

(2010) 12 OHC CK 0048

In the Orissa High Court

Case No : Writ Petition (C) No. 13033 of 2009

Gunamani Swain and Others

APPELLANT

Vs

Orissa State Financial Corporation represented through its
Managing Director and Others

RESPONDENT

Date of Decision : 06-12-2010

Acts Referred:

Citation : (2010) 12 OHC CK 0048

Hon'ble Judges : V. Gopala Gowda, C.J.;B.N. Mahapatra, J.

Bench : Division Bench

Final Decision : Allowed

Judgement

B.N. Mahapatra, J.—This Writ Petition has been filed with a prayer for quashing Annexure-2 by which the properties of the Petitioners were sold on 9.2.2009 as well as the deed of transfer executed on 31.03.2009 under Annexure-5 pursuant to such sale on the ground that the properties in question were sold at a lesser price than the market price without giving adequate publicity in daily newspaper(s) and such action of Opp. Parties tantamounts to colourable exercise of power.

2. The facts and circumstances giving rise to the present Writ Petition are that the properties in question appertaining to Khata No. 51 Plot No. 122 measuring an area of Ac.0.85 dec., Plot No. 131 measuring an area of Ac.0.05 dec. Plot No. 132 measuring an area of Ac.0.08 dec., Plot No. 140 measuring an area of Ac.0.21 dec. and Plot No. 141 measuring an area of Ac.2.17 dec., thus in total Ac.3.36 dec. in Mouza Belda in the district of Keonjhar are the ancestral properties of late Manmohan Swain. Opp. Party No. 3-Sanjukata Swain purchased a TATA truck bearing registration No. OR-09C-8177 by availing a loan from Opp. Party No. 1-Orissa State Financial Corporation (in short, "OSFC"). Accordingly, on 19.3.2002 an agreement was entered into between Opp. Parties 1 and 3. In the said loan, late Manmohan Swain, 6pp. Party No. 4-Ganeswar Swain and Opp. Party No. 5-Ghanashyam Swain stood as guarantors and created

equitable mortgage in respect of the properties in question in favour of Opp. Party No. 1. Since the loan amount was not paid, the OSFC published a notice for sale of the mortgaged properties in the Oriya daily "The Samaja" on 31.1.2009. The said properties were put to auction on 9.2.2009 and the same was finalized in favour of Opp. Party No. 2-Subhransu Sekhar Padhi for a total consideration of Rs. 10,09,000. Pursuant to such sale, Sale deed dated 31.03.2009 was executed between Opp. Party Nos. 1 and 2. Thereafter, on 10.6.2009 OSFC sent a notice by registered Post with A.D. to the Petitioner No. 2-Prafulla Chandra Swain, the son of late Manmohan Swain to take refund of Rs. 2,85,486. Being dissatisfied with such action of OSFC, the Petitioners have filed the present writ application.

3. Dr. A.K. Rath, Learned Counsel appearing on behalf of the Petitioners submits that Under Section 29 of the State Financial Corporations Act, 1951 (for short, "SFC Act"), OSFC has no authority to put the properties of the guarantors to auction. Section 31 of the SFC Act empowers the OSFC to proceed against the guarantor. Though the properties in question are the ancestral properties of late Manmohan Swain, in the Hal settlement of records of right published in 1977, the properties were recorded in the name of late Manmohan Swain and the same have not been partitioned between the Petitioners and Opp. Parties 4 and 5 by metes and bounds. Therefore, Opp. Parties 4 and 5 have no authority to create equitable mortgage in favour of Opp. Party No. 1 and this averment made in paragraph 6 of the Writ Petition has not been denied by the OSFC while replying the same in paragraph 15 of their counter affidavit. Before putting the properties to auction, Opp. Party No. 1 has not made any endeavour to make correct valuation of the properties in question. No valuation report was obtained from any authority by Opp. Party No. 1 before putting the properties to auction. Though the market value of the properties would be Rs. 15 lakhs, Opp. Parties fixed the upset price at Rs. 10,08,000. It is further submitted that had there been adequate publicity of the notice giving details of the properties, more persons would have participated in the auction. Since only one person, i.e., Opp. Party No. 2 has participated, the same cannot be deemed as auction. OSFC has also not issued/served any notice on the Petitioners to participate in the auction. Moreover, the Petitioners were not aware of the auction of their properties as the details of the said properties were not given in the auction notice (Annexure-1). It is further submitted that though the Petitioners are not legally liable to liquidate the dues of the loanee, still they are ready and willing to settle the dues. The OSFC is under legal obligation to satisfy itself that the auction has been conducted with strict adherence to the procedure prescribed in the statute and price fetched by it was reasonable.

