

(2008) 09 PAT CK 0112

Patna High Court

Case No: CWJC No. 4407 of 2005

M/s Deepak Electro Casting (I)
Pvt. Ltd.

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision: Sept. 23, 2008

Acts Referred:

- Constitution of India, 1950 - Article 226
- Penal Code, 1860 (IPC) - Section 120B, 34, 379, 406, 409
- Recovery of Debts Due to Banks and Financial Institutions Act, 1993 - Section 19
- State Financial Corporations Act, 1951 - Section 24, 29, 29(1)

Citation: (2009) 1 PLJR 623

Hon'ble Judges: Mridula Mishra, J

Bench: Single Bench

Advocate: Nirmal Kumar, Umesh Prasad Singh, S.D. Sanjay and Gautam Kejriwal, Umesh Singh and R.R. Singh, for the Appellant; R.R. Prasad for Respondent No. 4, M/s Ram Suresh Roy, R.K. Singh, II and Binay Kr. Ambastha, for the Respondent

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

Mridula Mishra, J.

Heard the parties. M/s Deepak Electro Casting India Pvt. Limited is a company incorporated under the provisions of Companies Act, 1956. This company is the petitioner in C.W.J.C. No. 4407 of 2005, which has started its industrial unit at Fardogola, Muzaffarpur. Central Bank of India, which is a Government of India undertaking through its Senior Manager of referred Branch is the petitioner in C.W.J.C. No. 5755 of 2005. Central Bank of India is respondent No. 4 in the writ application filed by M/s Deepak Electro Casting India Pvt. (Limited, Similarly, M/s Deepak Electro Casting India Pvt. Limited is respondent No. 5 in the writ application

filed by the Central Bank of India. Grievance of both the petitioners is against the Bihar State Credit and Investment Corporation ("BICICO", in short) a financial institution under the State Financial Corporation Act. Petitioners' grievance in both the writ application is that BICICO in an illegal and arbitrary exercise of jurisdiction u/s 29 of the State Financial Corporation Act has sold and handed over entire unit of M/s Deepak Electro Casting India Pvt. Limited to M/s TSR Financial Services Pvt. Ltd. (respondent No. 5) without any intimation to M/s Deepak Electro Casting India Pvt. Limited as well as the Central Bank of India, which has first charge over the machinery and current assets, present and future, as well as second charge over immovable properties hypothecated to BICICO.

2. Prayer of M/s Deepak Electro Casting India Pvt. Limited is for quashing the memo of takeover and handover of the industrial unit, dated 22.3.2005, to take back the possession of the assets of the industrial unit from respondent No. 5 and to restore possession of the unit to the petitioner as well as and to accept payment of the petitioner under one time settlement scheme.

3. Prayer of the Central Bank of India in C.W.J.C. No. 5755 of 2005 is to quash and cancel the order, dated 22.3.2005, issued in exercise of power u/s 29 of the State Financial Corporation Act, 1931, to quash the communication letter, dated 22.3.2005, whereby assets of M/s Deepak Electro Casting India Pvt. Limited was handed over to M/s TSR Financial Services Pvt. Ltd. and also to quash and cancel the agreement/arrangement of sale of assets and the document of transfer, if any, executed by BICICO in favour of respondent No. 5 in respect of assets of M/s Deepak Electro Casting India Pvt. Limited and to restore possession of the assets to M/s Deepak Electro Casting India Pvt. Limited.

4. Prayer of petitioners in both the writ applications is related to same activity of the BICICO, as such, both applications were taken up and heard together and finally being disposed of by a common order.

5. Admitted facts of the case are that M/s Deepak Electro Casting India Pvt. Limited approached BICICO for grant of financial assistance for setting up a Special Alloy Steel Casting Unit at Fardogola. Muzaffarpur. A term loan to the extent of rupees eighty lacs was sanctioned to the petitioner in the year 1992 on certain terms and conditions. Loan amount with interest was to be repaid for a period of eight years in terms of the payment schedule. The terms and conditions of the sanction of loan were duly incorporated in agreement, dated 9.3.1992, executed between the petitioner and BICICO, respondents 2 and 3. A first mortgage over the companies immovable and movable properties, including its machineries, spares, tools, accessories, present and future, were in favour of BICICO. The loan was sanctioned on working capital from a commercial Bank. A term loan of rupees sixty lacs was sanctioned, on condition of sanction of working capital, by any commercial Bank. Central Bank of India sanctioned works capital loan, as such, part of the assets of unit mortgaged to the BICICO over which it had first charge the Bank had second

