

(1999) 10 PAT CK 0061

In the Patna High Court

Case No : Letters Patent Appeal No. 804 of 1999

Haridwar Choubey

APPELLANT

Vs

The Managing Director, Bihar State Financial Corporation and
Others

RESPONDENT

Date of Decision : 14-10-1999

Acts Referred:

State Financial Corporations Act, 1951 — Section 29

Citation : AIR 2000 Patna 315 : (2001) 1 PLJR 697

Hon'ble Judges : Sachchidanand Jha, J; Gurusharan Sharma, J

Bench : Division Bench

Advocate : Narendra Prasad and Din Bandhu Singh, for the Appellant; P.K. Shanti, Ram Balak Mahto and Sarva Deo Singh, for the Respondent

Final Decision : Dismissed

Judgement

S.N. Jha, J.—This Letters Patent Appeal is directed against the judgment and order of a learned single Judge of this Court dated 25-6-99 in CWJC No. 9667 of 1998 dismissing the appellant's writ petition.

2. The dispute relates to the sale of the mortgaged assets of M/s. Rama Rice Mill situate at Banauli within Chenari P.S. of Rohtas District, at the instance of the Bihar State Financial Corporation ("the Corporation", for short) under the provisions of the State Financial Corporations Act, 1951 ("the Act for short). The appellant filed the abovementioned writ petition seeking, initially, a mandamus commanding the Corporation not to sell the mill in favour of any third party including respondent No. 3 Md. Azim, and consequential directions. By amendment, later, he prayed for quashing the order dated 24-9-98 regarding sale of the mill in favour of respondent No. 3 and the sale agreement dated 14-11-98 entered into with him i.e. respondent No. 3.

3. The case of the appellant, as stated in the writ petition, briefly, is as follows:

One Chandra Shekhar Choubey and other partners established the mill i.e. M/s.

Rama Rice Mill in the year 1978 after investing amount of Rs. 30 to 40 lacs. They made further investments in order to modernise the mill. However, as they needed more money, they approached the Corporation for grant of term loan. On 13-3-87 the Corporation sanctioned loan of Rs. 11.30 lacs. Another loan of Rs. 5.60 lacs was sanctioned on 2-7-88. However, amount of Rs. 2.20 lacs only was sanctioned as subsidy as working capital. Out of the said sanctioned amounts, Rs. 11.30 lacs and Rs. 4.86 lacs only were disbursed. It is said that due to paucity of fund and internal disputes between the partners the mill could not go into production and the amount of loan started mounting. In the year 1991 Chandrashekhar Choubey died. The loan repayment schedule was rescheduled in the year 1994 but the dues could not be paid. The mill was put on auction sale in 1994. The Corporation entered into negotiation with one Sunil Kumar Singh and Akhilesh Kumar Singh without giving any opportunity to the partners. The appellant later came to know that an order had been passed for sale of the mill to respondent No.-3. On 12-10-98 he approached the Managing Director of the Corporation seeking a week's time to enable him to deposit money after consulting other partners. He filed another application before the Managing Director on 20-10-98 seeking permission to deposit the money. Despite the said application and offer, he learnt, the Executive Committee of the Corporation vide resolution dated 31-10-98 had decided to sell the unit to respondent No. 3. On 10-11-98 he filed the writ petition. According to the petitioner the market value of the assets of the Mill was not less than Rs. 80 lacs and the proposed sale without giving him further opportunity to retain the unit was contrary to the law laid down by the Supreme Court in Mahesh Chandra Vs. Regional Manager, U.P. Financial Corporation and others, .

