
(2008) 12 KL CK 0033
In the High Court Of Kerala
Case No : WA. No. 478 of 2008

C. Thomas

APPELLANT

Vs

Kerala Financial Corporation and Others

RESPONDENT

Date of Decision : 12-12-2008

Acts Referred:

Constitution of India, 1950 — Article 226
Legal Services Authorities Act, 1987 — Section 19
State Financial Corporations Act, 1951 — Section 29, 30, 31, 31(1), 32
Transfer of Property Act, 1882 — Section 41, 53, 69, 69(3)

Citation : AIR 2009 Ker 47 : (2010) 2 BC 127 : (2009) 1 ILR (Ker) 153 : (2009) 1 KLT 19

Hon'ble Judges : H.L. Dattu, C.J.; A.K. Basheer, J

Bench : Division Bench

Advocate : Pirappancode V.S. Sudhir, for the Appellant; G.S. Reghunath, for the Respondent

Final Decision : Allowed

Judgement

A.K. Basheer, J.—Since these two appeals are directed against a common judgment arising from the same subject matter, they are being disposed of by this common judgment.

2. The short question that arises for consideration in these two appeals is whether the auction sale conducted by the Kerala Financial Corporation (for short, the Corporation) of the properties mortgaged by the appellants as co-obligants is illegal and vitiated. The learned singled Judge answered the above question in the negative and dismissed the writ petitions filed by the appellants.

3. Relevant facts may be briefly noticed.

4. M/s. Pallannattil Construction Company, a registered firm engaged in the business of construction work of roads, bridges etc. had availed of a term loan of Rs. 1.20 Crores from the Corporation, in March 2001. Several items of immovable properties belonging to the partners of the firm as well as to co-

obligants were mortgaged in favour of the Corporation for availing the loan, as could be seen from Ext.R1(a) letter of confirmation dated March 30, 2001 and Exts.R1(b) and R1(c) loan agreements dated March 29, 2001 and May 26, 2001 respectively. The borrower committed default in repayment of the loan. Therefore the Corporation published Ext.R6(a) sale notice dated May 27, 2006 inviting sealed tenders.

5. Auction sale was conducted among the tenderers as provided in the notification, for a total sum of Rs. 2,77,75,000/- (Rs.Two Crores Seventy seven Lakhs and Seventy Five Thousand) by sale of the mortgaged properties shown as serial Nos. 1 to 5 in Ext.P6 communication dated June 22, 2006 issued by the Corporation to the principal borrower M/s. Pallannattil Construction Company represented by its Managing Partner Sri. P.P. Poulouse (respondent No. 4 herein) . In the said communication the borrower was informed by the Corporation that the sale of the properties would be confirmed if the sale amount was not remitted on or before July 7, 2006 in favour of the successful bidders.

6. In these two appeals we are concerned with only one item of property shown as serial No. 4 in Ext.P6 described as hereunder:

59.09 ares of land in Re-sy. No. 136/3, 136/3-1 of Pangappara village

7. It is not in dispute that appellant in WA. No. 478/2008 was the absolute owner in possession of 70 cents and appellant in WA.611/2008 had ownership and possession of the remaining 76 cents in the above property ($76 + 70 = 1.46$ Acres = 59.09 Ares). Admittedly the above two plots lie as a compact plot. The above item of property was purchased by respondents 5 to 7 in the auction sale for a total sum of Rs. 76,50,000/-.

8. Appellant in WA.478/2006 filed W.P. No. 15125/2007 on May 14, 2007 contending, inter alia, that he had never mortgaged his property in favour of the Corporation as a co-obligant. According to the appellant, he had executed a Power of Attorney in favour of respondent No. 4 in March 2001 authorising him to sell the above property (70 cents), since he was not in a position to manage the same because of his old age. He had handed over his original title deed to respondent No. 4; but the sale did not take place. According to the appellant, he came to know about the alleged liability to the Corporation only when he received Ext.P1 communication of the Corporation dated February 10, 2006 informing him that as on February 1, 2006 he along with other co-obligants and principal borrower owed a total sum of Rs. 256.20 lakhs to the Corporation. They were put on notice that if the loan account was not closed on or before February 25, 2006, the properties mortgaged in favour of the Corporation as collateral securities, which had been taken possession of by the Corporation u/s 29 of the State Financial Corporations Act, would be sold through auction sale/private negotiation without any further notice to them. Appellant contended that he had responded to Ext.P1 notice and informed the Corporation that he was not liable to discharge the liability incurred by respondent No. 4 as he had not bound

himself in any loan transaction with the Corporation as a co-obligant. The appellant further alleged in the writ petition that he had managed to get a copy of Ext.P6 communication dated June 22, 2006 issued by the Corporation to respondent No. 4 informing the latter that the sale of the mortgaged properties would be confirmed if the entire dues to the tune of Rs. 2,77,75,000/- were not settled on or before July 7, 2006. Appellant further alleged that he had come to know about the mortgage of his property created by respondent No. 4 from Ext.P5 communication sent by respondent No. 4 to the Corporation seeking permission of the latter to sell the above mortgaged property by private sale in order to pay off the liability to the Corporation.

