(2010) 07 UK CK 0170

In the Uttarakhand High Court

Haridwar Asbestos add Cement Products Pvt. Ltd. and Others and Sri Yunus — APPELLANT

Vs

Uttar Pradesh Financial Corporation and Others — RESPONDENT

Date of Decision : 05-07-2010

Acts Referred:

Registration Act, 1908 — Section 23
State Financial Corporations Act, 1951 — Section 29, 29(1)

Citation : (2010) 07 UK CK 0170

Hon'ble Judges : J.S. Khehar, C.J;Sudhanshu Dhulia, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Sudhanshu Dhulia, J.—Heard the counsel for the petitioners and the respondents in the above two writ petitions. Writ Petition (M/B) No. 1149 of 2005 was filed by the petitioners M/s Haridwar Asbestos and Cement Products Pvt. Ltd. (who for convenience of this Court will be referred to as petitioner No. 1) for the relief that the proceedings initiated by the Uttar Pradesh Financial Corporation (from hereinafter referred to as the "Financial Corporation") u/s 29 of the State Financial Corporation Act, 1951 (from hereinafter referred to as the "Act") are illegal and, therefore, it was prayed that the respondents be restrained from initiating proceedings u/s 29 of the Act against them. It has been further prayed that a writ, order or direction in the nature of mandamus be issued directing the Financial Corporation not to sell the unit of petitioner No. 1 pursuant to the impugned notices given by the Financial Corporation. A final prayer has been made for a writ, order or direction in the nature of mandamus directing the said respondents to restore the possession of the unit back to petitioner No. 1 forthwith.

2. The second writ petition, which is Writ Petition (M/B) No. 1450 of 2006 has been filed by an auction purchaser Sri Yunus who purchased the unit of M/s Haridwar Asbestos and Cement Products Pvt. Ltd. in an auction and now

contends that the Financial Corporation, from where the unit has been purchased, refuses to proceed further in the matter and a prayer has been made for a writ, order or direction in the nature of mandamus directing the Financial Corporation to execute a fresh sale deed in favour of petitioner No. 2 in respect of the property purchased by M/s Haridwar Asbestos and Cement Products Pvt. Ltd. in an auction process.

3. Since the subject matter of the two writ petitions is the same, these have been connected and are presently being heard and decided by this composite order.

4. The brief facts of this case may be narrated first:

5. Petitioner No. 1 had admittedly taken a loan to the tune of Rs. 9,10,000/- from the Financial Corporation in the year 1991. The loan was taken for the purposes of construction of "cement blocks". The land as well as the factory and the plant machinery were hypothecated to the Financial Corporation for the purpose of said loan. Since petitioner No. 1 could not repay the loan amount in time, recovery proceedings were initiated by the Financial Corporation against petitioner No. 1. Against these proceedings, which were initiated in the year 1993-94 petitioner No. 1 had filed a writ petition before the High Court of Judicature at Allahabad being Writ Petition No. 844 of 1994.

6. In the said writ petition certain interim relief was granted in favour of petitioner No. 1 and ultimately the writ petition was disposed of as the counsel representing the Financial Corporation made a statement before the Court that the proceedings initiated by the Financial Corporation against petitioner No. 1 are presently rescinded. The writ petition was therefore dismissed as having become infructuous by an order of the High Court dated 9.5.1996. The case of the petitioner No. 1 is that he had admittedly taken a loan from the Financial Corporation which he has not repaid in time but the proceedings initiated against petitioner No. 1 u/s 29 of the Act stood rescinded as per the admission of the Financial Corporation in the High Court and, therefore, neither it was entitled nor it was legitimate on the part of the Financial Corporation to rake up the issue once again, that too after lapse of a long period. This is so because the financial corporation now sends a notice to petitioner No. 1 in the year 2005 asking petitioner No. 1 that he has still not repaid the loan amount and he must pay the loan amount within the stipulated time or the Financial Corporation will be constrained to take action against him u/s 29 of the Act.

7. Since Section 29 of the Act has an important bearing in the matter, the same is being reproduced below for a ready reference.

