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HIGH COURT OF CHHATTISGARH, BILASPUR**Judgment reserved on 09-11-2016****Judgment delivered on 02-03-2017****WP227 No. 7367 of 2011**

1. Manik Mehta, aged about 40 years, S/o Late Shri V.D Mehta, Proprietor of M/s Future Vision, 48/6, Nehru Nagar (W), Bhilai, District Durg (CG)

---- Petitioner**Versus**

1. UCO Bank, Through the Branch Manager, Nehru Nagar Branch, Bhilai, District Durg (CG)
2. The Chief Officer (Credit) UCO Bank, Sector-1, Bhilai, Distt.- Durg CG
3. The Senior Manager, UCO Bank, Sector-1, Bhilai, Distt.- Durg CG
4. Ajay Kumar Upadhyaya S/o Shri Gajraj Prasad Upadhyaya, Plot No. 5, Vivekanand Marg, Vaishali Nagar, Bhilai, Distt.- Durg CG

---- Respondent**And****CONT No. 526 Of 2014**

1. Manik Mehta S/o Late Shri V.D. Mehta Aged About 43 Years Proprietor of M/s Future Vision, 48/6, Nehru Nagar (W), Bhilai, P.S. Supela, Civil & Revenue Distt. Durg C.G.

---- Petitioner**Vs**

1. Shri P.K. Patniak, DGM, UCO Bank, Regional Zonal Office Raipur Chhattisgarh
2. Shri Ajay Gajbhaye AGM, UCO Bank Main Branch Sector-1, Bhilai, Distt. Durg Chhattisgarh

3. Shri Jaidev Chatterjee Senior Branch Manager, UCO Bank Nehru Nagar Branch, Bhilai Distt. Durg Chhattisgarh
4. Ajay Kumar Upadhyaya S/o Gajraj Prasad Upadhyaya Plot No. 5, Vivekanand Marg, Vaishali Nagar, Bhilai, Distt. Durg C.G.
5. Shri Rakesh Joshi T.I. PS Supela, Bhilai Presently Posted As T.I. Police Station Chawani, Bhilai Distt. Durg Chhattisgarh
6. Shri Anand Chhabbra Superintendent Of Police Durg Chhattisgarh

---- Respondent

For Petitioner	Shri Bhaskar Payashi, Advocate
For Respondents 1 to 3	Shri B.P. Rao and Shri Anil Kumar Pandey, Advocates
For Respondent No.4	Shri R.B. Sharma, Advocate

Hon'ble Shri Justice Prashant Kumar Mishra

C A V Order

WP227 No.7367 of 2011 :-

1. This petition under Article 227 of the Constitution of India has been preferred for quashment of the recovery and auction proceedings initiated against the petitioner by the respondent UCO Bank ('the Bank' henceforth); for quashing the appellate order dated 9-11-2011 passed by the Debts Recovery Appellate Tribunal, Allahabad ('the DRAT' henceforth) by which the appeals preferred by the Bank and the auction purchaser were allowed; and for a direction to the respondent Bank and the auction purchaser to hand over possession of the house.

2. The facts, in brief, as projected by the petitioner, are that the petitioner is a Graduate in Electrical Engineering and Information Technology. He is engaged in the business of Electronic/Computer Equipments from a rented premises at Bhilai. The petitioner obtained cash credit hypothecation facility/loan of Rs.3.50 lacs in the year 2000 which was subsequently enhanced to Rs.7.50 lacs in the year 2003. The hypothecated stocks lying in the petitioner's business premises were insured by the Bank with the Insurance Company of its own choice and the premium amount was deducted from the petitioner's account from time to time. During the intervening night of 28th February and 1st March, 2005 his landlord broke open and entered the petitioner's shop along with his accomplices and took away the trading stock, miscellaneous equipment, furniture/fixtures, etc. Thus, committed loot of goods worth Rs.12.50 lacs out of which articles worth Rs.2.00 lacs were thrown in front of the petitioner's residence in a dilapidated condition, but the remaining articles worth Rs.10.50 lacs cannot be retrieved. The incident was reported to the police on which First Information Report ('FIR' henceforth) was registered for offence under Section 448/34 of the Indian Penal Code ('IPC' henceforth). The petitioner has also filed a criminal complaint for addition of offence under Section 379 of the IPC. The criminal case is still pending consideration before