4. The Corporation filed two counter-affidavits. It stated that two term loans were sanctioned to M/s. Rama Rice Mill under two loan accounts for Rs. 17 lacs during 1987-88. The unit, however, could avail of Rs. 16.27 lacs only. The unit did not pay the instalment, as a result, the balance outstanding mounted to Rs. 43.49 lacs as on 31-5-96. In view of the successive defaults committed by the unit, the mortgaged assets of the unit were advertised for sale on 4-3-95 in the Hindustan Times. The unit was again advertised for sale in 1997. The sale notice published in the Hindustan Times on "10-1-97 and the Hindustan (Hindi) on 24-1-97. Two offers by (i) Sunil Kumar Singh and Akhilesh Kumar Singh, and (ii) Md. Azim were received pursuant to the said sale notice. They offered respectively Rs. 40 lacs and 39.75 lacs. Decision was taken to sell the unit to the former for Rs. 40 lacs. However, as they failed to make the initial cash down payment the sale order was later withdrawn. In the meantime, the Corporation had taken physical possession of the unit through its Branch Manager, Sasaram, on 28-3-98. After the sale order in favour of Sunil Kumar Singh and Akhilesh Kumar Singh was withdrawn, the second highest offerer i.e. Md. Azim approached the Branch Manager, Sasaram for sale of the unit in his favour. He was called for negotiation on 5-9-98. Md. Azim appeared before the Managing Director and submitted revised offer of Rs. 40.01 lacs. The offer being more than

the vetted valuation of assets of Rs. 31.29 lacs as well as the outstanding principal of Rs. 16.27 lacs, the Managing Director decided to sell the unit to him. The sale order was accordingly issued on 24-9-98, subject to approval by the Executive Committee of the Corporation. As per the said order Md. Azim was to make cash down payment of 25% of the amount offered and to pay the balance 75% in twenty quarterly instalments (c) 18% interest within five years. The Corporation stated that the unit had filed Title Suit No. 156 of 1997 before the Subordinate Judge, 1st Court, Sasaram, challenging the earlier decision for sale of the unit in favour of said Sunil Kumar Singh and another, and prayed for injunction which was rejected. After Md. Azim made the Initial cash down payment of 25% of the amount, the sale agreement was executed with him on 14-11 -98 and possession of the unit was handed over to him on the same day.

5. In the second counter-affidavit the Corporation denied the appellant's case that due opportunity had not been given to the promoters of the unit to retain the unit on matching terms. It stated that only after the promoters failed to accept the offer to retain the unit on matching terms that sale order was issued in favour of Sunil Kumar Singh and Akhilesh Kumar Singh.

6. After the Corporation filed the aforesaid affidavits, the appellant filed application seeking to challenge the validity of the decision to sell the unit to respondent No. 3, as already indicated above. He also filed two separate rejoinders to the counter-affidavits filed on behalf of the Corporation and respondent No. 3. In the rejoinder filed in reply to the Corporation's counter-affidavit he stated that he is still ready to retain the unit on the same terms on which the Corporation was intending to sell to a third party. He stated that he had made similar offer before the Managing Director on 12-10-98 and 20-10-98, and only after he did not get any positive response that he filed the writ petition. As regards Title Suit No. 156 of 1997 he stated that he is not a party to the suit and, secondly, that the suit had been filed against the decision for sale in favour of Sunil Kumar Singh and Akhilesh Kumar Singh. The decision to sell the unit to Md. Azim was taken later and that is not the subject-matter of the suit. In the other rejoinder filed in reply to the counter-affidavit of respondent No. 3 the appellant reiterated that the sale was contrary to the guidelines laid down by the Supreme Court in Mahesh Chandra Vs. Regional Manager, U.P. Financial Corporation and others, . He stated that after the sale order issued in favour of Sunil Kumar Singh was withdrawn no attempt was made by the Corporation to re-advertise the unit and on the basis of negotiation with respondent No. 3 the sale order was issued in his favour without giving fresh opportunity to the appellant to retain the unit on the same terms. The appellant stated that the present price of the mill is more than Rs. 90 lacs. Besides, his residential house also stands on portion of the mill premises.