9. Thus the appellant in WA. No. 478/2008 in his writ petition had primarily sought for issue of a writ of certiorari to quash Ext.P9 and P10 sale deeds executed by the Corporation in favour of the successful bidders (purchasers). The other prayer was to issue a writ of certiorari to quash Exts.P2 and P3 revenue recovery notices and Ext.P5 communication sent by respondent No. 4 to the Corporation and Ext.P6 notice issued by the Corporation to respondent No. 4. Appellant also prayed for issue of a writ in the nature of mandamus to the Corporation to return the original title deed of his property to him. We do not propose to refer to the other incidental reliefs sought for in the writ petition, at this stage.

10. Appellant in WA. No. 611 of 2008 is the petitioner in W.P. No. 19045 of 2007. She had admittedly mortgaged the other portion of item No. 4 (76 cents in R.S. No. 136/3 and 136/3-1 of Pangappara Village) referred to in the earlier part of this judgment in favour of the Corporation, to enable M/s. Pallannattil Construction Company to avail of the loan. It was also not disputed by the appellant that she was one of the guarantors for the loan availed of by the partnership firm. It is conceded by the appellant that the firm had committed default in repayment of the loan and that the Corporation had taken possession of all the mortgaged properties including the property belonging to her and the other appellant. It is further admitted by her that item No. 4 belonging to her and the appellant in WA. No. 478 of 2008 was sold for Rs. 76,50,000/- in the sale held by the Corporation. Appellant further admitted that she had received Ext.P1 notice dated June 22, 2006 issued by the Corporation informing her that the sale of the assets would be confirmed if the arrears due to the Corporation were not remitted. According to the appellant, she had approached Sri. Poullose, the Managing Director of the firm and requested him to return the title deed of her property. The Managing Director had promised that the dues would be paid off. Thereafter he had approached the Lok Adalat. Ext.P2 order was passed by the Adalat granting some time to the Managing Partner to make the payment. According to this appellant, she was not aware of the further steps taken by the Managing Partner in this regard. Appellant alleged that she was not aware of the steps taken by the Corporation after the sale. She further contended that the Corporation was not entitled to demand the entire dues payable by the Firm from her as a condition to release her property.

11. Therefore in the writ petition she prayed for issue of a writ of certiorari to quash Ext.P1 communication issued by the Corporation directing the appellant and the other debtors/guarantors to pay off the entire liability to the Corporation. The other prayer in the writ petition was to issue a writ in the nature of mandamus to the Corporation to release to her the title deed in respect of her property (76 cents in item No. 4) and also to direct the Corporation to set aside the sale of her property as soon as the value thereof was remitted by her. We do not propose to refer to the other ancillary reliefs sought for in the writ petition at this stage.

12. The case of the Corporation, which is not in serious dispute , was that it had taken possession of the mortgaged properties since the borrower and the co-obligants had failed to discharge the liability even after they were repeatedly intimated about the default committed by the principal borrower in repayment of the loans. It is the admitted position that the Corporation had taken possession of the properties u/s 29 of the Act on February 2, 2006. A sale notification was published in Mathrubhumi and Malayala Manorama daily newspapers on May 27, 2006 and the sale was held pursuant to the above notification (Ext.R6(a)).

