IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED :17-03-2020

CORAM

THE HON'BLE MR.JUSTICE M.M.SUNDRESH

AND

THE HONOURABLE MR.JUSTICE KRISHNAN RAMASAMY

W.P.No.22701 OF 2019

Semalaiappan ...Petitioner

-vs-

1. The Chief Manager & Authorised Officer,
   Andhra Bank, Coimbatore Main Branch,
   17, Mill Road, Coimbatore-641 002.

2. The Chief Manager & Authorised Officer,
   Punjab National Bank, A.G.M.Branch,
   774, Oppanakara Street,
   Coimbatore-641 001.

3. The Branch Head,
   Punjab National Bank,
   Park Road Branch,
   Tiruppur.

4.Loganathan ...Respondents

Petition under Article 226 of the Constitution of India, praying for issuance of a Writ of Mandamus to direct the respondents 1 and 2 to take measures against the primary security in the nature of mortgage and hypothecation of the assets of M/s.Rohini Textiles Industries (P) Ltd., under the provision of the SARFAESI Act, being the assets more than sufficient to recover the entire liabilities of the said company, without disturbing any of the personal immovable properties of the guarantors.

For Petitioner : Mr.Om Prakash,
Senior Counsel,
for Mr.V.Jayachandran.

For Respondent 1 : Mr.P.Veeraraghavan

For Respondents 2 & 3 : Mr.M.L.Ganesh

For Respondent 4 : Mr.S.Mukunth,
for M/s.Sarvabhauman
Associates.

ORDER

Petitioner is one of the guarantors for the loan amount extended to M/s.Rohini Textiles Industries (P) Ltd., in short ''the Company'', by the respondent banks. Apart from the petitioner, his wife, son and daughter-in-law also stood as guarantors for repayment of the loan amount of the respondent banks.

2. The respondent banks sanctioned a loan of Rs.120.00 crores to the company. To secure the said loan, the company also provided primary securities of its fixed assets valued at Rs.141.83 crores as on 13.03.2015 and further assets were procured using enhanced financial assistance extended by the first respondent. The primary securities of all the Units as on 31.03.2016 were at Rs.249.00 crores. Therefore, the petitioner contended that the banks are fully secured by the primary securities in the nature of private properties of the promoters.

3. Due to age factor, the petitioner was retired from the directorship of the company and the company was left with the management of his son and daughter-in-law, and the wife of the petitioner as a nominal Director.

4. In September,2016, the petitioner's son and daughter-in-law tried to sell the SIPCOT Processing House located at the Industrial Estate, Perundurai, to reduce the burden and ease out the pressure, as the market conditions for textile were not conducive. The fourth respondent showed interest to buy the said Unit for a consideration of Rs.100.00 crores. Though the value of the machineries and other assets of the said Unit was worth Rs.167.45 crores as on 31.03.2016, the company had agreed to sell the said Unit to the fourth respondent for Rs.100.00 crores, on his assurance of payment of 13% per annum interest for the said amount till the amount is paid to the respondent banks, apart from relieving the securities given by the company and its guarantors.

5. Since both the fourth respondent and the son of the petitioner agreed for sale of the SIPCOT Unit for a sum of Rs.100.00 crores, the discussions held on 14.12.2016 were

minuted and duly consented by both the parties. On 15.12.2016, a Memorandum of Understanding was entered into, incorporating various terms and conditions. As both the parties agreed, the son of the petitioner approached the first and second respondent banks for grant of their approval for sale of the property for a sum of Rs.100.00 crores. However, the banks refused to grant permission for sale of the said property for a sum of Rs.100.00 crores. Subsequently, the banks invoked recovery proceedings under the SARFAESI Act, due to non-payment of instalments of the loan amount, as agreed to by the company.

6. On account of good relations between the son of the petitioner and the fourth respondent, the son of the petitioner allowed the fourth respondent to run the SIPCOT Industrial Unit at Perundurai, but the banks strongly made an objection for the proposal of sale. Thereafter, when the son of the petitioner tried to re-enter into the SIPCOT Industrial Unit, the fourth respondent and his uncle Auditor Murugesan lashed out life threat against him. Therefore, the son of the petitioner committed suicide on 23.03.2017 and a police complaint was also filed in that regard.

