

(2005) 02 KL CK 0100

In the High Court Of Kerala

Case No : WA No. 1041, WP (C) No. 16778 of 2003 and WP (C) No. 17272 of 2005

Kerala Financial Corporation

APPELLANT

Vs

T.K. Jayaraian and Others

RESPONDENT

Date of Decision : 03-02-2005

Acts Referred:

Citation : (2005) 02 KL CK 0100

Hon'ble Judges : K.P. Balachandran, J.;M. Ramachandran, J.

Bench : Division Bench

Final Decision : Dismissed

Judgement

Balachandran, J.—W.A. No. 1041 of 2003 is filed by the Kerala Financial Corporation, the second respondent in O.P. 1947 of 1996 challenging the judgment of a Single Judge of this court holding that no revenue recovery proceedings can be initiated against the petitioners in the Original Petition as the claim involved therein as against them is barred by limitation. Reference to the parties are made herein as their status is in O.P. 1947 of 1996 to the extent possible. The petitioners in their personal capacity were guarantors for the loan advanced to the first respondent industrial unit which is a company registered under the Companies Act, they having executed Ext. R2(a) guarantee deed along with one T.K. Surendran Managing Director of the said company. The said T.K. Surendran is stated to have passed away on 28-6-1993 and the industrial unit is stated to be closed down ever since 1-3-1990 when there was a devastating fire which damaged the machineries and the building in which the said industrial unit had been housed.

2. The petitioners (two in number) in O.P. 1947 of 1996 are also the petitioners in W.P.C. 16778 of 2003 wherein they seek for a direction from this court to the Canara Bank, Vythiri Branch, the second respondent therein, to transfer the funds covered by Ext. P3 Fixed Deposit Receipt to the first respondent State Bank of India, Kainatty Branch, Wynad District enabling the discharge of their

liability under the one time settlement arrived at with the first respondent before the Debts Recovery Tribunal, Ernakulam. Ext. P3 fixed deposit receipt is one in the name of the company which is the first respondent in O.P. 1947 of 1996. W.P.C. 17272 of 2004 is filed by the second petitioner in the aforesaid petitions for quashing Ext. P2 prohibitory order therein issued by the Deputy Tahsildar (RR) K.F.C. dated 15-7-1999 attaching the amounts covered by Ext. P3 fixed deposit, receipt aforesaid for debts due from the first respondent company in O.P. 1947 of 1996. The amounts covered by Ext. P3 fixed deposit receipt is the insurance amount received for damage caused in fire to the industrial unit viz. the first respondent in O.P. 1947 of 1996 whereas the amounts due to the State Bank of India under the one time settlement arrived at with the petitioners represents the amounts payable on account of the loan availed by the aforesaid industrial unit for which also the petitioners were sureties.

3. We have heard arguments of Sri. V.B. Unniraj counsel for the Kerala Financial Corporation, appellant in W.A. 1041 of 2003 and the first respondent in W.P.C. 17272 of 2004, Advocate Sri. E. Subramani counsel for the petitioners in W.P.C. 16778 of 2003 and W.P.C. 17272 of 2004 and respondents 1 and 2 in W.A. 1041 of 2003; Government Pleader for respondents 4 and 5 in W.A. 1041 of 2003 and Standing Counsel for the First Respondent State Bank of India and the second respondent Canara Bank in W.P.C. 16778 of 2003.

4. We are constrained to observe that there is extreme dearth of relevant materials/pleadings, and the contribution of both, sides appear to be more or less equal in this respect. The petitioners in the O.P. had chosen to keep silence about their liability as guarantors, which was really material, and the suppression thereof was a serious lapse. On the part of the KFC, they had failed to produce the agreement entered into with the company, as the terms and conditions were highly relevant for a full fledged decision. Even after suffering a judgment, the Writ Appeal memorandum was thoroughly inadequate, although the stakes involved were high. We are disturbed by the fall in standards.

5. The case of the Kerala Financial Corporation that the loan advanced to the first respondent company as per agreement executed on 19-5-1986 was repayable in 17 yearly installments commencing from 10-3-1989 and ending with 10-3-1997 is not disputed before us. Hence the first instalment was to fall due on 10-3-1989 and the second on 10-3-1990. In the meanwhile fire mishap occurred on 1-3-1990 resulting in closure of the factory. Notices were issued to the first respondent company and its Directors by the second respondent K.F.C. on 3-5-1994 and 15-11-1994 for repayment of the loan amount with interest. Ext. P1 is the notice so sent on 15-11-1994 to the first petitioner wherein the amount due under the loan account as on 1-1-1994 is shown as Rs. 1,13,21,517. The first petitioner issued Ext. P2 reply thereto disowning liability as Director of the company. Pursuant thereto the second respondent took possession of the industrial unit of the first respondent on 20-7-1995 and brought it to sale for Rs. 73,50,000. The balance after adjusting the sale proceeds as on 1-1-1996

according to the second respondent is Rs. 160.66 lakhs and Ext. P3 notice was issued by the second respondent on 11-1-1996 claiming the said amount in terms of the loan agreement and invoking Ext. R2(a) guarantee agreement executed by the petitioners. Pursuant thereto requisition for initiating revenue recovery proceedings was issued on 22-1-1996 by the second respondent Financial Corporation. It is at this stage that the petitioners filed O.P. 1947 of 1996 for quashing Exts. P1 and P3 notices and for issuance of a writ of mandamus ordering the second respondent to recover the amounts due, from the first respondent company and its assets alone and not from the petitioners.