4. Per contra, Mr. Mishra Learned Counsel appearing on behalf of the OSFC submits that the OSFC had sanctioned a loan of Rs. 5,26,500 for purchase of a TATA Truck in favour of Opp. Party No. 3-Sanjukta Swain in the year 2002-2003. Late Manmohan Swain being the father-in-law of Opp. Party No. 3 mortgaged his collateral properties by depositing the original title deeds pertaining to Khata No. 51 as per Annexure-3. The OSFC has also obtained no objection from the three

sons of late Manmohan Swain, namely, Prafulla Kumar Swain (Petitioner No. 2), Ghanashyam Swain and Ganeswar Swain (Opp. Party Nos. 4 and 5 respectively). On failure of the borrower-Sanjukta Swain to repay the dues of the OSFC, the OSFC after issuance of several notices including recall notice was constrained to take over possession of the collateral properties on 30.10.2007. Since the hypothecated vehicle was not traceable, on 7.12.2007 the seized properties were advertised in the daily Oriya newspaper. "The Samaja" for sale. After publication of the sale notice, loanee, Smt. Sanjukta Swain came forward and proposed to settle the loan dues under O.T.S.-07 Scheme. The OSFC considering all the aspects, decided to settle the loan at Rs. 4,97,000 and settlement order was issued on 21.1.2008. Since the loanee failed to pay the settled dues as per the condition of the settlement order, the said settlement order was cancelled vide letter No. 863 dated 21.1.2009 and the seized properties were again advertised for auction in The Samaja on 30.1.2009 and the guarantors/mortgagors along with the borrower were communicated vide letter No. 855 dated 03.02.2009 to appear before the auction meeting on 09.02.2009 to be conducted by BLDC for release of the mortgaged assets. Since neither the loanee nor any of the guarantors responded to the said letter, the Corporation decided to sell the mortgaged properties to Opp. Party No. 2-Subhransu Sekhar Padhi at a negotiated price of Rs. 10,09,000 after observing all the formalities. The said decision of sale was communicated to the borrower and guarantors vide letter No. 918 dated 11.2.2009. After deposit of the entire sale consideration of Rs. 10,09,000 by the purchaser the possession was handed over to him on 31.3.2009 and the deed of conveyance (Annexure-5) was executed on the same day. Thus, all the sale formalities have been completed. Since the properties were sold at a higher price than the outstanding loan, the OSFC refunded the excess sale proceeds in terms of Section 29(4) of the SFC Act, and accordingly issued a letter dated 10.6.2009 to three sons of the mortgagor since he was dead. The Petitioners instead of receiving the excess sale proceeds filed the present Writ Petition arraying two of the sons and one daughter-in-law of late Manmohan Swain as Opp. Parties/guarantors and trying to make out a case. The OSFC has not done any illegality by selling the properties of the mortgager who himself executed the mortgage document with the OSFC during his life time. The valuation of the properties has been arrived at on the basis of the Bench Mark valuation fixed by the Government. The advertisement under Annexure-1 was never challenged instantly by any of the Petitioners or the guarantors. The details of the properties were duly mentioned in the Website.

5. Learned Counsel appearing for Opp. Party No. 2 Subhransu Sekhar Padhi, the auction purchaser submits that the auction was held in accordance with law with proper notice to the present Petitioners. The mortgage was made with due knowledge of the Petitioners. The Petitioners had never objected to the auction in question at any point of time. Late Manmohan Swain being the recorded tenant and being the manager and "Karta" of the family was competent under the law to stand as guarantor in respect of the mortgaged properties. The auction price

was just and reasonable. The Petitioners have no right to challenge the said auction. Opp. Party No. 2 is the bona fide auction purchaser and is in possession of the property. Opp. Party No. 1 took over possession of the mortgaged property on 31.10.2007 Under Section 29 of the SFC Act. The present Opp. Party No. 2 took over possession on 31.3.2009 pursuant to the auction held on 9.2.2009. Hence, the Writ Petition is liable to be dismissed.

6. On the above rival contentions the questions that fall for consideration by this Court are as under:

(i) Whether in exercise of the power vested Under Section 29 of the SFC Act, the OSFC can sell out the properties mortgaged with it by the guarantors?

(ii) Whether the OSFC is justified in selling out the properties of the guarantors through public auction in BLDC meeting held on 9.2.2009 as well as executing the deed of transfer on 31.03.2009 under Annexure-5 in favour of Opp. Party No. 2 without adhering to Section 31 of the SFC Act?