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 instalment 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, the Financial Corporation shall have the [right to take over the management or possession or both the industrial concerns], as well as the [right to transfer by way of lease or sale] and realise 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 est 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, and shall sue and be sued in the name of [the concern]

8. Petitioner No. 1 consequently filed a writ petition which is presently before this Court for the relief already referred above in the preceding paragraphs. This writ petition remained pending in this Court, during which pleadings in the matter were exchanged and a necessary party, namely, one Sri Yunus was impleaded as respondent No. 3 in the writ petition filed by petitioner No. 1 and the matter remained pending.

9. Meanwhile, petitioner No. 2 (i.e. the petitioner in the second writ petition) namely Sri Yunus filed Writ Petition (M/B) No. 1450 of 2006 stating that he has purchased the entire assets of petitioner No. 1, which include the land, building, plants and machinery of M/s. Haridwar Asbestos and Cement Products Pvt. Ltd. on "as is where is" basis for a total sale consideration of Rs. 2, 92,000/- in a public auction which has been approved by the Financial Corporation vide its letter dated 12.9.2003. At this stage, it is necessary to narrate in some detail the predicament of petitioner No. 2. Petitioner No. 2 having made payment through a draft for the sale consideration as mentioned above was handed over the possession of the property on 16.1.2004. According to petitioner No. 2, he took physical possession of the said property and subsequently invested Rs.

3,50,000/- towards renovation and repair and for further constructions in the dilapidated building. On 4.8.2004 petitioner No. 2 received a letter from the Financial Corporation directing petitioner No. 2 to execute the sale deed in his favour and for that he approached the office of the Financial Corporation on a particular date alongwith stamps and other documents. Petitioner No. 2 purchased the requisite stamps and thereafter on 25.8.2004 a sale deed was executed in favour of petitioner No. 2. The documents were also presented for registration on the very same day before the Sub-Registrar, Tehsil Roorkee, District Haridwar but due to non availability of the official of the Financial Corporation the sale deed could not be registered, on that date. Thereafter, petitioner No. 2 was running from pillar to post in order to get the sale deed registered in his favour ; but all in vein. Therefore, petitioner No. 2 was constrained to file a Writ Petition No. 955 of 2006 seeking appropriate directions from this Court for the registration of the sale deed but the said writ petition was dismissed as it was observed by the Court that for the purposes of registration the sale deed has become time barred u/s 23 of the Indian the Registration Act. Petitioner No. 2 once again started persuading the Financial Corporation but since all his efforts went in vein, he was yet again constrained to file a writ petition before this Court which is the present writ petition where the petitioner has made the following prayer:

(i) Issue a writ, order, or direction in the nature of mandamus or any other appropriate writ thereby directing to the respondents to execute a fresh sale deed with its proper registration in favour of the petitioner forthwith in respect purchased property of M/s Haridwar asbestos cement and cement products (P) Ltd. Khasra No. 248, situated village Chauli Chhapar District Haridwar.

(ii) Any other order or direction which this Hon''ble Court may deem fit and proper to the facts and circumstances of the case.

(iii) Award the writ petition with costs.

10. This being the factual position of the matter, we have before us on one hand a borrower i.e. petitioner No. 1 who had admittedly taken a loan from the Financial Corporation, which again admittedly has not been repaid, yet petitioner No. 1 asserts that the Financial Corporation cannot ask for the repayment of this loan as the same is time barred. The Financial Corporation, he would say, has rescinded its proceedings u/s 29 of the Act and therefore threatening petitioner No. 1 once again for a proceeding u/s 29 is incorrect, in fact, the demand of recovery from petitioner No. 1 is hopelessly time barred, as petitioner No. 1 claims and has sought relief from this Court against the action of the Financial Corporation, the details have already been given in the preceding paragraphs.

11. On the other hand the claim of petitioner No. 2 is that he is a bona fide auction purchaser, the auction which has not been challenged before any forum. He being the bona fide auction purchaser and having received the possession of the property consequent to the auction purchase has a legitimate expectations

and a right under the law, to get the sale deed executed in his favour by the Financial Corporation.

12. On these contesting prayers and reliefs sought by both the petitioners the Division Bench of this Court had passed an order earlier disposing of both the writ petitions on 5.12.2006. The order passed by the Division Bench of this Court dated 5.12.2006 is reproduced below:

The controversy involved in both these writ petitions is one and the same, hence they both are being disposed of by this common order.

