HON'BLE SRI JUSTICE NOOTY RAMAMOHANA RAO
And
HON'BLE DR. JUSTICE B. SIVA SANKARA RAO

WRIT PETITION No.5752 of 2016

ORDER : (Per Hon'ble Justice Nooty Ramamohana Rao)

The unfortunate petitioner is a guarantor to the loan transaction indulged in by some other party. He created a mortgage in favour of the 1st respondent-State Bank of India and as the principal borrower committed default in repaying the debt, the bank has declared the loan account as a non-performing asset and then initiated Securitisation measures provided for under Section 13 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as 'the SARFAESI Act'). Now, the District Magistrate, East Godavari District has issued proceedings on 7th January 2016 permitting the Tahsildar, Gandepalli to take possession of the scheduled property by conducting a panchanama. The property, which is sought to be taken possession, is allegedly owned by the petitioner herein. He has created a mortgage over it. This order dated 7th January 2016, is called in question in this writ petition.

2. The principal contention canvassed by Sri Siva Sai Swaroop, learned counsel for petitioner, is that the District Magistrate has mechanically proceeded in the matter based upon a mere letter addressed by the authorized

officer of 1st respondent-State Bank of India and without insisting for an affidavit to be filed by him, issued the impugned order, dated 7th January 2016.

3. Sri B.S.Prasad, learned counsel who has accepted notice on behalf of respondents 1 and 2 would submit that the Authorised Officer has taken measures strictly in accordance with the provisions contained under Section 13(4) of the Act, and hence, no exception need be taken to the action of the District Magistrate in issuing the proceedings, dated 7th January 2016.

4. The only question which is required to be addressed by us is whether the District Magistrate, who passes appropriate order authorizing to take possession of the secured asset discharges Judicial/Quasi-Judicial functions or merely acts in his administrative capacity as providing for the necessary assistance to the secured creditor.

5. Parliament enacted the SARFAESI Act with a view to regulate securitisation and reconstruction of financial assets and for enforcement of security interests and for matters connected therewith. Various expressions used in the Enactment are defined in Section 2(1). In Clause (c), “Bank” has been defined in the following terms :

> “"bank" means--
> (i) a banking company; or
> (ii) a corresponding new bank; or
> (iii) the State Bank of India; or

> (iv) a subsidiary bank; or
> (v) such other bank which the Central Government may,
> by notification, specify for the purposes of this Act"

Thus, State Bank of India, the 1st respondent herein, squarely answers the expression of the "Bank" found mentioned in the Act. The definition of the expression "Borrower" is found in Clause (f) of Section 2(1), which runs as under :

> ""borrower" means any person who has been granted financial assistance by any bank or financial institution or who has given any guarantee or created any mortgage or pledge as security for the financial assistance granted by bank any or financial institution and includes a person who becomes borrower of a securitisation company or reconstruction company consequent upon acquisition by it of any rights or interest of any bank or financial institution in relation to such financial assistance."

By the extensive definition assigned to the expression "borrower", even a guarantor answers the expression "borrower". The expression "default" is defined in Clause (j) of Section 2(1) as under :

> ""default" means non-payment of any principal debt or interest thereon or any other amount payable by a borrower to any secured creditor consequent upon which the account of such borrower is classified as non-performing asset in the books of account of the secured

creditor."

From the above definition, when once the account of the borrower is classified as a Non-Performing Asset in the Books of Account of the secured creditor, renders such an account as a default committed account. The expression "Secured Asset" has been defined in Clause (zc) of Section 2(1), as meaning the property on which the security interest is created. Thus, the residential plot belonged to the petitioner, which has been offered as a collateral security and also over which a mortgage is created, it answers the description of a secured asset. Similarly, the expression "security interest" is defined in Clause (zf) of Section 2(1) in the following words :

> ""security interest" means right, title and interest of any kind whatsoever upon property, created in favour of any secured creditor and includes any mortgage, charge, hypothecation, assignment other than those specified in section 31."

