(2008) 09 JH CK 0083

In the Jharkhand High Court

Case No : Writ Petition (C) No. 4566 of 2007

Dharam Chand Goyal APPELLANT

Vs

Bihar State Financial Corporation and Others RESPONDENT

Date of Decision : 04-09-2008

Acts Referred:

Bihar State Financial Corporations Act, 1951 — Section 32G
Contract Act, 1872 — Section 133

Citation : (2009) 57 BLJR 302 : (2009) 1 JCR 218

Hon'ble Judges : R.R. Prasad, J

Bench : Single Bench

Advocate : A.K. Das, for the Appellant; M.S. Mittal, for the Respondent

Final Decision : Allowed

Judgement

R.R. Prasad, J.—This writ application has been filed for issuance of a writ in the nature of certiorari for quashing the order as contained in Reference No. 386 dated 12.6.2006 (Annexure 10) whereby specified authority in exercise of power conferred u/s 32(G) of the Bihar State Financial Corporations Act issued a certificate for recovery of a sum of Rs. 2,36,78,313.94 along with pendente lite and future interest and made request from the Deputy Commissioner-cum-Certificate Officer to realize the said amount from all promoters of M/s. Chinar Foods Pvt. Ltd. Ranchi including the petitioner as arrears of land revenue and further to quash the entire certificate proceeding, bearing certificate case No. 03 (BSFC)/06-07, pending before the District Certificate Officer, Ranchi so far this petitioner is concerned.

2. The case of the petitioner is that M/s. Chinar Foods Pvt. Ltd. having its office at Ranchi to which petitioner was one of the Directors was sanctioned a term loan of Rs. 34,50,000/- on 26.6.1987 by the Corporation on mortgaging the title deeds with respect to immovable properties of the Company and on giving personal guarantee by the petitioner in the capacity of Director. The petitioner continued as Director of the said Company or some times but on account of his

ill-health, he tendered his resignation on 1.11.1988 which was accepted by the Board of Directors of the Company in its meeting held on 29.11.1988 and the Board of Directors in the said meeting also decided to appoint one Jagdish Prasad Choudhary as one of the Directors. Subsequently, Praveen Kumar Agarwal was also appointed as Director of the Company and information to that effect was given to the respondent-corporation, upon which and they were allowed to be inducted as new Directors. Before that, the petitioner had informed about his resignation to the Corporation, vide his letter dated 6.12.1998 and also made a request to revoke his personal guarantee given by him in the capacity of the Director of the said Company. Upon which, the petitioner was called upon by the Corporation to clarify his stand but he could not make contact to the respondent. However, he again made request to revoke personal guarantee but all on a sudden, the petitioner received a notice dated 29.7.2002 intimating therein that an application u/s 32(G) of the State Financial Corporation Act has been filed against him and other Directors for recovery of the dues. Immediately thereafter the petitioner appeared before the concerned officer and placed his case that as the petitioner had tendered his resignation as back as on 1.11.1988 which had been duly accepted by the Board of Directors, he is not liable to repay the loan amount but the respondent without considering the case of the petitioner, issued a certificate for recovery of the aforesaid amount from M/s. Chinar Foods Pvt. Ltd and its Directors including the petitioner which is wholly illegal and arbitrary.

3. According to counter affidavit filed on behalf of Bihar State Financial Corporation, the Corporation is entitled to recover the amount from the petitioner as the petitioner was one of the Directors of M/s. Chinar Foods Pvt. Ltd. and had also given personal guarantee for securing the loan advanced by Bihar State Financial Corporation and as M/s. Chinar Foods Pvt. Ltd has failed to liquidate the dues, step has been taken by the Corporation for recovery of the dues in terms of Section 32(G) of the State Financial Corporation Act from the Company and also from the petitioner, as the petitioner on being retired from the Directorship has not been relieved from the guarantorship and as the guarantorship had not been revoked, the petitioner is liable to repay the loan.

4. Learned Counsel appearing for the petitioner submits that the petitioner on being retired from the Company communicated it to the authorities of Bihar State Financial Corporation and also made request to revoke his personal guarantee as he had given guarantee in the capacity of the Director of the said Company and after his resignation, other persons were appointed as Directors and hence, even if the request made of revocation of guarantee was not acceded to, it would be deemed that the personal guarantee has been revoked and thereby the petitioner is not liable to pay off the debt which is against the Company.

