

(2012) 05 P&H CK 0160

High Court Of Punjab And Haryana At Chandigarh

Case No: CWP No. 6507 of 2011

Shanti Sarup Sharma

APPELLANT

Vs

State of Punjab and Others

RESPONDENT

Date of Decision: May 1, 2012

Acts Referred:

- Constitution of India, 1950 - Article 226, 227
- Penal Code, 1860 (IPC) - Section 406
- State Financial Corporations Act, 1951 - Section 2(c), 29, 31, 31(aa), 32G

Citation: AIR 2013 P&H 13 : (2012) 4 RCR(Civil) 766

Hon'ble Judges: Gurmeet Singh Sandhawalia, J; Ajay Kumar Mittal, J

Bench: Division Bench

Advocate: Prateek Pandit, for the Appellant; Gaurav Garg Dhuriwala, DAG, Punjab for the Respondent No. 1 and Mr. B.B. Sethi, Advocate for the Respondent No. 2 and 3, for the Respondent

Judgement

@JUDGMENTTAG-ORDER

G.S. Sandhawalia, J.

The present writ petition has been filed under Articles 226/227 of the Constitution of India seeking a writ in the nature of Certiorari for quashing the proceedings initiated by respondents No. 2 and 3 Punjab Financial Corporation (hereinafter referred to as "Corporation") u/s 29 of the State Financial corporation Act, 1951 (hereinafter referred to as "the Act") in respect of the residential property belonging to the petitioner bearing No. 2709/2719 situated in Ward No. 8, Sirhind Mandi, District Fatehgarh Sahib and for issuance of a writ in the nature of Mandamus directing the release of the said property. The case of the petitioner as pleaded is that son of the petitioner Rupinder Kumar Sharma was the sole proprietor of industrial concern M/s Aditi Agro Mills, Fatehgarh Sahib which had obtained a term loan of Rs. 40 lacs from the Corporation vide mortgage deed dated 31.3.1993. The

house in question bearing No. 2709/2719 situated in Ward No. 8, Sirhind Mandi, District Fatehgarh Sahib was the absolute ownership of Ved Parkash Sharma, father-in-law of the present petitioner and said Ved Parkash Sharma being the maternal grandfather of Rupinder Kumar Sharma in his capacity as surety/guarantor offered the said house as collateral security with respondent No. 2 for the purpose of raising loan and the same was, thus, mortgaged with the Corporation as per mortgage deed dated 31.3.1993. The properties belonging to the industrial concern measuring 1 kanals 14 marlas as well as the factory building alongwith the machinery was also mortgaged. The said industrial concern M/s Aditi Agro Mills, Fatehgarh Sahib started committing default from 15.3.1994 and accordingly, the Corporation took over the property u/s 29 of the Act. The father-in-law of the petitioner Ved Parkash Sharma passed away on 4.2.2008 executing a will dated 13.11.2006 whereby he bequeathed the said residential house in favour of his son-in-law, on the basis of which the present petitioner has become owner of the property. The Corporation purportedly exercising its powers u/s 29 of the Act has taken over the deemed possession of the house on 17.10.2002 in order to enforce the liability of the guarantor/surety. It is further pleaded that an FIR was also lodged against the son of the petitioner u/s 406 IPC at Police Station, Sirhind and he was convicted vide judgment dated 2.11.2007 and the son of the petitioner lost his mental equilibrium and left his house and thereafter the son of the petitioner was found with great efforts and till today he needs constant supervision and medical care having been rendered mentally unfit. It is further pleaded that proceedings u/s 29 of the Act could not be invoked against the guarantor and the Corporation had a right u/s 31(aa) for enforcing the liability of any surety and the claim of the Corporation was also time barred as default in repayment of loan was on 15.3.1994 and the last payment was due against the industrial concern on 15.3.2001. The Corporation had also written to the Nagar Council, Sirhind, District Fatehgarh Sahib that the house was mortgaged with the Corporation and, therefore, the ownership of the house should not be changed in the name of any other person vide letter dated 6.11.2009. It is further pleaded that the Corporation had no such right as the house could always be transferred to any person subject to the mortgage in favour of the Corporation. The property of industrial concern had also been sold away by the Corporation at throw away price of Rs. 12,18,100/- and also the machinery for Rs. 3,50,000/- whereas the Corporation had raised a demand of Rs. 2,69,82,610/- as per letter dated 10.12.2010 in response to a RTI query. The petitioner had been asked to make a payment of Rs. 40,67,392/- i.e. 15% as upfront amount for taking benefit of OTS scheme and in such circumstances the action of taking over the residential property of the guarantor was challenged.

