

(2013) 02 P&H CK 0061
In the Punjab And Haryana At Chandigarh
Case No : CWP No. 3106 of 2013

M/s. Arjun Dass Rice Mills and Others	APPELLANT
Vs	
Punjab National Bank	RESPONDENT

Date of Decision : 20-02-2013

Acts Referred:

Contract Act, 1872 — Section 128, 146

Citation : AIR 2013 P&H 128 : (2013) 4 BC 95 : (2013) 170 PLR 208

Hon'ble Judges : Ritu Bahri, J; Hemant Gupta, J

Bench : Division Bench

Advocate : R.C. Chaudhary, for the Appellant; C.S. Pasricha, for the Respondent

Final Decision : Dismissed

Judgement

Hemant Gupta, J.—The petitioners had taken financial assistance from the respondent-Bank in the year 2001. The petitioners mortgaged different properties including the property of rice sheller and the residential houses to secure loan advanced by the Bank. Since there was default in payment of the dues, the Bank initiated the proceedings against the petitioners under the Securitization & Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short "the Act"). The petitioners invoked the writ jurisdiction of this Court raising a grievance that the land and building of the rice sheller should be sold in the first instance towards satisfaction of the loan amount. Considering the said prayer, notice of motion was issued to the respondent. Mr. Advocate has filed reply on behalf of Bank. Same is taken on record. Rejoinder to the written statement has also been filed.

2. It is pointed out by Mr. that the Bank has made many efforts to sell the property of rice sheller as late as in the month of October 2012. It is also pointed out that the petitioners have hypothecated the stocks of total value of Rs. 9 crores approximately, but has misappropriated the entire stock without payment of single paisa to Bank. The Bank has lodged criminal proceedings against the petitioners with respect of such misappropriation. It is also contended that the

Bank has a right to choose the property against which the recovery is to be effected in the first instance. It is contended that the other property that is Rice Sheller could not be sold even after making many efforts; therefore, the Bank has no option to but sell other mortgaged properties including residential houses.

3. Mr. Chaudhary, counsel for the petitioners relies upon Sheeba Philominal Merlin and Esther Evelyon Vs. The Repatriates Co-op Finance and Development Bank Ltd. (Govt of India Enterprise), The General Manager, Repco Bank, The Authorized Officer, Repco Bank and S. Sasikumar,). In the judgment referred to by the learned counsel for the petitioners, the Court has found contravention of provision of the statute and also violation of the principle of natural justice so as to intervene in the action of the Bank under Act.

4. In the present case, the Bank is proceeding against the properties, which stand mortgaged by the petitioners. The repeated efforts to sell the property of the rice sheller have remained unsuccessful, therefore, the Bank is discharging its obligation to realize public money by sale of the residential properties. In fact, the Supreme Court in a judgment reported as State Bank of India Vs. Messrs. Indexport Registered and others, has held that the liability of a guarantor is co-extensive with that of the principal borrower and that not in alternative and that it is for the creditor to choose as to which property is to be proceeded against. The Court observed as under:

13. In the present case before us the decree does not postpone the execution. The decree is simultaneous and it is jointly and severally against all the defendants including the guarantor. It is the right of the decree-holder to proceed with it in a way he likes. Section 128 of the Indian Contract Act itself provides that "the liability of the surety is coextensive with that of the principal debtor, unless it is otherwise provided by the contract".

14. In Pollock & Mulla on Indian Contract and Specific Relief Act, Tenth Edition, at page 728 it is observed thus:

Coextensive.- Surety's liability is coextensive with that of the principal debtor.

A surety's liability to pay the debt is not removed by reason of the creditor's omission to sue the principal debtor. The creditor is not bound to exhaust his remedy against the principal before suing the surety, and a suit may be maintained against the surety though the principal has not been sued.

15. In Chitty on Contracts, 24th Edition, Volume 2 at page 1031 paragraph 4831 it is stated as under:

Conditions precedent to surety.- Prima facie the surety may be proceeded against without demand against him, and without first proceeding against the principal debtor.

16. In Halsbury's Laws of England, Fourth Edition, Vol. 20, paragraph 159 at page 87 it has been observed that "it is not necessary for the creditor, before

proceeding against the surety, to request the principal debtor to pay, or to sue him, although solvent, unless this is expressly stipulated for".

17. In *The Hukumchand Insurance Co. Ltd. Vs. The Bank of Baroda and Others*, a Division Bench of the High Court of Karnataka had an occasion to consider the question of liability of the surety vis-a-vis the principal debtor. Venkatachaliah, J. (as His Lordship then was) observed:

The question as to the liability of the surety, its extent and the manner of its enforcement have to be decided on first principles as to the nature and incidents of suretyship. The liability of a principal debtor and the liability of a surety which is coextensive with that of the former are really separate liabilities, although arising out of the same transaction. Notwithstanding the fact that they may stem from the same transaction, the two liabilities are distinct. The liability of the surety does not also, in all cases, arise simultaneously.

5. In another recent judgment, the Supreme Court has re-examined the entire issue in *Ram Kishun and Others Vs. State of U.P. and Others*, and reiterated the principles laid down earlier. It observed as under:

....(hereinafter called "the Contract Act"), the liability of the guarantor/surety is coextensive with that of the debtor. Therefore, the creditor has a right to obtain a decree against the surety and the principal debtor. The surety has no right to restrain execution of the decree against him until the creditor has exhausted his remedy against the principal debtor for the reason that it is the business of the surety/guarantor to see whether the principal debtor has paid or not. The surety does not have a right to dictate terms to the creditor as to how he should make the recovery and pursue his remedies against the principal debtor at his instance. (Vide *Bank of Bihar Ltd. Vs. Dr. Damodar Prasad and Another*, *Maharashtra State Electricity Board, Bombay Vs. Official Liquidator, High Court, Ernakulam and Another*, *Union Bank of India Vs. Manku Narayana*, and *State Bank of India Vs. Messrs. Indexport Registered and others*,

11. In *State Bank of India Vs. Saksaria Sugar Mills Ltd. and Others*, this Court while considering the provisions of Section 128 of the Contract Act held that liability of a surety is immediate and is not deferred until the creditor exhausts his remedies against the principal debtor. (See also *Industrial Investment Bank of India Ltd. Vs. Biswanath Jhunjhunwala*, and *United Bank of India Vs. Satyawati Tondon and Others*,

12. Section 146 of the Contract Act provides that co-sureties are liable to contribute equally. Thus, in case there are more than one surety/guarantor, they have to share the liability equally unless the agreement of contract provides otherwise.

13. Undoubtedly, public money should be recovered and recovery should be made expeditiously. But it does not mean that the financial institutions which are concerned only with the recovery of their loans, may be permitted to behave like

property dealers and be permitted further to dispose of the secured assets in any unreasonable or arbitrary manner in flagrant violation of the statutory provisions.

14. A right to hold property is a constitutional right as well as a human right. A person cannot be deprived of his property except in accordance with the provisions of a statute. (Vide Lachhman Dass Vs. Jagat Ram and Others, and Narmada Bachao Andolan Vs. State of Madhya Pradesh and Another, Thus, the condition precedent for taking away someone's property or disposing of the secured assets, is that the authority must ensure compliance with the statutory provisions.

6. In the present case, the Bank is proceeding against the properties in accordance with the provisions of a Statute. The petitioners having mortgaged their properties cannot be permitted to dispute the decision of the Bank to sell their residential properties so as to realize huge public money. In view of the above, we do not find any merit in the present writ petition. The same is accordingly dismissed.