

(2008) 09 OHC CK 0022
In the Orissa High Court
Case No : Writ Petition (C) No. 16616 of 2007

Sri Sarat Chandra Acharya

APPELLANT

Vs

Bank of India and Others

RESPONDENT

Date of Decision : 23-09-2008

Acts Referred:

Contract Act, 1872 — Section 128
Securitisation and Reconstruction of Financial Assets and Enforcement of Security
Interest Act, 2002 (SARFAESI) — Section 13(1), 13(2), 13(4), 17, 18

Citation : (2008) 09 OHC CK 0022

Hon'ble Judges : B.S. Chauhan, C.J;B.N. Mahapatra, J

Bench : Division Bench

Advocate : Asim Amitav Das, B.B. Ray, A.K. Behera, S. Mohanty and B.R. Swain,
for the Appellant; U.C. Behura and P. Dutta for Opp. party No. 3 and R.C. Dash,
for Opp. party No. 1, for the Respondent

Final Decision : Dismissed

Judgement

B.S. Chauhan, C.J.—This writ petition has been filed for quashing the order dated 30.11.2007 (AnnEx. -5) passed in Application No. 18 of 2007 by the Debts Recovery Appellate Tribunal, Kolkata (hereinafter called the "Appellate Tribunal") and for further direction that the recovery may be made from the properties belonging to the Opposite party No. 2, the loanee and not from the Petitioner's property, who is a guarantor.

2. The facts and circumstances giving rise to the case are that opposite party No. 2 had taken a loan from the opposite party No. 1, Bank of India in August, 1998 and the Petitioner stood guarantor for the same. As the loan taken by the opposite party No. 2 has not been re-paid, the bank initiated the proceeding u/s 13(1) of the Securitisation and Reconstruction of Financial Assets and Security Interest Act, 2002 (hereinafter called "the Act 2002") for recovery of a sum of Rs. 10,83,779 as on 31.2.2005 and the said opposite party No. 2 was directed to make the payment within sixty days. A copy of the said notice was also served

upon the Petitioner. The said opposite party No. 2 wanted to settle the matter with the bank. However, the proposal could not be materialized and therefore, further proceedings were taken up u/s 13(4) of the Act, 2002.

3. The opposite party bank vide advertisement dated 12.1.2007 invited auction bidders for sale of the properties belonging to the Petitioner i.e. guarantor and in pursuance of the same the said property has been sold in favour of the opposite party No. 3, Hitakar Mohapatra for a sum of Rs. 3,00,000 on 6.4.2007.

4. The Petitioner being aggrieved filed W.P.(C) No. 5070 of 2007 before this Court but the said Writ petition was dismissed relegating the Petitioner to file appeal u/s 17 of the Act before the Debts Recovery Tribunal (hereinafter called "the Tribunal"). The Petitioner approached the Tribunal but could not find any favour from the Tribunal. Petitioner in fact insisted that the Tribunal should direct the Bank to settle the matter. The Tribunal rejected the said prayer vide its order dated 3.10.2006 observing that the Tribunal had no such power. Petitioner preferred the time barred appeal before the Appellate Tribunal, u/s 18 of the Act, 2002. The Tribunal while entertaining the appeal condoned the delay of more than six months vide order dated 22.5.2007 (Annex-4) directed the Petitioner to show his bona fide and deposit a sum of Rs. 2,80,000 by 25.6.2007. The Petitioner made a deposit of Rs. 1,00,000 within the time stipulated by the Appellate Forum and made an application for extension of time to deposit the balance amount of Rs. 1,80,000. While seeking extension of time, he wanted to deposit a sum of Rs. 50,000 and a bank draft of the said amount was filed along with the application. The Tribunal rejected the said application vide 30.11.2007 and returned the bank draft to the Petitioner. Hence this petition.