7. Mr.Om Prakash, learned Senior Counsel for the petitioner, appearing on behalf of Mr.V.Jayachandran, has submitted that when the respondent banks have objected the move of Memorandum of Understanding, dated 15.12.2016, entered into between the son of the petitioner and the fourth respondent, it is the bounden duty of the said banks to take over all the hypothecated machineries and other assets, which were worth more than Rs.167.00 crores as on 31.03.2016, and, without doing so, the banks have negotiated once again with the fourth respondent and sold the said SIPCOT property for Rs.101.50 crores with 100% funding by the third respondent bank. He would further submit that the banks colluded with the fourth respondent and sold the property for a throw-away price.

8. The learned Senior Counsel would also contend that without taking steps to realise the loan amount in a legal manner, strangely, the first respondent issued Demand Notices, dated 27.06.2017, 28.06.2017 and 29.06.2017 under Section 13 (2) of the SARFAESI Act, demanding the company and the personal guarantors to pay Rs.101.71 crores to the first respondent and Rs.75.35 crores to the second respondent. The bank also issued Notice, dated 16.04.2019, under Section 13 (4) of the Act against the company. In the Demand Notice, dated 27.06.2017, the first and second respondent banks have shown various properties vide Nos.1 to 9 immovable properties, which were standing in the name of the son of the petitioner, excluding the primary securities mentioned in the sanction letters, dated 03.10.2015 and 31.12.2015. Likewise, in the Notice, dated

28.06.2017, the respondent banks have shown various immovable properties vide Nos.1 to 4 (a) to 4 (m) (totally 17 properties) of the son of the petitioner, excluding the primary securities. Accordingly, the learned Senior Counsel submitted that the respondent banks, in collusion and connivance with the fourth respondent, entered into an agreement, dated 28.09.2018, to sell the property.

9. The mainstay of the learned Senior Counsel for the petitioner is two fold. Firstly, when the primary securities of the company are very much available, invoking the provisions under the SARFAESI Act to take over the properties of the guarantors is not permissible. Secondly, if the primary securities of the company are realised, the same would meet out the entire liabilities of the company and, therefore, the respondent banks have an obligation to realise the primary securities and collateral securities of the company and if they are not sufficient to meet the requirement, then only, the banks are supposed to take action against the securities of the guarantors.

10. According to the learned Senior Counsel, when the son of the petitioner and the fourth respondent entered into a Memorandum of Understanding, dated 15.12.2016, for sale of the SIPCOT Industrial Unit for Rs.100.00 crores, the banks refused to grant permission; however, the banks, in collusion with the fourth respondent, entered into an agreement on 28.09.2018 to sell the SIPCOT Industrial Unit for a sum of Rs.101.50 crores. When the banks have not allowed the sale of the property for Rs.100.00 crores as per the MoU entered into between the son of the petitioner and the fourth respondent, after two years, they have entered into an agreement with the fourth respondent to sell the property for almost the same amount. If the banks had allowed to sell the property for Rs.100.00 crores, the company would have settled the dues of the banks without any further interest up to the year 2018. Therefore, the learned Senior Counsel contended that due to the fault of the respondent banks, the SIPCOT Industrial Unit at Perundurai was not able to revive and hence the banks are wholly responsible for the entire malafide acts in the transactions. Accordingly, he concluded his arguments by contending that without realising the primary securities of the company, the respondent banks are not supposed to disturb the personal immovable properties of the guarantors and hence this Writ Petition.

11. On the other hand, learned counsel for the respondent banks would contend that at the time of granting loan of Rs.120.00 crores, the company's properties were mortgaged as primary securities, apart from the guarantors' securities, and, in case of default of payment of the loan, it is for the banks

