

(1996) 08 KL CK 0005

In the High Court Of Kerala

Case No : CRP 2520 of 1994 and CMA No. 138 of 1995

Cochin Soft Drinks Co. and Others

APPELLANT

Vs

K.F.C.

RESPONDENT

Date of Decision : 23-08-1996

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 115

State Financial Corporations Act, 1951 — Section 31, 32, 32(9)

Citation : (1998) 2 KLJ 502

Hon'ble Judges : P.K. Balasubramanyan, J;K.A. Abdul Gafoor, J

Bench : Division Bench

Advocate : P. Sukumaran Nayar, Thottathil B. Radhakrishnan and S. Sreekumar, for the Appellant; Mathew Zacharia, Koshy George, T.R. Raman Pillai (Sr. Advocate) and T.R. Ramachandran Nair, for the Respondent

Final Decision : Dismissed

Judgement

P.K. Balasubramanyan, J.—The Kerala Financial Corporation obtained an order under Sec. 31 of the State Financial Corporations Act. When proceedings were initiated under Sec. 31 of the Act the same was not objected to by the debtor, petitioners in C.R.P. 2520 of 1994 and the appellants in C.M.A. 138 of 1995. In the application for an order under Sec. 31 of the Act the Financial Corporation did not specifically include the prayer for the compounding of the interest as per the stipulation in the agreement. This resulted in the court not making a specific order for the compounding of the interest. Subsequently the Financial Corporation filed E.P. 165 of 1994 for executing the order. In the execution petition we are concerned with a sum of Rs. 13,76,557.15 was claimed by the Kerala Financial Corporation as the balance amount due. The Financial Corporation sought recovery of that amount by sale of the undertaking. At that stage the debtor filed E.A. 37 of 1994, praying for the issue of a direction to the decree holder, the Kerala Financial Corporation to accept the amount shown in Annexure-I to that petition and to record satisfaction of the earlier order passed under Sec. 31 of the Act. The debtor's stand was that since the earlier order did

not provide for the compounding of interest, the Financial Corporation could not claim the amounts due to it on the basis of compounding of interest. In other words the gist of the contention was that the order passed under Sec. 31 of the Act having already determined the amount due, the court enforcing that order being the executing court, could not go behind the order and proceed on the basis that the agreement between the parties provided for the compounding of unpaid interest. This claim was opposed by the Financial Corporation which pointed out that going by the transaction between the parties the amount claimed by it in the execution petition was due and since no adjudication as such was involved in an order under Sec. 31 of the Act, there was no bar to the court when approached again, in calculating the correct amount due to the Financial Corporation and providing for its recovery. Before the court below various decisions were cited. The court below took the view that the court was not passing a decree for realisation of any amount in a proceeding under Sec. 31 of the Act and the quantum if any to be fixed for the purpose of enforcing the debt should be in terms of the agreement between the debtor and the financial Corporation and if the agreement provided for compounding of interest then the court could not go behind that agreement or order that compound interest need not be paid. In that view the court found that the prayer in E.A. 37 of 1994 could not be granted. Finding that the amount claimed in the statement filed by the Financial Corporation showing, the balance as on 27-6-1994 was not objected to, the court found that the said amount was due to the Financial Corporation. It is this order that is challenged in Revision by the petitioners in E.A. 37 of 1994.

2. Meanwhile it appears that the debtors had entered into an agreement for sale of the undertaking with one Thomas who is the respondent in C.M.A. 138 of 1995. The said Thomas filed a suit O.S. No. 3 of 1995 before the Subordinate Judge's Court of Ernakulam praying for specific performance of that agreement for sale. That suit is being resisted by the debtors to the Financial Corporation on various grounds. In that suit Thomas filed I.A. 15 of 1995 praying for a temporary injunction restraining the debtors from selling the petition schedule property to any other person and from committing waste or dealing with the property in any manner until the disposal of that suit. That application was resisted by the debtors. The Subordinate Judge's Court of Ernakulam passed an order restraining the debtors from selling the property, from committing waste and from dealing with the property in any manner till the disposal of the suit. It is that order that is challenged by the debtors in C.M.A. 138 of 1995.

3. When C.M.A. 138 of 1995 came up for hearing, the factum of the Civil Revision Petition pending in this court was brought to the notice of the court. Since the amount of liability due to the Financial Corporation may have relevance in the suit for specific performance filed by Thomas, it was felt that it would be better if the Revision and the Civil Miscellaneous Appeal were heard together. Hence both the Revision and the Civil Miscellaneous Appeal were taken up together for hearing.

4. Relying on sub-sections 4 to 8 of Sec. 32 of the State Financial Corporations Act learned counsel for the revision petitioners contended that an investigation by the District Judge in accordance with the provisions contained in the CPC is contemplated by the said section and once such an investigation is completed and an order is made by the District Judge, the said order has to be executed in the manner provided by the Code of Civil Procedure. This coupled with the fact that a right of appeal is conferred under Sec. 32(9) of the Act would clearly indicate that there is a final adjudication by the District Judge while passing an order under Sec. 32 of the Act and when such an order is passed the same becomes final and binding on the parties. He therefore contends that when in the order originally made, the District Judge did not provide for payment of compound interest and that order became final, in enforcement of that order the court cannot go behind the said order. This is sought to be met by counsel for the Financial Corporation by contending that going by the decisions relied on by the court below it is clear that there is no adjudication as such contemplated by the District Judge while making the original order and that the District Judge is obliged to pass an order only in terms of the contract between the parties and the Financial Corporation can always claim the correct amount due under the contract even if there might be an omission in the order first passed to provide for compound interest when the contract itself provided for the same. He also contended that the present revision arises from the order on an application made by the judgment debtors seeking a declaration that the amounts due from them is only in terms of the Annexure to their application and it is open to the Financial Corporation in such proceeding to show that on the terms of the contract between the parties the real amount due is not the amount shown in Annexure-I and consequently the application made by the judgment debtors has to be dismissed. According to him the court below has found on the terms of the contract that the amount shown by the judgment debtors in their application is not the correct amount and has consequently dismissed the application and in Revision this court cannot interfere on the basis that there is any finality attached to the earlier order passed by the District Court. He also pointed out that the earlier order passed by the District Court was really an uncontested order.

