



Our attention has been drawn to a decision of this Court in Pawan Kumar Jain Vs. Pradeshiya Industrial and Investment Corporation of U.P. Ltd. and Ors. - (2004) 6 SCC 758 wherein a Division Bench of this Court opined as under:

" 8. In our view, the above set out provisions of the U.P. Act are very clear. Action against the guarantor cannot be taken until the property of the principal debtor is first sold off. As the appellant has not sold the property of the principal debtor, the action against the appellant cannot be sustained. We, therefore, set aside the recovery notice..."

Our attention has, however, been drawn to some decisions of Allahabad High Court, to which we need not advert to, that proceeding against a guarantor would be covered by Section 3(1) (d) of the Act. Section 3(1) (d) of the Act reads as under:

(d) to any agreement providing that any money payable thereunder to the State Government shall be recoverable as arrears of land revenue; and such person

(i) makes any default in repayment of the loan or advance or any installment thereof; or

(ii) having become liable under the conditions of the grant to refund the grant or any portion thereof, makes any default in the refund of such grant or portion or any installment thereof; or

(iii) otherwise fails to comply with the terms of the agreement, then, in the case of the State Government, such officer as may be authorized in that behalf by the State Government by notification in the Official Gazette, and in the case of Corporation of a government company the Managing Director thereof, and in the case of a banking company, the loan agent thereof, by whatever name called, may send a certificate to the Collector, mentioning the sum due from such person and requesting that such sum together with costs of the proceedings be recovered as if it were an arrears of land revenue."

Section 4 provides for a saving clause, Clause (b) of Sub-Section (2) of Section 4 reads as under:

"(b) in every case of a mortgage, charge or other encumbrance on immovable property, such property or, as the case may be, the interest of the defaulter therein, shall first be sold in proceedings for recovery of the sum due from that person as if it were an arrear of land revenue, and any other proceedings may be taken thereafter only if the Collector certifies that there is no prospect of realization of the entire sum due through the first-mentioned process within a reasonable time" (emphasis added)

This Court in Pawan Kumar Jain (Supra) did not consider the effect of Section 3(1) (d) of the Act. Under the general law, namely, Section 128 of the Indian Contract Act, the liability of a borrower and that of the

guarantor is co-extensive. In our opinion if the State had intended to make any provision contrary or inconsistent with the said general provision it should have specifically been so stated in the Act. Furthermore, Section 4 (2) (b) is an exception to Section 3 thereof. General power of recovery of dues as arrears of land revenues is provided for in Section 3. Section 4(2)(b), however, in our opinion speaks of a situation where the defaulter's immovable property is mortgaged, charged or otherwise encumbered and only in that event the same is required to be sold first and only in the event the entire amount is not recovered thereby any other proceeding may be initiated thereafter subject to the conditions laid down therein. We may, however, note that Section 4(2)(b) of the Act covers the case of a defaulter and not that of a guarantor. Even otherwise, ordinarily the property of a guarantor would not be subjected to any mortgage, charge, pledge or other encumbrance. Section 4 (2)(b) of the Act, therefore, being an exception to the general provision, namely, Section 3 thereof, we are of the opinion that it may not be correct to hold that a guarantor is also covered by the said provision.

For the reasons aforementioned, we are of the opinion that the ratio in Pawan Kumar Jain(Supra) case may ultimately be found not to be correct. As we doubt the correctness of the said decision, we are of the opinion that the matter should be referred to a larger Bench. We direct accordingly.

Let the records be placed before the Hon'ble the Chief Justice of India for appropriate orders.

[ Meenu Sethi ]  
Court Master

[ Pushap Lata Bhardwaj ]  
Court Master