

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 16.09.2019

CORAM:

THE HON'BLE MR.JUSTICE S.MANIKUMAR
AND
THE HON'BLE MR.JUSTICE R.PONGIAPPAN

W.P.No.10927 of 2017
and W.M.P.Nos.11895 & 29552 of 2017

D.Soodamani ... Petitioner

versus

Vijaya Bank,
Represented by Chief Manager /
Authorized Officer,
Asset Recovery Management Branch,
No.144, Moore Street,
Chennai - 600 010. ... Respondent

PRAYER: Writ Petition has been filed under Article 226 of the Constitution of India, praying for the issuance of a writ of mandamus, forbearing the respondent herein from proceeding against the property of the petitioner measuring an extent of 944 sq.ft. bearing Old Door No.2/24, New Door No.94, Jayavinayagar Koil Street, Jaganathapuram, Chetpet, Chennai - 600 031, without first recovering their dues by selling the mortgaged property of the principal borrower.

For Petitioner : Mr.S.Jayakumar

For Respondent : Mr.Elaya Rajkumar
for M/s.Ramalingam & Associates

O R D E R

(Order of the Court was made by R.PONGIAPPAN, J.)

The petitioner has filed the present writ petition, for a writ of mandamus, forbearing the respondent from proceeding against the property of the petitioner, measuring an extent of 944 sq.ft., bearing Old Door No.2/24, New Door No.94, Jayavinayagar Koil Street, Jaganathapuram, Chetpet, Chennai-600 031, without first recovering their dues by selling the mortgaged property of the principal borrower.

2. Brief facts leading to the filing of the Writ Petition are that, the husband of the petitioner, namely, P.Durairaj, is carrying on business in the name and style of G.K.Engineers. For the development of his business, he has mortgaged the property, measuring an extent of 3054 sq.ft. together with building thereon, measuring an extent of 3044 sq.ft. at Door No.42, Bajanai Koil Street, Mel Aynambakkam, Chennai and availed a cash credit facility for a sum of Rs.15,00,000/- as loan from the respondent Bank in the year 2007. For the loan availed by her husband, the petitioner herein stood as the personal guarantor without mortgaging any property or offer any security towards the loan.

3. When at the time of repaying the loan along with interest, there was a sudden loss in business and the project run by the husband of the petitioner was abruptly stopped due to some third party disputes and as such, there were some defaults in the payment of interest. In view of the default committed, the cash credit loan account was declared as NPA in the year 2009 and thereafter, the respondent Bank took possession of the property belonging to the husband of the petitioner on 16.09.2009 by issuing possession notice under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act [hereinafter referred to as 'SARFAESI Act'].

4. Pursuant to the same, on 10.11.2010, the respondent Bank issued an auction notice and brought the property for sale. In spite of the proceedings taken by the Bank, periodic payments were being made to the loan account and the Bank did not proceed with the auction sale. Thereafter, the respondent Bank approached the Debts Recovery Tribunal-III, Chennai by filing O.A.No.155 of 2013 making a claim for recovery of Rs.87,37,531/-. The Tribunal issued the Recovery Certificate in DRN No.223 of 2013 dated 24.10.2013 for a sum of Rs.91,30,117.90. Based on the Recovery Certificate, a notice dated 25.10.2013 was issued for the recovery of amount. Even in the Lok Adalat, due to some crisis, the settlement of Rs.56,00,000/- was not able to be paid to the Bank by the husband of the petitioner. The property which, the husband of the petitioner had mortgaged with the respondent Bank is a building consisting of 3044 sq.ft. and the rents have not been received from the building for nearly 6 to 7 years due to the auction taken by the Bank and as a result of which, the dues were not able to be repaid in time.

5. Thereafter, the respondent Bank issued auction notice dated 21.01.2017 stating that the outstanding dues is to the tune of Rs.1,70,74,224.50/- but the reserve price for auction was fixed only at Rs.49,50,000/-. The petitioner did not

know how the outstanding amount was arrived at Rs.92,46,571.50 as on 23.12.2013, which was settled in the Lok Adalat for a sum of Rs.56,00,000/-, suddenly shot upto Rs.1,70,74,224.50 as on 21.01.2017. Even after issuing the auction notice as a second time, the respondent Bank did not proceed with the auction and the property was not auctioned.

6. All of a sudden, the respondent Bank has approached the Debts Recovery Tribunal for attachment of the petitioner's residential house, which has not been mortgaged with the respondent's Bank. On 25.03.2017, the Debts Recovery Tribunal, has passed an order of attachment as against the residential house of the petitioner. Without selling the mortgaged property given by the principal borrower towards the realization of the dues, the attempt made by the respondent Bank for selling the property of the petitioner is not fair and unwarranted.

7. As of now, the petitioner was informed that the respondent Bank are taking steps to bring her property for sale. The representation dated 25.04.2017 given by the petitioner for taking the proceedings against the mortgaged property of the principal borrower towards the recovery of the dues, has not considered by the Bank authorities. Being aggrieved by the attachment order passed against the petitioner's property, the present Writ Petition is filed.

8. According to Mr.S.Jayakumar, learned counsel for the petitioner, attaching the property of the petitioner before selling the mortgaged property, is not at all necessary for the Bank authorities.

9. On the other hand, the learned counsel for the respondent Bank had opposed the writ petition stating that being the Guarantor to the loan availed by the husband of the petitioner, the respondent Bank is having every right to sell the property owned by her.