7. To deal with the question No. (i) it is necessary to know what is contemplated in Section 29 of the SFC Act which is relevant for our purpose. Section 29 of the said Act is extracted below:

29. Rights of Financial Corporation in case of default.-(1) Where any industrial concern, which is under a liability to the Financial Corporation under an agreement, makes any default in repayment of any loan or advance or any installment thereof in meeting its obligations in relation to any guarantee given by the corporation or otherwise fails to comply with the terms of its agreement with the Financial Corporation, the Financial Corporation shall have the right to take over the management or possession or both of the industrial concern, as well as the right to transfer by way of lease or sale and realize the property pledged, mortgaged, hypothecated or assigned to the Financial Corporation.

(2) Any transfer of property made by the Financial Corporation, in exercise of its powers under Sub-section (1), shall vest in the transferee all rights in or to the property transferred as if the transfer had been made by the owner of the property.

(3) The Financial Corporation shall have the same rights and powers with respect to goods manufactured or produced wholly or partly from goods forming part of the security held by it as it had with respect to the original goods.

(4) Where any action has been taken against an industrial concern under the provisions of Sub-section (1), all costs, charges and expenses which in the opinion of the Financial Corporation have been properly incurred by it as incidental thereto shall be recoverable from the industrial concern and the money which is received by it shall, in the absence of any contract to the contrary, be held by it in trust to be applied firstly, in payment of such costs, charges and expenses and, secondly, in discharge of the debt due to the financial Corporation, and the residue of the money so received shall be paid to the person entitled

thereto.

(5) Where the Financial Corporation has taken any action against an industrial concern under the provisions of Sub-section (1), the Financial Corporation shall be deemed to be the owner of such concern, for the purposes of suits by or against the concern, and shall sue and be used in the name of the concern.

Section 29 speaks about the right of financial Corporation in case of default in repayment of loan. The default contemplated thereby is of the industrial concern. When an industrial concern makes any default in repayment of any loan or advance or any installment thereof under the agreement or in meeting its obligation in relation to any guarantee given by the Corporation, the financial Corporation shall have the right to take over the management or possession or both of the industrial concern. It further gives right to the Corporation to transfer by way of lease or sale and realize the property pledged, mortgaged, hypothecated as assigned to the financial Corporation by the industrial concern. The right of financial Corporation in terms of Section 29 must be exercised only on a defaulting party. Section 29 does not empower the Corporation to proceed against the surety even if some properties are mortgaged or hypothecated to it. Our view is further strengthened by the provisions of Sub-section (4) of Section 29 which lays down appropriation of sale proceeds with reference to only industrial concern and not surety or guarantor.

8. At this juncture, it would be profitable to refer to the judgment of the Apex Court in Karnataka State Financial Corporation Vs. N. Narasimhaiah and Others, , wherein the Apex Court has held as under:

8. A lender of money under the common law has the remedy to file a suit for realization of the amount lent if the borrower does not repay the same. The Act, however, provides for a special remedy in favour of the Financial Corporation constituted thereunder enabling it to exercise a statutory power of either selling the property or take over the management or possession or both belonging to the industrial concern.

9. Section 29, therefore, confers an extraordinary power upon the "Corporation". It, being a "State" within the meaning of Article 12 of the Constitution of India, is expected to exercise its statutory powers reasonably and bona fide.

Xxx xxx xxx

12. If special provisions are made in derogation to the general right of a citizen, the statute, in our opinion, should receive strict construction. "Industrial concern" has been defined under the Act. For the purpose of enforcing a liability of an industrial concern, recourse can be taken both Under Sections 29 and 31 of the Act. Right of the Corporation to file a suit or take recourse to the provisions contained in Section 32G of the Act also exists.

13. The heading of Section 29 of the Act states "Rights of Financial Corporation in case of default". The default contemplated thereby is of the industrial concern.

Such default would create a liability on the industrial concern. Such a liability would arise when the industrial concern makes any default in repayment of any loan or advance or any installment thereof under the agreement. It may also arise when it fails to meet its obligation(s) in relation to any guarantee given by the Corporation. If it otherwise fails to comply with the terms of the agreement with the Financial Corporation, also the same provisions would apply. In the eventualities contemplated Under Section 29 of the Act, the Corporation shall have the right to take over the management or possession or both of the industrial concern. The provision does not stop there. It confers an additional, right as the words "as well as" is used which confers a right on the corporation to transfer by way of lease or sale and realise the property pledged, mortgaged, hypothetical or assigned to the Corporation.