Heard Sri Alok Singh, Sr. Advocate assisted by Sri D. Barthwal appeared on behalf of the petitioner, U.P.F.C. is represented by Sri Naresh Pant, Advocate who is being assisted by the Regional Manager of the UPFC, Sri Ashwani Kumar.

Having regard to the facts and circumstances of the case, it is provided that the amount on which the sale has been confirmed, that amount shall be paid by M/s Haridwar Asbestos and Cement Products Pvt. Ltd. (petitioner in WPMB No. 1149 of 2005) to the U.P.F.C. The U.P.F.C. while handing over the possession to M/s Asbestos Pvt. Ltd. shall make the payment of Rs. 2,92,000/- along with 9% interest to Sri Yunus (petitioner in WPMB No. 1450 of 2006) from the date of deposit. It is also provided that the property i.e. machinery and plants implanted by M/s Haridwar Asbestos Pvt. Ltd. shall be valued and that amount shall be reduced from the amount to be recovered from M/s Haridwar Asbestos Pvt. Ltd. by the UPFC. It is also made clear that from the date the UPFC has taken the possession of the land in dispute, from that date the interest shall not be taken from the petitioner - M/s Haridwar Asbestos Pvt. Ltd. However, remaining dues shall be paid by the petitioner - M/s Haridwar Asbestos Pvt. Ltd. within a period of four months with interest as per the agreement before the date of taking over the possession u/s 29 of U.P. Financial Corporation Act.

With regard to the petitioner Sri Yunus (petitioner in WPMB No. 1450 of 2006), it is provided that the purchaser i.e. the petitioner shall be returned the amount deposited by him with interest at the rate of 9% per annum from the date on which the auction was held till the date of its payment by the U.P.F.C. In view of this order, the auction sale is hereby cancelled.

In terms of the above, both the parties have arrived at this one time settlement before this Court and they have also signed on the order sheet in this regard.

In view of the above, both the writ petitions are disposed of finally.

13. Since this order was in favour of petitioner No. 1, petitioner No. 2 feeling aggrieved by the said order filed an SLP before the Apex Court. After granting leave to petitioner No. 2, the appeal was allowed with costs. The Apex Court had to say this :

The auction sale has to be set aside if any known ground exists thereafter such a ground has to be made out by the borrower. A Writ Court may not be the appropriate forum.

We, therefore, deprecate the practice in which the High Court has proceeded to record its judgment and issued directions. We also do not approve that after the judgments are delivered, the following should have been recorded:

In terms of the above, both parties have arrived at this one time settlement before this Court and they have also signed on the order sheet in this regard.

We, therefore, set aside the impugned judgment and remand the matter to the High Court for consideration of the matter afresh.

14. On its remand the matter has been heard at length. We must first deal with the contention advanced by petitioner No. 1. The case of petitioner No. 1 is that he had taken a loan of Rs. 9,10,000/- and since the instalments were not paid in time the Financial Corporation had initiated recovery proceedings against petitioner No. 1 for which Writ Petition No. 844 of 1994 was filed but dismissed as having become infructuous vide order dated 9.5.1996. Therefore the petitioner contends that now it does not give any right to the Financial Corporation to initiate proceedings u/s 29 of the Act de novo. Admittedly, there is nothing on record as to what happened between 1994 to 2003. From the records available before this Court by petitioner No. 1 as well as by the Financial Corporation what was rescinded according to the Financial Corporation was the proceedings u/s 29 of the Act which the Financial Corporation was constrained to take against petitioner No. 1 in the year 1993-94, as it had knowledge that petitioner No. 1 was removing away the plants and the machinery, from the site. However, once an assurance was given by petitioner No. 1 for depositing Rs. 25,000/- with the Corporation a statement was made by the counsel for the Financial Corporation to stay the proceedings u/s 29 and the matter came to an end, as far as the then initiation of proceedings u/s 29 of the Act was concerned. The case of the Financial Corporation is that between 1994 to 2003 the Financial Corporation had not taken over the management of the petitioner company. Only physical possession of the mortgaged assets were taken and it was always ready to deliver back the physical possession to petitioner No. 1 but no requisition of this kind was made by petitioner No. 1. There is nothing available on the record nor it is the case of petitioner No. 1 that such a requisition was made by it to the Financial Corporation. The Financial Corporation has also contested the allegation of petitioner No. 1 that prior to taking the subsequent action u/s 29 of the Act, no intimation was given to petitioner No. 1. The Corporation has filed a letter dated 30.10.2002 which was sent to the Director of the Company Sri Om Prakash Tyagi stating that there is an outstanding dues against the petitioner company to the tune of Rs. 71.94 lakh and in case they are interested in one time settlement, they must contact the Corporation within seven days. As it did not happen, a proper advertisement in a newspaper was made by the Financial Corporation for sale of the property by way of auction. The advertisement was made in Amar Ujala newspaper on 8.9.2000, and thereafter on the following dates : 30.6.2001, 4.10.2001, 1.2.2002, 27.6.2002,23.1.2003, 23.6.2003 and

