

(2011) 07 P&H CK 0185

In the Punjab And Haryana At Chandigarh

Case No : Civil Writ Petition No. 9657 of 2001 (O and M)

Gaurav Processors Private Limited

APPELLANT

Vs

Haryana Financial Corporation and Another

RESPONDENT

Date of Decision : 27-07-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 89
State Financial Corporations Act, 1951 — Section 29

Citation : (2011) 164 PLR 525

Hon'ble Judges : K. Kannan, J

Bench : Single Bench

Judgement

K. Kannan, J.—The property of industrial concern, which had availed of a secured loan from the Respondent-Corporation, was sought to be sold for recovery of amount due to the Respondent-Corporation. The issue has come through this writ petition, seeking for a mandamus to direct the Respondents to accept the proposal submitted by the Petitioner and dispose of the unit to the person as proposed or in the alternative to any better person, who could offer more, and for issuance of other directions. The writ petition came to be filed at a time when the Petitioner admittedly could not repay the loan and the Respondent took possession of the Petitioner's premises on 16.06.1997. At that time, the amount outstanding was in the range of Rs. 1.70 lacs and odd, but after taking possession, the property was not immediately put up for auction. At every time when bids were called, the Respondent informed the Petitioner, but the Petitioner himself had his own apprehensions that the property would be sold for less than what the market could fetch.

2. Even before the arguments could get underway, the counsel for the Respondents pointed out that the prayer in the writ petition has not been amended ever since its initial filing and the relief in the petition does not take note of the subsequent events which have taken place where the property was sold to a buyer who the Petitioner himself had brought and the sale was also made in his favour at the price suggested by the Petitioner himself for Rs. 1.40

crores against the offer of Rs. 1.35 crores which the Corporation had identified through another party as the highest bidder. The Court passed an order on 03.04.2002 allowing the property to be sold to the person brought at the instance of the Petitioner himself and a further order passed on 10.05.2002 that records the fact that the requisite deposits had been made by the person brought by the Petitioner and an agreement had also been entered into for purchase.

3. Having regard to the subsequent development of a sale having been concluded in favour of a person who the Petitioner himself had brought, the substantial relief sought for in the writ petition cannot any longer avail. However, the counsel appearing on behalf of the Petitioner addressed arguments that the Respondent had not settled the accounts yet and was still making demands as though large sums of money were still due. During the course of proceedings, a Local Commissioner had been appointed to take an inventory of the machineries at the factory, since the Petitioner alleged that the valuable machineries were getting pilfered and the Respondent, as a person in possession, who was not merely a bailee, but a trustee of the Petitioner's property, was bound to exercise due diligence and care and would become responsible for any loss occasioned by the pilferage of the valuable items. A report had been filed by the Commissioner after inspection but the Corporation itself had very serious objections for the report in so far as it gave details of valuation of some of the items and assumed that some goods had gone in disrepair or lost due to the pilferage by the alleged negligence of the Corporation. The Petitioner's contention, however, was that if the valuation of the Commissioner's report were to be accepted, the Respondent was still liable to pay to the Petitioner than any form of liability to subsist in favour of the Respondent by the Petitioner.

4. There can be no dispute on the fact that the Corporation, that takes possession of the property in the manner provided under statute by invoking Section 29 of State Financial Corporation Act of 1951 (for short, "the SFC Act"), is bound to take appropriate care and the degree of care is not merely as a bailee, but as a trustee, as laid down by several decisions of the Hon'ble Supreme Court. The learned Counsel for the Petitioner cites the decisions and I have reproduced them, merely as a measure of assurance to the Petitioner that in the ultimate dispensation, the Court has taken note of care and circumspection that the Financial Corporation must take before the property is sold. In the decision in Everest Wools Pvt. Ltd. And Ors. v. U.P. Financial Corporation and Ors. (2008) 1 SCC 643 , the Hon'ble Supreme Court has held that the Corporation shall act as a trustee and where the assets of an ongoing concern are taken over for sale, extra care on the part of the Corporation was necessary. In the decision in Karnataka State Industrial Investment and Development Corporation Ltd. Vs. Cavalet India Ltd. and Others, , the Hon'ble Supreme Court has held that, while taking resort to Section 29 of the SFC Act, Corporation must take a conscious decision whether action u/s 29 was required to be taken, after considering in its proper perspective any cause shown for default. The dominant consideration in an action u/s 29 shall be to secure the best price for the property to be sold

which is possible only after due publicity and inviting maximum public participation. The Corporation is not like an ordinary moneylender and the State action must be such as that object of SFC Act is not lost, namely, to promote industrialization of the State by encouraging small and medium industries. In the decision in *M/s Yamuna Enterprises, Yamunanagar v. Haryana Financial Corporation and Ors.* (2002) 2 PLR 194, this Court noticed that, despite the lapse of 4 years, the goods had not been sold and the borrower had been deprived of the use of computers. The Court accepted the contention that the Petitioner was entitled to be credited of the assessed value of the computers on the date of its taking over possession.

