

**THE HON'BLE SRI JUSTICE NOOTY RAMAMOHANA RAO
AND**

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

WRIT PETITIONS No. 3676, 3685, 3766 AND 3795 OF 2016

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

These Writ Petitions can be disposed of by this common order as the respondent bank namely Bank of Baroda is common in all the cases. Further, the question that has fallen for our consideration is also identical in all these Writ Petitions.

In all these cases, the securitization measures adopted by the respondent bank, in particular proposing to put the secured asset to sale is questioned. There is no dispute on the factual count that the respective writ petitioners are 'borrowers' and they answer the said expression as defined in Section 2(1)(f) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short, 'the Act'), which has been ushered in to regulate the securitization and reconstruction of financial assets and enforcement of security interests. The respondent bank answers the description of 'bank', as defined in clause (c) of sub-section (1) of Section 2, as it is a banking company within the meaning of Section 5(c) of the Banking Regulation Act, 1949. There is also no further difficulty for us to hold that 'default' has been committed as was defined in Section 2(1)(j). The expression 'financial asset' has been defined in Section 2(1)(l) in the following terms:

" financial asset" means debt or receivables and includes –

- i) a claim to any debt or receivables or part thereof, whether secured or unsecured; or
- ii) any debt or receivables secured by, mortgage of, or charge on, immovable property; or
- iii) a mortgage, charge, hypothecation or pledge of movable property; or
- iv) any right or interest in the security, whether full or part underlying such debt or receivables; or
- v) any beneficial interest in property, whether movable or immovable, or in such debt, receivables, whether such interest is existing, future, accruing, conditional or contingent; or
- vi) any financial assistance.

Consequently, the mortgage created by the respective writ petitioners

renders the same as a 'financial asset'. There is also no difficulty that the respective accounts of the borrowers have been declared as 'non-performing assets' as per the definition assigned to the said expression in clause (o) of sub-section (1) of Section 2. The expression 'secured asset' has been defined in clause (zc) of sub-section (1) of Section 2 of the Act as meaning the property on which the security interest is created.

Section 13 of this Act has provided for measures for securitization, which can be adopted for enforcement of the security interest. Under sub-section (2) of Section 13, a notice of demand has to be drawn after the asset is declared as a 'non-performing asset', calling upon the borrower to liquidate the entire liability, by providing him a minimum of sixty days' time. If the debt remains un-liquidated and/or the notice issued under sub-section (2) of Section 13 remains un-answered to the satisfaction of the respective bankers, measures provided for under sub-section (4) thereof can be initiated. Under clause (a) of sub-section (4), the secured creditor may take 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. Hence, the proposed action of the respective bankers cannot be taken exception to in view of the fact that sub-section (4) of Section 13 authorizes such an action to be taken in case default is committed by the borrower.

Under Section 38 of the Act, Central Government has been conferred power to make, by notification, rules for carrying out the provisions of the said Act. Accordingly, the Security Interest (Enforcement) Rules, 2002 (henceforth be referred to for short as 'the Rules') have been framed and they are notified by the Central Government on 20.09.2002. These Rules have provided for the mechanism of giving effect to the provisions contained in the Act itself. Sub-rule (1) of Rule 8 thereof spelt out that where the secured asset is an immovable property, the authorized officer shall take or cause to be

taken possession, by delivering a possession notice prepared as nearly as possible to the one specified in Appendix - IV to these Rules, to the borrower and also by affixing the possession notice on the outer door or at such conspicuous place of the immovable property. Rule 9 dealt with aspects such as time of sale, issue of sale certificate, delivery of possession, etcetera. Sub-rule (1) thereof reads as under:

“ 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 news papers or notice of sale has been served to the borrower.”

It is thus clear that sale of an immovable property of the defaulted borrower can be undertaken only after expiry of thirty days period after the notice in that regard is delivered to the borrower and also it is published in newspapers for the information of the general public. The purpose that is sought to be achieved from this requirement is to provide one more opportunity to the defaulted borrower to liquidate the liability before the expiry of thirty days time. Further, even if he does not have the necessary financial wherewithal to clear the liability entirely on his own, he will be able to utilize this time for organizing the necessary help for liquidating the liability.

Alternatively, the defaulting borrower may scout for an appropriate source or person, who himself can acquire the asset for as nearer the market price prevailing as is possible. In the process, the interests of the secured creditor are also protected equally. The publication in newspapers is bound to attract the attention of the prospective purchasers, who also will try to ascertain, in the meantime, as to the reasonable market value that the immovable property in question would fetch and on that basis, they would be preparing themselves for participation or filing the bids. Further more, to avoid formation of unhealthy cartels, who will look for acquiring the asset, with a view to secure a valuable asset for a far lesser price than it can reasonably fetch in the open market, the public notice of inviting bids now-a-days is followed by the method of holding electronic auctions, known as

‘e-auctions’. In this method, the bidders may not be knowing each other and the prospects of the cartel formation and then their trying to regulate the auction process is completely neutralized. Only genuine participant in auctions will receive the necessary consideration at the hands of the creditor. Therefore, a fair and transparent procedure is sought to be followed even while disposing of the secured asset by the secured creditor. Hence, service of notice and then giving a minimum of thirty days time before the asset is liquidated is bound to be regarded as a mandatory requirement.

Whereas, in the instant case, though a decision has been taken to deliver the notice of the intended sale of the respective secured assets, but however, it has resulted in serving the notices providing for less than thirty days time for the borrower. By thus short-circuiting the requirement of Rules 8 and 9, read together, the chances of the borrower securing a prospective purchaser entirely on his own, got impaired. We are therefore, of the opinion that the respondent bank has not complied with the mandatory requirements of Rules 8 and 9 and hence, it cannot liquidate the secured asset for realizing the debt due. In that view of the matter, we have no hesitation to allow these Writ Petitions and we do it accordingly. No costs.

However, it shall be open to the respondent bank to take all such measures, which are in accordance with law, against the defaulted borrower.

Consequently, the miscellaneous applications, if any shall stand disposed of.

NOOTY RAMAMOHANA RAO, J

DR. B. SIVA SANKARA RAO, J

01st March 2016

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