

AFR

HIGH COURT OF ORISSA : CUTTACK.

W.P.(C) No. 21465 of 2022

(in the matter of an application under
Articles 226 & 227 of the Constitution of India, 1950)

KSHITISH KUMAR MOHANTA

...

Petitioner

Dr. Sujata Dash,
Advocate for the petitioner

-versus-

***THE BRANCH MANAGER, UNION
BANK OF INDIA & OTHERS***

...

Opposite Parties

Mr. Amit Kumar Nath,
Advocate for opposite party No.1

Date of Hearing and Order : 26.08.2022

CORAM:

MR. JUSTICE JASWANT SINGH

AND

MR. JUSTICE MURAHARI SRI RAMAN

ORDER

1. This matter is taken up by virtual/physical mode.
2. The Petitioner, who stood as guarantor for a loan of Rs.30,00,000/- (rupees thirty lakhs) availed by his friend, late Ganeswar Mohanta, from Union Bank of India, Karanjia Branch in the district of Mayurbhanj in connection with business in the
P.T.O.

name and style “M/s. Ganesh Traders”, has filed this writ petition craving for following reliefs:

*“*** issue a writ of mandamus/certiorari or any other Writ by quashing the e-auction notice dated 29/07/2022 for sale of the property of the petitioner as per Annexure-4 (to be read as Annexure-1) and opposite party bank may kindly be directed to recover the amount from the legal heirs of deceased Ganeswar Mohanta namely the principal borrower ***.”*

3. Dr. Sujata Dash, Advocate for the petitioner submitted that the friend of the Petitioner who was the loanee (died on 10.09.2020) left behind legal heirs with huge property which is sufficient to liquidate the loan liability. It is complained that during the pendency of Original Application bearing No.376 of 2021 filed by the opposite party-bank in the Debts Recovery Tribunal at Cuttack under Section 19 of the Recovery of Debts and Bankruptcy Act, 1993, particularly so when the petitioner has already filed his written statement on 25.05.2022 before the said Tribunal, action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for brevity hereafter referred to as “SARFAESI Act”), for e-auction sale fixing date on 30.08.2022 has unjustly been taken by the opposite party No.3-Union Bank of India, Regional Office in the district of Balasore *vide* Notice dated 29.07.2022 placed at Annexure-1. It is also submitted by the learned counsel for the petitioner that though the opposite party-bank is well aware of the fact that the original loanee-late Ganeswar Mohanta has left sufficient landed property to meet the loan amount, yet the property stands as collateral security belonging to the petitioner-guarantor is

proceeded with for e-auction without serving any notice thereunder. It is next contended by the counsel for the petitioner that as none of the mandatory process given out under Rules 5, 8 and 9 of the Security Interest (Enforcement) Rules, 2002, is followed, the petitioner has filed a petition for grant of stay of e-auction sale which could not be taken up for consideration due to non-availability of Presiding Officer of the Debts Recovery Tribunal at Cuttack and, therefore, approaching this Court by way of writ petition under the provisions of Article 226/227 of the Constitution of India, the petitioner-guarantor seeks reliefs as already mentioned in the foregoing paragraph.

4. Bearing in mind what has been stated in *Ram Kishun Vrs. State of Uttar Pradesh, (2012) 11 SCC 511* to the effect that public money should be recovered and recovery should be made expeditiously, the contentions of the petitioner are untenable in the eye of law inasmuch as the liability of the surety as per Section 128 of the Contract Act, 1872, is coextensive with that of the principal debtor and once the debtor failed to clear the debts then the surety will become liable and the liability will be immediate. The creditor does not need to exhaust his remedies against the debtor first prior to going against the guarantor. The Contract Act uses the word “surety” for guarantor and Section 128 thereof clearly states that “the liability of the surety is coextensive with that of the principal debtor, unless it is otherwise provided by the contract”, which means the guarantor will not only be liable for the principal loan amount, but also for any interest and charges which may have become due on the loan. In other words, it can be said that if bank

feels that chasing the borrower is difficult, it may resort to the easy way of targeting the guarantor by attaching the property which is easy access for it. Thus, the implication of this section is that the liability of the guarantor is immediate and cannot be deferred until the creditor exhausts his remedies against the principal debtor. [*Vide: State Bank of India Vrs. Saksaria Sugar Mills Ltd.*, (1986) 2 SCC 145; *Industrial Investment Bank of India Ltd. Vrs. Biswanath Jhunjunwala*, (2009) 9 SCC 478; *United Bank of India Vrs. Satyawati Tondon*, (2010) 8 SCC 110 = AIR 2010 SC 3413].

