IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 22.04.2022

Coram:

THE HONOURABLE MR.MUNISHWAR NATH BHANDARI, Chief Justice
and
THE HONOURABLE MR.JUSTICE D.BHARATHA CHAKRAVARTHY

W.P.No.10200 of 2022
and
W.M.P.No.9901 of 2022

M.Ramamoorthy .. Petitioner

Vs.

The Authorised Officer,
City Union Bank Limited,
Credit Recovery and Management Department,
Administrative Office No.24-B,
Gandhi Nagar,
Kumbakonam - 612 001. .. Respondents

Writ Petition filed under Article 226 of the Constitution of India, praying for issuance of a Writ of Certiorari to call for the records pertaining to the Auction Notice Ref.No.C.O/REC/NPA/2022, dated 15.03.2022 pertaining to property of the petitioner being house and ground bearing Door No.5, Annanagar, Seerkadu Road, Thiruvalluvar University, Katpadi Taluk, Vellore District, Comprised in Survey No.75/4B, New Subdivided Survey No.75/4B6 of an extent of 2639 Sq.ft in respect of Auction to be held on 25.04.2022 at 1.00 P.M at City Union Bank Limited, Gudiyatham Branch, Ward No.3, Muthu Naidu Street, Pichanoor, Gudiyatham, Vellore - 632 602.

For petitioner : Mr.K.Venkateswaran

ORDER
(The Order of the Court was made by The Honourable Chief Justice)

By this Writ Petition, a challenge has been made to the auction notice, dated 15.03.2022 on the ground that reserve price of the borrower's property would be sufficient to satisfy the loan amount advanced by the Bank. Thus, auction of guarantor's property be stayed.

2. We have considered the submissions made by the learned counsel for the petitioner. We find that the financial institutions can recover the due amount by enforcing it against the guarantor without affecting the borrower and vice versa. The guarantor cannot press for recovery of the amount from the borrower only, in view of the judgment of the Apex Court in the case of Industrial Investment Bank of India Vs. Biswanath Jhunjhunwala, reported in 2009 (9) SCC 478, and the relevant portion of the same read as follows:

> "15. This Court, while approving the said judgment, observed that: (Damodar Prasad case (Bank of Bihar Limited Vs. Dr.Damodar Prasad) [AIR 1969 SC 297 : (1969) 1 SCR 620] , AIR p.299, para 6)
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> > "6. … 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."
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> 16. In SBI v. Indexport Registered [(1992) 3 SCC 159 : AIR 1992 SC 1740] 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 : AIR 1992 SC 1740] , SCC 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] [Ed.: The word in the original is "property"—however the import is the same: that a composite decree can be executed both against the principal debtor or the sureties.] ."

The Court further observed that (Indexport case [(1992) 3 SCC 159 : AIR 1992 SC 1740] , SCC 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". [Ed.: This is the verbatim text of Section 128 of the Contract Act, 1872.]

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

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. The appellant shall be entitled to costs of Rs 50,000."

3. Thus, the financial institutions have been given an option to recover the amount from the guarantor also. Accordingly, we do not find that any case is made out in favour of the petitioner in reference to the prayer made. Accordingly, this Writ Petition fails and is dismissed. There shall be no order as to costs. Consequently, the connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CS-III)

// True Copy //

Sub Assistant Registrar

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To

The Authorised Officer,
City Union Bank Limited,
Credit Recovery and Management Department,
Administrative Office No.24-B,
Gandhi Nagar,
Kumbakonam - 612 001.

+1cc to Mr.K.Venkateswaran, Advocate SR.No.28115

W.P.No.10200 of 2022

NK(CO)
CB(02/05/2022)