14. 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. The right of the Financial Corporation in terms of Section 29 of the Act must be exercised only on a defaulting party. There cannot be any default as is envisaged in Section 29 by a surety or a guarantor. The liabilities of a surety or the guarantor to repay the loan of the principal debtor arises only when a default is made by the latter.

15. The words "as well as" in our opinion play a significant role. It confers two different rights but such rights are to be enforced against the same person, viz., the industrial concern. Submission of the Learned senior Counsel that the second part of Section 29 having not referred to "industrial concern", any property pledged, mortgaged, hypothecated or assigned to the Financial Corporation can be sold, in our opinion cannot be accepted. It is true that Sub-section (1) of Section 29 speaks of guarantee. But such a guarantee is meant to be furnished by the Corporation in favour of a third party for the benefit of the industrial concern. It does not speak about a surety or guarantee given in favour of the Corporation for the benefit of the industrial concern.

16. The legislative object and intent becomes furthermore clear as in terms of Sub-section (4) of Section 29 of the Act only when a property is sold, the manner in which the sale proceeds is to be appropriated has categorically been provided therein.

In view of the above, we are of the considered view that the OSFC in exercise of power vested Under Section 29 of the SFC Act cannot sell out the properties mortgaged to it by the guarantors.

9. Question No. (ii) relates to legality of the action of OSFC in putting the properties of the guarantor to auction without adhering to the provisions of Section 31 of the SFC Act and execution of the deed of transfer pursuant to said sale. For better appreciation, the provisions of Section 31 of the SFC Act is reproduced below:

31. Special provisions for enforcement of claims by Financial Corporation.-

(1) Where an industrial concern, in breach of any agreement, makes any default in repayment of any loan or advance or any installment thereof or in meeting its obligations in relation to any guarantee given by the Corporation 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 Under Section 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 (4 of 1982), 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 property pledged, mortgaged, hypothecated or assigned to the Financial Corporation as security for the loan or advance; or

(aa) for enforcing the liability of any surety; 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.

10. Section 31 of the SFC Act provides for a special provision for enforcement of claims by the financial Corporation against a surety or guarantor. The financial Corporation can proceed against a surety or mortgagor invoking the provision Under Section 31 for the default committed by the industrial concern, and also where the financial Corporation requires the industrial concern to make immediate repayment of loan or advance in terms of Section 30 and the industrial concern fails to make such repayment. The OSFC can resort to the provision of Section 31 without prejudice to its right under the provision of Section 29 of the SFC Act and Section 39 of the Transfer of Property Act, 1882. To exercise power under Section 31, the OSFC is required to apply to the District Judge having appropriate jurisdiction. Thus, where Section 29 is concerned with the property of industrial concern, Section 31 takes within its sweep both the property of industrial concern and that of the surety. The statute provides an additional remedy for recovery of the amount in favour of the OSFC by proceeding against the surety in terms of Section 31 of the OSFC Act. Such a power is not vested with the Corporation Under Section 29.

11. Needless to say that public money has to be recovered from the defaulters,

who do not repay the loan amount to the financial institutions. This does not mean that financial institutions are at liberty to dispose of the secured asset of the defaulters in unreasonable or arbitrary manner in flagrant violation of the statutory provisions and principles of natural justice. In *Lachhman Dass Vs. Jagat Ram and Others*, , the Apex Court held that the right to hold property is a constitutional right as well as human right. A person cannot be deprived of his property except in accordance with provisions of the statute. (Also see *Chairman, Indore Vikas Pradhikaran Vs. Pure Industrial Cock and Chem. Ltd. and Others*, and *Commissioner of Municipal Corporation, Shimla Vs. Prem Lata Sood and Others*,). Thus, the condition precedent for taking away someone's property or disposing of the secured asset is that the authority must ensure compliance of the statutory provisions.

It is the settled law that when the action of the State or its instrumentalities is not at par with the rules or regulations and supported by the Statute, the Court must exercise its jurisdiction to declare such an act to be illegal and invalid. In *Sirsi Municipality by its President Sirsi Vs. Cecelia Kom Francis Tellis*, , the Hon"ble Supreme Court observed that the ratio is that the rules or the regulations are binding on the authorities.

