(2004) 08 AHC CK 0146

In the Allahabad High Court

Case No : C.M.W.P. No. 32556 of 2004

Pramod Kumar and Another — APPELLANT

Vs

Punjab National Bank and Another — RESPONDENT

Date of Decision : 16-08-2004

Acts Referred:

Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 13(2)

Citation : AIR 2005 All 20 : (2004) 4 AWC 3297 : (2005) 1 BC 548 : (2006) 130 CompCas 187 : (2006) 5 CompLJ 120

Hon'ble Judges : D.P. Gupta, J;B.S. Chauhan, J

Bench : Division Bench

Advocate : N.K. Dwivedi, for the Appellant; Tarun Verma, for the Respondent

Final Decision : Dismissed

Judgement

B.S. Chauhan, J.—This writ petition has been filed for restraining the respondents from making the recovery from the petitioners, who stood guarantor, and also for restraining them from holding the auction as published in the local newspapers.

2. The facts and circumstances giving rise to this case are that petitioners'' brother Gautam Singh purchased a plot in 1998, and he had taken the loan of Rs. 5,90,000 from the respondent No. 1 for constructing the house. The entire amount could not be paid and the principal debtor died of heart attack on 19.5.2004. The notice u/s 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, was issued to the debtor as well as to the petitioners on 16.10.2003, and in pursuance of the same, the house is being auctioned. Hence this petition.

3. The petitioners do not disclose anywhere as to whether the said Gautam Singh has left his widow or any legal heir behind him, as no one has been impleaded on his behalf. Secondly, petitioners do not disclose as to whether they were the owner of the part of the land on which the house had been constructed. Learned counsel for the petitioners is not able to explain that if the recovery is being

made from the estate of the deceased debtor, how the petitioners could have objection. A parrot like argument is made that petitioners are guarantors and thus no recovery can be made from them.

4. If the petitioners were the guarantors, their liability is co- extensive to that of the principal debtor. The issue was considered by the Hon''ble Supreme Court in Bank of Bihar Ltd. Vs. Dr. Damodar Prasad and Another, . wherein the argument that first the recovery should be made from the principal debtor, and if not satisfied, only then guarantor should be asked to pay, was negatived. Even the Hon''ble Apex Court held as under :

"Before payment the surety has no right to dictate terms to the creditor and ask him to pursue his remedies against the principal in the first instance. As Lord Eldon observed in Wright v. Simpson (1802) 6 Ves Jun : 31 ER 1272

"But the surety Is a guarantee ; and it is his business to see whether the principal prays, and not that of creditor". In the absence of some special equity the surety has no right to restrain an action against him by the creditor on the ground that the principal is solvent or that the creditor may have relief against the principal in some other proceedings.

Likewise where the creditor has obtained a decree against the surety and the principal, the surety has no right to restrain execution against him until the creditor has exhausted his remedies against the principal."

5. A Division Bench of Orissa High Court in Sukur Pradhan and Others Vs. Orissa State Financial Corporation and Others, , after considering a large number of judgments, including the Union Bank of India Vs. Manku Narayana, ; Swaminatha Pillai Vs. S.L. Lakshmana Ayyar and Another, ; Kuckreja Ltd. v. Said Alam AIR 1941 Lah 16 ; Madho Sah Vs. Sitaram Sah and Others, and The Hukumchand Insurance Co. Ltd. Vs. The Bank of Baroda and Others, , which were referred to and relied upon, held that the guarantor cannot be asked by the creditor first, to make a recovery, without exhausting all the remedies against the principal debtor.

6. In State Bank of India Vs. Saksaria Sugar Mills Ltd. and Others, , the Hon''ble Supreme Court while interpreting the provision of Section 128 of the Contract Act, held that the liability of a surety is immediate and is not deferred until the creditor exhausted his remedies against the principal debtor. Similar view has been reiterated in Dalichand Vs. The State of Rajasthan and Others, .

7. Thus, in view of the above, the legal position can be summarised that a surety is liable to the creditor in respect of the remedy which he may have against the principal debtor, and there is no bar for the creditor not to proceed against the surety without making any attempt or exhausting the remedies against the principal debtor.

8. In view of the above, firstly, petitioners fail to explain why the recovery cannot be made from the estate of the deceased debtor and how the petitioners can claim any right in the said property. As the recovery is being made from the

estate of the principal debtor, the petitioners being guarantors cannot have the grievance. Even otherwise, the liability of the guarantor is co-extensive of the principal debtor. No relief can be granted to the petitioners on any of the grounds urged before us. No other point is raised.

9. The petition is devoid of any merit, and accordingly, dismissed.