4.1. It has been laid down in *Ram Kishun Vrs. State of Uttar Pradesh*, (2012) 11 SCC 511 as follows:

“10. There can be no dispute to the settled legal proposition of law that in view of the provisions of Section 128 of the Contract Act, 1872 (hereinafter called “the Contract Act”), the liability of the guarantor/surety is coextensive with that of the debtor. Therefore, the creditor has a right to obtain a decree against the surety and the principal debtor. The surety has no right to restrain execution of the decree against him until the creditor has exhausted his remedy against the principal debtor for the reason that it is the business of the surety/guarantor to see whether the principal debtor has paid or not. The surety does not have a right to dictate terms to the creditor as to how he should make the recovery and pursue his remedies against the principal debtor at his instance. [*Vide Bank of Bihar Ltd. Vrs. Damodar Prasad*, AIR 1969 SC 297; *Maharashtra SEB Vrs. Official Liquidator*, (1982) 3 SCC 358 = AIR 1982 SC 1497; *Union Bank of India Vrs. Manku Narayana*, (1987) 2 SCC 335 = AIR 1987 SC 1078; *State Bank of India Vrs. Indexport Registered*, (1992) 3 SCC 159 = AIR 1992 SC 1740].

12. *Section 146 of the Contract Act provides that co-sureties are liable to contribute equally. Thus, in case there are more than one surety/guarantor, they have to share the liability equally unless the agreement of contract provides otherwise.*

4.2. It has been stated in *Bank of Bihar Ltd. Vrs. Dr. Damodar Prasad*, (1969) 1 SCR 620 = AIR 1969 SC 297 = (1969) 39 Comp Cas 133 that:

“4. *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 Vrs. Simpson [6 Ves Jun 714, 734 : 31 ER 1272, 1282]:*

‘But the surety is a guarantee; and it is his business to see whether the principal pays, and not that of the 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.

6. *It is now suggested that under Order 20 Rule 11(1) and Section 151 of the Code of Civil Procedure the Court passing the decree had the power to impose the condition that the judgment-creditor would not be at liberty to enforce the decree against the surety until the creditor has exhausted his remedies against the principal. Order 20 Rule 11(1) provides that “where and insofar as a decree is for the payment of money, the Court may for any sufficient reason at the time of passing the decree order that payment of the amount decreed shall be postponed or shall be made by instalments, with or without interest, notwithstanding anything contained in the contract under which the money is payable”. For making an order under Order 20 Rule 11(1) the court must give sufficient reasons. The direction*

postponing payment of the amount decreed must be clear and specific. The injunction upon the creditor not to proceed against the surety until the creditor has exhausted his remedies against the principal is of the vaguest character. It is not stated how and when the creditor would exhaust his remedies against the principal. Is the creditor to ask for imprisonment of the principal? Is he bound to discover at his peril all the properties of the principal and sell them; and if he cannot, does he lose his remedy against the surety? Has he to file an insolvency petition against the principal? The trial court gave no reasons for this extraordinary direction. The Court rejected the prayer of the principal debtor for payment of the decretal amount in instalments as there was no evidence to show that he could not pay the decretal amount in one lump sum. It is, therefore, said that the principal was solvent. But the solvency of the principal is not a sufficient ground for restraining execution of the decree against the surety. It is the duty of the surety to pay the decretal amount. On such payment he will be subrogated to the rights of the creditor under Section 140 of the Indian Contract Act, and he may then recover the amount from the principal. The very object of the guarantee is defeated if the creditor is asked to postpone his remedies against the surety. In the present case the creditor is a banking company. A guarantee is a collateral security usually taken by a banker. The security will become useless if his rights against the surety can be so easily cut down. The impugned direction cannot be justified under Order 20 Rule 11(1). Assuring that apart from Order 20 Rule 11(1) the Court had the inherent power under Section 151 to direct postponement of execution of the decree, the ends of justice did not require such postponement.”