the jurisdictional Magistrate's Court. 3 days prior to this incident the entire stock was inspected by the Bank and inspection charges of Rs.3,000/- was debited from the petitioner's account, however, the insurance claim raised by the petitioner was not processed because of Bank's failure to inspect the shop after the incident for verification of the stock as also for the reason that the insurance policy obtained by the Bank was in the wrong name of M/s Furnitures Vision whereas the petitioner's business concern is named as M/s Future Vision.

3. Due to the set back in the business pursuant to the above stated event, the account was declared NPA on 6-7-2007 even though the outstanding dues were only to the tune of Rs.6.98 lacs as on 1-3-2005, but as per the norms of the Reserve Bank of India ('the RBI' henceforth), in case of CC limit of hypothecation cases, the account would be declared NPA if stock not existing. The Bank, thereafter, invoked the provisions contained under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ('the Act, 2002' henceforth) to enforce the security interest. The Bank eventually conducted auction of the secured asset on 24-6-2008 and confirmed the same on 20-3-2009. Petitioner's application challenging the auction proceeding was allowed by the

Debts Recovery Tribunal ('the DRT' henceforth) on 9-11-2011, against which the auction purchaser as well as the Bank preferred appeals before the DRAT, which have been allowed by the impugned order, as a consequence the auction sale has been affirmed.

4. Challenging the impugned order, Shri Bhaskar Payasi, learned counsel appearing for the petitioner, duly assisted by the petitioner himself, would submit that the Bank proceeded to conduct the auction in a highhanded and arbitrary manner without giving any time to the petitioner to deposit the amount, which he was willing to do. It is also argued that after the conditional order passed by the DRT allowing the petitioner's contention for setting aside the auction, the petitioner repeatedly requested the Bank to accept the amount directed by the DRT, but the Bank avoided to receive the amount and went in appeal with the sole motive of inflicting loss to the petitioner, as if the Bank officials were litigating in any personal matter. In course of arguments, learned counsel for the petitioner would highlight the irregularities committed by the Bank in conducting the auction inasmuch as despite auction purchaser's failure to deposit 25% amount on the date of auction, the sale was confirmed. It is also argued that the DRAT has made an apparent and patent error by holding

that the petitioner's appeal was not maintainable before the DRT.

5. Per contra, learned counsel appearing for the respondent Bank and the auction purchaser would support the impugned order passed by the DRAT on submission that the secured asset belonged to the guarantor and not to the petitioner, therefore, his appeal was not maintainable and the DRAT has rightly allowed the appeals of the Bank and the auction purchaser.
6. I have heard learned counsel appearing for the parties as well as the petitioner at length and perused the record.
7. The petitioner has thrown challenge to the auction proceedings on merits and has further assailed the order passed by the DRAT, whereby the Bank's appeal has been allowed on technical ground without adverting to the merits of the grounds of challenge, which reasoned with DRT for quashing the auction proceedings.
8. I shall, therefore, firstly proceed to analyse and determine as to whether the DRAT is justified in allowing the Bank's appeal on the ground that the petitioner's application/appeal before the DRT was not maintainable, as he is not an aggrieved party because it is the guarantor's property and

not that of the borrower, which has been auctioned to realise the debt.