7. The learned single Judge in his im- pugned order held that before finalising the sale in favour of Sunil Kumar Singh and Akhilesh Kumar Singh, by memo No. 433 dated 10-3-97 offer was made to the unit-holder to retain the unit on

matching terms offered by said Sunil Kumar Singh and Akhilesh Kumar Singh but the promoters did not accept the offer, instead, they filed Title Suit for setting aside the sale order. The learned single Judge also took into consideration the fact that only one partner and not the firm had filed the writ petition and, thus, come forward with the offer to retain the unit. The learned single Judge noticed the decisions of the Supreme Court in U.P. Financial Corporation Vs. Gem Cap (India) Pvt. Ltd. and Others, and U.P. Financial Corporation and Others Vs. Naini Oxygen and Acetylene Gas Ltd. and Another, , and observed that in view of those decisions it is not open to the High Court to interfere with the decision of the Financial Corporation except on the ground of violation of statutory provisions of the Act or mala fide, and accordingly dismissed the writ petition by the impugned order.

8. Shri Narendra Prasad, learned Counsel for the appellant, submitted that the Corporation has failed to observe the guidelines laid down by the Supreme Court in Mahesh Chandra Vs. Regional Manager, U.P. Financial Corporation and others, , and the impugned sale of the unit in favour of respondent No, 3, therefore, is fit to be quashed. He submitted that on 20-10-98 the appellant had made a definite offer seeking permission to deposit the money to which the Corporation did not respond. According to the counsel, although an offer had been made to the promoters to retain the unit on matching terms on 10-3-97 before finalising the sale in favour of Sunil Kumar Singh and Akhilesh Kumar Singh, after the proposed sale fell through, the Corporation was obliged to make similar offer before finalising the sale in favour of Md. Azim which was done on the basis of negotiation. It was pointed out that the unit has been sold to Md. Azim on 25% cash down payment and the rest amount is payable in instalments and the appellant is willing to take the unit on the same terms. Counsel stated that the appellant, as a matter of fact, is prepared to pay Rs. 41 lacs i.e. more than the amount at which the sale has been finalised. Counsel submitted that the learned single Judge dismissed the writ petition, inter alia, on the ground that one partner of the firm is not competent to retain the unit, which is contrary to the decision in Mahesh Chandra's case.

9. Shri P. K. Shahi. appearing for the Corporation, made the following submissions. The unit was put on sale after the unit-holder committed successive defaults and the arrears mounted to Rs, 43.49 lacs by 31-5-96, despite the fact that the loan repayment schedule was modified. It is an admitted position that opportunity was given to unit-holder on 10-3-97 to retain the unit on matching terms offered by Sunil Kumar Singh and Akhilesh Kumar Singh but instead of responding to such offer the unit filed Title Suit challenging the action itself, of the Corporation. It is thus not open to the appellant to urge before this Court that opportunity was not given to retain the unit. The conduct disentitles the appellant to any relief. The ratio of the decision in Mahesh Chandra's case can be applied only in a case where no opportunity is given to the unit-holder. The dues having mounted to Rs. 43.49 lacs up to May, 1996 and no genuine attempt having been made to either run the mill or start repaying the amount, the offer

now being made by the appellant is a mere pretence. In view of the subsequent decision of the Supreme Court in the case of Gem Cap (India) Pvt. Ltd. AIR 1993 SC 1435 (supra) and Shivalingappa Kallayanappa and others Vs. State of Karnataka, , this Court is not supposed to reappraise the decision of the Corporation, the Court can Interfere with such decision only on the ground of violation of any statutory provision of the Act or on the ground of mala fide. Since no violation of any statutory provision has been established nor any case of mala fide has been made out, the learned single Judge rightly dismissed the writ petition and the order thus, does not warrant any interference in Letters Patent Jurisdiction.