charge. Subsequently, the petitioner unit decided to construct a second unit, to expand and increase its capacity, as such, it sought "no objection" from the BICICO for taking financial assistance from Central Bank of India. The Central Bank of India was agreeable to grant financial assistance for this purpose on the condition that it would have first charge over the machinery indicated in the sanction letter. The Central Bank of India had mortgaged and fixed charge over one induction furnace and all the current assets of the company with the knowledge of BICICO. In this view the petitioner unit has been financed by BICICO as well as Central Bank of India, Muzaffapur Branch. The charge, which was created in favour of the Central Bank of India, was duly registered with the Registrar of Companies on 12.2.1996. The petitioner's case is that due to electricity disconnection in the month of August, 2002, the production in the unit of petitioner was suspended for a long period and, thereafter, it became sick and could not revive. The petitioner arranged for some finance and partially discharged its liability to the Bank. Attempt was made to revive the unit but without any favourable result.

6. BICICO, in the meantime, announced one time settlement scheme, 2004, in the month of October, 2004. As per the settlement policy, different categories of units were liable to pay their outstanding towards full and final settlement for the units. The period allowed for filing application for one time settlement scheme policy was extended up to 31.12.2004 and finally up to 31.3.2005.

7. The petitioners' case is that BICICO in the daily newspaper "Dainik Jagaran", dated 24.11.2004, published sale notice for sale of several units, which defaulted in repayment of loans. In the list there were 76 units, but the name of petitioner's unit did not find place. The petitioner, in the meantime, on several occasions visited the office of BICICO, with a request to furnish statement of account for one time settlement to arrange required finance to take benefit of one time settlement policy. BICICO did not intimate the amount which were payable by the petitioner's unit under the one time settlement scheme. Subsequently, the petitioner came to know that BICICO has surreptitiously transferred entire unit to one respondent No. 5 by breaking open the seal of the unit and handed over its possession to respondent No. 5 on 22.3.2004. This was done without giving any notice to the petitioner and without taking respondent No. 4 into confidence. Before transferring the unit in favour of respondent No. 5, valuation of the unit by an official valuer in terms of Section 24 of the Act was not done for the purposes of determining adequacy of offer. Before settlement of transfer no notice was given to the petitioner whether he is interested in retaining the unit by making payment equivalent to the valuation of the unit by the official valuer. Possession was handed over to respondent No. 5 without preparing inventory of properties in presence of the petitioner as well as the Central Bank of India. Every thing was done in haste even without waiting till the last date, i.e., 30.3.2003 for one time settlement policy.

8. BICICO has denied all these allegations. It has been stated that on 30.9.2004 total dues of the BICICO was Rs. 257 lacs. BICICO on 6.5.2003 had sent a notice to the petitioner informing his dues as on 31.3.2003 with a request for repayment of loan, but, there was no communication from his side, in this regard. Considering petitioner's reluctance and also that one Mahesh Kumar Agarwal made an offer of Rs. 55.11 lacs for purchase of assets of the petitioner's company in response to notice published on 28.9.2004 in various newspaper, no copy of such sale notice has been annexed neither it has been disclosed that in which newspaper it was published. In the light of offer a notice was published in "Dainik Jag ran", a daily newspaper, dated 9.11.2004. At serial No. 3 of the said notice the name of petitioner's unit was mentioned. This notice was published for informing Directors/Promoters of the unit regarding offer made by interim purchaser with respect to petitioner unit which was Rs. 55.11 lacs required from one Mahesh Kumar Agarwal. Through this notice option was given to the Directors and Promoters of the company to get auction proceeding stayed either by depositing the bill amount or one time settlement amount as per one time settlement policy, 2004 within thirty days, but, there was no response. In this notice it was specifically mentioned that right of co-financier shall be protected. There was no response from the petitioner's side in response to notice, dated 11.12.2004 two tenders were received, one was of M/s TSR Financial Services Pvt. Ltd., which made an offer of Rs. 60.21 lacs and the other offer was of one S.N. Agarwal for Rs. 55.21 lacs. The offers were considered by the Tender Committee on 21.12.2004. The Committee decided the schedule for payment by the company which will make highest offer. It was also resolved that possession will be delivered to the purchaser company after payment of fifty per cent of the consideration amount. On 23.11.2004 tentative acceptance was given to the offer made by respondent No. 5 on it's offer was higher. As per schedule respondent No. 5 had to make payment of 25 per cent of the total consideration money immediately 75 per cent in four equal monthly installments starting from January, 2005 to 10.4.2005, i.e., last date for making 100 per cent payment, subject to final approval of the Board of Directors of BICICO. On payment of 50% of the consideration amount on 16.3.2005 sale agreement was executed with respondent No. 5. A notification regarding taking over of assets of company in pursuance of power conferred u/s 29 of the Act was issued on 22.3.2005. On the same date possession of the unit was handed over to respondent No. 5. As per Annexure A/G annexed with the counter affidavit filed on behalf of respondents 2 and 3, after handing over possession to respondent No. 5 on 22.3.2005, inventory of missing items was prepared on 21.4.2005 and, thereafter, Complaint Case No. 993(M) of 2005 was filed against M/s Deepak Electro Casting India Pvt. Limited on 29.4.2005 under Sections 379, 420, 406, 409, 425 read with Section 34/120B of the Indian Penal Code.

