

(2011) 01 AP CK 0056
In the Andhra Pradesh High Court
Case No : WA No. 554 of 2008

C.V. Chary

APPELLANT

Vs

A.P. State Financial Corporation and Others

RESPONDENT

Date of Decision : 24-01-2011

Acts Referred:

Constitution of India, 1950 — Article 14, 21, 300A
Contract Act, 1872 — Section 128
State Financial Corporations Act, 1951 — Section 29, 31

Citation : (2011) 4 ALD 27

Hon'ble Judges : N. Ravi Shankar, J;A. Gopal Reddy, J

Bench : Division Bench

Advocate : Sharad Sanghi, for the Appellant; T. Durga Reddy, for the Respondent

Final Decision : Allowed

Judgement

A. Gopal Reddy, J.—This writ appeal under Clause 15 of Letters Patent by the writ Petitioner is directed against the order of the learned Single Judge, dated 28.2.2008 dismissing WP No. 21607 of 2006 filed for issuing a writ of mandamus declaring the auction conducted by the A.P. State Financial Corporation in respect of the property bearing H. No. 3-9-61, Sharada Nagar Colony, Ramanthapur, Hyderabad belonging to the Petitioner-guarantor, u/s 29 of Financial Corporation Act as arbitrary, illegal, unlawful and violative of principles of natural justice and Articles 14, 21 and 300-A of the Constitution of India and consequently to direct the Respondents not to evict the Petitioner forcibly from the said property without due process of law. Pending the writ petition, the writ Petitioner filed WPMP No. 28073 of 2006 for restoration of possession of the property.

2. Facts which are not in dispute, which led to filing the writ appeal are as under:

Third Respondent obtained loan from the first Respondent-A.P. State Financial Corporation (for short "Corporation") to which, the Petitioner as well as Respondents 4 and 5 stood as guarantors hypothecating their properties towards collateral security for the loan availed. On third Respondent defaulting to

discharge the loan amount, proceedings were initiated by the Corporation and a notification, dated 31.1.2005 was issued notifying the property of the Petitioner for sale by auction along with the properties belonging to other sureties i.e. Respondents 4 and 5. As the auction did not take place pursuant to the said notification as there were no bidders, another notification was issued on 25.8.2005 and yet another notification was issued on 21.3.2006. On the first notification, the writ Petitioner-Appellant contacted the third Respondent and she appears to have promised the writ Petitioner for settling the accounts with the Corporation. On the subsequent notifications issued by the Corporation, the writ Petitioner made a representation and filed WP No. 17212 of 2006 which was dismissed on 20.9.2006 at the admission stage holding that by the impugned notice, dated 26.4.2006 the Corporation called upon the Petitioner to handover vacant possession so as to facilitate handing over of possession of the property to the prospective purchaser, on conclusion of the auction, which was subject-matter of challenge in the said writ petition. Thereafter WA No. 993 of 2006 was filed against the dismissal of WP No. 17212 of 2006 on 27.9.2006, which was also dismissed as withdrawn on 9.10.2006 with a liberty to file a fresh writ petition on the same cause of action. Later the present writ petition was filed on 16.10.2006. Meanwhile, the Corporation issued a sale letter on 16.8.2006 in favour of 6th Respondent finalizing the sale of property at Rs. 27 lakhs on 100% down payment and on 19.10.2006 a panchanama was conducted dispossessing the writ Petitioner from the schedule property and a sale deed was executed on 30.10.2006 in favour of 6th Respondent.

