002.

32. As has already been stated by us in the earlier part of this judgment during the course of narration of facts that the process initiated by the bank by serving upon the respondents a notice, dated 22.09.2004, followed by the action of the bank in issuing the auction notice and thereafter the issuance of notification, dated 12.10.2004, and thereafter the issuance of notice of sale, dated 03.11.2004, inviting sealed tenders was in fact scuttled by the respondent Nos.1 & 2 when they approached the bank to postpone the sale by making a OTS offer.

33. An amount of Rs.90,000/- was remitted on 25.11.2004 with a commitment to deposit the rest by 31.12.2004, which proposal was not

accepted by the bank, which had insisted that it would accept the OTS proposal only after the payment of 50% amount payable under the OTS proposal. At that critical moment, the respondents managed to prevent the action of the bank for selling the property in question while going back on its promise even as per their OTS proposal and the schedule fixed by it.

34. The principles laid down by the Apex Court in the case of **Mathew Varghese** and in particular paragraph No.53 would squarely apply in the present case and the bank would be under no obligation to yet again serve a 30 day notice and to start the process afresh as it was the borrower who could solely be attributed to sale getting not concluded pursuant to its notices, dated 12.10.2004 and 03.11.2004.

35. Even otherwise, the order passed by the DRAT, Kolkata, that the authorized officer of the bank is required to issue a 30 day notice under Rule 8(6) and 15 day notice under the first *proviso* to Rule 9(1) of the Rules, 2002, is also a view, which is legally unsustainable inasmuch as reference to the provisions of Rule 9(1) had been made after the said provision was amended in the year, 2016, which certainly was not applicable in the facts and circumstances of the case as the sale had been affected in favour of the auction purchaser in the year 2005 itself. Moreover, the DRAT, Kolkata, had failed to notice the ratio of the judgment rendered in **Mathew Varghese** especially in paragraph No.53, which was subsequently followed in the case of **S. Karthik**.

36. Be that as it may, the Writ Petition is allowed. The judgment and order impugned, dated 12.08.2024, passed by the DRAT, Kolkata, is set aside. There shall be no order as to costs.

Consequently, connected miscellaneous applications, if any, shall stand closed.

DHIRAJ SINGH THAKUR, CJ

RAVI CHEEMALAPATI, J

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**HON'BLE MR. JUSTICE DHIRAJ SINGH THAKUR, CHIEF JUSTICE
&
HON'BLE MR. JUSTICE RAVI CHEEMALAPATI**

W.P.No.21974 of 2024

Dt: 20.05.2025

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