

(1972) 11 MP CK 0008

In the Madhya Pradesh High Court

Case No : Miscellaneous Petition Case No. 31 of 1970

Durlabh Kumar

APPELLANT

Vs

The District Judge, Indore and Another

RESPONDENT

Date of Decision : 23-11-1972

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 20 Rule 11

Constitution of India, 1950 — Article 226

State Financial Corporations Act, 1951 — Section 31, 31(1), 32, 32(6)

Citation : AIR 1973 MP 175 : (1973) JLJ 209 : (1973) 18 MPLJ 150

Hon'ble Judges : K.K. Dube, J;G.L. Oza, J

Bench : Division Bench

Advocate : K.L. Sethi, for the Appellant; S.N. Kohli, for the Respondent

Final Decision : Allowed

Judgement

Oza, J.

This petition has been filed by the petitioner against an order passed by the District Judge, Indore, directing the sale of the property of the petitioner and recovery of the amount due to the respondent No. 2.

Respondent No. 2 filed an application before the District Judge, Indore, u/s 31 of the State-Financial Corporations Act, 1951, (hereinafter called the Act), for the sale of the property of the petitioner which was mortgaged as security for a loan advanced by the respondent to the petitioner. It was alleged that according to the terms of the agreement the petitioner was required to pay off this amount in five equal yearly Instalments starting from 1st March 1965. There was also a term for Payment of interest which was to be a half-yearly payment. and in case of default respondent No. 2 was entitled to recover the whole amount. It is alleged that after the payment of the first instalment, the petitioner paid some amount against the second instalment. But thereafter he failed to pay anything. Consequently the respondent-Corporation gave a notice on 17th September 1968 calling upon the petitioner to pay the whole amount with interest. As the

petitioner did not pay the whole amount even after this notice, an application u/s 31 of the Act was filed before the District" Judge on 6th December 1968. In his reply to this application, the petitioner pleaded that he was regular in payment upto 30th June 1966. but later on account of acute shortage of water in Indore there was cut in electric supply and so the petitioner could not run his factory, and it was because of these circumstances that it became impossible for the petitioner to pay the instalments and interest as stipulated. It was also pleaded by the petitioner that as the factory had been closed for the last three years and it was not possible for him to pay the whole amount, he should be granted the facility of instalments.

On the pleadings of the parties, the learned District Judge framed various issues, and by his order dated the 6th September 1969 held that the petitioner could not be permitted to lead evidence to prove his bona fides and the circumstances in which it was not possible for him to pay the instalments. He also held that the petitioner could "not be permitted to lead evidence to establish circumstances justifying an order for instalments. After this order, there being no other dispute, the learned District Judge, by his order dated the 19th November 1968 confirmed the order of attachment, which was issued earlier, and directed that the amount due to the respondent No. 2 be recovered by sale of the property of the petitioner.

Learned counsel for the petitioner contended that the jurisdiction of the learned District Judge while deal-ins with an application u/s 31 of the Act is wide enough and he was bound to investigate into the facts and circumstances pleaded by the petitioner, It was contended that the learned District Judge after investigation into the facts alleged by the petitioner, was even competent to set aside the attachment or also to grant instalments which the Court could do under Order 20, Rule 11, Civil P. C. Learned counsel also contended that Sub-section (6) of Sec. 32 of the Act clearly lays down that the provisions contained in the CPC would be applicable so far as they are not inconsistent with the provisions of the Act. He placed reliance on the decision in *Asnew Drums Private Ltd. and Others Vs. Maharashtra State Finance Corporation and Others*, and *Industrial Finance Corporation of India and Another Vs. Thakur Paper Mills Ltd. and Another*, . Learned counsel also contended that although an appeal under Sub-section (91 of Section 32 of the Act could be filed, still on account of some ailment in the petitioner's family no appeal could be filed but on that ground the petition could not be thrown out as apparently the learned District Judge has refused to exercise jurisdiction vested in him by law. In support of his contention, learned counsel relied on *L. Hirday Narain Vs. Income Tax Officer, Bareilly*, .

Shri Kohli appearing for the respondent-Corporation contended that in view of the provisions contained in Section 30 of the Act it could not be doubted that the Corporation gets a right for recovery of the whole amount, and once that right vested in the respondent-Corporation the learned District Judge could not go into the matter except to investigate into the claim of the respondent-Corporation.

According to the learned counsel, the claim would only be pertaining to the demand made by respondent No. 2 and as in the present case the amount claimed was not disputed, the learned District Judge was right in refusing to investigate into the reasons for non-payment. He also contended that although the CPC has been made applicable still it would only be applicable to the extent of procedure pertaining to enquiries before the District Court.