6. Section 13 of the Act has provided for measures to be adopted by the secured creditor for enforcing security interest. Under Section 13(2), a demand notice calling upon the borrower as well as the guarantor to liquidate the entire liability has to be served and a 60 days time period also has got to be provided for liquidating such a liability. Only in the event of such liability not being cleared and left outstanding, the follow-up measures which are provided for under Section 13(4) can be initiated. Section 13(4) has

provided for taking possession of the secured asset of the borrower including the right to transfer by way of lease, assignment or sale, for realizing the secured asset. Section 14(1) has provided that where possession of any secured asset is required to be taken by the secured creditor or any secured asset is required to be sold or transferred by the secured creditor, the secured creditor may, for the purpose of taking possession or control of any such secured asset, request in writing, the Chief Metropolitan Magistrate or the District Magistrate within whose jurisdiction any such secured asset may be situated, to take possession thereof. Upon such application being considered by the Chief Metropolitan Magistrate or the District Magistrate, he shall take possession of such asset and then forward such asset to the secured creditor. The 1st proviso to Section 14(1) clearly brings out that any application by the secured creditor shall be accompanied by an affidavit duly affirmed by the authorized officer of the secured creditor. He was also required to furnish relevant information as provided for under Clauses (i) to (ix) therein. We have, therefore, no hesitation to infer that the District Magistrate could have acted in this matter strictly in accordance with the provisions contained under Section 14(1) of the Act and in the absence of any material to the contra, it is not appropriate for us to infer that the authorized officer of the 1st respondent-Bank has not filed the necessary affidavit before the District Magistrate disclosing the information called for in Clauses (i) to (ix) contained in the proviso to Section 14(1).

7. When the petitioner made no attempt whatsoever to ascertain either from the office of the District Magistrate or that of the authorized officer of the 1st respondent-Bank as to whether he has secured an affidavit from the concerned person and filed it, it will not be appropriate for us to assume that the District Magistrate has acted contrary to law. The burden lies on the petitioner who made an allegation to the contra, to establish the same with reference to relevant material. In the instant case, no attempt whatsoever is made to discharge this burden, for it to be shifted to the shoulders of the 1st respondent-Bank or the 2nd respondent-its authorized officer, or for that matter, the 3rd respondent-District Magistrate.

8. Learned counsel for the 1st respondent-Bank has drawn our attention to the fact that on 11th September 2015, the petitioner herein has undertaken to liquidate the liability, but however, inspite of the 1st respondent-Bank extending certain financial concession by way of a compromise, neither the petitioner herein nor the principal borrower has cleared the debt due and payable to the 1st respondent-Bank. In view of what has been stated supra, we find no merit in this writ petition.

9. However, Sri Siva Sai Swaroop, learned counsel for petitioner would urge that if the petitioner is now thrown out of his residential unit, he will have no roof over his head and he will have to face innumerable hardships in the process. Therefore, the learned counsel for petitioner would urge that if the respondent-Bank takes only symbolic possession of the residential house of the petitioner herein and provides him time till 30th March 2016 to liquidate the liability entirely on his own or secure the loan to be cleared completely by the principal borrower, his residential house may not be put to sale. While we may not be justified in preventing the 1st respondent-Bank from proceeding further in the matter and in putting the secured asset to sale, we feel that ends of justice would be better served by directing the 1st respondent-Bank to take symbolic possession of the dwelling house of the petitioner over which security interest is created by him in favour of the 1st respondent-Bank and provide him time till 30th March 2016 to liquidate the entire liability, failing which, the petitioner shall deliver vacant possession of the secured asset in his possession to respondents 1 and 2 latest by 5 p.m. on 04.04.2016. It is needless for us to observe that in case the debt is completely liquidated either by the petitioner herein or by the principal borrower, no further action shall be taken to dispossess the petitioner from the secured asset and a

certificate that he stands discharged from further obligations has to be issued to him.

10. With these, the writ petition stands disposed of. No costs. As a sequel, pending miscellaneous applications, if any, shall stand closed.

NOOTY RAMAMOHANA RAO, J

DR. B. SIVA SANKARA RAO, J

25th February 2016
ajr