4.3. In *State Bank of India Vrs. Indexport Registered*, (1992) 3 SCC 159 it has been laid down as follows:

“13. In the present case before us the decree does not postpone the execution. The decree is simultaneous and it is jointly and severally against all the defendants including the

guarantor. It is the right of the decree-holder to proceed with it in a way he likes. Section 128 of the Indian Contract Act itself provides that “the liability of the surety is coextensive with that of the principal debtor, unless it is otherwise provided by the contract”.

14. *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.”

15. *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.”

16. *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”.

17. *In Hukumchand Insurance Co. Ltd. Vrs. Bank of Baroda, AIR 1977 Kant 204 = (1977) 2 Kant LJ 194 = ILR (1977) 2 Kant 980 a Division Bench of the High Court of Karnataka had an occasion to consider the question of liability of the*

surety vis-a-vis the principal debtor. Venkatachaliah, J. (as His Lordship then was) observed:

“The question as to the liability of the surety, its extent and the manner of its enforcement have to be decided on first principles as to the nature and incidents of suretyship. The liability of a principal debtor and the liability of a surety which is coextensive with that of the former are really separate liabilities, although arising out of the same transaction. Notwithstanding the fact that they may stem from the same transaction, the two liabilities are distinct. The liability of the surety does not also, in all cases, arise simultaneously.”

18. *It will be noticed that the guarantor alone could have been sued, without even suing the principal debtor, so long as the creditor satisfies the court that the principal debtor is in default.*
19. *In Jagannath Ganeshram Agarwala Vrs. Shivnarayan Bhagirath, AIR 1940 Bom 247 = 42 BLR 451 = 190 IC 73 a Division Bench of the Bombay High Court (Kania and Wassoodew, JJ.) held that the liability of the surety is coextensive, but is not in the alternative. Both the principal debtor and the surety are liable at the same time to the creditors.*
20. *In Muthuvelappa Goundan Vrs. Palaniapa Chettiar, 1937 Mad WR 373, the facts were that the plaint combined two claims, one against defendants 1 to 3 and their children on the basis of a promissory note Ex. ‘A’ executed by defendants 1 to 3 and one Kasiappa, deceased, on August 29, 1931 and the other a claim against Kasiappa's sons (defendants 4 and 5) not merely on the promissory note but also on a security bond Ex. ‘B’ executed by Kasiappa on April 17, 1932 in respect of the amount due under Ex. ‘A’. The suit was decreed. An appeal was filed by defendants 1 to 3 against certain directions contained in the decree of the lower court as to the manner in which the decree is to be executed. The Subordinate Judge had to consider the contention put forward on behalf of Kasiappa's sons that the properties covered by Ex. ‘B’ should be sold only after*

the plaintiff had exhausted his remedies against defendants 1 to 3 and their family properties. Defendants 1 to 3 contended to the contrary. The trial court directed that the plaintiff should bring the secured properties to sale after exhausting the personal remedy against the defendants, meaning the remedy personally against defendants 1 to 3, and also the remedy against the family property of all the defendants. The appeal was filed by defendants 1 to 3 before the High Court. It was contended on behalf of the appellants that the lower court should have directed the plaintiff to proceed in the first instance against the security properties and only after they had been sold should the plaintiff have been permitted to proceed against the appellants personally. This contention was sought to be supported before the High Court by the analogy of a decree to be passed in mortgage suits. It was pleaded that provisions of Section 68 of the Transfer of Property Act should be applied as the remedy in respect of charge is governed by it. It was also urged on behalf of the appellants that on the true construction of Section 68, the course contended for by him would be the proper course. This contention of the appellants was negatived by the High Court. The High Court observed that this can apply only as between the mortgagor and the mortgagee and the appellants had nothing whatever to do with the security bond. The relationship of the appellants was not of the mortgagor at all, and, therefore, Section 68 could not be invoked.”