Section 30 of the Act no doubt provides that the Financial Corporation may by notice in writing demand the payment of full amount advanced to any industrial concern in the event of the happening of certain events, and the clauses of this section provide for all those circumstances which will entitle the Corporation to demand the whole amount. Section 30. therefore confers power on the Corporation to recover the whole amount in addition to the term of the contract itself. Section 31 of the Act provides the procedure for the recovery of the amount. It was contended, on reference to the statement of objects and reasons which was attached to the Bill of this Act when it was presented for enactment, that the scheme of Section 31 provides a special procedure for recovery of the amounts due to a Corporation. It may not be necessary to go into the objects and reasons stated when the Bill was introduced. But a perusal of Section 31 itself clearly indicates that instead of the Corporation being called upon to file a regular civil suit, a special procedure has been prescribed for enforcement of the claims. Section 31 provides for an application by the Corporation on the basis of which proceedings for recovery can be launched. Section 31 is as under:--

"31. (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 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. any officer of the Financial Corporation, generally or specially authorized 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

(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." The three clauses of Sub-section (1) provide for various reliefs which the Corporation can seek when it makes an application under this section. Clauses (a) and (b) of Sub-section (1) are the two reliefs which a Corporation may claim as final reliefs in the application, whereas Clause (c) provides for certain interim orders in the nature of attachment or injunction. Section 32 of the Act prescribes the procedure after such an application has been filed before the District Judge. Sub-sections (1) and (2) of Section 32 pertain to Passing of interlocutory orders. Sub-section (3) provides that if the District Judge so thinks fit he may even examine the officer who makes the application, before the issue of an interlocutory order, Sub-section (4) of Section 32 and the rest of its sub-sections provide for the procedure for final determination. Subsections (4), (5) and (6) of Section 32 are as under :

"32.

(4) At the same time as he passes an order under Sub-section (1), the District Judge shall issue to the industrial concern a notice accompanied by copies of the order, the application and the evidence, if any, recorded by him calling upon it to show cause on a date to be specified in the notice why the ad interim order of attachment should not be made absolute or the injunction confirmed.

(5) If no cause is shown on or before the date specified in the notice under Sub-sections (2) and (4), the District Judge shall forthwith make the ad interim order absolute and direct the sale of the attached property or transfer the management of the industrial concern to the Financial Corporation or confirm the injunction,

(6) If cause is shown, the District Judge shall proceed to investigate the claim of the Financial Corporation in accordance with the provisions contained in the Code of Civil Procedure, 1908, in so far as such provisions may be applied thereto."

Sub-section (4) of Section 32 provides that a notice shall be issued to the industrial concern to show cause why the order passed should not be made absolute, and along with this notice a copy of the order will also be sent. Sub-section (5) provides that if no cause is shown, the District Judge shall forthwith make the interim order absolute. Sub-section (6) provides for the procedure in case cause is shown and it is provided that the District Judge shall proceed to investigate the claim of the Financial Corporation in accordance with the provisions contained in the Code of Civil Procedure. It is on the basis of Sub-section (6) of Section 32 that it is contended that the District Judge was bound to investigate the defence set up by the petitioner because in absence of any investigation about it it could not be said that the claim of the Corporation has been investigated. The word "claim", used in Sub-section (6), cannot be said to mean only the monetary part of the claim which the Corporation is entitled to recover. Section 31 refers to the word "claim" stating "Special provisions for enforcement of claims by Financial Corporation." Consequently the word "claim"

has been used in these provisions to mean the sum-total of the facts alleged by the Corporation with demand for a relief under any of the three clauses of Sub-section (1) of Section 31. Consequently the question of default and the justification sought by the petitioner would also fall within, the ambit of investigation into the claim. This sub-section also brings in the Code of Civil Procedure, and it has been provided that the District Judge shall proceed to investigate the claim of the Financial Corporation in accordance with the provisions contained in the Civil P. C,

A similar language has been used in Sub-section (8) of Section 32, which is as under :

"(8) An order of attachment or sale of property under this section shall be carried into effect as far as practicable in the manner provided in the Code of Civil Procedure, 1908, for the attachment or sale of property in execution of a decree as if the Financial Corporation were the decree-holder." This language was considered by the Supreme Court in *Asnew Drums Private Ltd. and Others Vs. Maharashtra State Finance Corporation and Others*, where it was held as under-

"The question which really arises is whether by using the words "in the manner provided in the Code of Civil Procedure" in Section 32(8) the Legislature intended to include the provisions in the Code dealing with appeals. There is no doubt that under the CPC an order setting aside or refusing to set aside a sale in execution of a decree is appealable under O. XLIII, Rule 1 (i). It is difficult to understand why the scope of the language should be cut down by not including appeals provided under the CPC within the ambit of the words "in the manner provided in the Code of Civil Procedure". "Manner" means method of procedure and to provide for an appeal is to provide for a mode of procedure. The State Financial Corporation lends huge amounts and we cannot for a moment imagine that it was the intention of the Legislature to make the order of sale of property, passed by the District Judge, final and only subject to an appeal to the Supreme Court under Article 136 of the Constitution.""