5. Learned Counsel appearing for the petitioner further submits that respondents'' action of impleading the petitioner in the certificate proceeding for realizing the debt is quite illegal as the Finance Company should have first taken

step to realize the money after putting the property which had been mortgaged, to sale and if the proceed of such sale is less than sum due, then the respondents should have proceeded against the petitioner but the respondents have never adopted this procedure and hence, action taken by the respondents is unsustainable.

6. Learned Counsel in support of his submission has referred to a decision rendered in a case of Pawan Kumar Jain Vs. The Pradeshiya Industrial and Investment Corporation of U.P. Ltd. and Others, .

As against this, learned Counsel appearing for the State Financial Corporation submits that the provision as contained in Section 32(G) of the said Financial Corporation Act never puts any bar in proceeding with simultaneously to recover the debt from the principal debtor and also from guarantor and as the personal guarantee had never been revoked, the petitioner is also liable to pay off the debt.

7. In the context of the rival submission advanced on behalf of the parties raising an issue that it is not open for the respondents to proceed with simultaneously against the principal debtor and the guarantor to realize the debt which has been contradicted on the ground that Section 32(G) of the State Financial Act does not put any such bar one needs to examine the provision as contained in Section 32(G) of the Act which reads as under:

32G. Recovery of amounts due to the Financial Corporation as an arrear of land revenue - Where any amount is due to the Financial Corporation in respect of any accommodation granted by it to any industrial concern, the Financial Corporation or any person authorized by it in writing in this behalf, may, without prejudice to any other mode of recovery, make an application to the State Government for the recovery of the amount due to it, and if the State Government or such authority, as that Government may specify in this behalf, is satisfied, after following such procedure as may be prescribed, that any amount is so due, it may issue a certificate for that amount to the Collector, and the Collector shall proceed to recover that amount in the same manner as an arrear of land revenue.

A reading of the section shows that on an application being filed before the State Government by the Financial Corporation, the State Government or specified authority has to record its decision about the amount due and it is only thereafter a certificate for the amount so due can be issued to the Collector for recovery of the amount as arrears of land revenue. Thus, it never stipulates that the authority first should have taken step for realizing the amount from the principal debtor and if it receives less amount what is due against the principal debtor, then the authority should proceed to realize the amount from the guarantor. However, it would be significant to note here that provision never prescribes about the procedure to be followed in realizing the debt from the debtor and under that situation, the authority u/s 32(G) would be required to follow and apply such procedure which is just, fair, reasonable and is in consonance with the principles of natural justice.

8. So far decision referred to on behalf of the petitioner is concerned, it has been held that the authority should first take step for realizing the debt from the principal debtor and if the amount is not realized fully, then the authority may proceed to realize rest of the amount from the guarantor. But that proposition has been laid down keeping in view the provision as contained in Section 4(2)(a) of the U.P Public Money (Recovery of Dues) Act, 1972 which stipulates that in every case of pledge of goods, proceeding shall first be taken for sale of things pledged and if the proceed of such sale are less than the sum due, then proceeding shall be taken for recovery of the balance as if it were the arrears of land revenue.

9. Since such stipulation is never there in Section 32(G) of the Act, the petitioner cannot derive any benefit of that decision. However, question, in the facts and circumstances, certainly crop up as to whether the petitioner when had expressed his intention on being retired from the post of Directorship, to revoke his guarantee, the guarantee would be deemed to have been discharged even in absence of any decision taken by the creditor. It has already been noted that the petitioner having retired from the Directorship made a request to revoke personal guarantee which fact was acknowledged by the respondents but kept silence for decades though in the meantime, respondents'' Corporation allowed other Directors to be inducted in place of the petitioner against whom respondents have also proceeded for realizing the debt. From these facts, it is evidently clear that there has been change in the position of the principal debtor as regards his creditor which materially affects the position of the surety/ guarantor putting him into a disadvantageous position and in that event, personal guarantee even if any, would be deemed to have been discharged in terms of the provision of Section 133 of the Indian Contract Act which stipulates that if any variance is made in terms of the contract between the principal debtor and the creditor without consent of the surety, surety gets discharged. In the instant case, when new Directors replaces the petitioner on his retirement and the mater is informed to the respondents with a request to revoke the guarantee, the guarantee if any, given by the petitioner would certainly he deemed to have discharged as there has been certainly change in the position of the principal debtor as regards his creditor.

10. In that view of the matter, the order dated 12.6.2006 issuing a certificate of recovery of the debt by the specified authority of Bihar State Financial Corporation is hereby set aside so far this petitioner is concerned and consequently, the certificate case No. 03 (BSFC)06-07, pending in the court of District Certificate Officer, Ranchi is quashed so far this petitioner is concerned.

In the result, this application is allowed.

