THE HON'BLE SRI JUSTICE SANJAY KUMAR
AND
THE HON'BLE SRI JUSTICE GUDISEVA SHYAM PRASAD

WRIT PETITION NO.44973 OF 2016

O R D E R
(*Per Sri Justice Sanjay Kumar)*

This writ petition was filed assailing the action of Bank of Baroda, the first respondent, in trying to take physical possession of the tenanted premises occupied by the petitioner under the guise of the order dated 02.08.2016 passed by the Collector and District Magistrate, West Godavari District, under Section 14 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for brevity, 'the SARFAESI Act'). A consequential direction was also sought to restrain the respondent-bank from evicting the petitioner from the tenanted premises without following the due process of law.

The petitioner claims that one V.Narasimha Rao is the absolute owner of the subject premises which he let out to the petitioner on monthly rent to enable him to run his restaurant under the name and style of M/s.Swapna Restaurant and Bar. An unregistered lease agreement was executed on 01.07.2013 for 10 years in this regard. While so, the first respondent-bank informed him that the subject premises was mortgaged to it by V.Narasimha Rao, his lessor, as security for the loan availed by M/s.Sri Satya Krishna Trading Company. The bank threatened to take possession of the said property and sell the same for recovery of its dues. The petitioner complained that on 09.10.2016, the officials of the first respondent-bank along with the Tahsildar, Palkol Mandal, West Godavari District, came to the subject premises and informed him that an order had been passed by the District Collector, West Godavari, for taking over the physical possession of the premises. The petitioner alleged that the first respondent-bank had not followed the due procedure laid down by law while obtaining the order dated 02.08.2016 from the District Collector, West Godavari. Further, he asserted that he was not put on notice or given an opportunity of hearing prior to passing of the said order, which amounted to violation of the principles of natural justice. He asserted that the first respondent-bank had obtained the order without disclosing that he was in physical possession of the premises in the capacity of a tenant and that the order was liable to be set aside.

By order dated 26.12.2016, this Court took note of the petitioner's claim that he was a tenant running a hotel in the premises and granted interim stay of all further proceedings pursuant to the impugned order dated 02.08.2016.

WVMP No.759 of 2017 was filed by the first respondent-bank to vacate the aforesaid interim order.

Heard Sri Ch.Siva Reddy, learned counsel for the petitioner, and Sri G.Vasantha Rayudu, learned counsel for the bank.

As comprehensive arguments were advanced traversing the gamut of the controversy, the writ petition is taken up for disposal.

Sri Ch.Siva Reddy, learned counsel, would contend that a tenant in possession of the property offered as secured interest would be entitled to be put on notice prior to issuance of an order under Section 14 of the SARFAESI Act. He would place reliance in this regard on ***HARSHAD GOVARDHAN SONDAGAR V/s. INTERNATIONAL ASSETS RECONSTRUCTION COMPANY LIMITED***[1]

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[1] (2014) 6 SCC 1

and ***VISHAL N. KALSARIA V/s. BANK OF INDIA***[2]. He would contend that unless the petitioner, being a tenant in occupation of the premises, is evicted in accordance with the due procedure laid down by law, the first respondent-bank could not proceed against the premises in question under the provisions of the SARFAESI Act.

Per contra, Sri G.Vasantha Rayudu, learned counsel, basing on the averments made in the counter-affidavit, would argue that the lease agreement, on the strength of which the petitioner claims to be a tenant, is an unregistered document rendering it unenforceable in law and that it would not bind the bank. He would contend that as a secured interest was created over the premises in question by the owner and as the petitioner could not be considered to be a lawful lessee in possession thereof, the bank cannot be prevented from proceeding further in relation thereto under the provisions of the SARFAESI Act. He pointed out that in spite of repeated demands, the outstanding dues of the bank had not been cleared either by the borrower or the guarantors and the bank therefore had no option but to initiate proceedings under the SARFAESI Act.

