(1993) 02 OHC CK 0007

In the Orissa High Court

Case No : A.H.O. No. 21 of 1990

Gopal Chandra Ghose — APPELLANT

Vs

Orissa State Financial Corporation — RESPONDENT

Date of Decision : 23-02-1993

Acts Referred:
Contract Act, 1872 — Section 230
State Financial Corporations Act, 1951 — Section 31

Citation : AIR 1994 Ori 143

Hon'ble Judges : K.C. Jagadeb Roy, J;G.B. Patnaik, J

Bench : Division Bench

Advocate : R.C. Mohanty, R. Mohanty and Debakanta Mohanty, for the Appellant; S.K. Sinha and Sahoo, for the Respondent

Final Decision : Dismissed

Judgement

K.C. Jagadeb Roy, J.—The present letters patent appeal under Article 4 of the Orissa High Court Order 1948 read with Clause 10 of the Letters Patent constituting the High Court of Judicature of Patna has been filed by the appellant of Miscellaneous Appeal No. 20 of 1980 which has been disposed of by the judgment of the Hon''ble single Judge of this court dated 25-4-1990.

The Misc.Appeal was filed against the order of the District Judge, Cuttack passed u/s 31 of the State Financial Corporation Act, 1951 (hereinafter referred to as the ''Act''). The said order had been passed by the District Judge at the instance of the State Financial Corporation directing confirmation of the orders of injunction and attachment of the appellant''s properties made earlier and directing sale of the said attached properties to be made is accordance with provisions of Section 32(7) of the Act. The facts as revealed from the pleadings of the parties and the evidence that was led by them are that the appellant had made an application for a loan for production of an Oriya picture with the title "LAXMI-O-Heera" but the same having been rejected by the O.S.F.C. as according to them it was the Film Finance Corporation of India which is the proper body for such advancement of loan. Subsequently however, the Government of Orissa by its letter Ext. 20 dated 19-6-1972 sanctioned a loan of Rs. 1,70,000/- in favour of the appellant under the Agency Agreement scheme and intimated the same to the Director of Industries.This exhibit indicates that the loan had been sanctioned in accordance with the recommendations of the respondent (O.S.F.C.) and it was directed that the amount to be disbursed from the amount of Rs. 5,00,000/- sanctioned by the Government in Government Order No. 5847-I dated 24-3-1972 which had been placed at the disposal of the respondent-Corporation under the aforesaid Agency Agreement Scheme. A copy of the said letter was, however, forwarded to the Managing Director of the Corporation alone and the loanee-appel-lant was not communicated about such correspondence. After the Director of Industries wrote to the Managing Director of the respondent-Corporation it is only on 1-7-1972 after such communication from the Director, the respondent-Corporation had communicated with the appellant vide Ext. 19-A intimating that the Government had sanctioned the amount of Rs. 1,70,000/- subject to the terms and conditions in the letter and other usual conditions of the mortgage deed. The terms contained in the letter required that the Corporation shall exercise all control over making positive of the film to be produced and that no positive could made without specific and prior permission of the Corporation and the loanee was to execute an irrevocable power of attorney authorising the Corporation to act on their behalf with regard to distribution of film to the distributors and show houses, and also to act on their behalf for collection of dues. The rate of interest stipulated was by 81/4% per annum with a rebate of 4% of timely payment and the loan was to be repaid within a period of not exceeding two years with a further condition that the first instalment shall commence either on the date of expiry of one year from the date of registration of the mortgage deed or the expiry of thirty days from the date of release of the film whichever is earlier. There was still a further stipulation that the repayment shall be 40% for the first four months, 35% for the second four months and 25% for the last four months of the year. These conditions are identical to the terms stipulated by the Government in Ext. 20 addressed to be Director of Industries, Orissa.