20.7.2003. Auction could not be made on the above dates as the Corporation did not get the price it was seeking for the property. It has been brought to the notice of this Court that initially the highest price was Rs. 1,65,000/- which was subsequently increased to Rs. 2,25,000/- and thereafter it was Rs. 2,92,000/-. In fact petitioner No. 2 was the highest bidder at all times and consistently increased his bid in the subsequent auctions. There is no allegation on record by any of the parties that the auction was done in violation of law or any fraud was committed in the public auction. Therefore, on these given set of facts no relief can be given to petitioner No. 1 for the reason that he is a defaulter of a loan given to him by the Financial Corporation and inspite of full and ample opportunities given to him by the Corporation, he failed to repay his debt and therefore the Financial Corporation was right in recovering its dues u/s 29 of the Act by going for an auction sale. Petitioner No. 1 has admitted to this loan taken by it from the Corporation. He again admits that this loan has not been returned by him. It is nobody''s case that the Corporation had waived this loan in favour of petitioner No. 1 (assuming that it had powers to do so). Yet petitioner No. 1 cries foul against the action of the Corporation and steadily maintains that the Corporation was not justified in its recovery of the loan against him !

15. What is, however, amazing is as to why the Financial Corporation refused to register the sale deed in favour of petitioner No. 2. There seems to be no justifiable reasons for this inaction on the part of the Financial Corporation on which much would be said later in this judgment.

16. Petitioner No. 2 seems to have a legitimate claim. He was a bona fide auction purchaser in an auction sale which has not been challenged before this Court. There is no allegation of any fraud or violation of any law in the auction sale done on 12.09.2003 in which petitioner No. 2 was a bona fide auction purchaser. The rights of a bona fide purchaser stand on a much higher footing. There is no legitimate explanation on the part of the financial corporation for having denied petitioner No. 2 this right. For a public authority i.e. the Financial Corporation this uncanny behaviour of running with the hare and hunting with the hounds must be deprecated. On the one end the Financial Corporation has proceeded (and rightly so) against petitioner No. 1 u/s 29 of the Act but its action becomes absolutely bizarre while no registered sale deed was executed in favour of petitioner No. 2 who is a bona fide auction purchaser, inspite of repeated efforts in this regard by petitioner No. 2. The sole reason that the Corporation has still got certain dues from petitioner No. 1, cannot be a ground for denying the legitimate right to petitioner No. 2. This is what has been held by the Apex Court in Valji Khimji and Company Vs. Official Liquidator of Hindustan Nitro Product (Gujarat) Ltd. and Others, . Normally an auction sale cannot be set aside except on the ground of violation of law, material irregularity or fraud. Therefore, the right of an auction purchaser in the auction sale being crystallized the necessary consequences must follow. For this reason, this Court holds that Writ Petition (M/B) No. 1149 of 2005 M/s Haridwar Asbestos and Cement Products Pvt. Ltd. and Ors. v. Uttar Pradesh Financial Corporation and Ors. is liable to be dismissed and

is hereby dismissed. Consequently, the writ petition of Petitioner No. 2, namely, Writ Petition (M/B) No. 1450 of 2006 Shri Yunus v. Uttar Pradesh Financial Corporation and Ors. is liable to be allowed and is hereby allowed. The Financial Corporation is directed to execute and register the sale deed in favour of petitioner No. 2 within a period of three months from the date a certified copy of this order is handed over to the Managing Director of the Financial Corporation.

17. No order as to costs.