It cannot, therefore, be doubted that when the Legislature used this language to bring in the Code of Civil Procedure, the relevant provisions of the Code were made applicable. In *Industrial Finance Corporation of India and Another Vs. Thakur Paper Mills Ltd. and Another*, a question arose about the jurisdiction of the District Judge u/s 30 of the Industrial Finance Corporation Act, 1948, which is more or less analogous to Section 32 of the present Act, and it was observed as under-

"The question, therefore, that arises for our consideration, is whether the proceedings u/s 30 of the Act are the proceedings contemplated by Section 141 of the Code. In the proceeding u/s 30 of the Act, the Corporation in the circumstances mentioned therein has to apply to the District Judge for the relief or reliefs stated above. In a suit also, a party has to make out a cause of action and has to claim a certain relief and, after the trial, the Court passes a decree in

favour of the plaintiff or dismisses the suit. Therefore, the special provisions for enforcement of claims by the Corporation are very similar to the proceedings in the nature of the suit. I am, therefore, of opinion that a proceeding under this section is a proceeding of the kind contemplated by Section 141 of the Code, and, as such, the District Judge, while acting under that section, had the power to appoint a receiver under Order 40, Rule 1 of the Code." Consequently it cannot be doubted that while enquiring into the claim as provided in subsection (6), the District Judge ought to have investigated into the circumstances pleaded by the petitioner as he had jurisdiction under Order 20, Rule 11, Civil P. C. to consider the case of the petitioner.

Sub-section (7) of Section 32, which provides the reliefs which the District Judge can grant, is as under-

"(7) After making an investigation under Sub-section (6), the District Judge may-

- (a) confirm the order of attachment and direct the sale of the attached property;
- (b) vary the order of attachment so as to release a portion of the property from attachment and direct the sale of the remainder of the attached property;
- (c) release the property from attachment;
- (d) confirm or dissolve the injunction; or
- (e) transfer the management of the industrial concern to the Financial Corporation or reject the claim made in this behalf;

Provided that when making an order under Clause (c), the District Judge may make such further orders as he thinks necessary to protect the interests of the Financial Corporation and may apportion the costs of the proceedings in such manner as thinks fit:

Provided further that unless the Financial Corporation intimates to the District Judge that it will not appeal against any order releasing any property from attachment, such order shall not be given effect to, until the expiry of the period fixed under Sub-section (9) within which an appeal may be preferred or, if an appeal is preferred, unless the High Court otherwise directs until the appeal is disposed of."

These reliefs which a District Judge can grant while deciding an application u/s 31 of the Act clearly go to show that the District Judge can also release a property from attachment, and while so doing he can also pass orders for protecting the interests of the Financial Corporation. This also shows that the District Judge can even pass orders which do not fall within any one of the reliefs that may be claimed by the Corporation. As already discussed, the application of the provisions of the CPC has already been discussed by the Supreme Court in the decision referred to above. In this view of the matter, it cannot be doubted that the District Judge ought to have investigated the objections raised by the petitioner to the claim of the respondent Corporation.

It was contended that as the alternative remedy of appeal, which was available to the petitioner, was not availed of by him, relief under Article 226 of the Constitution could not be granted. In *L. Hirday Narain Vs. Income Tax Officer, Bareilly*, this question was considered by the Supreme Court and it was observed that-

"An order u/s 35 of the Income Tax Act is not appealable. It is true that a petition to revise the order could be moved before the Commissioner of Income Tax. But Hirday Narain moved a petition in the High Court of Allahabad and the High Court entertained that petition. If the High Court had not entertained his petition, Hirday Narain could have moved the Commissioner in revision, because at the date on which the petition was moved the period prescribed by Section 33A of the Act had not expired. We are unable to hold that because a revision application could have been moved for an order correcting the order of the Income Tax Officer u/s 35, but was not moved, the High Court would be justified in dismissing as not maintainable the petition, which was entertained and was heard on the merits."

In this view of the matter, it would not be right to reject this petition at this stage. Shri Kohli, appearing for the respondent-Corporation, contended that in the Supreme Court case referred to above on the date, on which the writ petition was filed in the High Court a revision could be filed, and as the High Court admitted the petition the Supreme Court felt that thereafter the petition could not be dismissed on that ground alone. But, according to the learned counsel, in the present case the time for appeal had already run out, and, therefore, the alternative remedy having not been availed of, this petition could not be entertained. It is no doubt true that the time provided for an appeal had run out when this petition was filed. But if the petitioner had so chosen, he could have preferred an appeal and sought condonation. In that view of the matter, the principles laid down by the Supreme Court will fully apply to the present case also, and no distinction can be drawn only on that ground. It appears that what the Supreme Court felt was that if at the time of motion hearing the petition had not been entertained, the petitioner could have sought the alternative remedy, but that not having been done, after lapse of long time it would not be fit to refuse to grant relief as now it would not be possible for the petitioner to avail of the alternative remedy also. Apart from that, the question involved in the present case is about the jurisdiction of the District Judge, and by refusing to investigate into the objections raised by the petitioner the District Judge had refused to exercise jurisdiction in him by law. Consequently this is a ground on which a petition under Article 226 or even under Article 227 of the Constitution would be maintainable. Consequently the petition cannot also be thrown out on the objection of maintainability.

The petition is, therefore, allowed, the order passed by the District Judge, Indore, is set aside, and the case is sent back to him for investigating into the objections raised by the petitioner and their disposal in accordance with law. The

order of attachment passed shall, however, continue, until the disposal of the matter by the District Judge. In the circumstances of the case, the parties are directed to bear their own costs. The outstanding amount of security deposit shall be refunded to the petitioner.