10. We have heard both parties and carefully considered the rival submissions.

11. In respect to the Guarantor, 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."

12. 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."

13. 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."

14. In this occasion, it is necessary to see the contents of the counter affidavit filed by the respondent Bank. In paragraph no.6 of the counter affidavit, the respondent Bank has stated that at the time when the respondent Bank initiated auction against the principal through their Authorized Officer under Section 13(4) of SARFAESI Act by taking possession of the secured asset, there was obstruction created by the principal and hence, the Authorized Officer of the respondent Bank took symbolic possession of the secured asset on 16.09.2009 by strictly following the procedures contemplated under the Act. In the meanwhile, the principal borrower has filed an application before the Debt Recovery Tribunal in S.A.No.102 of 2010 and obtained an order of stay. After vacating the stay, only on 16.12.2010, physical vacant possession of the property was handed over to the respondent.

15. On 27.01.2011, some third parties broke open the lock of the sealed property and entered into the premises and also took the custody of the property. More than that one K.Raja claiming to be a lessee in the said premises had filed an appeal under Section 17 before the Debts Recovery Tribunal, Chennai. After issuance of the Recovery Certificate, the principal borrower, P.Durairaj has approached the Lok Adalat, in which, he agreed to pay a sum of Rs.56,00,000/- in six installments and also agreed that the first installment of Rs.5,00,000/- shall be paid on or before 05.12.2013.

16. However, the respondent Bank has issued auction sale notice dated 31.10.2015 fixing the date of auction on 18.12.2015 with a reserve price of Rs.55,00,000/-. The said auction did not take place for want of bidders. Again, the respondent Bank brought the mortgaged property for sale and issued a fresh auction notice dated 21.01.2017 fixing the auction on 10.03.2017 and the said auction has also been failed, as there were no bidders. The third attempt made by the respondent Bank has also not taken place for want of bidders. Only in the said circumstances, the respondent Bank initiated the recovery proceedings against the petitioner and days have passed, the outstanding sum was increased to the tune of Rs.1,79,11,755.50.

17. Therefore, on culling out the entire circumstances, it reveals the fact that the respondent Bank has primarily initiated the auction only against the principal debtor and not against the petitioner. Even after issuing three auction sale notices, the respondent Bank has failed in its attempt to sell the property. Only in the said circumstances, they initiated the recovery proceedings against the petitioner.

18. In this occasion, it is relevant to consider the judgment of the Hon'ble Apex Court in INDUSTRIAL INVESTMENT BANK OF INDIA vs. BISWANATH JHUNJHUNWALA reported in (2009) 9 SCC 478, wherein it has held as follows:

"16. In State Bank of India v. M/s. Indexport Registered (1992) 3 SCC 159, this Court held that the decree holder bank can execute the decree against the guarantor without proceeding against the principal borrower. The guarantor's liability is coextensive with that of the principal debtor.

17. In that case, this court further observed that: (Indexport case (1992) 3 SCC 159, p.164, para 10)

"10. ... The execution of the money decree is not made dependent on first applying for execution of the mortgage decree. The choice is left entirely with the decree-holder. The question arises, whether a decree which is framed as a composite decree, as a matter of law, must be executed against the mortgage property first or can a money decree, which covers whole or part of decretal amount covering mortgage decree can be executed

earlier. There is nothing in law which provides such a composite decree to be first executed only against the [principal debtor]."

The Court further observed that (Indexport case (1992) 3 SCC 159, p.165, para 13) "the liability of the surety is coextensive with that of the principal debtor, unless it is otherwise provided by the contract".

18. The term "coextensive" has been defined in the celebrated book of Pollock & Mulla on Indian Contract and Specific Relief Act, 10th Edn., at page 728 as under:

"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."

19. Further, in the same judgment, in para 27, the Hon'ble Apex Court observed as follows:

"27.The legal position as crystallised by a series of cases of this Court is clear that the liability of the guarantor and principal debtors is coextensive and not in alternative. When we examine the impugned judgment in the light of the consistent position of law, then the obvious conclusion has to be that the High Court under its power of superintendence under Article 227 of the Constitution of India was not justified to stay further proceedings in OA No.156 of 1997. Consequently, the appeal is allowed and the impugned judgment of the High Court of Calcutta is set aside."

20. So, the factual aspects considered by the Hon'ble Apex Court is fully applicable to the present case. Since the guarantor is having the coextensive liability along with principal debtor, we are not in a position to stay the proceedings initiated by the respondent Bank. Only due to the

failure in the attempt made before the principal debtor, the Bank Authorities have initiated auction against the property having by the guarantor. Therefore, in the said circumstances, it cannot be ordered as the Bank Authorities should sell the mortgaged property of the principal borrower before initiating the attachment proceedings against the property having by the petitioner. Thus, the Writ Petition filed by the petitioner is not having any merits.

21. In the result, Writ Petition is dismissed. No Costs. Consequently, connected writ miscellaneous petitions are closed.

Sd/-

Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

sri

+2cc to M/s.Ramalingam & Associates, Advocate SR.79484

+2cc to Mr.S.Jayakumar, Advocate SR.79966

Pre-delivery order made in

W.P.No.10927 of 2017

and W.M.P.Nos.11895 & 29552 of 2017

PM(CO)

CB(04/11/2019)