6. The only contention that was canvassed before the Single Judge was that no amount demanded vide Ext. P3 can be realised resorting to revenue recovery proceedings as the said claim is barred by limitation. The learned Judge took the view that as there is admittedly default by the principal debtor in payment of the instalment that had fallen due on 10-3-1990, Ext. R2(a) guarantee agreement should have been invoked within three years therefrom, and that having not been done, the entire claim is barred by limitation and hence those amounts cannot be recovered resorting to revenue recovery proceedings from the petitioners in view of the decision of the Supreme Court in *State of Kerala and Others Vs. Kalliyankutty and Another*--> and the decision of a Single Judge of this Court in *Annamma Jose Vs. Kerala Financial Corporation*, . It is now settled by the decision in *Kalyanikutty's* case referred to supra that by invoking the Revenue Recovery Act, only dues that are legally recoverable can be recovered.

7. In the present case debt due from the first respondent company was charged on immovable property as well, and hence under Article 62 of the Limitation Act 1963, 12 years was available to the second respondent to enforce payment. The second respondent had already taken over possession of the industrial unit on 20-7-1995 and sold it and the revenue recovery proceedings are initiated for the recovery of the balance amount due. The said claim as against the first respondent company is obviously not barred. As per terms of Ext. R2(a) guarantee agreement the liability of the guarantors is coextensive with that of the principal debtor and under clause 12 thereof the liability of the petitioners to pay the amount arises only on demand made by the Kerala Financial Corporation invoking the guarantee agreement. According to the petitioners Ext. P1 notice of demand dated 15-11-1994 was followed by Ext. P3 notice of demand dated 11-1-1996 invoking the guarantee agreement. It is thereupon that the Original Petition was filed on 13-1-1996. Even assuming that the guarantee was so invoked on 3-5-1994 when the first demand was made as stated by the second respondent viz. even prior to Ext. P1 notice dated 15-11-1994, the claim advanced under the guarantee agreement does not get barred by limitation till expiry of three years therefrom, as the Article that applies is Article 113 of the Limitation Act, 1963. Article 55 of the Limitation Act relied on by the Single Judge does not however appear to have application as the claim is not for compensation for the breach of any agreement. The second respondent has invoked the revenue recovery proceedings within two years of the earliest

demand made by them to the petitioners and we find that the claim in the circumstances is not barred by limitation but is well within time. In Annamma Joseph's case this court quashed revenue recovery proceedings against the guarantors as the proceedings were initiated beyond seven years of the notice issued to them threatening revenue recovery action in case of failure to remit the amount and rightly it was declared that the claim was barred by limitation. The position is not so in this case. Hence the petitioners were not entitled to get the relief canvassed or upheld and we are of the view that the original Petition deserved to be dismissed. Ext. P2 prohibitory order in W.P.C. 17272 of 2004 is one whereby the amounts in fixed deposit with the Canara Bank, Vythiri Branch in Wynad District in the name of the first respondent company being the deposit of the insurance amount of Rs. 5 lakhs is ordered to be attached. The second petitioner who is one of the guarantors cannot have the relief of quashing Ext. P2 prohibitory order attaching the said amount towards dues from the first respondent company as prayed for in W.P.C. 17272 of 2004. Similarly the reliefs prayed for by the petitioners in W.P.C. 16778 of 2003 filed by them for a direction to the second respondent Canara Bank, Vythiri Branch to pay the amounts due under the aforesaid fixed deposit receipt to the first respondent State Bank of India towards discharge of debt due from them under the one time settlement arrived at before the Debts Recovery Tribunal in claim advanced by the State Bank of India for recovery of amounts due from them, they being sureties for the loan advanced to the first respondent company, also is not sustainable as that stands attached already for debts due from the first respondent company to the second respondent/K.F.C. Thus W.P.C. 16778 of 2003 and W.P.C. 17272 of 2004 are devoid of merit.

In the result, W.P.C. 16778 of 2003 and W.P.C. 17272 of 2004 are dismissed. Allowing W.A. 1041 of 2003, the judgment in O.P. 1947 of 1996 is set aside.

However taking note of the facts of the case, we are of the view that fresh opportunity is to be given to the parties to agitate over the matter, especially since we are unsettling the judgment which was in their favour. In respect of the loan outstanding, we direct the State Bank of India to give the petitioners/ company a further opportunity for availing of the benefit of the one time settlement scheme, and this may be given within two months from the date of receipt of a copy of this judgment.

The KFC has to make recalculation in the matter, after notice to the petitioners in the Original Petition, if they propose to move further in the matter against the guarantors as their present demands are least transparent, and even arbitrary. Remissions as admissible also are to be appropriately extended to them. Any steps for recovery should be initiated only thereafter. We direct the parties to bear their respective costs.