13. The property belonging to the appellants was purchased by respondents 5 to 7 for Rs. 76,50,000/- in July 2006, as could be seen from Ext.R6(b). The purchasers had deposited the entire sale value as stipulated by the Corporation in August 2006 itself. But Sri. Paulose, the Managing Director of the Company had filed a petition before the Lok Adalat at Thiruvananthapuram organised by the District Legal Services Authority u/s 19 of the Legal Services Authorities Act (Act 39/87) seeking its intervention as regards the sale of the above property (item No. 4) belonging to the appellants. In terms of the settlement arrived at between the parties, the Corporation agreed to release the above property after setting aside the sale, if respondent No. 4 remitted a sum of Rs. One Crore on or before December 22, 2006. In Ext.P6 (d) order dated October 14, 2006 passed by the Lok Adalat it was agreed between the parties that the Corporation would be at liberty to continue with the sale proceedings if respondent No. 4 failed to make the deposit of Rs. One Crore , as agreed. It was not disputed by respondent No. 4 or any of the other parties that the above undertaking was not complied with by respondent No. 4. Thereafter the Corporation had confirmed the sale in favour of respondents 5 to 7 and sale deeds (Exts.P9 and P10) were executed on December 6,2006 in favour of the purchasers. In short, the Corporation contended that the appellants were not at all justified in invoking the extra ordinary jurisdiction of this Court under Article 226 of the Constitution not only for the reason that they had suppressed many material facts but also since there was inordinate delay in approaching the Court. We will refer to the other contentions raised by the Corporation at a later stage in the latter part of this judgment, as and when found necessary.

14. We have heard learned Counsel for the appellants, learned Standing Counsel for the Corporation and also learned Counsel for the other contesting

respondents.

15. The primary contention raised by the appellants is that the Corporation had no right or authority to take possession of the mortgaged properties/securities belonging to the guarantors by invoking the power u/s 29 of the State Financial Corporations Act, 1951. It is further contended by the learned Counsel that the Corporation could have proceeded against the secured assets only either u/s 31 or Section 32(G) of the Act. Learned Counsel have placed heavy reliance on the recent decision of their Lordships of the Supreme court in Karnataka State Financial Corporation Vs. N. Narasimahaiah and Others, in support of the above contention.

16. But it is contended on behalf of the contesting respondents that the Corporation had taken possession of the mortgaged properties/collateral securities on February 2, 2006. According to the Corporation, notice was issued to the principal borrower and the guarantors in October 2005 informing them about the decision to take possession of the collateral securities. It is beyond controversy that sale of the properties was conducted after due publication of notice in leading Malayalam dailies like Malayala Manorama etc. dated May 25, 2006 (Ext.R6(a)). It is also the admitted position that item No. 4 in which the two appellants are interested was purchased by respondents 5 to 7 for Rs. 76,50,000/-. The purchasers had admittedly made the deposit of the entire purchase money in terms of the notification issued in this regard. In the meanwhile, as mentioned earlier, the principal borrower, Sri. P.P. Poulose, the Managing Partner of the firm, had approached the Lok Adalat seeking some relief in respect of item No. 4. The Lok Adalat had passed Ext.R6(d) on October 14, 2006 after hearing the Corporation also keeping the sale and release of the property to the successful bidders in abeyance, if Sri. Poulose deposited Rs. One Crore on or before December 2, 2006. But Sri. Poulose did not make the deposit as agreed by him before the Lok Adalat. Thereafter the Corporation had executed Exts. R4(e), R4(f) and R4(g) sale deeds in respect of item No. 4 in favour of respondents 5 to 7, the successful bidders of the said property. The above sale deeds were executed on December 6, 2006. Thus it is contended that the sale in respect of item No. 4 was completed for all practical purposes in favour of respondents 5 to 7 a long time back.

17. It is pointed out by learned Counsel for the Corporation that the appellant in WA. No. 478 of 2008 had filed the writ petition on May 14, 2007, while the appellant in WA. No. 611/2008 had filed her writ petition on June 20, 2007, six to seven months after the sale deeds were executed in favour of the successful bidders. The primary contention raised by the appellant in WA.478/2008 in his writ petition was that he had never mortgaged his property as a collateral security. According to him he had executed a Power of attorney in favour of Sri. Poulose, the Managing Partner of the firm in March 2001 authorising him only to sell the above property. The appellant however admitted that he had handed over his original title deed to Sri. Poulose at the time of executing the Power of

Attorney. But he came to know about the alleged liability to the Corporation only in February 2006 when he received Ext.P1 communication. However the appellant further admitted that he was aware of the mortgage of his property by the firm in December 2005 itself as revealed from Ext.P5 communication sent by the principal borrower to the Corporation. In short, the documents produced by the appellant himself would show that he was all along aware that his property was also mortgaged as a collateral security. It is also contended by the Corporation that it is very difficult to accept the contention of the appellant that he had executed a Power of Attorney in favour of respondent No. 4, the Managing Partner, only to sell his property and that he had handed over the original title deed to respondent No. 4 for that purpose only. A perusal of Ext. R1(a) letter of confirmation and Exts.R1(b) and R1(c) agreements executed by the principal borrower and the co-obligants including the appellant in favour of the Corporation will also unambiguously show that the above contention raised by the appellant are totally untenable, it is contended. Learned Counsel for the Corporation would further contend that the appellants have not disputed their signature in Exts.R1(a), (b) and (c) referred to above. Thus it is evident from the above documents that the appellants were parties to the loan agreement and that they had mortgaged their respective properties which were scheduled to Exts.R1(b) and (c) agreements.