9. Respondent No. 4 has also filed C.W.J.C. No. 5755 of 2005 and the statement made in counter and supplementary counter affidavit is similar to the statement

made in the writ application. Case of respondent No. 4 is that the petitioner applied to respondent No. 4 for loan as also for credit limit of Rs. 65 lacs and term loan of Rs. 70 lacs under the small scale industries scheme. Respondent No. 4 advanced a sum of Rs. 60 lacs for working capital and also advanced financial assistance for setting up second unit of Electro Casting Re-rolling Plant, after issuance of "no objection certificate", dated 14.3.1995, issued by BICICO. Charge created in favour of respondent No. 4 was duly registered by the Registrar of Companies under the Companies Act. Since, the loan advanced by the Bank was not repaid as per schedule in the agreement, the Bank filed an application before the Presiding Officer, Debt Recovery Tribunal, Patna, u/s 19 of the Recovery of Debts Due to Bank and Financial Institution Act, 1993, which gave rise to O.A. No. 17 of 1998. Certificate was issued by the Tribunal and R.P. Case No. 47 of 2002 was initiated for recovery of Rs. 1,77,44,605.86 with pendente lite and future interest and cost. The matter was finally settled in terms of compromise order passed in Miscellaneous Case No. 1 of 2002, dated 7.2.2002. A compromise was filed on 2nd December, 2004, duly sworn in by the parties. BICICO having full knowledge of the certificate issued in favour of the Bank by Debt Recovery Tribunal, for extraneous reasons issued an order, dated 22.3.2005 u/s 29(1) of the State Financial Corporation Act and took over possession of the assets of the petitioner's company. This act of BICICO was mala fide and completely in arbitrary exercise of jurisdiction u/s 29(1) of the State Financial Corporation Act. In the notice u/s 29 of the Act only asset which was described were the lands, but on the same date plant and machinery not included in the inventory of the assets were handed over to respondent No. 5. Plant and machineries were the assets of the Bank. A sale notice was published by BICICO on 24.11.2004 in the Hindi journal "Dainik Jagran". In this notice name of petitioner-company did not find place. Later on Managing Director of the BICICO issued Memo No. 3205, dated 17.3.2005, deciding to takeover possession of the assets of petitioner's company. The order handing over possession of the assets indicates unfair and unreasonable action taken by BICICO and it's authorities and on the same date it was handed over to respondent No. 5. No prior notice was issued calling the amount of loan, no sale notice was published, the last notice published on 24.11.2004 did not include the name of petitioner's company. It seems that everything was finalized by private negotiation. Even before taking over possession of the assets on 22.3.2005 or before 17.3.2005 by the Managing Director or his delegate in favour of respondent No. 5. It has been submitted by counsel for respondent No. 5 that the authorities of the BICICO failed to act honestly in discharge of their official duty. Their action is in complete violation of the judgment delivered by the Apex Court in the case of [Gajraj Jain Vs. State of Bihar and Others](#),

10. Respondent No. 5 initially filed I.A. No. 3440 of 2005 to vacate the interim order, dated 26.4.2005 and 18.5.2005, whereby till disposal of the writ application respondent No. 5 or it's representatives/ assignees were restrained from dealing with the mortgaged properties and by order, dated 18.5.2005 the order was

reiterated. Subsequently, a detailed counter affidavit was also filed. It has been stated in the counter affidavit of respondent No. 5 that in response to sale notice, dated 11.12.2004, published in daily newspaper "Hindustan" respondent No. 5 submitted its offer on 20.12.2004 for purchase of unit alongwith a demand draft of rupees one lac as earnest money. In the sale notice, it was not mentioned that at the unit there was any liability or claim of others besides BICICO. The name of petitioner unit was at serial No. 3 and simply it was mentioned that right of co-financier shall be protected as per the terms of the agreement. Since, respondent No. 5 was the highest offerer, BICICO by letter, dated 23.12.2004, informed acceptance of its offer. A schedule was prepared for payment and till 14.3.2005 more than fifty per cent consideration amount was paid to BICICO. Thereafter, on 16.3.2005 an agreement was executed in between respondent No. 5 and BICICO. Case of respondent No. 5 is that the unit was sold by BICICO after due publicity and considering offers, as such, the decision is in accordance with law. Respondent No. 5 has further stated that full payment was made to BICICO by 11.4.2005.