9. The DRT dealt with the above aspect of the matter in the opening part of its order dated 29.03.2011 to hold that the borrower for whose credit facility the property was mortgaged has the right to challenge the recovery proceedings since the mortgager has the right to proceed against the principal borrower to realise the money that he had to pay to liquidate the dues of the principal borrower. On the other hand, the DRAT has found that under Section 17 of the Act, 2002 any person (including the borrower), aggrieved by any of the measures referred to in sub-section (4) of Section 13 may prefer an appeal to the DRT, however, in the present case, the property of the guarantor having been auctioned, the borrower is not a aggrieved party.
10. Reference would be necessary to the provisions contained in Sections 13 & 17 of the Act, 2002 for further discussion on the issue. Under Section 13 the Bank is entitled to enforce any security interest credited in favour of any secured creditor without the intervention of the Court or Tribunal in accordance with the provisions of the Act. In case the borrower fails to discharge his liability, the bank can take the measures provided in Section 13(4) of the Act,

2002 for recovery of the loan amount. The “measures” available for enforcement of security interest have been mainly provided in Section 13 (4), which provides that in case the borrower fails to discharge his liability in full within the period specified in sub-section (2) of Section 13, the secured creditor may take recourse to one or more of the measures to recover his secured debt, the measure being (a) take possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset; and (b) take over the management of the business of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset. The word 'secured asset', as defined under Section 2 (1) (zc), means the property on which security interest is created. The word 'security interest' has been defined under Section 2 (1) (zf) to mean the right, title and interest of any kind whatsoever upon property, created in favour of any secured creditor and includes any mortgage, charge, hypothecation, assignment other than those specified in Section 31. Interestingly, the Act, 2002 does not define the word 'guarantor', however, the word 'borrower' is defined in Section 2 (1) (f) to mean any person who has been granted financial assistance by any bank or financial institution or who has given any guarantee or created any mortgage or pledge as security

for the financial assistance granted by any bank or financial institution and includes a person who becomes borrower of a securitisation company or reconstruction company consequent upon acquisition by it of any rights or interest of any bank or financial institution in relation to such financial assistance.

11. A conjoint reading of the above definitions would take us to the conclusion that the security interest is created with respect to the property called 'secured asset' by the guarantor for the benefit of borrower and not for his own benefit, therefore, by a deeming fiction a person who has given any guarantee has also been referred to as a borrower. It is precisely for this reason Section 13 (4) empowers the bank to take recourse to the measures in the event borrower fails to discharge his liability and more significantly Section 13 (4) (a) empowers the bank to take possession of the 'secured assets of the borrower' including the right to transfer by way of lease, assignment or sale for realizing the secured asset. The only conclusion which can be drawn from the above provision is that even if the secured asset is created on the property belonging to the guarantor, it remains secured asset of the borrower, as referred in Section 13 (4) (a) of the Act, 2002. If it is interpreted in the manner in which the Bank has put forth,

every guarantor would come forward to challenge the measures taken under Section 13 (4) on the plea that it is the secured asset of the guarantor and not that of the borrower, therefore, measures under Section 13 (4) (a) cannot be taken which speaks about the secured assets of the borrower and not of guarantor.

12. It will now be profitable to refer to the provisions contained in Section 17 (1), providing the right to appeal, which reads thus:-

17. Right to appeal.-- (1) Any person (including borrower), aggrieved by any of the measures referred to in sub-section (4) of section 13 taken by the secured creditor or his authorised officer under this Chapter, may make an application alongwith such fee, as may be prescribed to the Debts Recovery Tribunal having jurisdiction in the matter within forty-five days from the date on which such measure had been taken:

Provided that different fees may be prescribed for making the application by the borrower and the person other than the borrower.

Explanation : For the removal of doubts it is hereby declared that the communication of the reasons to the borrower by the secured creditor for not having accepted his representation or objection or the likely action of the secured creditor at the stage of communication of reasons to the borrower shall not entitle the person (including borrower) to make an application to the Debts Recovery

Tribunal under sub-section (1) of Section 17.