10. Shri Ram Balak Mahto, learned Counsel for respondent No. 3, made the following submissions. Two auction notices were published in 1995 and 1997. But there is, nothing on the record to show that any attempt was made to run the mill and/or approach the Corporation in the matter of payment of dues. In Mahesh Chandra's case the petitioner had taken steps to show his bona fide at different stages and, therefore.

the Supreme Court granted him the relief in the facts of the case. It is not correct to say that opportunity was not given to the unit-holders to retain the unit as per the guidelines laid down in Mahesh Chandra's case. A definite offer in this regard was made on 10-3-97 but instead of accepting the offer to retain the unit on the same terms, they filed the suit challenging the Corporation's action itself. The appellant's argument regarding further opportunity at the stage of negotiation" is misplaced. As a matter of fact, it was not a case of negotiation. Respondent No. 3 had already made second highest offer. After the highest offerer failed to make the cash down payment and sale order issued in his favour was withdrawn, the Corporation was fully justified to consider the respondent's claim. All that the respondent did was to raise his offer at the behest of the Managing Director from Rs. 39.75 lacs to Rs. 40.01 laes. There is nothing on the record to show that the firm is ready and willing to retain the unit-- or the bona fide of the appellant's claim.

11. Shri Narendra Prasad, in reply, submitted as follows:

The cause of action for filing the suit was the sale order in favour of Sunil Kumar Singh and Akhilesh Kumar Singh, which does not survive after withdrawal of the said sale order. The cause of action for filing the present writ petition being subsequent sale order in favour of respondent No. 3 i.e. a different cause of action, no adverse inference can be drawn for filing the suit in Lhe writ petition. What is to be seen as per Mahesh Chandra's case is the bona fide of the action of the Corporation and not that of the unit-holders. A definite offer having been made by the appellant on 12/20-10-98, the Corporation should have given him an opportunity to pay the dues and, thus, retain the unit. What the appellant is really worried about is that even after the unit is sold for Rs. 40.01 lacs, the balance outstanding against the firm is to be realised from the personal guarantee of the guarantors which will virtually ruin them. It is a fit case,

therefore, in which the Court should consider giving an opportunity to the appellant to retain the unit so that at least part of the mortgaged assets can be sold and the dues be liquidated. The present market value of the mortgaged assets is about Rs. 90 lacs. In support of different contentions, apart from Mahesh Chandra Vs. Regional Manager, U.P. Financial Corporation and others, , reliance was placed on Shri Krishna Singh v. Union of India (1992) 1 PLJR 91 (SC) and Karnataka State Financial Corporation v. Micro Cast Rubber & Allied Corporation (P) Ltd,. (1996) 2 PLJR 165 (SC).

12. The main thrust of the argument of the counsel for the appellant being denial of opportunity to retain the unit, I shall first deal with this point. It is not in dispute that opportunity was given at the time of sale to Sunil Kumar Singh and Akhilesh Kumar Singh on 10-3-97. The submission of the appellant, however, is that after the proposed sale fell through, at the stage of negotiation with respondent No. 3 another opportunity should have been given. What appears to have been done in the present case is merely to ask respondent No. 3 as to whether he was prepared to pay at least what Sunil Kumar Singh and Akhilesh Kumar Singh had offered, or more, to which he apparently agreed. That is how as against the offer of Rs. 40 lacs made by Sunil Kumar Singh and Akhilesh Kumar Singh, he submitted a revised offer of Rs. 40.01 lacs. In terms of the decision in Mahesh Chandra's case what is required of the Corporation is to give an opportunity to the unit-holder to retain the unit at the same price and on the same terms and conditions as being offered by the tenderer. In a case where the Corporation decides to sell the unit for a lower amount, whether as a result of negotiation or otherwise, without giving fresh opportunity to the unit-holder, certainly, the unit-holder can make a legitimate grievance. But where the unit is proposed to be sold at the same price or more, I do not think any fresh opportunity is required to be given. In the present case, if the Corporation had decided to sell the unit at Rs. 39.75 lacs offered by respondent No. 3, the amount being lower than what had been offered by Sunil Kumar Singh and Akhilesh Kumar Singh, and in turn to the unit-holder, notwithstanding the small difference of Rs. 25 thousand, it can be said that fresh opportunity should have been given to the unit-holder. This, however, is not the situation here. If the unit-holders were not ready and willing to retain the unit at the price offered by Sunil Kumar Singh and his partner i.e. Rs, 40 lakhs and on the terms and conditions offered by him, in the ordinary course, it was not expected that they would be ready and willing to match the higher offer made by respondent No. 3.