11. Second supplementary affidavit was also filed by respondent No. 5 in which it has been admitted by respondent No. 5 that offer of respondent No. 5 was tentatively accepted by BICICO subject to final approval of the sale by the Board of Directors of BICICO and/or other conditions that may be imposed by the Board of Directors. After receipt of full and final payment when the matter was placed in the meeting of Board of Directors for approval of sale on 5.9.2005 it was disapproved. The disapproval of the Board was for the reason that the assets have been sold for a very low value. It has been stated by respondent No. 5 that the sale was disapproved by the Board of Directors, without appreciating that value ascertained by the Government approved valuer was never brought in the knowledge of respondent No. 5 at any point of time. In the supplementary counter affidavit it has also been stated that again on 24.1.2006 auction sale notice was published by the BICICO in the daily newspaper which was also available on website. Respondent No. 5, once again, submitted offer on 4.2.2006. Since it was a sole offer, as such, it was accepted and informed by letter, dated 4.2.2006 by the BICICO. This sale has finally been approved by the Board of Directors on 7.6.2006.

12. Considering the counter affidavits filed by the parties and submissions made by the counsel the fact which comes on fore is that entire exercise has been done by the BICICO before term for one time settlement expired. One time settlement expired on 31.5.2005. Petitioner had also approached for one time settlement, which was not considered. Sale notice which was published on 24.11.2004 in that name of petitioner's unit was not mentioned. By an internal arrangement offers were invited. When one Mahesh Kumar Agarwal offered Rs. 55.1 lacs, thereafter, on 11.12.2004 a notice was published for auction on "as is where is basis" inviting fresh offers, but, before that no such independent notice was issued to the petitioners or the Central Bank of India, who is also co-financier informing that unit is being placed for sale. It is said that two tenders were received, but, in the final auction only one

tenderer, i.e., respondent No. 5 appeared. Before publishing sale notice assets were not assessed and valued by the official valuer. Inventory was not prepared in presence of the petitioner's representative as well as the representative of respondent No. 4. No notice was given to the petitioner and respondent No. 4 regarding taking over and handing over of the assets of the units. After everything was done on 22.3.2005 a letter was sent to the petitioner. Petitioner, thereafter, challenged the action of BICICO by filing writ application. An order of stay was passed on 26.4.2005 restraining respondent No. 5, its representatives and assignees from making any transaction with the mortgaged properties. In spite of that respondent No. 5 continued to deal with the property, sale made in favour of respondent No. 5 was disapproved by the Board of Directors on 5.9.2005. BICICO, thereafter, without informing the Court and taking any permission, in this regard, published auction notice in "Dainik Jagaran" on 24.1.2006 (Annexure R/5/J). This auction sale notice is vague and name of petitioner's unit has not been mentioned purposely. The notice discloses that the details of the unit for sale are available on website. Naturally, this may or may not attract attention of interested person like petitioner or another person. No one made any offer in response to this auction notice except respondent No. 5. Respondent No. 5 made its offer on 4.2.2006. On the same date respondent No. 5 was informed that his offer has been accepted. On 12.2.2006 letter was issued by BICICO to respondent No. 5 that the sale has been approved by the Board. All transactions have been made in a very secretive and surreptitious manner. Assets of an unit was going to be sold, in accordance with law a wide publicity was required, proper notice to the interested parties were required, but, without fulfilling these legal requirements for the second time, assets of the unit was transferred in favour of respondent No. 5 ignoring the stay order passed by this Court. This in itself is a good ground for quashing the decision of BICICO for transferring assets of petitioner's unit in favour of respondent No. 5.

13. The first sale and transfer of property in favour of respondent No. 5 by BICICO was under challenge in the writ application that was automatically quashed on account of its disapproval by the Board of Directors, dated 5.9.2005. Now the second transaction, which has been made during the pendency of the writ application is in existence and needs consideration by this court.