18. It is further contended by the learned Counsel for the contesting respondents that the appellants had at no point of time raised even a little finger questioning the legality and propriety of the action taken by the Corporation to invoke the power u/s 29 of the Act. The appellants had also not raised such a contention either in the writ petition or in the memoranda of appeal. Thus it is contended by the learned Counsel for the contesting respondents that the proceedings for realisation of the debt having culminated in the sale of the secured assets a long time ago, the same may not be set at naught at this belated stage.

19. Learned Counsel for the successful bidders have also vehemently contended before us that the bidders had purchased the property in question after selling off their other assets in order to raise funds. It is pointed out that they being bona fide purchasers, respondents 5 to 7 will suffer irreparable damage and loss if the action taken by the Corporation u/s 29 of the Act is declared null and void, especially since they have invested huge amounts for developing the property after purchase.

20. In this context learned Counsel has invited our attention to the provisions contained in Sections 41 and 53 of the Transfer of Property Act contending that respondents 5 to 7, for no fault of theirs, cannot be penalised and put to prejudice and loss. Our attention has also been invited to Sub-section (3) of Section 69 of the Transfer of Property Act which postulates that when a sale of a mortgaged property has been made in exercise of the power vested with the mortgagee, the title of the purchaser shall not be impeachable on the ground that no case had arisen to authorise the sale, or that due notice was not given,

or that the power was otherwise improperly or irregularly exercised. It may at once be noticed that the latter part of Sub-section (3) of Section 69 enables the person damnified by an unauthorised or improper or irregular exercise of the power to have his remedy in damages against the person exercising the power. Learned counsel has also cited the decision in *Rose Potteries Vs. West Bengal Financial Corporation*, wherein it was held that Section 69 of the Transfer of Property Act gives power to a mortgagee to sell the mortgaged property without the intervention of the Court. It was further held in that decision that the provisions of Section 29 are similar to the power given to a mortgagee u/s 69 of the Transfer of Property Act and therefore it cannot be said that the right given u/s 29 can only be exercised in accordance with the procedure laid down by Section 31.

21. The above contentions raised by the contesting respondents are at first blush totally sound and attractive. It may be noticed that at the time when the Corporation proceeded against the secured assets, the settled position of law that governed the field was that the Corporation could proceed u/s 29 of the Act not only against the properties of the industrial concern but also against the properties of the sureties as well, in view of the decision of a Full Bench of this Court in *Ponnappan v. Kerala Financial Corporation* 2007 (3) KLT 68. Even prior to this a Division Bench of this Court in *Thressiamma v. K.S.F. Corporation* 1986 KLT 1344 had also taken a similar view. The view taken in *Thressiamma's* case was affirmed by the Full Bench in *Ponnappan's* case. Thus at that stage the appellants could not have successfully challenged the action taken by the Corporation when it proceeded against the secured assets of the guarantors u/s 29 of the Act. But in view of the dictum laid down by their Lordships of the Supreme Court in *Narasimahaiah's* case (*supra*), the above decisions rendered by this Court in *Thressiamma's* case and *Ponnappan's* case may not be good law.

22. It is contended by the learned Counsel for the appellants that the legal position has undergone a sea change when the Apex Court in *Narasimahaiah's* case (*supra*) pronounced that the secured assets of the guarantors cannot be proceeded against by the Corporation u/s 29 of the Act. There is considerable force in the above contention.

23. In this context it may be profitable to peruse the provisions contained in Sections 29 and 31 of the Act. Relevant clauses of Section 29 read as follows:

29. Rights of Financial Corporation in case of default:--(1)Where any industrial concern, which is under a liability to the Financial Corporation under an agreement, makes any default in repayment of any loan or advance or any instalment thereof or in meeting its obligations 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 Financial Corporation shall have the right to take over the management or possession or both of the industrial concerns, as well as the right to transfer by way of lease or sale and realise the property pledged, mortgaged, hypothecated or assigned to the Financial Corporation.

...

(4) Where any action has been taken against an industrial concern under the provisions of Sub-section (1), all costs, charges and expenses which in the opinion of the Financial Corporation have been properly incurred by it as incidental thereto shall be recoverable from the industrial concern and the money which is received by it shall, in the absence of any contract to the contrary, be held by it in trust to be applied firstly, in payment of such costs, charges and expenses and, secondly, in discharge of the debt due to the Financial Corporation, and the residue of the money so received shall be paid to the person entitled thereto.

