(2012) 03 OHC CK 0035

In the Orissa High Court

Case No : OJC. No. 4037 of 2002

Himansu Sekhar Panda APPELLANT

Vs

Orissa State Financial Corporation O.M.P. Square and Others RESPONDENT

Date of Decision : 16-03-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 34
Contract Act, 1872 — Section 128
State Financial Corporations Act, 1951 — Section 20, 29, 30, 31, 32

Citation : AIR 2012 Ori 120

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

Bench : Division Bench

Advocate : Balakrishna Rao and R.K. Patnaik, for the Appellant; S. Misra, G. Tripathy and S. Panda, for the Respondent

Final Decision : Allowed

Judgement

V. Gopala Gowda, C.J.—The first writ petition is filed by the principal borrower in relation to the transaction amount of Rs. 4,93,338/- against the term loan of Rs. 4,99,000/- granted in his favour for a direction to the opposite parties to re-calculate and re-determine the correct outstanding loan dues, consider the representation made on 11-2-2002 and rephrase the same to be paid by the petitioner to the OSFC in suitable monthly installments. The second and third writ petitions are filed by the guarantor, who is the mother of the principal borrower to quash the sale notice under Annexure-2 for selling the bus bearing Regn. No. OR-12-2343 in public auction which was scheduled to be held on 17-2-2007 as bad in law as the same has been done without notice to the petitioner and also for settlement of the loan amount under OTS policy which was in force. The brief facts of the case is that for non-compliance of the terms and conditions of the loan agreement, proceedings has been initiated by the opposite parties. The bus was seized by the opposite parties on 26-5-2006 and the same was sold in public auction on 12-1-2007 at Rs. 1,51,000/- lower than the off-set price of Rs. 2,50,000/- and much lower than the insured value of Rs. 3,25,000/-

covering the period from 3-9-2005 to 2-9-2006 including the date of seizure and the same was done behind the back of both borrowers and guarantor. The said action of the opposite parties is challenged by the borrower and guarantor urging various legal contentions. Since the principal borrower failed to comply with terms and conditions of the loan agreement, proceedings has been initiated by the opposite parties against the guarantor in respect of two mortgaged properties kept towards co-lateral security for having availed the loan by the son of the guarantor.

2. The said action of the opposite parties has been challenged by the learned counsel appearing for the petitioners in all the writ petitions by placing strong reliance upon the judgment of this Court in the case of Smt. Sukanti Mohapatra v. Orissa State Financial Corporation & Ors., reported in 2012 (I) OLR 374, and the case of Karnataka State Financial Corporation Vs. N. Narasimahaiah and Others, . He has placed strong reliance upon paragraph 17 and 42 in support of the proposition that provisions of Section 128 of the Contract Act must also be kept in mind by the Corporation that the liability of a surety is made co-extensive with the liability of the principal debtor. Learned counsel for the petitioners, i.e. principal borrower and guarantor placed reliance upon the decision of the Supreme Court in support of the legal submission that the sale of the vehicle after seizure at Rs. 1,51,000/- which is lower than the insured value amount referred to supra and lower than the off-set price is bad in law. Further, it is contended that apart from the said legal contention, the seizure of the vehicle when the proceedings before this Court are pending in OJC No. 4037 of 2002 as this Court issued notice both in the writ petition and Misc. Case No. 4142 of 2002 and when the matter is pending before this Court regarding rephasement of the terms and conditions of the agreement regarding settlement of the loan amount by installments, action u/s 29 of the SFC Act by the opposite parties is bad in law without obtaining approval of this Court. Further it is contended that the initiation of the proceedings u/s 29 of the Act by the OSFC for seizure of the vehicle is bad in law as it is not a industrial concern. In support of this contention, he has placed reliance upon the decision of the Karnataka High Court in the case of H.I. Shamshuddin v. Karnataka State Financial Corporation & Ors., reported in AIR 2010 Karnataka 187 wherein in the said case after referring to judgments of the Supreme Court particularly, the judgment of the Supreme Court in the case of Karnataka State Financial Corporation Vs. N. Narasimahaiah and Others, referred to supra, wherein the learned single Judge has framed the question that whether Section 29 of the SFC Act invests a jurisdiction in the KSFC to sell any property pledged, mortgaged, hypothecated or assigned to it other than that of the industrial concern?

3. The answer to the said question need not detain the Court for long as it is no more res integra in the light of the authoritative pronouncement of the Apex Court in Karnataka State Financial Corporation Vs. N. Narasimahaiah and Others,) referred to supra. The Apex Court having regard to Sections 29, 30, 31, 32 and 32 (G) interpreted Section 29 as a special provision and answered the

said issue. Answering the said question, the Court has relied upon the observation made by the Hon''ble Supreme Court at paragraphs 14 and 15 in the case of Narasimhaiah referred to supra in favour of the guarantor. Sub-section (1) of Section 20 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.

4. Having referred to the relevant paragraphs, the case of the petitioner is that as she has mortgaged her immovable properties to secure the loan to be extended by the Corporation, Section 29 is not attracted to the schedule immovable properties furnished by the guarantor in favour of the Corporation. Hence the Corporation is not entitled to take over the said properties mortgaged by the petitioner and sold it in public auction for recovery of the loan amount availed by the principal borrower.