In the judgment in *Kharavela Industries Pvt. Ltd. Vs. Orissa State Financial Corporation and Others*, a Division Bench of Orissa High Court held that the failure of the Corporation to consider payment made by the industry immediately after it was taken over, was liable to be interfered with as vitiated. I will have no use for the application of the law laid down by the Orissa High Court, for, I am not prepared to examine that the act of taking over possession itself was unjustified. The Petitioner had two rounds of litigation through civil suits and appeals questioning the decision to take possession but in this writ petition, the Petitioner was prepared to accept the prospect of taking possession and the requirement of sale as exigent and appropriate. The intervention was sought only to ensure that the best price was secured. For the same reason even the reliance of the judgment of a Division Bench of the Allahabad High Court in *Bharat Explosive Ltd. Vs. The Pradeshia Industrial and Investment Corporation of U.P. Ltd and others*, is not relevant, for, it was considering the issue of failure of the Corporation to reschedule the loans and preventing the Petitioner's planning for further expansion. In that case, the Corporation had assured the Petitioner to give certain concessions which it later withdrew. The Corporation's action was found to be suspect. The learned Counsel has also referred to the judgment of the Hon'ble Supreme Court in *Mahesh Chandra Vs. Regional Manager, U.P. Financial Corporation and others*, to make reliance on the directives of the Hon'ble Supreme Court while dealing with sale of the properties of an industrial concern. This decision has been referred to, only to examine whether the Corporation was acting within the parameters, as laid down in the said decision, which was the law prevailing at the time when the writ petition was filed in 2001. *Mahesh Chandra* was overruled in the subsequent decision of the Hon'ble Supreme Court in *Haryana Financial Corporation and Another Vs. Jagdamba Oil Mills and Another*, .

5. The counsel for the Petitioner argued that the Respondent was unnecessarily dragging its feet and not putting up the property for sale by involving the Petitioner by issuing notices and informing the bids that had been offered by purchasers. According to the learned Counsel, Mr. Bansal, the Petitioner was losing precious time by postponing sales every time after offers had been received by the Corporation. This was in response to an argument by the Corporation that if there had been a delay in the sale of the property, it was only

on account of the Petitioner's own conduct in filing suits and staying the recoveries. The counsel for the Corporation further explained that after the property was taken possession on 16.06.1997, the Petitioner had filed a suit on 14.10.1997 and obtained an order of stay for taking further action for sale. The stay was vacated on 03.06.1998 and the appeal filed to the District Court was also dismissed on 30.06.1998. A civil revision was filed before this Court and it was dismissed on 05.08.1998. The properties had been, therefore, put for auction again on 27.11.2008 and bids had been invited, but the sale could not be confirmed only because the requirement of law as in Mahesh Chandra was to inform the borrower Company of the bids to ensure that it was not sold for the low price or without letting the borrower know whether the offer was appropriate and whether the action of the Corporation was justified. I will accept the contention of the Corporation that even apart from the initial delay caused by the institution of a civil suit by the Petitioner, the subsequent delay in finalizing the sale took place only in view of the then extant law as laid down by Mahesh Chandra that required the Corporation to inform the borrower of the price of the highest bid received by it. When ultimately the property was sold, I notice that there had been persistent efforts taken by the Corporation to bring up the property for sale and it followed a sure measure of transparency by letting the Petitioner know of the bids at every time. Even after the petition was filed before this Court, the Court was monitoring every offer and counter-offer before it finalized the transaction in favour of a person brought by the Petitioner himself as a willing purchaser. I will not, therefore, find that there was any undue delay for putting up the property for sale by the Corporation to make it liable for any inadequacy of price for the property. It is a notorious fact that court auction sales or sales at the instance of creditors through formal procedures prescribed under enactments do not always fetch the best market price. A distress sale is a sentimental drag, as it were and if competitive bids exist, they go only so far as to bring the best bargain price under the given circumstances. A sale of a going concern doing well and making profits is not the same as a sale of an industrial concern that is unable to repay its debts, for whatever reasons.