2. The petition was contested on the ground that the will had not been probated and the petitioner did not have any right and the writ petition suffers from delay and laches as the possession of the house in question was taken on 17.10.2002 and the petition has been filed after a lapse of 9 years whereas the dues against the loan

advanced has accumulated beyond Rs. 2.69 crores. It is averred that the suit property being under mortgage with the special stipulation that the Corporation has a right to sell the property without court intervention, the writ petition was not maintainable. It was pleaded that the liability of the principal debtor and the surety was co-extensive and the value of the property was highly insufficient to discharge the liability and since the principal debtor has committed default in not paying the amount so advanced with stipulated interest, the Corporation was justified in taking action u/s 29 of the Act for recovery of the loan with interest by taking over possession of the residential house. It was further averred that Ved Parkash Sharma the original owner of the house was signatory to the mortgage deed dated 31.3.1993 and the mortgage agreement itself provided the power to sell the mortgaged properties without intervention of the court. The value of the house was stated to be Rs. 12 lacs which was highly inadequate for recovery of loan and there was no other way to recover the same except by way of sale of the property. The provisions of Section 31 of the Act were supplemental and not in derogation of Section 29 of the Act and, therefore, this case was fully covered by [Andhra Pradesh State Financial Corporation Vs. M/s. GAR Re-Rolling Mills and another](#), It is further pleaded that the Act being a special Act, the general provisions of Limitation Act are not applicable and the interest of the State exchequer was involved. It is alleged that the son of the petitioner Rupinder Kumar Sharma had sold the machinery and he had been convicted by the Additional Chief Judicial Magistrate, Fatehgarh Sahib and the Corporation is yet to recover Rs. 2.69 crores with further interest and the house was still to be put to auction.

3. Replication has been filed by the petitioner and it was controverted that the property has been legally inherited by the petitioner and the Corporation was under obligation to act fairly and the Corporation has been in unauthorised possession of the house in question without following the proper procedure and the petitioner had been staying in an Ashram in Haridwar. It is denied that outstanding loan had accumulated to Rs. 2.69 crores and it is alleged that the clause in the mortgage deed was in contravention of the provisions of the State Financial Corporation Act, 1951 and parties could not contract in contravention of the statutory provisions. The original owner of the house Ved Parkash Sharma had only offered the property as collateral security and the Corporation could not have enforced the liability of the surety without taking recourse to Section 31 of the Act.

4. Counsel for the petitioner has placed reliance upon the judgment of the Apex Court in [Karnataka State Financial Corporation Vs. N. Narasimahaiah and Others](#), and judgment of this Court in [Mrs. Prakashwati Jain and another Vs. Punjab State Industrial Development Corporation and others](#), to contend that the right of the Financial Corporation u/s 29 of the Act would only be against the borrower industrial concern and act of the corporation in taking deemed possession of the property of the surety/guarantor was not justified.

5. Mr. B.B. Sethi, learned counsel appearing for the Corporation contended that the liability of the guarantor was co-extensive and placed reliance upon the judgment of the Apex Court in H.S. Basavaraj (dead) by his L.Rs. and another v. Canara Bank and others (2010) 12 Supreme Court Cases 458 and [Punjab Financial Corporation Vs. Surya Auto Industries](#) . It was next submitted that since the original owner Ved Parkash Sharma was himself signatory to the mortgage deed, therefore, he had entered into contract with the Corporation and as such he was bound by the same and placed reliance upon Clause (ix) of Clause 5 of the mortgage deed to contend that action could be taken u/s 29 of the Act against mortgaged property of the surety also.

6. We find force in the submission of learned counsel for the petitioner. Section 29 of the Act specifically provides that whenever an industrial concern which is under liability to the Financial Corporation in pursuance to an agreement and makes any default in repayment of any loan or advance in relation to any guarantee given by the Corporation or otherwise fails to comply with the terms of its agreement with the Financial Corporation, the Corporation shall have the right to take over the management or possession or both of the industrial concern and realize the property pledged, mortgaged, hypothecated or assigned to the Corporation. Similar matter came up for consideration before the Hon"ble Apex Court in Karnataka State Financial Corporation"s case (supra) where while upholding the judgment of the Karnataka High Court, it was held that Section 29 confers an extraordinary power upon the Corporation and it is expected to exercise its statutory powers reasonably and bona fide. The powers of the Corporation u/s 31 & 32G of the Act were also taken into consideration and it was observed that there would not be any default as envisaged in Section 29 of the Act by a surety or a guarantor and the power was granted to the Corporation against the surety only in terms of Section 31 of the Act and not u/s 29 of the Act. The relevant paragraph reads as under: -

14. Section 29 of the Act nowhere states that the corporation can proceed against the surety even if some properties are mortgaged or hypothecated by it. The right of the financial corporation in terms of Section 29 of the Act must be exercised only on a defaulting party. There cannot be any default as is envisaged in Section 29 by a surety or a guarantor. The liabilities of a surety or the guarantor to repay the loan of the principal debtor arises only when a default is made by the latter.

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27. The legislative intent, in our opinion, is manifest. The intention of the Parliament in enacting Sections 29 and 31 of the Act was not similar. Whereas Section 29 of the Act consists of the property of the industrial concern, Section 31 takes within its sweep both the property of the industrial concern and as that of the surety. None of the provisions control each other. The Parliament intended to provide an additional remedy for recovery of the amount in favour of the Corporation by proceeding against a surety only in terms of Section 31 of the Act and not u/s 29 thereof.