3. The main contentions advanced by the writ Petitioner in WP No. 21607 of 2006 are that u/s 29 of the State Financial Corporation Act (for short "Act"), the Corporation is not empowered to bring the property of a surety to sale and only the property of the principal borrower could be brought to sale and that the property was sold for a nominal amount by an arbitrary and clandestine process. The learned Single Judge of this Court after referring to the Full Bench judgment of Kerala High Court in A.N. Ponnappan Vs. Kerala Financial Corporation and The Branch Manager, , held that Section 29 process is available against the property of the surety as well, and dissented from the judgment of the Karnataka High Court in N. Narasimhaiah v. Karnataka State Financial Corporation AIR 2004 Kar. 46, as the appeal against the same is pending and the said order has not been suspended or stayed. It was held that since the first Respondent is a statutory public authority and has issued a public notification published in the daily press for auction of the property, it must be presumed that the first Respondent had acted in bona fide and transparently in obtaining the best price for the property, and therefore, the burden is upon the Petitioner to establish the contrary, but except a bald allegation, the Petitioner has not discharged the burden and accordingly dismissed the writ petition. Hence, the present appeal.

4. Heard the learned Counsel for the Appellant-writ Petitioner and also the Standing Counsel for the Corporation. In spite of service of notice, the 6th Respondent has not chosen to put up appearance opposing the appeal.

5. The question as to whether the Corporation in exercise of power u/s 29 of the State Financial Corporation Act, 1951 can sell the property of a guarantor is no longer res integra in view of the law declared by the Apex Court in Karnataka State Financial Corporation Vs. N. Narasimhaiah and Others, wherein the Apex Court approved the ratio laid down by the Karnataka High Court in N. Narasimhaiah's case (supra). It was held that 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. It was further held that the right of the Financial Corporation in terms of Section 29 of the Act must be exercised only against borrower who has committed default. There cannot be any default as is envisaged in Section 29 by a surety or a guarantor and the liability of a surety or the guarantor to repay the loan of the principal debtor arises only when a default is made by the latter. After considering the provisions of Section 128 of the Contract Act, it was further held that "ordinarily, therefore, when a guarantee is sought to be enforced, the same must be done through a Court having appropriate jurisdiction. In the absence of any express provision in the statute, a person being in lawful possession cannot be deprived thereof by reason of default on the part of the principal borrower". It was observed that the legislative intent is manifest in enacting Sections 29 and 31 of the Act, which are 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. 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. In view of the same, the writ Petitioner has to succeed.

6. Sri Sharad Sanghi, learned Counsel appearing for the Appellant-writ Petitioner contends that though the possession of the property was taken over by the Respondents, once the sale is set aside, sale conducted by them is without jurisdiction and they have to restore the possession of the property to the writ Petitioner along with the articles for which WPMP No. 28073 of 2006 was earlier filed which was dismissed as a sequel to the dismissal of the writ petition. In support of the said submission, reliance is placed on the judgment of a Division Bench of Kerala High Court in C. Thomas Vs. Kerala Financial Corporation and Others, , wherein it was held that "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, and that 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 therein has to be upheld. We do so. It is held that sale of item No. 4 in Ext.P6 in WP No. 15125/2007 (Ext.P1 in WP 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." The learned

Counsel further relied upon the judgment of a Division Bench of this Court in v. Gopal Reddy v. A.P. State Financial Corporation 1996 (1) ALD 1014, wherein, it was held that once the sale is set aside, the lessee in whose favour lease was created pendente lite cannot have a higher right than the Corporation had and has to abide by the result of the case.

7. In the present case, the issuance of the auction notification and the sale conducted pursuant to the notification are the subject-matter of challenge in the writ petition. The possession of the property was admittedly taken and the writ Petitioner was dispossessed from the property on 19.10.2006 as per the panchanama conducted. Even if the possession was taken on dismissal of WP No. 17212 of 2006, it is only symbolic possession but the physical possession was taken only on 19.10.2006 pending the writ petition and the sale deed was executed in favour of 6th Respondent admittedly on 30.10.2006 pending the writ petition. Therefore, once the sale conducted itself is illegal, the sale deed executed pending the writ petition is subject to the result in the writ petition and the same will be null and void.

8. For the said reasons, the writ appeal is allowed and WP No. 21607 of 2006 is allowed setting aside the auction and consequential proceedings including the execution of the sale deed in favour of 6th Respondent. The Respondent-Corporation is directed to restore possession of the property to the writ Petitioner. No order as to costs.