to select the properties to be sold to realise the loan. They would further contend that wherever the properties are available either of the guarantors or the primary securities, which are easily realisable, the banks have every right to bring the same for auction to realise the dues. The petitioner is a guarantor to the loan and if the guarantor's properties are easily realisable, the banks have absolute right over the said properties to bring the same for auction either along with primary securities or only singly. The guarantor has no business to question the selection of the banks to bring his properties into auction. Therefore, the learned counsel contended that this Writ Petition is innocuous in nature and the petitioner cannot dictate terms to the secured creditors as to how to enforce the securities for the amount due to the respondent banks. The learned counsel would submit that loan was granted by the Consortium and, therefore, the Consortium banks have got prerogative to enforce the securities, which are easily realisable. Further, they would contend that the liability of the borrower and the guarantor are co-extensive in nature in terms of Section 128 of the Indian Contract Act and as such the petitioner and the borrower are jointly and severally liable to pay the huge outstanding loan of Rs.34.47 crores to Punjab National Bank and Rs.60.38 crores to Andhra Bank, aggregating to the tune of Rs.94.83 crores. According to the learned counsel, the Apex Court as well as various High Courts repeatedly held that the secured creditors have got every right to proceed against the guarantors simultaneously in order to recover the outstanding loan amount.

12. We have heard the learned counsel for the parties and also perused the material available on record.

13. Admittedly, the loan was granted by the respondent banks to the company to an extent of Rs.120.00 crores. For the said loan, the petitioner, his wife, son and daughter-in-law stood as guarantors. The company provided its movable and immovable properties as primary securities and the guarantors also provided their properties as security for repayment of the loan amount.



14. Now, the issue to be decided in the present case is, whether the banks have prerogative to proceed against the properties of the guarantors, without proceeding against the primary securities of the company.

15. Under Section 128 of the Indian Contract Act, the liabilities of the borrowers and the guarantors are co-extensive in nature. Therefore, the petitioner and the borrower are jointly and severally liable to pay the outstanding loan of the company. Since the liabilities of the borrowers and the guarantors are co-extensive, joint and several to pay the amount, certainly, the answer to the above question would be that the banks have got all the prerogatives to take action against the guarantors' properties.

16. It is a settled law that the banks have prerogative over selection of the properties to bring the same for sale and to realise the loan amount. Therefore, the petitioner, being a guarantor, has no right to dictate terms to the secured creditors how to enforce the secured assets for auction to recover the loan amount.

17. In the case on hand, even during the year 2016, the son of the petitioner and the fourth respondent entered into a Memorandum of Understanding for sale of the property for Rs.100.00 crores. After entering into the said MoU, when the son of the petitioner and the fourth respondent approached the respondent banks, the banks refused to accept the said proposal. That was because, the company was paying instalments without any default, as stated by the petitioner. According to the petitioner, the company was paying instalments of loan without any default up to the year 2017. Thereafter, since the default was made by the company, the respondent banks were forced to enter into a sale agreement with the fourth respondent for sale of the property for a sum of Rs.101.50 crores. Therefore, we are of the considered view that the said transaction of the banks cannot be questioned, as the same is entered into, after default was made by the company, whereas, the proposal mooted by the son and the fourth respondent was in the year 2016.

18. Since the banks have got prerogative right to enforce the securities which are easily enforceable, we do not find any fault on the part of the Consortium Banks in taking action against the properties of the guarantors to realise the dues of the banks. As we have have already stated above, the liabilities of the borrower and the guarantors are co-extensive in nature and, therefore, the guarantors, including the petitioner, and the borrower are jointly and severally liable to pay the outstanding loan amount. It is the choice and prerogative of the Consortium Banks to proceed against the securities, which are easily available for enforcement.

19. In such view of the matter, we do not find any merit in this Writ Petition and it is, accordingly, dismissed. No costs. Consequently, the connected W.M.P.No.22265 of 2019 is also dismissed.

Sd/-
Assistant Registrar(CS VI)

//True Copy//

Sub Assistant Registrar

dixit

To

1. The Chief Manager & Authorised Officer,
   Andhra Bank, Coimbatore Main Branch,
   17, Mill Road, Coimbatore-641 002.

2. The Chief Manager & Authorised Officer,
   Punjab National Bank, A.G.M.Branch,
   774, Oppanakara Street,
   Coimbatore-641 001.

3. The Branch Head,
   Punjab National Bank,
   Park Road Branch,
   Tiruppur.

+1cc to Mr.M.L.Ganesh, Advocate, S.R.No.23948
+1cc to Mr.P.Veera Raghavan, Advocate, S.R.No.23992
+1cc to Mr.V.Jayachandran, Advocate, S.R.No.24138



Pre-Delivery Order
in W.P.No.22701 OF 2019

LN(CO)
KKV/15/06/2020