5. Learned Counsel for the Petitioner has raised large number of issues particularly that the notice u/s 13(2) and 13(4) of the Act had never been served on the Petitioner as the address given by the bank on the said notice was not correct. In the facts and circumstances of the case the Appellate Forum could have extended time giving opportunity to the Petitioner to meet the requirement of pre-deposit condition. Hence the orders are liable to be quashed. So far as the grievance of non-service of notices is concerned, as subsequent to the said notice u/s 13(2) of the Act, 2002, the Petitioner had approached the writ court as well as the Tribunal and appellate forum and did not point any prejudice had caused to him, more so, notice u/s 13(4) and subsequently auction notice has been published in the newspaper "Samaj" dated 12.1.2007 having wide circulation, we fail to understand how the Petitioner can raise the grievance that he had not been aware of the proceeding. The last part of the advertisement reads as under:-

This is also a notice to the borrower/guarantors of the above said loan account(s) for settlement of their outstanding dues with the bank and attend the public auction on the above mentioned date of sale.

6. Thus, there was a notice to the borrower/guarantors of the above the said

running accounts for settlement of the outstanding dues with the bank and attend the public auction on the above mentioned date of sale.

7. It is not the case of the Petitioner that he had not been aware of the proceedings. However, admittedly No. attempt had been made to settle the dues nor he made any attempt to bring any buyer. No. explanation has been offered as to why he could not participate in the auction sale.

8. It has been submitted by Sri Das, that recovery proceeding could not be initiated against the Petitioner/guarantor without first making any attempt to satisfy the decree against the borrower. In view of the provisions u/s 128 of the Contract Act, such a defence is not available to the Petitioner for the reasons that liability of the guarantor under the Contract Act is co-extensive to that of the loanee.

9. The provisions of Section 128 of the Contract Act were considered by the 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. The 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 Yes Jun 714 at p. 734.... But the surety is a guarantee; and it is his business to see whether the principal pays, 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.

10. Similar view has been reiterated in State Bank of India Vs. Messrs. Indexport Registered and others, by the larger Bench overruling its earlier judgment in Union Bank of India Vs. Manku Narayana, ; wherein it has been held that the bank has to proceed against the mortgaged property of the borrower first and then proceed against the guarantor.

11. A Division Bench this High Court in Sukur Pradhan and Others Vs. Orissa State Financial Corporation and Others, , after considering a large number of judgments running from 1917 to 1992, including the Union Bank of India Vs. Manku Narayana, ; Swaminatha Pillai Vs. S.L. Lakshmana Ayyar and Another, ; AIR 1941 16 (Lahore); 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 can be asked by the creditor first, to make a recovery, without exhausting all the remedies against the

principal debtor. The Court held as under:-

From the aforesaid decisions which run from 1917 to 1992, it is apparent that a surety is liable to the creditor irrespective of the remedy which the creditor may have against the principal debtor and the creditor may proceed against the surety without exhausting his remedies against the principal debtor.

12. In *State Bank of India Vs. Saksaria Sugar Mills Ltd. and Others*, the 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*, .

13. In AIR 2003 SC 2103 the Hon"ble Supreme Court considered the provisions of the U.P. Public Moneys (Recovery of Dues) Act, 1972 (hereinafter called "U.P. Act, 1972") and held that in view of the specific provision provided therein, it is not permissible for the creditor, may be a financial institution, to make the recovery from the guarantor without taking recourse of recovery against the principal borrower. Therefore, implication of provisions u/s 128 of the Contract Act had been interpreted in a manner that in case a demand cannot be satisfied after putting the property of the principal borrower to auction, only then, proceedings for recovery can be initiated against the guarantor.

14. The said judgment had subsequently been followed in *Pawan Kumar Jain Vs. The Pradeshia Industrial and Investment Corporation of U.P. Ltd. and Others*, ; *Ashok Mahajan Vs. State of U.P. and Others*, and *Ram Kripal Singh Vs. State of U.P. and Others*, .