Whenever any action of the authority is in violation of the provisions of the statute or the action is constitutionally illegal, it cannot claim any sanctity in law; and there is no obligation on the part of the Court to sanctify such an illegal act. Wherever the statutory provision is ignored, the Court cannot become a silent spectator to such an illegality and it becomes the solemn duty of the Court to deal with the persons violating the law with heavy hands. (See *R.N. Nanjundappa Vs. T. Thimmiah and Another*, , *Sultan Sadik Vs. Sanjay Raj Subba and Others*,)

Thus, the legal position remains, every statutory provision requires strict adherence for the reason that the statute creates rights in favour of the citizens, and, if any order is passed de hors the same, it cannot be held to be a valid order and cannot be enforced. See *Swastik Agency and Others Vs. State Bank of India, Main Branch and Others*,). The Apex Court in *Badrinath Vs. Government of Tamil Nadu and Others*, observed that once the basis of a proceeding is gone, all consequential acts, action, orders would fall to the ground automatically. Non-compliance of mandatory requirements vitiates the proceedings.

12. It is not in dispute that in the present case the properties of the guarantors were put to auction by the OSFC exercising power Under Section 29 of the SFC Act. The procedure provided Under Section 31 of the said Act has not been complied with before putting the properties of the guarantors to public auction for sale.

Apart from the above, it comes to our notice that the manner III which the properties of the guarantors were put to sale in public auction is not fair at all. When the upset price was fixed at Rs. 10,08,000 the same was sold to a single

bidder for a consideration of Rs. 10,09,000 which is just Rs. 1000 over and above the upset price. In the newspaper advertisement details of the properties have not been given.

13. The Apex Court in Mahesh Chandra Vs. Regional Manager, U.P. Financial Corporation and others, has held as under:

18. The Corporation or its officers or servants as trustee are bound to exercise their power in good faith in selling or dealing with the property of the debtor as a ordinary prudent man would exercise in the management of his own affairs to preserve and protect his own estate. Therefore, the acts of the officer or servant of the Corporation should be reasonable, just and fair which must meet the eye and the offer accepted must be of competitive and every attempt should be made to secure as maximum price as possible to liquidate the liabilities incurred by the industrial concern or the debtor under the Act.

xxx xxx xxx

21. The sale by public auction or tender or private negotiation should be bona fide action. First is universally recognized to be the best and most fair method. It is expected to fetch best competitive price and is beyond reproach. Second should be restored to rarely only if first is an impossibility. Generally tenders would be calling quotation to execute public work or to award contracts etc. and third should always be avoided as it cannot withstand public gaze. It casts reflection on Corporation and its officials and is against social and public interest. In case transfer cannot be effected by public auction and it is necessary to resort to sale by tender it is both fair and necessary to inform the unit holder, if unit has been got valued for purposes of transfer of the estimated value for sale as he is as much interested as the Corporation. Sale of public property by calling tenders escape attention of many an intending participants. Every endeavour should, therefore, be made to give wide publicity and to get the maximum priced. Bureaucracy feels that accountability is an impediment to efficient discharge of the duty. Accountability is no more and no less than, the concept of accountability of a private concern to their shareholders. There is a distinction between prying into details of day to day administration and of the legitimate actions or resultant consequences thereof. To enthuse efficiency into administration, a balance between accountability an autonomy of action of management in public enterprises should be carefully maintained. Over emphasis on either would impinge upon public efficiency. But undermining the accountability would give immunity or carte blanche power to deal with the public property or of the debtor at whim or vagary. Whether the public authority acted bona fide and in the best interest as prudent owner in the given facts would do, be gazed from impugned action and attending circumstances. The authority should justify the action assailed on the touchstone of justness, fairness, reasonableness and as a reasonable prudent owner.

14. In view of the above, sale of the properties of the guarantors and subsequent

execution of deed of transfer under Annexure-5 are liable to be quashed for being done in flagrant violation of the statutory provision contained in Section 31 of the SFC Act which we direct accordingly. In such fact situation, Opp. Party No. 2, the auction purchaser is entitled to get refund of the amount deposited by him with Opp. Party No. 1 towards consideration money of the properties in question. Opp. Party No. 1-OSFC shall refund the said amount with interest " 9% per annum within a period of eight weeks from today. Opp. Party No. 1-OSFC is directed to recalculate the amount due from the loanee including interest accrued thereon and issue a fresh demand notice to be served upon the loanee as well as the Petitioner-guarantors within the time stipulated hereinabove. It is further directed that as Opp. Party No. 1-OSFC proceeded illegally it is not entitled to claim for legal expenses from the loanee/Petitioners/guarantors. On receipt of the recomputed demand from the OSFC, the Petitioner-guarantors shall deposit the same within a period of eight weeks from the date of receipt, failing which the OSFC shall be at liberty to proceed against the Petitioner-guarantors for making full recovery of the outstanding dues in accordance with law.

15. In the result, the Writ Petition succeeds. No costs.