Perusal of the lease deed dated 01.07.2013 executed by V.Narsimha Rao in favour of the petitioner reflects that the lease period reserved thereunder was 10 years, i.e., from 01.07.2013 to 30.06.2023. The monthly rental to be paid was Rs.10,000/-. However, the lease deed was not registered. Under Section 17(d) of the Registration Act, 1908, as amended by A.P.Act No.4 of 1999, all leases of immovable property in the State of Andhra Pradesh compulsorily have to be registered. This is irrespective of whether the lease period is less than one year or one year or above. Further, as

[2] AIR 2016 SC 530

the monthly rental reserved under the lease is Rs.10,000/-, it would not attract the provisions of the Andhra Pradesh Buildings (Lease, Rent and Eviction) Control Act, 1960. In effect, the lease deed under which the petitioner claims tenancy rights is unenforceable in law. The question however is whether he would still be entitled to protection in terms of the law laid down in the judgments cited *supra*.

In ***HARSHAD GOVARDHAN SONDAGAR***[1], the Supreme Court observed that even if a mortgage is created over a property, so long as the mortgage deed does not prohibit the mortgagor from leasing out the same and as long as the lease satisfies the requirements of Section 65-A(2) of the Transfer of Property Act, 1882, a lease would be binding on the mortgagee. In relation to the right of the secured creditor to take possession of such secured asset under the provisions of Section 13(4) of the SARFAESI Act, the Supreme Court observed that where the lawful possession of such asset is not with the borrower but with a lessee under a valid lease, the secured creditor cannot take possession of the asset until the lawful possession of the lessee gets determined. Referring to the power of the Chief Metropolitan Magistrate/District Magistrate under Section 14 of the SARFAESI Act to deliver possession of a secured asset to the secured creditor, the Supreme Court held that such power would not extend to taking possession of such an asset from a lessee in lawful possession under a valid lease. The secured creditor while moving the Chief Metropolitan Magistrate/District Magistrate for assistance to take possession of the secured asset under Section 14 of the SARFAESI Act was therefore held to be under a duty to state in the affidavit accompanying the application that the secured asset was not in the possession of a lessee under a valid lease. After receiving a possession notice under Rule 8(1) of the Security Interest (Enforcement) Rules, 2002, if the lawful lessee resists the Authorized Officer of the secured creditor in taking over the possession of the secured asset, the Supreme Court observed that the Authorized Officer would necessarily have to file an application before the Chief Metropolitan Magistrate/District Magistrate under Section 14 of the SARFAESI Act stating in the affidavit accompanying the application the name and address of the person claiming to be the lessee. The Supreme Court further observed that when such an application was filed, the Chief Judicial Magistrate/District Magistrate would have to give notice and an opportunity of hearing to the person claiming to be a lessee as well as to the secured creditor, consistent with the principles of natural justice, and then take a decision. Further, if the Chief Metropolitan Magistrate/District Magistrate was satisfied that there was a valid lease and that such a lease had not been determined in accordance with law, he cannot pass an order for delivering possession of the secured asset to the secured creditor. However, in case he comes to the conclusion that, in fact, there is no valid lease made either before creation of the mortgage or after creation of the mortgage satisfying the requirements of Section 65-A of the Transfer of Property Act, 1882, or that even though there was a valid lease, it stood determined in accordance with Section 111 of the Transfer of Property Act, 1882, he can pass an order for delivering possession of the secured asset to the secured creditor. The Supreme Court also considered the contention of the secured creditor therein that the alleged tenants had not produced any documents to prove that they were *bonafide* lessees of the secured assets. Referring to Section 107 of the Transfer of Property Act, 1882, the Supreme Court observed that a lease of immovable property from year to year, or one year can be made only by a registered document and as the lessee relied on an unregistered instrument accompanied by delivery of possession, the Chief Metropolitan Magistrate/District Magistrate was justified in concluding that he was not entitled to possession of the secured asset for more than a year from the date of the instrument or the date of delivery of possession by the landlord.

Sri Ch.Siva Reddy, learned counsel, also placed reliance on ***RAM RATTAN V/s. STATE OF U.P.***[3], wherein the Supreme Court observed that it is well settled that a true owner has every right to dispossess or throw out a trespasser while he is in the act or process of trespassing and has not accomplished his possession, but this right is not available to the true owner if the trespasser is successful in accomplishing his possession to the knowledge of the true owner. Learned counsel would contend that even if the petitioner is treated as a trespasser, he would have to be divested of his possession in a manner known to law and the order dated 02.08.2016 does not meet the requisite standards.