14. Counsel for the petitioner as well as the counsel appearing for respondent No. 5 have placed reliance on decisions of the Apex Court reported in [Gajraj Jain Vs. State of Bihar and Others](#), and [S.J.S. Business Enterprises \(P\) Ltd. Vs. State of Bihar and Others](#). In both decisions similar action of BICICO was found illegal and arbitrary which was done in exercise of jurisdiction u/s 29 of the State Financial Corporation Act. The Apex Court in paragraph 17 of the decision reported in [S.J.S. Business Enterprises \(P\) Ltd. Vs. State of Bihar and Others](#), has held as follows:-

"17. We are of the view that the sale effected in favour of Respondent No. 6 cannot be sustained. It is axiomatic that the statutory powers vested in State Financial

Corporation under the State Financial Corporations Act, must be exercised bona fide. The presumption that public officials will discharge, their duties honestly and in accordance with the law may be rebutted by establishing circumstances which reasonably probabalise the abuse of that power. In such event it is for the officer concerned to explain the circumstance which are set up against him. If there is no credible explanation forthcoming the court can assume that the impugned action was improper (See Pannalal Binjaraj vs. Union of India, AIR at p. 409). Doubtless some of the restrictions placed on State Financial Corporations exercising their powers u/s 29 of the State Financial Corporations Act, as prescribed in Mahesh Chandra vs. Regional Manager, U.P. Financial Corpn. Are no longer in place in view of the subsequent decision in Haryana Financial Corporation vs. Jagdamba Oil Mills. However, in overruling the decision in Mahesh Chandra this Court has affirmed the view taken in, Chairman and Managing Director, SIPCOT vs. Contromix (P) Ltd. and said that in the matter of sale u/s 29, State Financial Corporations must act in accordance with the statute and must not act unfairly i.e. unreason ably. If they do, their action can bo called into question under Article 226. Reasonableness is to be tested against the dominant consideration to secure the best price for the property to bo sold."

"This can be achieved only when there is a maximum public participation in the process of sale and everybody has an opportunity of making an offer. Public auction after adequate publicity ensures participation of every person who is interested in purchasing the property and generally secures the best price."

15. In the light of the aforesaid judgment, I find that there has been very limited partition, so far second auction sale is concerned. Sale notice was so vague that no one approached and sub mitted their offer for purchase of the assets of the unit. Respondent No. 5 was sole offerer. The jurisdiction which has been conferred u/s 29 of the Act has been exercised by the authorities of BICICO in most arbitrary and illegal manner. The Central Bank of India which was the co-financier and had second charge over the immovable properties and some assets, but, first charge over machines and equipments was not even informed before fixation of the value. The value of the property was not fixed by the official valuer as required u/s 24 of the State Financial Corporations Act. Assets of the unit even after disapproval of sale by the Board of Directors remained in possession of respondent No. 5, This is apparent from the fact that after subsequent auction and sale in favour of respondent No. 5, there are no order on record showing that the possession was again handed over to the purchaser. It shows that in spite of disapproval of sale by sale by the "Board" respondent No. 5 remained in possession of assets though legally not entitled to hold such property. The BICICO and it's authorities have filed a complaint case against the petitioner alleging theft of mortgaged property presumably for their own defence. Possession of the assests of the unit was taken over by BICICO on 22.3.2005, at that time no inventory was prepared. From Annexure-AQ of the BICICO, it transpires that inventory of missing items were prepared on 21.4.2005,

i.e., after handing over of the possession of the assets in favour of respondent No. 5. Thereafter, Complaint Case No. 993 of 2005 was filed. If such inventory would have been prepared prior to taking over and handing over of possession only then it could have been assessed that which properties were missing prior to 22.3.2005, i.e., the date when the possession was handed over.

16. All these lapses which have been made by BICICO, show that sale is in complete violation of Section 29 of the State Financial Corporations Act right to co-mortgagee/co-financier has not been protected as required u/s 29(1) of the Act. The action of respondent-BICICO is completely arbitrary and in violation of Section 29 of the Act. There was no reason for BICICO to sell the property of the unit in haste when the one time settlement scheme was still in existence. In the first sale letter name of petitioner's unit was not mentioned. This is also a reason to hold that the transaction was a malicious transaction and not made in accordance with law.

17. For all these reasons, subsequent auction notice as well as acceptance of offer, dated 4.2.2006, by respondent No. 5 in response to this auction notice is quashed. The approval of sale by the Board of Directors, dated 12.2.2006, is also quashed. The status of the property of the petitioner's unit is relegated to the same position at which it was prior to 22.3.2005. The respondent-BICICO and respondent No. 5 are directed to restore possession of unit to the petitioner M/s Deepak Electro Casting India Pvt. Limited. BICICO may proceed in accordance with law to exercise it's jurisdiction u/s 29 of the State Financial Corporations Act, after giving an opportunity to the petitioner for repayment of it's dues by fixing a time limit. In case within this time limit petitioner fails to make payment, BICICO may exercise it's jurisdiction u/s 29 of the State Financial Corporations Act. With these observations and directions, both writ applications are allowed.