7. The Hon"ble Supreme Court in A.P. State Financial Corporation's case (supra) was dealing with the case regarding the right of the Corporation to withdraw and take recourse to provisions u/s 29 of the Act and abandon the remedy u/s 31 of the Act. After adverting to the said pronouncement the Apex Court in Karnataka State Financial Corporation's case had laid down the proposition of law as enunciated hereinbefore.

8. The contention of the learned counsel for the respondent Corporation fails to convince us in view of the recent Full Bench decision of this Court in [Shiv Charan Singh Vs. Haryana State Industrial and Infrastructure Development Corporation Limited and Another](#), The question which was referred to the Full Bench was as under:-

Whether the parties can agree to confer jurisdiction to the financial Institution to proceed against the guarantor in exercise of the powers conferred u/s 29 of the Act?

9. After taking into consideration the provisions of the bond of guarantee and the judgment of the Apex Court in Karnataka State Financial Corporation's case (supra), the Full Bench came to the conclusion that the parties could not confer jurisdiction under the statute which was not provided and accordingly, held that the Corporation has no right to proceed against the guarantor u/s 29 of the Act and can only proceed against him under Sections 31 and 32G of the Act. The conclusion part reads as under:-

21. Keeping in view the aforesaid principles, an agreement between the parties conceding a right to the Corporation to act against the guarantor u/s 29 of the Act is akin to conferment of jurisdiction on the Corporation to exercise jurisdiction to take over possession of the assets of the guarantor. Section 29 of the Act is restrictive in nature as it confers right on the Corporation to act against the industrial concern, engaged in the manufacture, preservation or processing of goods etc., as defined in Section 2(c) of the Act alone. A guarantor does not fall within the definition of industrial concern either expressly or impliedly. The right to take over the management and possession is of industrial concern and not of assets of a guarantor. The Corporation has a right to proceed against a guarantor u/s 31 of the Act or u/s 32G of the Act, but Section 29 of the Act confers limited jurisdiction on the Corporation to act against the industrial concern alone. The parties cannot by agreement confer jurisdiction on the Corporation, which the Act does not contemplate. Therefore, Clause 8 of the mortgage deed will not enable the Corporation to take possession of the assets of the guarantor and to sell the same in exercise of powers conferred u/s 29 of the Act.

VI. Conclusion

22. In view of the above, we hold that the parties by an agreement cannot confer jurisdiction on the Corporation to proceed against the guarantor u/s 29 of the Act as the jurisdiction under the aforesaid provisions of law can be exercised only against

the industrial concern.

10. The Full Bench further noticed that the Division Bench judgment of this Court in [Jasbir Kaur and Another Vs. Punjab State Industrial Development Corporation Ltd., Chandigarh and Another](#), was decided prior to the judgment of Hon"ble Supreme Court in Karnataka State Financial Corporation's case (supra) and, therefore, it was no longer good law. The judgment of the Full Bench of this Court in Paramjit Singh Ahuja's case (supra) was held not to be binding precedent in view of decision in Karnataka State Financial Corporation's case (supra). Accordingly, in view of the binding precedent of the Full Bench in Shiv Charan Singh's case (supra) and the judgment of the Apex Court in Karnataka State Financial Corporation's case (supra), the issue stands squarely covered against the Corporation and in favour of the petitioner.

11. In all fairness to learned counsel for the respondents, reference is made to the judgments relied upon by him. The judgments relied upon by the counsel for the respondents are not applicable to the facts and circumstances of this case.

12. The judgment in H.S. Basavaraj's case pertains to the suit filed by the bank for recovery of the loan amount and it was in such circumstances, the Hon"ble Apex Court held that guarantor/surety's liability would be co-extensive to that of the borrower. Similarly in Surya Auto Industries case (supra), the Hon"ble Supreme Court had set aside the judgment of this Court wherein action taken u/s 29 of the Act had been quashed. This Court had framed the question that whether the Corporation has absolute power of retaining the property without taking any steps and to continue to charge the interest and penal interest without any limit. It was in such circumstances the judgment was set aside on the ground that there was no specific challenge to the terms of the agreement entered into between the Corporation and the respondent and the rate of interest could not be altered.

13. In view of the above and the principle of law enunciated in Karnataka State Financial Corporation's case (supra) and Shiv Charan Singh's case (supra), it is held that the provisions of Section 29 of the Act cannot be invoked against the surety/guarantor and can be exercised against the industrial concern alone and the property mortgaged by it. Accordingly, the present writ petition is allowed. The action of the respondents in taking symbolic possession of the residential house No. 2709/2719 Ward No. 8, Sirhind Mandi, District Fatehgarh Sahib is quashed and the Corporation is further directed to deliver the possession of the house in question to the petitioner as prayed for within four weeks from the date of receipt of certified copy of this order. However, the petitioner shall not alienate the house till the clearance of the liability under the deed of guarantee of the loan amount by the principal borrower which ever is earlier.