It is noteworthy that a letter of intent as per Ext. 31 was issued by the Corporation to the appellant on 17-7-1972 intimating him that with reference to his application, the Corporation had sanctioned him loan of Rs. 1,70,000/- (the underlining is made by us for emphasis) and called upon the lessee to secure the loan of an equitable mortgage by deposit of title deeds, by hypothecation of his existing movable properties as well as the film with copies made therefrom indicating in the said letters of intent the conditions including that of inte.rest, repayment, recovery, accounts etc. and calling upon the appellant-lessee to communicate to the Corporation his acceptance of the terms in writing. The loanee-appellant endorsed his acceptance of all the terms and conditions contained in the letter on the very same day and on the basis of much communication, a hypothecation agreement (Ext. 6) was executed by the lessee on 17-7-1972 and also mortgage deed as per Ext. 5 was also executed in favour of the Corporation on the same day. As was required by the loanee, the loanee also executed an irrevocable power of attorney Ext. J and out of the sanctioned loan amount Rs. 63,000/- was released on 19-7-1972, Rs. 40,000/- on 16-1-1973, Rs. 25,000/- on 16-2-73 and Rs. 40,000/- on 29-3-73. Later on, however, on 29-3-1973 there is an agreement executed as per Ext. 3 between the appellant and the respondent changing the name of the film from ''LAXM1-O-MEERA'' to GHAR SANSAR. Since the loaneE-appel-lant committed several defaults in payment of the loan in accordance with the agreement even after sending him several notices, the respondent approached the District Judge u/s 31 of the Act praying for an order of sale of the properties mortgaged and hypothecated as per unjustment of the sale proceeds towards the dues together with future and pendente lite interest till realisation.

2. The claim of the Corporation was resisted by the appellant by filing written statement which was supplemented by two other additional written statements later. The stand of the appellant in the written-state-ment was that since the loan was sanctioned by the Government on the terms and conditions imposed by it and the stipulations regarding payment of compound interest was not indicated by the Government, the claim of compound interest was not authorised, as it was not in accordance with the directions of the Government while granting the loan. That apart the Corporation having not furnished to the loanee-appellant the accounts of all collections made by it and having failed to take necessary action for realisation of the full share money from the defaulting picture houses, the claim of money made by the Corporation was not the lawful demand from the loanee and correctness of the claim was challenged by him. The loanee while not admitting the correctness of the schedule-A of the petition u/s 31 of the Act has submitted a list which according to him should have been collected from different picture houses where the picture was screened. According to the loanee since the irrevocable power of attorney was given to the Corporation, the Corporation had taken up the responsibility of collecting the amount as was shown in the statement furnished by him and should have been taken to have been collected and debited to his credit in the loan ledger and if there was any default on the part of the respondent in collecting the said amount liability on account of this should be borne by the Corporation.

Though no witness was examined by the respondent, the appellant himself examined as C.P.W. I. on analysis of the evidence and documents which were exhibited by either side and marked on admissions, the learned District Judge negatived the plea raised by the loanee-appellant and decided the case against him. In the Misc. Appeal on the side of the loanee it was argued that the proceeding u/s 31 of the Act was not attracted to the present loan since the advancement of loan to make the film could not be treated to be an advancement to an industrial concern, and as such, this loan could not be contemplated within the scheme of the Act. The second point that was raised on behalf of the loanee was that the loan in question was not advanced by the respondent-Corporation out of its own funds and the Corporation dishonoured the loan in favour of the loanee as the agent of the State Government. As such, the proceeding u/s 31 of the Act by the Corporation without making State Government a party was not maintainable and the proceeding was not in consonance with the provisions of the statute and the stipulations of payment of compound interest was viola-tive of the terms and conditions sanctioned by the Government as well as the letter Ext. 19-A of the Corporation issued to him.

3. The Hon''ble single Judge gave his findings in his judgment against the appel-lant-loanee on all those points. According to the Hon''ble Judge production of the films for exhibition is to be regarded as industry. According to the Hon''ble Judge, the production of the film from the raw film with all its process, the finished product is a wholly distinct article with a different name, character and use and therefore be suitably called to have been manufactured out of the raw films and the production of film therefore can be treated as an industrial concern within the meaning of Section 2(c) of the Act which squarely comes within Clause (i) of the said Section 2(c) which states that the industrial concern means any concern engaged or to be engaged in the manufacture, preservation or processing of goods.