15. More so, the correctness of the judgment in *Unique Butyle Tube Industries (P) Ltd. (supra)* has been doubted by the Apex Court while making a reference to the larger Bench for reconsideration vide order dated 25.10.2004 in SLP (Civil) No. 7660 of 2003 (*M/s. Paliwal Glass Works v. State of U.P.*).

16. Learned Counsel for the Petitioner could not point out any provision analogous to the provisions of U.P. Act, 1972, which is applicable in the instant case. In view thereof, the said principles cannot be made applicable herein particularly in view of the fact that in *Unique Butyle Tube Industries (P) Ltd. (supra)* the Apex Court has held that in case proceedings are taken before the DRT, such a privilege is not available to the guarantor.

17. We do not find any force in the submission made by Sri Das, Learned Counsel for the Petitioner that in the facts and circumstances of the case, the appellate Tribunal was under obligation to extend time to deposit the amount which is a condition precedent for maintaining the appeal u/s 18 of the Act, for the reason that the Petitioner first approached this Court without exhausting the remedy provided under the statute. His writ petition was dismissed asking him to avail the remedy under the Act, 2002. He approached the Tribunal at a belated stage. His Original Application No. 41 of 2006 was dismissed vide order dated

3.10.2006.

18. The appellate authority had been very considerate as the application for condonation of delay for six months and five days was allowed. The Petitioner had to deposit the money as per the statutory provision and in spite of giving the reasonable time the same had not been deposited, within the stipulated period i.e. by 25.6.2007. The Tribunal has rightly rejected the application and as a consequence the appeal failed. During the interregnum period, not only the auction sale took place, but the sale has been confirmed and the sale certificate has been issued in favour of opposite party No. 3, who claims to be in possession of the said property. Therefore, in view of the above, No. interference is required.

19. While entertaining this writ petition, this Court wanted to satisfy itself as to whether the property has properly been valued prior to holding of auction and the Bank proceeded in accordance with law. In pursuance of the order of this Court, the bank has filed all the documents to explain the factual position. It is evident that there had been outstanding dues of Rs. 10,83,779 as on 31.7.2005 and notice to that effect had been given to the Petitioner as well as the borrower vide letter dated 11.8.2005. The Petitioner himself wrote a letter dated 30.11.2005 to the Bank for settling the matter with the borrower. The bank vide letter dated 5.12.2005 informed the Petitioner that it was not possible to allow any more time to the principal borrower to deposit the amount. Petitioner as well as the principal borrower were asked to deposit the amount as No. further extension would be allowed. Similar letter had been sent to the Petitioner on 5.1.2006. The Petitioner wrote a letter on 24.1.2006 that he would make an attempt by 15.2.2006 to find out a suitable solution to the problem, but in vain. The bank initiated the proceedings in accordance with law before the property was put to auction, all legal requirements had been complied with. Valuation report was also obtained from the approved valuer on 24.1.2006 which runs to six pages and according to which the valuation of the house came to Rs. 3,00,000 and the same had been sold for Rs. 3,00,000. The said property had been sold in favour of opposite party No. 3 and sale certificate has been issued in his favour.

20. In view of the above, there is No. scope of reaching the conclusion that auction sale had not been performed in accordance with law.

21. In view of the above, we do not find any force on the submission of the Learned Counsel for the Petitioner. The petition is accordingly dismissed.

22. Before parting with the case, we would like to express our anguish for the sorry state of affairs made herein that though the Petitioner has prayed for quashing the orders of the Tribunal and Appellate Tribunal, but none of the said forums have been impleaded as a party. In view of the judgment of a Constitution Bench of the Supreme Court in *Udit Narain Singh Malpaharia Vs. Additional Member, Board of Revenue, Bihar*, , the petition is not maintainable without impleading the Tribunal. Thus, we are not in a position to express any

opinion and as No. objection is being raised by the opposite parties, we are very much doubtful regarding the maintainability of such a petition.

B.N. Mahapatra, J.

23. I agree.