4.4. This Court, in the case of *Orissa State Financial Corporation Vrs. Ramesh Chandra Behera and Another*, 2002 SCC OnLine Ori 21 = AIR 2003 Ori 30, has succinctly stated the law on the subject as follows:

“6. Law is no more *res integra* that; the liability of a surety is co-extensive with that of the principal debtor and a decree can be executed either against the principal debtor or the surety, at the discretion of the creditor. However, where the surety is made to discharge such liability of the principal

*debtor, such surety has got a right to be reimbursed by the principal debtor. ****

5. Further argument is advanced by Ms. Dash masquerading that notice under Section 13(2) of the SARFAESI Act was not served and she contended that as such the notice dated 29.07.2022 for e-auction sale is illegal. The copy of notice dated 21.10.2021 to take symbolic possession of the assets available as one of the annexures to the written statement (Annexure-3 to the writ petition) filed by the petitioner before the Debts Recovery Tribunal in O.A. No.376/2021 being Defendant No.3, reads thus:

“***

Guarantor

Mr. Kshitish Kumar Mohanta

S/o. Narahari Mohanta,

At/PO: Raruan

Dist. Mayurbhanj – 757 025

Sir,

Sub: Notice to take possession of the assets, A/c. Ganesh Traders

*Please refer to our **demand notices dated 13.08.2021, issued under Section 13** as per the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 **calling upon you to discharge** in full a sum of Rs.24,01,017 [Twenty Four Lakhs One Thousand and Seventeen only] as on 30.06.2021 together with interest mentioned therein. In spite of notice issued by us, **you have failed to discharge** you liability in full even after the expiry of 60 days notice period, hence the bank has no other option but to take further action by way of enforcement of securities by taking possession and selling the securities for realizing the bank dues as contemplated under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. ****

[Emphasis supplied]

5.1. Pertinent here to refer to Rule 3 of the Securities Interest Rules, 2002, dealing with “Demand Notice” which reads as follows:

“(1) The service of demand notice as refereed to in sub-section (2) of Section 13 of the Act shall be made by delivering or transmitting at the place where the borrower or his agent, empowered to accept the notice or documents of behalf of the borrower, actually and voluntarily resides or carries on business or personally works for gain, by registered post with acknowledgement due, addressed to the borrower or his agent empowered to accept the service or by Speed Post or by courier or by any other means of transmission of documents like fax message or electronic mail service:

Provided that where authorised officer has reason to believe that the borrower or his agent is avoiding the service of the notice or that for any other reason, the service cannot be made as aforesaid, the service shall be effected by affixing a copy of the demand notice on the outer door or some other conspicuous part of the house or building in which the borrower or his agent ordinarily resides or carries on business or personally works for gain and also by publishing the contents of the demand notice in two leading newspapers, one in vernacular language, having sufficient circulation in that locality.”

5.2. Cursory glance at the contents of the written statement (Annexure-3) stated to have been filed on 25.05.2022 in O.A. No.376 of 2021 pursuant to summons dated 06.10.2021 issued by the Debts Recovery Tribunal, Cuttack, where the aforesaid notice dated 21.10.2021 formed part thereof, manifests that not a single line of objection has been raised with regard to the fact mentioned in the said document. This clinches the issue to falsify the statement of the counsel for the petitioner that the proceeding under the SARFAESI Act was initiated without service of notice.

5.3. Under the aforesaid premises, it is safe to construe that the petitioner had the knowledge throughout about the initiation of proceeding under the SARFAESI Act after observing statutory formality. Therefore, despite availability of alternative remedy to question the factual determination *qua* service of notice and observance of necessary formality by the bank in order to initiate appropriate proceeding under Section 13(2) of the SARFAESI Act, the petitioner has avoided to take recourse of Section 17 of said Act. Nevertheless, the petitioner has stated to have approached this Court invoking extraordinary jurisdiction under Article 226/227 of the Constitution of India on the specious plea of “absence” of the Presiding Officer of the Debts Recovery Tribunal at Cuttack, and has feebly averred, without disclosing material particulars in the writ petition, that an application has been made to the said Tribunal praying therein for grant of stay of e-auction of property of the petitioner-guarantor.

6. In consequence, this Court declines to interfere with the e-auction sale notice dated 29th July, 2022 issued by Union Bank of India, Karanjia-2 Branch in the district of Mayurbhanj. Accordingly, the writ petition is dismissed.

(JASWANT SINGH)
JUDGE

(M.S. RAMAN)
JUDGE