Regarding the maintainability of the proceeding u/s 31 of the Act, the Hon''ble Judge held that the Corporation is authorised to carry on and transact business, inter alia, as the agent of the Central or the State Government in respect of any manner connected with, or arising out of, the grant of loan or advance to an industrial concern or subscription to debentures of an industrial concern. Thus there was an express provision in the Act that one of the statutory functions of the Corporation is to act as an agent of the State Government in respect of loans of the advances made to an industrial concern. Therefore the respondent was discharging its statutory functions even while acting as the agent of the State Government. Section 31 of the Act vests special rights in the Corporation to move the District Judge for sale of the property pledged, mortgaged, hypothecated or assigned to it as security for the loan or advance or to transfer to the management of the industrial concern to it or for an ad interim injunction restraining the industrial concern from transferring or removing its machinery or plant or equipment from its premises. Since an application u/s 31 of the Act can be filed by the Corporation in respect of all its business as capable of being conducted by it u/s 25, be it as a principal or as the agent, it was not necessary for the Corporation to implead the State Government in the application as the principal debtor since the Corporation was the constituted functionary under the Act to take steps for recovery in respect of all types of loans advanced by it including agency loans, no exception could be taken to the proceeding under the Act. The Hon''ble single Judge accordingly held that the Corporation was entitled to file the petition u/s 31 of the Act and held the petition to be maintainable.

Regarding the correctness of the accounts maintained by the Corporation and the loan and receipt from the show houses on display of the films, the Hon''ble single

Judge held that nothing was shown to hold that the accounts of the respondents were wrong. As a matter of fact, the Court in coming to its conclusion, referred to the deposition of the appellant-loanee wherein he stated that except the papers which has been exhibited either on the date of his examination in court or before, he did not have any other paper at home to show any payment towards his loan to the Corporation and controvert the statements of the Corporation as in Exts-1 and 2 and ultimately dismissed the appeal with costs. The loanee-appellant being aggrieved by the said judgment of the Hon''ble single Judge has preferred this Letters Patent Appeal on the following grounds.

(i) That the Corporation having advanced the money as the agent of the State Government, it had no authority to initiate a suit of the present nature without making the State Government a party to the same (Ref. paragraph 6 of the ground of appeal).

(ii) Because of the irrevocable power of attorney given by the loanee-appellant in favour of the Corporation, the loanee-appel-lant was rendered powerless to collect the money or its dues as due to him and the Corporation would not be allowed to take the benefit of its laches in not collecting it from the loanee-appellant for adjustment towards its dues and that the Corporation had no authority to realise the compound interest on the defaulted amount and that the receipts of payment made from the show houses directly to the respondent had not been entered into the book of accounts and ledgers of the respondent-Corporation.

The appellant-loanee has abandoned his argument regarding the competency of the Corporation in advancing the loan to him and his earlier argument that production of the films was not a part of the industrial concern to which the Corporation was authorised to advance the money by way of loan has not been pressed in this appeal and has been abandoned.

4. Coming to the next point as to the maintainability of the proceeding u/s 31 of the Act by the Corporation, we are of the view that the Act has been enacted to facilitate a State or group of States in setting up Financial Corporations in order to provide minimum and long term credit to industrial concern with a view to assist the medium small scale of industries in the States. Section 33 of the Act speaks of the funds of Financial Corporation, which reads as follows :

"Every Financial Corporation shall have its own fund, and all receipts of the Financial Corporation shall be carried thereto and all payments by the Corporation shall be made therefrom."

Section 7 of the Act deals with the additional financial capital of Financial Corporation and its borrowing power. Sub-section (3) of which authorises the Financial Corporation to borrow money from the State Government in consultation with the Development Bank and Reserve Bank of India on such terms and conditions as may be agreed upon, for the purpose of carrying out its functions under this Act. Section 25 of the Act which deals with different kinds of business which the Financial Corporation may transact specified in Clause (d) of Sub-section (1) of the said section that it can act as an agent of the Central or State Government etc. etc. in respect of the matter connected with, or arising out of grant of loans or advances to an industrial concern.