6. This is not to completely absolve the liability of the Corporation for any lapse that may have been occasioned by taking over of a running concern reeling under financial distress and not taking appropriate care for sale of the movables and machinery or taking appropriate care of the protection of the machinery. The Commissioner's report gives a telling narration of the poor upkeep of the machinery at that time when the premises had been under the control of the Corporation. The Commissioner has filed photographs along with his report that showed that in many places, the wires had been hanging loose and many other places, equipments appeared to have been removed from the place and the places where machineries had been installed had remained as vacant spaces to indicate that they had been removed subsequently. The counsel for the Corporation has very serious objections to the report regarding the alleged missing articles. The learned Counsel would state that it was in "as is, where is"

condition. This contention of the Corporation cannot be wholly true, for, if any machinery had been removed by the Petitioner and there were hanging wires showing that the Petitioner himself had removed valuable machinery, the Corporation must have immediately informed the Petitioner and made a complaint that the valuable machineries and articles, which had been hypothecated to the Corporation, had been removed. I do not find that there is any such complaint.

7. However in one way, I would uphold the objection by the counsel for the Corporation that the value of the articles as estimated by the Local Commissioner cannot be taken as the last word since, according to the Corporation, there is no basis found in the report as to how the Local Commissioner had estimated the respective values. It is essentially a technical exercise and without actual authentication and supporting documents to gather the prices in the market and without production of documents by the Petitioner of the invoices for purchase of the various machineries, the Commissioner could not have assessed the valuation of the machineries.

8. The learned Counsel for the Petitioner states that in the worst scenario, the liability of the Petitioner must freeze as on the date when the Petitioner's assets were taken over and the value of the movables as on that date must be considered. In my view, the liability cannot cease even for interest merely because the property has been taken possession by the Corporation. On the other hand, the liability of industrial concern shall subsist not merely for the principal but also for the interest up to the date when the Corporation, by exercise on due diligence, could put up the property for sale. A passage of time may not have significant bearing for bringing the best price for real estate in a growing economy like India, but the machineries rust; lose value by non-user; and depreciate in value by length of time. The value of the machineries on the day when the property was sold will have to be ascertained only by actual recording of evidence with reference to proper documents that the Petitioner ought to have in his custody or technical evidence through experts in trade or manufacturers or dealers of the articles. I do not think it will be possible for this Court to determine the price to assess the extent of loss alleged to have been caused by the alleged negligence of the Corporation by merely relying on what the Commissioner's report states. The counsel for the Respondent contends that objections have been filed to the Commissioner's report and valuation and that the Commissioner has given the valuation of the articles wholly on the information of what the Petitioner has supplied, without inviting the corporation to join issues on the valuation before the report was filed.

9. The appropriate remedy for the Petitioner will be only to institute a civil suit for considering the actual loss alleged to have been caused. If such a suit were to be filed since the liability of the Respondent shall be in a capacity as a trustee, there ought not to be any objection regarding the issue of limitation. The decision rendered by this Court itself must be taken to be the starting point when

the liability of the Respondent as a trustee is declared on the institution of such suit. The trial Court shall also examine Section 89 (CPC) formulation to see whether a reasonable settlement is possible. Even at the time of arguments, I put at across to the counsel for the Corporation Shri Sehgal if the parties would be willing to put through an arbitrary agreement to determine the value of the movables as on the date when the property was sold and the deficiency in value if any, that had contributed to the price of the plant and machineries when it was ultimately sold; whether there had been any deterioration in the value by the alleged poor upkeep of the machineries during the time when the Corporation was in its possession and whether any pilferage had occurred during the time when the corporation was in possession, as alleged. Since I could not evoke any positive response, I will allow for remitting the issue of determining the actual loss which the Petitioner claims that has arisen by the alleged negligence and want of care of the Respondent-Corporation. I am of the view that the Petitioner is entitled to demand the actual value of the movables which had been lost due to alleged poor upkeep or by its alleged negligence in letting some of the equipments to be pilfered. These assertions cannot be taken at their face value but would require to be established by appropriate evidence. The Respondent shall not take any action for recovery by merely loading interest on the amount outstanding by giving credit only to the amount realized by the sale of the industrial concern. If any action is taken by the Corporation for realization of dues as alleged as still outstanding, the Petitioner shall have an opportunity to let in evidence by way of counter claim of the amount which it alleges as due from the Corporation. Alternatively, the Petitioner will be liberty to file an appropriate civil suit for recovery of damages or accounting for the alleged loss caused to it by the conduct of the Respondent-Corporation.

10. The writ petition is disposed of on the above terms.