13. In the present case, as a matter of fact, as mentioned several times in this judgment, after offer was given to retain the unit on matching terms on 10-3-98, instead of positively responding to the offer and availing of the opportunity, a suit was filed on or about 8-4-97. It may be that the appellant does not figure as a party in the suit but the suit having admittedly been filed in the name of the firm and appellant being one of its partners it is not open to him to dissociate himself from the suit. As the Supreme Court has observed in Her Highness Maharani Mandalsa Devi and Others Vs. M. Ramnarain (P) Ltd. and Others, . "a suit by or

in the name of a firm is really by or in the name of all its partners. The decree passed in the suit, though in form against the firm, is in effect a decree against all the partners".

14. It is significant to mention here that the fact regarding filing of the suit was completely suppressed in the writ petition, it was only after the Corporation in its counter-affidavit stated relevant facts in that regard, that the appellant came with explanation that he is not a party in the suit. There is no such statement, however, that he was not aware of the filing of the suit. In my opinion, suppression of such a material fact having a great bearing on the bona fide of the claim being put forward, in substance and effect, on behalf of the firm, could justify summary dismissal of the writ petition on the maxim "suppressio veri suggestio falsi".

15. The submissions of Shri Narendra Prasad that cause of action for filing the suit was different and that such cause of action has vanished does not impress me. If it was so, I fail to understand, why the suit has been allowed to remain pending. The plea was taken before the learned single Judge on behalf of the respondents and it found favour with him. If the suit has become infructuous steps should have been taken to withdraw it. The position, thus, is that two remedies are being pursued simultaneously, one partner Bldyapati Choubey has filed the suit in the name of the firm while the appellant filed the writ petition.

16. The appellant has tried to gain the sympathy of the Court by stating that it was on account of the disputes amongst the partners which cropped up after the death of Chandrashekhar Choubey that the Instalments could not be paid. While it appears to be a plausible reason, on that basis the sale cannot be faulted. It is the uncontroverted case of the respondents that defaults started in or about 1991 and by May, 1996 the dues had mounted to Rs. 43.49 lakhs. Prior to that, in 1995 sale notice under Sections 29 and 30 of the Act had been published, followed by another sale notice in the year 1997. There is nothing on the record to suggest that any attempt was made on behalf of the partners to run the mill and/or to repay the loan to the Corporation by some other means, such as, sale of other properties, In Mahesh Chandra Vs. Regional Manager, U.P. Financial Corporation and others, , the petitioner had made request for permission for sale of part of the mortgaged assets to repay the loan. Nothing whatsoever has been stated about any step taken by the appellant or any other person between 1991 and 1998. In Mahesh Chandra's case, long before the sale the petitioner had offered to pay Rs. 5 lacs and odd. In the present case two sale notices failed to evoke any response, rather suit was filed to scuttle the process of sale. In my opinion, if the intention of the appellant was bona fide he along with other partners could have approached the Corporation soon after sale notice, if not earlier, instead of filing the suit. The first response even according to appellant came only on 12-10-98 but by that time the sale order had already been issued in favour of respondent No. 3 on 24-9-98 subject to approval by the Executive Committee, which was done on 14-10-98. As a matter of fact, although no such

case has been pleaded by the Corporation, I have doubts if the appellant made any offer on 12-10-98 vide Annexure-1 to the writ petition and the contents thereof are factually correct. As per Annexure-1, on 12-10-98 i.e. the date when an application was ultimately filed, the Managing Director of the Corporation had orally asked the appellant to deposit the money. The fact, however, is that on 24-9-98 itself the sale order had been issued in favour of respondent No. 3 and the matter was pending with the Executive Committee. The second application contained in Annexure-2 was allegedly filed on 20-10-98 but by then the Executive Committee had already approved the sale order in favour of the respondent. No doubt, if there had been violation of the guidelines in Mahesh Chandra's case, that is to say, due opportunity had not been given to the unit-holder to retain unit on matching terms, the position would have been different. I have already discussed this aspect earlier.