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13. In **United Bank of India v. Satyawati Tondon and others**¹, the Supreme Court has held that the expression 'any person' used in Section 17 (1) is of wide import. It takes within its fold, not only the borrower but also the guarantor or any other person who may be affected by the action taken under Section 13 (4) or Section 14.
14. The Supreme Court in **Jagdish Singh v. Heeralal and others**² has referred with approval the principle laid down in **Satyawati Tondon** (supra).
15. The legal position which emerges from a reading of Sections 13 & 17 of the Act, 2002 and the above cited judgments of the Supreme Court is that when the secured creditor proceeds to take any measure under Section 13 (4), in addition to the borrower, the guarantor may also prefer an appeal. It is nowhere provided, as has been interpreted by the DRAT in the impugned order, that when secured asset belongs to the guarantor, only the guarantor can prefer an appeal and not the borrower. In drawing the above conclusion, I may resort to add one more reason by

¹ (2010) 8 SCC 110

² (2014) 1 SCC 479

referring to provisions contained in Section 17 (3) of the Act, 2002 which reads thus :

17. Right to appeal.--

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(3) If, the Debts Recovery Tribunal, after examining the facts and circumstances of the case and evidence produced by the parties, comes to the conclusion that any of the measures referred to in sub-section (4) of section 13, taken by the secured creditor are not in accordance with the provisions of this Act and the rules made thereunder, and require restoration of the management of the secured assets to the borrower or restoration of possession of the secured assets to the borrower, it may by order, declare the recourse to any one or more measures referred to in sub-section (4) of section 13 taken by the secured assets as invalid and restore the possession of the secured assets to the borrower or restore the management of the secured assets to the borrower, as the case may be, and pass such order as it may consider appropriate and necessary in relation to any of the recourse taken by the secured creditor under sub-section (4) of section 13.

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16. The above provision of Section 17 (3) unequivocally provides that if the measures referred to in sub-section (4) of Section 13, taken by the secured creditor are not in accordance with the provisions of the Act and the Rules made thereunder, and require restoration of possession of

the secured assets to the borrower, it may by order, declare the recourse to any one or more measures referred to in sub-section (4) of Section 13 taken by the secured assets as invalid and restore the possession of the secured assets to the borrower or restore to the management.

17. Thus, here also, the legislature intends to provide relief to the borrower by restoring the possession of the secured asset. Even if the term 'borrower' includes a 'guarantor', it does not exclude the borrower himself to disentitle him to prefer any appeal when the measures are taken under Section 13 (4) of the Act, 2002.
18. The DRAT having not adverted to the merits of the issue on the basis of which the DRT set aside the auction proceedings, while setting aside the impugned order passed by the DRAT, I deem it appropriate to remit back the matter to the DRAT for deciding the appeal on merits.
19. Accordingly, the impugned order passed by the DRAT is set aside and the DRAT is directed to decide the appeals preferred by the bank and the auction purchaser, in accordance with law and on its own merits, at the earliest, preferably within a period of six (6) months from today.
20. Accordingly, the writ petition is allowed to the extent indicated above. No order as to cost(s).

Contempt Case (C) No.526 of 2014 :-

21. The contempt application has been preferred alleging violation of the interim order dated 07.12.2011 passed in the writ petition which has now been decided by this Court. The interim order was operative only till the next date of hearing. It was continued on 11.05.2012, however, on subsequent dates there is no order for continuing the interim relief. The writ petition was, thereafter, dismissed for want of prosecution on 19.12.2013 and restored on 08.01.2014 in MCC No.3 of 2014. The petitioner seems to be under impression that the interim relief is continuing.
22. Realizing that the interim relief is not operative, the petitioner moved an application (I.A. No.5) on 06.08.2014 for grant of interim relief, which remain pending without there being any order in petitioner's favour.
23. The petitioner alleges that in violation of the interim order possession was taken over on 10.01.2014/02.02.2014, which amounts to contempt of lawful authority or the order of the Court. As earlier noticed, the interim order was not operative in petitioner's favour when the possession was taken over on 10.01.2014/02.02.2014, therefore, the respondents have not committed any contempt of the interim order, which was not operative on the date.

24. In view of the above, the contempt petition is dismissed.

No order as to cost(s).

Sd/-

Judge

Prashant Kumar Mishra

Gowri