5. The decisions of the Supreme Court and the decision of this court in C.S. Re-Rolling Co.(P) Ltd. v. KFC (1989 (2) KLT 474) do indicate that there is no decree as such passed by the District Judge while making an order under Sec. 32 of the Act. It is no doubt true that the Supreme Court has in the decision in Maganlal Vs. Jaiswal Industries, Neemach and Others, has held that by a legal fiction an order passed under the Section is treated as a decree and can be enforced as such. But that in our view is different from saying that the court is called upon to adjudicate a lis between the parties when an application under Sec. 31 is made by the Financial Corporation. The cause to be shown by a debtor on the scheme of Sec. 32 of the Act is only as to why the ad-interim order of attachment should not be made absolute or the order of injunction granted shall not be confirmed. A

determination of the actual amount due from the debtor to the corporation is not as such made the subject matter of an adjudication. This appears also to be the view taken by the High Court of Punjab and Haryana in the decisions in *Man Singh Vs. Punjab Financial Corporation, Chandigarh and Others*, and *Punjab Financial Corporation Vs. K.B. Industries and Another*, that the Financial Corporation is entitled to recover the actual amount due as per the contract. In the present case there was no contest at the stage of the order on the application under Sec. 31 of the Act. When there is no actual determination of the amount due by the order made under Sec. 32 of the Act by the District Judge, we do not think that the existence of a prior adjudication on merits regarding the quantum of the liability can be postulated so as to preclude the Financial Corporation from showing again before the District Judge that the correct amount due to the Financial Corporation is not what is stated in the earlier order. The principle of the executing court being bound by the decree and being not in a position to go behind the decree cannot also apply to the proceedings pending under Sec. 32 of the Act, though no doubt an order made by the District Judge is capable of being enforced as provided for in the CPC for execution of a decree.

6. There is no dispute that under the terms of the contract the judgment debtors are bound to pay compound interest when the interest is not paid in time. The application made by the judgment debtors from out of which this revision arises is one for an order that the amount shown by them in their application is the correct amount due to the Financial Corporation. The Financial Corporation has clearly shown that the amount shown by the judgment debtors in their application is not the correct amount payable by the terms of the transaction between the parties. The court below has dismissed the application made by the judgment debtors. On the facts obtaining in this case, there being no dispute regarding amount due under the contract as such, we do not think that this is a fit case where we should exercise our jurisdiction under Sec. 115 of the CPC to interfere with the order of the court below. Once we find that the District Judge is not precluded from legally considering whether the amount due to the Financial Corporation has been paid or not and is entitled to proceed with the enforcement of the obligation of the debtors it is clear that the court below is well within its jurisdiction in proceeding with the enforcement of the obligation of the judgment debtors at the instance of the Financial Corporation. It is in the light, of that finding that we think that this is not a fit case where we should exercise our jurisdiction under Sec. 115 of the Code of Civil Procedure. Thus both on merits and on the question of our exercising the jurisdiction under Sec. 115 of the CPC we find no reason to interfere with the order of the court below in Revision.

7. Coming to the Civil Miscellaneous Appeal, it is seen that the court below has restrained the debtors from alienating the property, committing any waste therein and from dealing with the property in any manner. The Financial Corporation is not a party to the suit and obviously the order granted by the court below cannot stand in the way of the Financial Corporation Proceeding with

the enforcement of its rights under the Act. Since the plaintiff has filed a suit for specific performance of an agreement to sell and since there is only an injunction restraining alienation of the property pending disposal of that suit, prima facie it could be stated that there is no serious infirmity in the order passed by the court below. What is urged by the counsel for the defendants in that suit is that the liability of the Financial Corporation is mounting up and unless the debtors are enabled to sell a portion of the property so as to liquidate the liability of the Financial Corporation, the debtors will suffer irreparable injury and in such a situation the order of interim injunction granted by the court below operates harshly on them. There is some substance in this grievance. But we do not think that the order of injunction now granted should be vacated as a whole in the light of that consequence. We think it appropriate to direct that if the debtors are in a position to find out a buyer for any portion of the property that is the subject-matter of the suit for specific performance, it will be open to the debtors to move the trial court for permission to sell the property or portions thereof to the intending purchaser and in that situation it will be open to the plaintiff therein to offer to provide a sum equivalent to the proposed purchase price and to request the court not to grant permission to sell the property. Since it will be open to the Financial Corporation to sell the property even otherwise, notwithstanding the order of injunction granted by the court below, we think that this would be a sufficient safeguard in respect of the rights of the plaintiff, defendants as well as the Financial Corporation who is the mortgagee of the property in question.

While therefore confirming the order of injunction granted by the court below, we grant the defendants in that suit an opportunity to bring forth specific proposals for sale before the trial court with a direction to that court to consider that request in the light of the objections that may be filed by the plaintiff or in the light of the offer for deposit that may be made by the plaintiff and to pass appropriate orders regarding those aspects.

For the reasons stated above, the Civil Revision Petition is dismissed and the Civil Miscellaneous Appeal is also dismissed subject to the above modification.