5. A detailed statement of counter affidavit has been filed in W.P. (C) No. 3001 of 2009 by the opposite parties seeking to justify the action taken in respect of the immovable mortgaged properties of the guarantor as co-lateral security for recovery of the loan availed by the principal borrower. Further, strong reliance has been placed upon the proceedings initiated against the guarantor after referring to various correspondences made with the Principal borrower, but he did not comply with the same. Therefore, there was utter violation of the terms and conditions of the loan agreement by the borrower in not paying the loan amount as agreed upon by him. Therefore, the loan amount sought to be recovered out of the co-lateral security properties of the guarantor. Though the said stand is taken by the State Financial Corporation in the statement of counter affidavit, learned counsel for the Corporation invited our attention to the decision of the Karnataka State Financial Corporation Vs. N. Narasimahaiah and Others, referred to supra which judgment is followed by this Court in the case of Smt. Sukanti Mohapatra v. Orissa State Financial Corporation & Ors., referred to supra and submitted that Section 29 of the Act is not attracted to the fact situation, then they may be permitted to proceed against the guarantor by following the procedure contemplated u/s 31 of the Act. Petition had been filed before the Branch Level Disposal Committee and after obtaining necessary orders, the properties may be sold in the public auction.

6. With reference to the rival legal contentions urged on behalf of the parties, we have carefully considered the same with a view to find out as to whether the petitioners are entitled for the reliefs sought for in the writ petitions? What order?

7. Our answer to the aforesaid point is in favour of the borrower and guarantor for the following reasons.

It is an undisputed fact that OJC No. 4037 of 2002 was filed before this Court seeking for issuance of a mandamus for rephasement of the installments to clear the outstanding loan amount borrowed by the borrower. When the matter is pending before this Court after issuing notice in these writ petitions, the vehicle was seized on 26-5-2006 and the same was sold on 12-1-2007 at Rs. 1,51,000/- which is lower than the off-set price of Rs. 2,50,000/- and also much lower than the insured value valued at Rs. 3,25,000/- covering the period from 3-9-2005 to 2-9-2006 including the date of seizure. Therefore, the sale of the seized vehicle from the possession of the principal borrower is not for a valid consideration. Since, the State Financial Corporation is the Trustee of the property and sold the same in public auction invoking Section 29 of the SFC Act sale is bad in law accordingly we have to set aside the same. Since the vehicle has already been sold in public auction five years back, it would not be appropriate to direct the State Financial Corporation to re-sell the same. Having regard to the undisputed fact of sale of the vehicle for lesser value, we have to accept the sale value of the vehicle at Rs. 3,25,000/- as the vehicle has been insured with the New India Insurance Company, which is a Government owned company. Therefore, the said amount is taken as the amount received by the State Financial Corporation on 12-1-2007 and the same should he taken as the amount which is realized towards the loan amount and for the remaining amount the principal borrower shall be allowed to have the One Time Settlement Scheme as the same was in force on the date of filing of the writ petition being OJC No. 4037 of 2002 and extend the benefit to him by adjusting the requisite amount received out of the sale consideration amount. The same shall be considered and disposed of within a period of four weeks from the date of receipt of certified copy of this order. Since we have answered that the sale of bus is bad in law for the reasons recorded above, during pendency of the writ petition prayers sought for in the writ petition No. 4046 of 2009 is required to be allowed as the principal borrower has rightly challenged the same. The sale of the co-lateral security property has been questioned in W.P. (C) No. 4046 of 2009 by the guarantor, since she is entitled to challenge the same as she is an aggrieved party for sale of the vehicle which is hypothecated in favour of the State Financial Corporation in realization of the valid consideration. Certainly gross illegality has been done by OSFC and its officers upon the guarantor and she will lose her immovable property which has been mortgaged with the OSFC as co-lateral security towards the loan borrowed by the borrower. Therefore, the relief sought for in W.P. (C) No. 4046 of 2009 is required to be allowed. Accordingly, we allow the said writ petition. The reliefs sought for in OJC No. 4037 of 2002 is subsequent to the event that had taken place during the pendency of the writ petition proceedings, the reliefs sought for in the aforesaid writ petition need not be granted. Therefore, the writ petition bearing OJC No. 4037 of 2002 is dismissed having become infructuous. The reliefs sought for in W.P. (C) No. 4046 of 2009 has to be granted giving direction to the principal borrower to file application seeking for One Time Settlement under the OTS Scheme, 2002 as he was before this Court seeking for re-phasement of the loan amount and at that point of time OTS Scheme was invoked. The said benefit should be extended to the principal borrower. Further the petitioner in W.P. (C) No. 3001 of 2009 is entitled to get the relief. We make it very clear that if the principal borrower approaches the State Financial

Corporation including a petition for relief under the One Time Settlement Scheme, 2002, for the balance loan amount to be recovered from him as well as from the guarantor, the same shall be considered on its own merit and disposed of within a period of four weeks from today. All the calculation with regard to the loan amount shall be made after accepting the value of the bus of the borrower at Rs. 3,25,000/- which was sold on 12-1-2007. From that date, the earlier period and subsequent period, the rate of interest that will be accrued at 6% yearly to be calculated in view of the Constitution Bench decision of the Supreme Court in the case of Central Bank of India Vs. Ravindra and Others,) Section 34 of the CPC may be applied to the case. It is not quarterly pendente lite interest, yearly simple interest must be calculated on the principal amount and the same must be calculated towards loan amount and strictly enforced as per the guidelines laid down in the aforesaid case. If after examination, the petitioner is entitled for one time settlement, the same shall be extended to the principal borrower.

With the aforesaid observation and direction to the Orissa State Financial Corporation, W.P. (C) No. 4046 of 2009 is allowed, O.J.C. No. 4037 of 2002 is dismissed as infructuous. W.P. (C) No. 3001 of 2009 is also allowed as per the direction given in W.P. (C) No. 4046 of 2009. Learned counsel for the petitioner in W.P. (C) No. 4046 of 2009 is directed to file application under OTS Scheme, 2002 within a period of two weeks and within four weeks thereafter the Orissa State Financial Corporation shall dispose of the same keeping in view the directions given to it and observations made.

