
(2009) 06 KL CK 0158

High Court Of Kerala

Case No: Writ Petition (C) No. 11916 of 2009

Valsamma Varghese

APPELLANT

Vs

Kerala State Industrial
Development Corpn.
Ltd.

RESPONDENT

Date of Decision: June 17, 2009

Citation: (2010) 26 SCL 26

Hon'ble Judges: P.R. Ramachandra Menon, J

Bench: Single Bench

Advocate: P.K. Joseph, for the Appellant; M. Pathrose Mathai, Saji Varghese, Mariam Mathai and C.K. Govindan, for the Respondent

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

P.R. Ramachandra Menon, J.

Is it mandatory to proceed against the company and its assets first, before proceeding against the Guarantors and their assets for realisation of the dues; forms the subject-matter of challenge in this case.

2. The petitioner has approached this Court challenging the revenue recovery proceedings initiated at the instance of the first respondent for realisation of the due amount from the company by name "Bristo Foods Pvt. Ltd." in which the petitioner was one of the Directors.

3. With regard to the factual matrix, it is to be noted that the loan was extended to the above company by the first respondent on the basis of the collateral security and also on the basis of the personal guarantee given by the petitioner. The case of the petitioner is that she had resigned from the Board of Directors of the company and, hence, the property belonging to the petitioner could be proceeded against, only after the steps to be

pursued and finalised against the properties of the company, particularly, when equitable mortgage has been created over the latter properties. In support of the said proposition, the learned Counsel for the petitioner places reliance on the decision in [Ashok Mahajan Vs. State of U.P. and Others, .](#)

4. The learned Counsel appearing for the first respondent, with specific reference to the averments in the counter-affidavit, submits that the case put forth by the petitioner is quite wrong and misconceived. The legal position actually stands covered by a Three Member Bench Decision rendered by the Apex Court in [State Bank of India Vs. Messrs. Indexport Registered and others, .](#) wherein it has been specifically held that the decree holder cannot be forced to first exhaust the remedy by way of execution of mortgage decree alone and then to proceed against the Guarantor. The earlier decision rendered by the Apex Court to the contrary, as reported in [Union Bank of India Vs. Manku Narayana,](#) was overruled in the above decision.

5. According to the first respondent, maximum leniency had already been extended to the Company, in which the petitioner was a Director, whereby, repayment of the loan was re-scheduled "four" times. The Company had also preferred a petition seeking for the benefit of OTS, which was directed to be considered as per Ext.P5 judgment in W.P. (C) No. 26812 of 2008. In compliance with the above verdict, the representation preferred by the company was considered and the outcome was conveyed to the party vide Ext.P6, observing that no further re-scheduling of the loan was possible under any circumstances. The outstanding liability, as on date, will come to more than Rs. 1.76 crores and that the first respondent is very much entitled to proceed against the concerned company as well as against the Guarantors for recovery of the due amount.

6. It is brought to light that the petitioner does not have any case that she has been singled out. The learned Counsel for the first respondent submits that the first respondent has already proceeded with appropriate steps against the company and its assets as well, and also against other Guarantors. In any view of the matter, this Court does not find it necessary to go into the facts and figures with regard to the relative extent of the rights and liabilities among the Guarantors to the loan transaction and is rather confining to the legality of the issue as discussed above.

7. In response to the submission made by the learned Counsel appearing for the petitioner, placing reliance on the decision in Ashok Majahan "s case (supra), the learned Counsel appearing for the first respondent submits that the said decision was rendered by the Supreme Court with reference to the specific provisions under Sections 3 and 4 of the Uttar Pradesh Public Moneys (Recovery of Dues) Act, 1972. The legal provision discussed in the basic decision in Pawan Kumar Jain v. Pradeshhiya Industrial and Investment Corporation of U.P. Ltd. JT 2004 (6) SC 305 has been discussed and dealt with in paragraph No. 6 of the above verdict. The relevant provisions as extracted therein u/s 4(2)(b) of the U.P. Act are extracted below for convenience of reference.

4(2)(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 proceeding may be taken thereafter only if the Collector certifies that there is no prospect of realisation of the entire sum due through the first mentioned process within a reasonable time.

The position becomes very clear from the paragraph No. 8 of the above decision, wherein it is observed as follows:

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.

8. From the above, it is crystal clear that the observation made by the Apex Court in the decision in Ashok Mahajan "s case (supra) is having application only with reference to the specific provisions as contained in the U.P. Act. This is more so, in view of the law declared by a Division Bench of this Court as per judgment dated 21-10-2008 in W.A. No. 1994 of 2008 wherein almost identical circumstances as involved in the instant case were put to scrutiny. It was observed therein, that no provision was brought to the notice of the Court, as to whether the provisions of the Revenue Recovery proceedings were in pari material with the provisions of the U.P. Act and hence, interference was declined therein. No such provision is brought to the notice of this Court in the present case as well.

In the above facts and circumstances, no interference is called for. The Writ Petition fails and it is dismissed accordingly.

Petition dismissed.