5. Now the question is whether in disbursing this loan, the Corporation was actually acting as an agent of the State Government. If so, was it necessary to implead the State Government as a party in a proceeding u/s 31 of the Act in exercising its right available to it under the said section. Further assuming for the moment that the Corporation actually disburses the money as the agent of. the State Government, could it have brought this proceeding independently without joining the State Government as a party?

Section 230 of the Indian Contract Act reads as follows :

"In the absence of any contract to that effect, an agent cannot personally enforce contracts entered into.by him on behalf of his principal, nor is he personally bound by them. Such a contract shall be presumed to exist in the following cases :--

(1) Where the contract is made by an agent for the sale or purchase of goods for a marchant resident abroad;

(2) Where the agent does not disclose the name of his principal;

(3) where the principal, though disclosed cannot be sued."

Whether an agent, apart from the cases specially mentioned is to be taken to have contracted personally, or merely on behalf of the principal, depends on what appears to have been the intention of the parties, to be deduced from the nature and terms of the particular contract and the surrounding circumstances. The personal liability of the agent depends on the intention of the parties. In the case of an oral contract the question is purely one of fact but in the case of a contract in writing. The said intention is what appears from the terms of the written agreement considered as a whole. An agent who signs a contract in his own name without qualification, though known to be an agent, is understood to contract personally unless a contrary intention plainly appears from the body of the instrument. (Reference be made to para 2 at page 911 of the Indian Contract Act and Specific Relief Act Tenth Edn. by Pollock and Mulla.)

Whenever an agent has entered into a contract in such terms he is personally entitled to sue thereon. (Reference be made to the last paragraph at page 912 of the Indian Contract Act and Specific Relief Act, Tenth Edn. by Pollock and Mulla).

In paragraph 17 of the judgment of the Apex Court, reported in Radhakrishna Sivadutta Rai and Others Vs. Tayeballi Dawoodbhai, , reference to Bowstead on "Agency" had been made which are stated below and the court observed that in case of a contract in writing other than a bill of exchange, promissory note or cheque, the initiation of the parties as appearing can be gathered from the terms of the written agreement as a whole, the construction whereof is a matter of law for the court. According to Bowstead :

(a) If the contract be signed by the agent in his own name without qualification, he is deemed to have contracted personally, unless a contrary intention plainly appears from other portions of the document.

(b) If the agent add words to his signature, indicating that he signs as an agent, or for or on behalf of a principal, he is deemed to have contracted personally unless it plainly appears from other portions of the document, that, notwithstanding such qualified signature, he intended to bind himself."

Ext. 19 dated 27-6-72 is a letter from the Director of Industries to the Managing Director O.S.F.C. intimating the Govern-ment orders for disbursement of the loan to the loance after registration of the mortgage deed under intimation to the office. As per Ext. 19-A dated 1-7-72, the Managing Director of the Corporation had intimated the loanee about the Government sanction in his favour an amount of Rs. 1,70,000/- subject to the terms and conditions mentioned in that exhibit. These conditions, inter alia, included that the films produced be kept in possession of the O.S.F.C. or at their direction in the processing laboratory. The Corporation shall exercise all controls over making positives and no positive can be made without the specific and prior permission of the O.S.F.C. The Corporation was to supervise the production of films expenditurs and expenditure in this connection should be met by the loanee and the Corporation reserves the copyright of the film besides irrevocable power of attorney is to be executed in favour of the Corporation by the loanee with regard to distribution of the films to the distributors and show houses thereby creating any interest of the Corporation in the contract of loan agreement. Ext. 20 dated 19-6-1972 and Ext. 21 dated 27-6-1972 are the letters from the undersecretary to the Government in the Industries Department to the Director of Industries intimating the sanction of the loan in favour of the loanee as per the recommendation of the O.S.F.C. which show that this loan was to be disbursed from the loan of Rs. 5,00,000/- that was placed at the disposal of the O.S.F.C. under the loan agreement. Ext. 6 is the most vital document in this regard which is a letter of hypothecation executed by the loanee in favour of the Corporation. Ext. 6 shows that the loanee had accepted the fact and that the O.S.F.C. had agreed to land and advance the sum constituting the loan in which such instalments as the Corporation thought fit on the security on equitable mortgage of the loanee''s property with all buildings and structurers thereon and situate at Mouza Kudunpur, Choudhury Bazar, Cuttack and by hypothecating all tangible movable properties, furniture, assets and other movable assets with the Corporation and agreed to pay the amount of loan to the Corporation at its head office at Barabati Stadium. The loanee had also pledged and hypothecated with the Corporation the film and all other copies of the same, produced or to be produced by way of first charge as detailed in para 2 of the letter appearing at page 53 of the paper book. In para-3 it had been specificlly indicated that the hypothecated assets shall be held as the