Learned counsel also placed reliance on ***SHRI JANKI DEVI BHAGAT TRUST, AGRA V/s. RAM SWARUP JAIN (DEAD) BY LRS.***[4], wherein the Supreme Court was dealing with an unregistered lease document. Despite the same, the Supreme Court held that once the factum of lease is not in dispute, it has to be treated as a lease from month to month and would be terminable by 15 days notice.

HARSHAD GOVARDHAN SONDAGAR[1] fell for consideration before the Supreme Court in ***VISHAL N. KALSARIA***[2]. The issue however was limited to the question as to whether a protected tenant

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[3] AIR 1977 SC 619
[4] AIR 1995 SC 2482

under the Maharashtra Rent Control Act, 1999 could be treated as a lawful lessee despite an unregistered lease agreement and whether the SARFAESI Act would override the Rent Control Act. In this context, the Supreme Court observed that the provisions of the SARFAESI Act cannot be used to override the Rent Control Act. As regards the unregistered lease instrument, the Supreme Court referred to Section 55(2) of the Maharashtra Rent Control Act, whereunder the duty to get a lease deed registered is placed on the landlord and observed that neither the landlord nor the bank could be permitted to exploit the fact of non-registration of such a deed against a tenant. It was further observed that if no written lease deed existed, then such tenants are required to prove that they have been in occupation of the premises by producing evidence in the proceedings under Section 14 of the SARFAESI Act.

Though strong reliance is sought to be placed by Sri Ch.Siva Reddy, learned counsel, on ***VISHAL N. KALSARIA***[2], it has no application whatsoever to the case on hand as the leasehold rights claimed by the petitioner are beyond the purview of the rent control legislation prevailing in the State of Andhra Pradesh as the admitted monthly rental is far in excess of the maximum of Rs.3,500/- per month prescribed thereunder.

However, we find merit in the submission of Sri Ch.Siva Reddy, learned counsel, that being in occupation of the premises, the petitioner ought to have been put on notice by the District Collector, West Godavari District, before exercising powers under Section 14 of the SARFAESI Act. This is clear from ***HARSHAD GOVARDHAN SONDAGAR***[1] wherein it was categorically observed that if the person in possession refuses to deliver the same pursuant to a notice under

Rule 8(1) of the Security Interest (Enforcement) Rules, 2002, claiming to be a tenant, the secured creditor necessarily has to approach the Magistrate under Section 14 of the SARFAESI Act disclosing the name of the person claiming to be the tenant in possession. Thereupon, the Chief Metropolitan Magistrate/District Magistrate is required to give notice to such person and examine as to whether he is a lawful lessee entitled to the protection of law.

In the present case, perusal of the order dated 02.08.2016 passed by the District Collector, West Godavari District, reflects that no such notice was given to the petitioner. To set right the lapse committed in this regard, we are of the opinion that it is wholly unnecessary to nullify the proceedings initiated by the first respondent-bank at this stage so as to prolong the possession of the petitioner over the secured asset. The petitioner, on the face of it, is not in a position to show that he is a lawful lessee. As already stated *supra*, the lease agreement under which he claims tenancy rights is an unregistered one, which is unenforceable in the light of the provisions of the Registration Act, 1908, as applicable in the State of Andhra Pradesh. Even if it is construed that the petitioner is a tenant from month to month, ***HARSHAD GOVARDHAN SONDAGAR***[1] makes it clear that under Section 14 of the SARFAESI Act, if the Magistrate comes to the conclusion that there is no valid lease, he can pass an order for delivering the possession of the secured asset to the secured creditor. As a monthly tenancy is determinable in law with 15 days notice, the petitioner is entitled to only this protection and his month to month tenancy would stand lawfully determined thereby.

The writ petition is accordingly dismissed. The petitioner shall vacate and hand over the possession of the secured premises to the first respondent-bank by 31.07.2017, failing which the respondent bank is at liberty to take lawful measures for securing the possession thereof pursuant to the order dated 02.08.2016 passed by the District Collector, West Godavari. Pending miscellaneous petitions, including the implead petition in WPMP No.25069 of 2017, shall also stand dismissed. Interim order dated 26.12.2016 shall stand vacated. No order as to costs.

SANJAY KUMAR,J

GUDISEVA SHYAM PRASAD,J

13th JULY, 2017

PGS