THE HON'BLE SRI JUSTICE NOOTY RAMAMOHANA RAO

AND

THE HON'BLE DR. JUSTICE B.SIVA SANKARA RAO

WRIT PETITION No.8685 of 2016

ORDER : (per the Hon'ble Sri Justice Nooty Ramamohana Rao)

This writ petition is instituted seeking a writ of mandamus for declaring the action of the respondent/Indian Overseas Bank and two others in making attempts to evict the petitioners from their respective shops at door No.26-11-3/1, Ground Floor, Hindi Street, Gandhi Nagar, Vijayawada under the guise of orders in Crl.M.P. No.1039 of 2015 passed by the Chief Metropolitan Magistrate, Vijayawada without following the due process of law and by taking possession of the property with the help of police without informing the petitioners as illegal.

It appears the 2nd respondent herein has availed certain financial assistance from the 1st respondent-Bank and committed default in clearing the same. The 3rd respondent herein created security interest over his immovable property and consequently he also answers the description of 'borrower' as defined in Section 2(1)(f) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for brevity, 'the Act'). The outstanding liability as on 30.11.2010 was standing at Rs.43,87,933/- plus unpaid interest thereafter. In those set of circumstances, the 1st respondent/Bank has raised a demand notice under sub-section (2) of Section 13 of the Act on 30.11.2010 demanding the liquidation of the outstanding liability by providing 60 days time. Though the respondents 2 and 3 seems to have received the said notice on 06.12.2010 but they have not made any attempt to liquidate the liability. In those set of circumstances, the follow up action under sub-section (4) of Section 13 of the Act has been initiated and symbolic possession of the property has been taken on 05.03.2011. The possession notice under Rule 8(1) of the Security (enforcement) Rules was also affixed on the mortgaged property. The said possession notice was also got published in two leading news papers in circulation at Vijayawada viz., Deccan Chronicle English newspaper and Andhra Bhoomi Telugu newspaper, Krishna District edition dated 09.03.2011 calling upon the general public not to deal with the schedule property. It appears the borrowers have paid a sum of Rs.7,87,614/- and thus the total sum of liability has mounted up to Rs.94,88,474/-. In those set of circumstances, the 1st respondent-Bank has moved the Chief Metropolitan Magistrate at Vijayawada seeking the assistance of the said Court under Section 14(1) of the Act for securing physical possession of the mortgaged property over which the security interest has been created by the principal borrower together with the guarantors. Since the application was moved on 05.10.2015 and all the objections have also been complied with by 11.01.2016, the learned Chief Metropolitan Magistrate has taken up Crl.M.P. No.1039 of 2016 on 23.02.2016. Learned Magistrate after recording his satisfaction that it is a just and proper case to appoint an Advocate-Commissioner to execute the warrant, appointed Smt.N.Neelaveni, Advocate, Vijayawada as an Advocate-Commissioner to execute the warrant for the purpose mentioned therein and posted the matter to 01.03.2016 for payment of the fees to the Advocate Commissioner and it appears the Bank has since paid the fees. Obviously the Advocate Commissioner appointed by the Chief Metropolitan Magistrate, Vijayawada has either attempted to take possession of the schedule property or served notice on the petitioners herein, who claimed to be the tenants of the defaulting borrower to vacate and deliver vacant possession of the schedule property which triggered the present writ petition.

Learned counsel for the petitioner Sri Markondaiah would submit that when there are tenants in the premises the landlord cannot collude with the Bank and get the petitioners evicted from the suit schedule property without taking recourse to the provisions of the Rent Control Act. This contention is based upon the fact that in the year 2013 the 3rd respondent herein appears to have instituted O.S. No.903 of 2013 against Tejaswini Agencies, of which the 2nd petitioner herein is stated to be the proprietor, seeking its eviction and when that suit is dismissed, 3rd respondent carried the matter by way of appeal A.S. No.168 of 2014 on the file of the VII Additional District Judge, Vijayawada and the said appeal is still pending. It is hence contended that the present attempt is to bypass the legal process of securing eviction of the petitioners herein. It is also pointed out that the 3rd respondent has also instituted another suit O.S. No.1345 of 2015 against the 1st petitioner herein seeking his eviction from the schedule premises and that suit is still pending. A copy of the plaint in O.S. No.1345 of 2015 is placed at page No.20 of the paper book filed in this Court. From that we gather that the suit is instituted as recently as on 18.12.2015.

From the above narration of facts, it emerges that the respondent Nos.2 and 3, the borrowers, have committed default in liquidating the liability towards the

1st respondent bank, forcing the bank to initiate securitisation measures provided for under Section 13 of the Act as long back as on 30.11.2010. Whereas the two suits instituted by the respondent Nos.2 and 3 seeking eviction of their tenants were instituted long thereafter in the years 2013 and 2015. It would also be appropriate to notice that under sub-section (4) of Section 13 of the Act symbolic possession was already taken by the Bank as long back as on 05.03.2011. Therefore, the contention canvassed by the learned counsel for the petitioners that there is collusion between the 1st respondent-Bank and respondent Nos.2 and 3 the defaulting borrowers is without any merit.

At any rate, at the time when the respondent Nos.2 and 3 have secured the financial assistance from the 1st respondent bank, they have not disclosed any right of tenancy existing in favour of the petitioners in this writ petition for the bank to be bound to put the petitioners herein on notice as well. Therefore, the principle enunciated by the Supreme Court in ***Harshad Govardhan Sondagar V. International Assets Reconstruction Co. Ltd & others***[1] gets attracted. In para No.25 read with para No.32 of the Judgment, the principle has been brought out correctly.

Learned counsel for the petitioner has placed reliance the Judgment rendered by the Supreme Court in ***Vishal N.Kalsaria V. Bank of India & others***[2]***;*** in para No.28 the Supreme Court has explained as to how the principle in ***Harshad Govardhan Sondagar*** supra has to be understood. In para No.29 it is clearly brought out that as far as granting leasehold rights being created <u>after</u> the property has been mortgaged to the bank, the consent of the creditor needs to be taken. No such consent was stated to have been obtained by respondent Nos.2 and 3 at the time of creating rights of tenancy in favour of the petitioners herein.

Therefore, in the absence of any material placed on record to demonstrate or vouch for the fact that the right of tenancy or leasehold interest have been created prior to the date of availing the financial assistance from the 1st respondent-Bank, we cannot justifiable ignore the principle enunciated in ***Harshad Govardhan Sondagar***. In this view of the matter, we do not find any merit in this writ petition and it is accordingly dismissed.

But, however, it shall be open to the petitioners to offer to liquidate the liability completely, in which event they need not be evicted from the schedule premises.

In the result, the writ petition is dismissed. No costs. Consequently, miscellaneous petitions, if any shall stand closed.

NOOTY RAMAMOHANA RAO, J

Dr.B.SIVA SANKARA RAO, J

29-03- 2016
ksh

[1] (2014)6 SCC 1

[2] Criminal Appeal No.52 of 2016 (decided on 20.01.2016)