Corporation''s exclusive property (underlining is made by us for emphasis) specially appropriated to the security and the borrower would not, except the consent and writing of the Corporation, create any mortgage, charge, lien or incumbrance thereon affecting the same or any part thereof nor do anything which would prejudice the security. The borrower undertook to pay punctually the premium of insurance and the insurance policy and the cover note shall be deposited by the loanee with the Corporation. In the event the loanee failed to insure the property, the Corporation may insure the hypothecated assets and debit the premium and other charges against the loanee''s account maintained by the Corporation and in the event of loss, destruction by fire or otherwise or damage to the hypothecated assets or any of them or any part thereof the Corporation shall be entitled to recover and receive :all money payable in respect of the insurance. Any short fall shall be paid by the loanee to the Corporation on this account. In para-10 it is mentioned that the Corporation has the right to take possession of the hypothecated assets in case of default of payment of money or instalments due to the Corporation.

6. A proceeding u/s 31 of the Act strictly speaking is not in a nature of suit and right is created in favour of the Corporation to proceed against the securities by moving the District Judge u/s 31 of the Act. As held by the Full Bench of this Court, reported in State Financial Corporation Ltd. Vs. Satpathy Brothers and Nanda Co. (P.) Ltd. and Others, u/s 31 of the Act, three types of reliefs can be prayed for by the State Financial Corporation.

(a) for an order for the sale of the property pledged, mortgaged, hypothecated or assigned to the Finance 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.

Section 46B of the Act clarifies the position that the provisions of the Act and the Rules made thereunder shall have the effect in case they are inconsistent with any other law for the time being in force or any provision in the memorandum or Articles of association of an industrial concern. Subject to this restriction the provisions of the Act shall be in addition to, and not in derrogation of any other law for the time being in applicable to an industrial concern. Thus the jurisdiction of the Civil Courts in certain circumstances is not ousted.

7. Assuming that the Corporation was disbursing the loan on behalf of the Government, it was certainly functioning as a statutory agent u/s 25(1)(d) of the State Financial Corporation Act. Section 31 of the Act authorises the Corporation to seek the relief claimed in their petition in the present case, in the event the industrial concern failed to comply with the terms and of the agreement with the

Corporation which has been indeed done in the case. Several notices have been issued to the loanee to comply with the terms and conditions in making payment of instalments which he had failed. Therefore this statutory power contained in Section 31 being a special power conferred under this Act must prevail over the general principle that in the enforcement of a contract by an agent without adding the principal will not be maintainable unless it came within the excepted Clause contained in Section 230 of the Contract Act. When the Government desires to place certain amount of money for loans to be granted for a specific purpose and once it is challenged through the Financial Corporation of the State, the O.S.F.C. Act, 1951 has taken care of this transaction and the provisions of Section 31 authorises the Corporation with whom an agreement was entered into by the loaned to enforce his terms and conditions This is asserted in Section 468 of the Act that the special features shall prevail notwithstanding anything inconsistence therewith contained in the other law for the time being in force. Therefore the proceeding u/s 31 of the Act by the Corporation was maintainable. That apart the Corporation even if acted as statutory agent certain interest were createc under the agreement in favour of the Corporation in respect of the properties which were mortgaged and hypothecated to it, as detailed in Ext. 4. Therefore it was an agency coupled with the interest as these interests were also created in favour of the Corpora tion by the State Government which is eviden from the plain reading of the Exts. 19, 19-A and 20. Therefore the bar against an agent to enforce the contract personally would no stand on the way even if it is held that it wa: acting on behalf of the State Government a: an agent as there was a contract to that effec and the Corporation had an interest in the transaction.