24. A perusal of the provisions contained in Section 29 will undoubtedly show that the Corporation is vested with the power to take over the management or possession, or both, of the industrial concern if it makes any default in any loan or advance or any instalment thereof or in meeting its obligations in relation to any guarantee given by the Corporation or otherwise fails to comply with the terms of its agreement with the Financial Corporation. Obviously the right of the Corporation to take over the management or possession or both of the industrial concern in the event of default u/s 29 is in relation to the property of the industrial concern only.

Section 31 reads thus:

31. Special provisions for enforcement of claims by Financial Corporation:--(1) Where an industrial concern, in breach of any agreement makes any default in repayment of any loan or advance or any instalment thereof or in meeting its obligation in relation to any guarantee given by the Corporation or otherwise fails to comply with the terms of its agreement with the Financial Corporation or where the Financial Corporation requires an industrial concern to make immediate repayment of any loan or advance u/s 30 and the industrial concern fails to make such repayment then, without prejudice to the provisions of Section 29 of this Act and of Section 69 of the Transfer of Property Act, 1882 (4 of 1882), any officer of the Financial Corporation, generally or specially authorised by the Board in this behalf, may apply to the district judge within the limits of whose jurisdiction the industrial concern carries on the whole or a substantial part of its business for one or more of the following reliefs, namely:

(a) for an order for the sale of the property pledged, mortgaged, hypothecated or assigned to the Financial Corporation as security for the loan or advance; or

(aa) for enforcing the liability of any surety; or

(b) for transferring the management of the industrial concern to the Financial Corporation; or

(C) for an ad interim injunction restraining the industrial concern from transferring or removing its machinery or plant or equipment from the premises of the industrial concern without the permission of the Board, where such

removal is apprehended.

(2) An application under Sub-section (1) shall state the nature and extent of the liability of the industrial concern to the Financial Corporation, the ground on which it is made and such other particulars as may be prescribed.

25. Section 31 deals with special provisions for enforcement of claims by the Corporation in the event of breach of any agreement by the industrial concern or making any default in repayment of any loan or advance. Sub-clause (a) of Sub-section (1) of Section 31 empowers and authorises the Corporation to proceed against the property pledged, mortgaged or hypothecated or assigned to the Corporation as security for the loan or advance. Sub-clause (aa) of Sub-section (1) of Section 31 also enables the Corporation to enforce the liability of any surety through an application to the District Judge within the limits of whose jurisdiction the industrial concern carries on the whole or any substantial part of its business.

26. Sub-section (1A) of Section 32 postulates that the District Judge on receipt of an application u/s 31 shall issue notice calling upon the surety to show cause why his liability should not be enforced. Sub-section (4A) of Section 32 lays down that the District Judge shall order enforcement of the liability of the surety if no cause is shown by the surety on or before the date specified in the notice under Sub-section (1A). The above provisions referred to by us will undoubtedly show that the Act in no uncertain terms has laid down the method by which the mortgaged properties or assets of a surety can be dealt with by the Corporation. In *Narasimahaiah (supra)* the Apex Court, after analysing the above provisions very extensively, has succinctly laid down thus:

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 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.

27. In the case on hand, there is no dispute that the Corporation had taken possession of the properties mortgaged by the sureties by invoking the power u/s 29 of the Act in February 2006, albeit the Corporation had admittedly alerted the guarantors/sureties that it will be constrained to take possession since the principal borrower and the guarantors had committed default in repayment of the loan.

28. It is trite that if a special statute prescribes a particular mode for its enforcement, the provisions contained therein have to be scrupulously implemented. A conjoint reading of Sections 29 to 31 will unambiguously show that the Corporation can proceed against a secured/mortgaged asset of a surety/

guarantor only under those specified circumstances and that too in a manner prescribed under the Act.

29. We have carefully perused the entire materials available on record. In our view, the Corporation was not justified in proceeding against the secured assets of the appellants/guarantors u/s 29 of the Act, in view of the statutory provisions contained therein, which in clear and unambiguous terms delineate the powers of the Corporation. The Corporation could have proceeded against the secured assets of the guarantors only u/s 31 of the Act. In that view of the matter the challenge raised by the appellants has to be upheld. We do so. It is held that sale of item No. 4 in Ext.P6 in W.P. No. 15125/2007 (Ext.P1 in W.P. No. 19045/2007) is null and void and all actions taken by the Corporation pursuant to the sale in respect of the said item of property are also held to be invalid and inoperative. Writ Appeals are allowed in the above terms.