17. I have also grave doubts about the bona fide of the appellant's contention regarding his "readiness" to make cash down payment of 25% of the amount at which the unit has been sold to respondent No. 3. No fact or figure has been disclosed as to how and from which source the appellant proposes to raise the amount of more than 10 lacs. The plea, according to me, appears to be pretence, a ploy to frustrate the sale in favour of respondent No. 3. Counsel for the Corporation, in course of hearing, highlighted the fact that experience of the Corporation is that despite successive sale notices suitable buyers do not come forward to buy the units, so much so that the Corporation is not able to recover even the amount spent on publication of the sale notice in different newspapers, in the present case, the Corporation has been able to find a suitable buyer and if any interference is made by this Court at this stage and the sale order is set aside, in the event the appellant does not pay the money as being offered by him, it may be difficult for the Corporation to find an equally suitable buyer in future. I find force in the submission of the counsel.

18. As noted above, an argument was made on behalf of the appellant that the unit is sought to be sold for a price less than its potential price, Firstly, it is said that the market value of the mortgaged assets is not less than Rs. 90 lacs, and secondly that proper publicity was not made. As regards the first submission, as already stated above, the amount of Rs. 40.01 lacs is more than the vetted valuation of the assets of Rs, 31.29 lacs and the outstanding principal of Rs. 16.27 lacs calculated on the basis of the standard norms followed by the Corporation. No material has been brought on record to substantiate the plea regarding market valuation of the property. As stated above, on two occasions -- in 1995 and again in 1997 --sale notices were published, on the second occasion such publication was made in two standard newspapers having wide circulation. It does not, therefore, seem to be a case in which the sale has been made without any proper publicity which could fetch more price. If the real value of the property is not less than 90 lacs it is difficult to appreciate as to how the appellant and/or other partners of the firm would sit tight and allow the unit to be sold showing virtually no genuine concern to retain the property on the same

terms and conditions. Admittedly the dues outstanding against the unit are much more than the amount at which it is being sold. It was 43.40 lakhs as on 31-5-96. In course of time it must have substantially increased. The appellant and other concerned should have shown better discretion and acted more sincerely. The perusal of the two letters dated 12-10-98 and 20-12-98 (supra), shows on the face of it, how casually the appellant approached the Corporation.

19. The facts of the case in Mahesh Chandra Vs. Regional Manager, U.P. Financial Corporation and others, , which is the sheet-anchor of the appellant's case, were completely different. As regards the guidelines laid down therein I am satisfied that they have been substantially complied with. In the absence of any proof of mala fide, therefore, it is not possible to interfere with the impugned orders. The learned single Judge has relied on the decisions of the Supreme Court in the case of Gem Cap (India) Pvt. Ltd. AIR 1993 SC 1435 (supra) and Shivalingappa Kallayanappa and others Vs. State of Karnataka, . In the former case, it has been stated,

"In a matter between the Corporation and its debtor, a writ Court has no say except in two situations : (1) there is a statutory violation in the part of the Corporation or (2) where the Corporation acts unfairly i.e. unreasonably."

In the other case, the Court observed,

"However, we cannot lose sight of the fact that the Corporation is an independent autonomous statutory body having its own constitution and rules to abide by, and functions and obligations to discharge. As such, in the discharge of its functions, it is free to act according to its own light. The views it forms and the decisions it takes are on the basis of the information in its possession and the advice it receives and according to its own perspective and calculations. Unless its action is mala fide, even a wrong decision taken by it is not open to challenge. It is not for the Courts or a third party to substitute its decision, however more prudent, commercial or business like it may be, for the wisdom (or the lack of it) of the conduct of the Corporation, the same cannot be assailed for making the Corporation liable."

20. In the above premises of fact and law, I do not find any error in the judgment and order of the learned single Judge to warrant any interference in the matter. This Letters Patent Appeal is accordingly dismissed but without any order as to cost.

Gukusharan Sharma, J.

21. I agree.