Section 230 of the Contract Act in its opening words states that in the absense of any contract to that effect, an agent cannot enforce the contract. As has already been said there was specific provisions in the Act authorising to enforce the contract of hypothecation and mortgage as is contained in Section 31 of the Act. The Corporation therefore could enforce the relief entering its rights u/s 31 of the Act. Looking to the case from another angle, here the loan amount was actually placed at the disposal of the Corporation which could be treated for the purpose of making loans as a part of the funds of the Corporation. The hypothecation and mortgages that were made to the Corporation by the loanee were not done in favour of the Corporation on behalf of the Government nor the Corporation entered into the transaction anywhere in the written document as an agent of the State Government. Therefore the Corporation even though received the money under the agency agreement was dealing with the money as its own as the money was earmarked for the purpose by the Government, the Government had laid down its own conditions of advancement of the loan which the Corporation obviously followed. Therefore, the Corporation was competent to initiate the proceeding u/s 31 of the Act in its can same without adding the State Government as a party.

In view of this, we are in total agreement with the hon''ble single Judge of this

Court that the proceeding brought by the Corporation u/s 31 of the Act before the District Judge was wholly maintainable.

8. As far as the challenge to the accounts is concerned, it may be indicated that pleadings are not evidence though evidence can be led in support of the pleadings. Though a list had beeh annexed to second amendment to the written statement that the Corporation has received certain amounts from different show houses, in evidence the loanee who examined himself as O.P.W. 1 just proved nothing in that regard. In his deposition, the loanee had stated in cross-examination that he drew the amount of Rs. 1,75,000/- from the O.S.F.C. That none of the 28 exhibits had intimated his anything about the money collected by the Corporation from then towards exhibition charges in respect of the film and till the date of deposition he did not make any demand to them for supply of the information. He further stated that he did not know how much the Corporation had then received in discharge of the loan taken by him and that he did not have any paper at home to show any payment made towards the loan of the Corporation and to controvert the statement of the Corporation in Exts. 1 and 2 which are the loan ledger of the O.S.F.C. and the statement of accounts of payment. He also admitted to have certain prints with him of whom none of which was in circulation for being exhibited in the picture house. He also admitted to have gone through the ledger maintained by the Corporation regarding his loan on several occasions. Therefore nothing has been stated in his evidence as to what particular payment had not been accounted for reflected in Exts. 1 and 2. Therefore we do not want to differ from what the Hon''ble single Judge said in this respect regarding the correctness of the demand by the Corporation and the failure of the loans to disprove any item of it.

9. Coming to the demand of compound interest in the letter of hypothecation of assets, the loanee had agreed to pay the compound interest in para 8 of Ext. 6 which he had agreed to be abided by the letter of hypothecation.

Regarding the maintainability the objection raised by the loanee that the proceeding was not maintainable in absence of the Government as a party was not raised during the proceeding u/s 31. It was only raised in the first appellate stage before the Hon''ble single Judge of this Court. Had such a point been raised at the stage of Section 31 proceeding. The Corporation would have been in a position to detail his stand stating that even if he entered into the contract as an agent he had the right to enforce the agreement in exercise of the powers without adding the Government as a party u/s 31 because that was the intention of the parties. Besides the Corporation might have led further evidence in support of such an intention. Therefore this issue involved question of fact. Such a question could not be allowed to be raised at a later stage which will otherwise prejudice the Corporation. In any view of the matter, we have indicated that the finding and the judgment of the Hon''ble single Judge were justified in the facts''and circumstances of the case and we do not find any reason to interfere with this. The appeal is dismissed with costs.

G.B. Patnaik, J.

10. I agree.

