IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
APPELLATE SIDE

Before:
The Hon'ble Justice Om Narayan Rai

WPA 26970 of 2024

Biswajit Pattanayak
Vs.
Union of India & Ors.

For the Petitioner : Mr. Samir Ranjan Aich
……….Advocate

For the Union of India : Mr. Kalidas Sahar Roy
………..Advocate

For the Respondent Nos. 2 and 3 :Mr. Pijush Kanti Ray
Mr. Surajit Mukherjee
……..Advocates

Heard on : 25.03.2025

Judgment on : 25.03.2025

The Court:

1. Affidavit of service filed in Court today be kept with the record.
2. This writ petition assails the action of the bank under Section 13(4) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (in short 'said Act').
3. Mr. Samir Ranjan Aich, the learned Advocate for the writ petitioner submits that the bank has acted in a high handed manner in taking physical possession of the writ petitioner's property and putting it on auction under the said Act despite the fact that the writ petitioner is a guarantor and not the borrower. The writ petitioner complains that the bank has for obvious reasons not pursued its remedy against the principal borrower and has latched on to the property of the guarantor. It has been further submitted that it is impermissible for the bank to take recourse to the remedy only against the guarantor by leaving the borrower scot free. It is, therefore, prayed that the property of the writ petitioner whereof physical possession

has been taken and which has been sold in auction may be restored to the writ petitioner.

4. Mr. Pijush Kanti Ray, learned Advocate appearing on behalf of the respondent nos. 2 and 3, submits that the instant writ petition is not entertainable for more than one reasons. He submits that challenging the action of the bank under Section 13(4) of the said Act, the writ petitioner has already approached the Debt Recovery Tribunal No. 2, Kolkata, by filing an application under Section 17 of the said Act being SA No. 534 of 2022. Relying on the judgments of the Hon'ble Supreme Court in ***Kanaiyalal Lalchand Sachdev vs. State of Maharashtra and Others*[1]*,*** ***Devi Ispat Limited and Another vs. State Bank of India and Others*[2]**, and ***Phoenix Arc Private Limited vs. Vishwa Bharati Vidya Mandir and Others*[3]**, it is submitted that writ remedy is no longer available to the writ petitioner. He further submits that the writ petitioner is guilty of suppression of material facts and that the writ petitioner has not indicated to the Court that he has already approached the Debts Recovery Tribunal prior to filing of this writ petition. In this regard he produces a copy of the print out of the case status obtained from the official website of the Debts Recovery Tribunal-2, Kolkata and a copy of the order dated October 4, 2024 passed in SA 534 of 2022 (Sri Biswajit Pattanayak vs. State Bank of India). The same are taken on record.

5. Laying emphasis on the observations of the Hon'ble Supreme Court in paragraph 21 of ***Phoenix Arc Private Limited (supra)***, it has been submitted that the practice of approaching this Court under Article 226 of the Constitution of India after having approached the Debt Recovery Tribunal under Section 17 of the said Act has been strongly deprecated by the Hon'ble Supreme Court.

6. Upon hearing the learned Advocate for the respective parties and perusing the material on record, this Court finds that this writ petition is not fit to be entertained. There is a plethora of judgments of the Hon'ble Supreme Court on the point that if a person is aggrieved by any action taken by the

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[1] *(2011) 2 SCC 782*
[2] *(2014) 5 SCC 762*
[3] *(2022) 5 SCC 345*

secured creditor under the provisions of the said Act, then, such person should approach the Debts Recovery Tribunal by taking recourse to Section 17 of the said Act.

7. The contention of the writ petitioner that the bank has proceeded only against the guarantor and not the borrower is equally without merit. The provisions of Section 128 of the Contract Act make it amply clear that the liability of a guarantor is co-extensive with that of the borrower or the principal debtor.

8. Furthermore it is well settled that a creditor is free to take recourse to any remedy available to it against either the Borrower or the Guarantor or against both of them. In fact this issue was directly answered by the Hon'ble Supreme Court in the context of proceedings under the said Act of 2002, in the case of ***United Bank of India v. Satyawati Tondon*[4]*:***

> ***37.*** *The question whether the appellant could have issued notices to Respondent 1 under Sections 13(2) and (4) and filed an application under Section 14 of the SARFAESI Act without first initiating action against the borrower i.e. Respondent 2 for recovery of the outstanding dues is no longer res integra. In Bank of Bihar Ltd. v. Dr. Damodar Prasad [AIR 1969 SC 297 : (1969) 1 SCR 620] this Court considered and answered in affirmative the question whether the Bank is entitled to recover its dues from the surety and observed: (AIR p. 299, para 6)*
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> *"6. … 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 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."*
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> ***38.*** *In SBI v. 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 and then proceeded to observe: (SCC p. 164, para 10)*
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> *"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]."*

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[4] *(2010) 8 SCC 110*

> ***39.*** *In Industrial Investment Bank of India Ltd. v. Biswanath Jhunjhunwala [(2009) 9 SCC 478] this Court again held that the liability of the guarantor and principal debtor is coextensive and not in alternative and the creditor/decree-holder has the right to proceed against either for recovery of dues or realisation of the decretal amount.*
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> ***40.*** *In view of the law laid down in the aforementioned cases, it must be held that the High Court completely misdirected itself in assuming that the appellant could not have initiated action against Respondent 1 without making efforts for recovery of its dues from the borrower, Respondent 2.*

9. On top of everything, the present writ petition, as has been rightly contended by Mr. Ray, is an abuse of the process of law in the wake of the fact that the writ petitioner has already approached the Debts Recovery Tribunal by filing SA 534 of 2022.
10. The writ petition is, therefore, dismissed.
11. There shall, however, be no order as to costs.
12. Urgent Photostat certified copy of this order, if applied for, be given to the parties on priority basis.

(Om Narayan Rai, J.)