

(2011) 07 P&H CK 0224

In the Punjab And Haryana At Chandigarh

Case No : Civil Writ Petition No. 16896 of 2008

Mrs. Prakashwati Jain and another

APPELLANT

Vs

Punjab State Industrial Development Corporation and others

RESPONDENT

Date of Decision : 20-07-2011

Acts Referred:

Contract Act, 1872 — Section 2

State Financial Corporations Act, 1951 — Section 29, 29(4), 31, 32

Transfer of Property Act, 1882 — Section 58, 69

Citation : (2011) 164 PLR 242 : (2011) 4 RCR(Civil) 687

Hon'ble Judges : K. Kannan, J

Bench : Single Bench

Final Decision : Allowed

Judgement

K. Kannan, J.—The writ petition challenges the act of taking possession by the State finance Corporation of the property belonging to the petitioner in purported exercise of powers u/s 29 of the State Financial Corporation Act. The petition was filed when the property had been alleged to have been put in auction and before the confirmation of sale. A Bench of this Court, while ordering notice to the respondents had directed on September 26, 2008 that the sale would not be confirmed. The case addresses the right of question of whether the memorandum of deposit of title deed in the manner drafted required registration and whether the effect of non-registration renders invalid the mortgage. The second contention is that the petitioner is but a surety for the loan advanced by the 1st Respondent Corporation to the second respondent and hence the power of the Corporation to take possession of the assets u/s 29 of the Act does not extend to the property of the surety. In this judgment for the reasons stated herein, I find that the first objection regarding the need for registration as contended by the petitioner is not tenable. The second objection is sustained and hence the writ petition is directed to be allowed with certain observations. Hereon, the facts, reasons and the position of law that this case bristles with.

2. The 2nd respondent has entered into a term loan agreement dated 2.11.98 with the 1st respondent for a term loan agreement with respondent No. 1 for running a factory. He has executed a hypothecation deed on the present and future movable and immovable assets of the property, apart from a document of mortgage. A collateral security by deposit of title deeds have been made by the petitioner to secure the loan for the 2nd respondent and a memorandum has been executed on 12.1.99.

3. The enforceability of the document as without consideration is stated in the petition. The contention is hollow and was not pressed at the time of arguments. The term "consideration" as defined u/s 2(d) of the Contract Act makes possible the enforceability of a debt even against a stranger to consideration, so long as the detriment suffered by the promisor is for the benefit obtained to another person. The collateral security offered by the surety for the benefit obtained by the principal debtor is sufficient consideration to make it enforceable.

4. A mortgage is created by mere deposit of title deeds in notified towns without having to execute any document. Section 58(f) of the Transfer of Property Act defines an equitable mortgage as follows:-

58(f) Mortgage by deposit of title deeds.- Where a person in any of the following towns, namely, the towns of Calcutta, Madras and Bombay and in any other town which the State Government concerned may, by notification in the Official Gazette, specify in this behalf, delivers to a creditor or his agent documents of title to immovable property, with intent to create a security thereon, the transaction is called a mortgage by deposit of title-deeds.

5. No document is necessary, if a memorandum is drawn to record the fait accompli of deposit, it does not require registration. However, if only the document itself creates the deposit and contains the bargain between parties, it would require registration. In all such cases, the recitals in the memorandum is the best guide of what the parties have intended and how the transaction has taken effect and how it affects the right to the property. The document reads:

Yesterday Smt. Parkashwati Jain... had attened the office of Punjab State Industrial Development Corporation Ltd. and delivered to and deposited with Sh. A.K. Sud, General Manager (F) who was acting for and on behalf of the said PSIDC, the document of title, evidences, deeds and writing more particularly described in the first schedule, hereunder written (hereinafter called the said title deeds) in respect of the immovable properties owner and possessed by them are free from all in encumbrances more particularly described in the schedule here under written.

....

Smt. Parkashwati Jain and Sh. Jai Chand stated that equitable mortgage created as aforesaid shall continue subsist (sic) and title deeds shall continue to remain deposit with PSIDC so long as the company was not fully discharged of its

liability under the said loan agreement dated 2nd Nov., 1998.

Sh. A.K.Sud, General Manager (f) on behalf of PSIDC accepted the deposit of title deeds made by Smt. Parkashwant Jain and Sh. Jai Chand Jain as collateral security for term load of Rs.250 lacs in terms of loan agreement dated 2nd November, 1998.

Sch. I.

1. Sale Deed dated 6.5.1997 (with description)
2. Sale Deed dated 7.5.1997 (with description)
3. Sale Deed dated 9.3.1998 (with description)

Sch. II

(Description of property at Quadipur, Delhi

Date 12th January, 1999

Confirmed for and behalf of M/s Vardhman (LF) Forge Ltd.

Sd/- Smt. & Sh. Jain Accepted for and behalf PSIDC Sd/-AK Sud

6. From the fact that the concluding part of the documents refers to the document as executed on 12th January and both parties have signed under the expressions confirmed and accepted the counsel argued that the mortgage itself was executed on 12th January and hence it is required to be registered. The argument discards the essential feature contained in the preamble that the documents had been handed over the previous day with intent to create a collateral security for the loan advanced on 2nd Nov., 1998 at the request of M/s Vardhaman. What the parties were "confirming" and "accepting" are these aspects of deposit with such intent as mentioned in the preamble. It is pellucid that the memorandum merely recorded a past event of fact of deposit and did not itself create the mortgage. The document did not therefore create the mortgage and hence did not require registration.

7. On the issue of enforceability of the debt by resort to section 29 of the SFC Act, the action of the 1st respondent clearly conflicts with the power that is restricted only against the industrial concern that was the borrower and not the surety. What is possible for the Corporation to do u/s 31 for attachment and sale through the District Court against either the principal debtor or the surety or both is not possible by the plain terms of the respective sections of the Act are not possible for actions against the surety. This issue has been settled through a decision of the Supreme Court in Karnataka State Financial Corporation Vs. N. Narasimahaiah and Others, .

19. 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 u/s 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 on the corporation to transfer by way of lease or sale and realize the property pledged, mortgaged, hypothecated or assigned to the corporation.

20. Section 29 of the Act nowhere states that the corporation can proceed against the surety even if some properties are mortgage 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.

21. The words as well as in our opinion play a significant role. They confer 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.

22. 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. It is significant to notice that sub-section (4) of Section 29 of the Act which lays down appropriation of the sale proceeds only refers to industrial concern and not a surety or guarantor.

8. Drawing distinction between the powers of Section 29 and 31 the Supreme Court further held :

Only clause (c) of sub-section (1) of Section 31 of the Act empowers the District Judge in the event any application is filed by the Corporation to pass an ad interim injunction. The very fact that section 31 uses the terminology without prejudice to the provisions of Section 29 of the Act and/or Section 69 of the Transfer of Property Act, it clearly postulates an additional relief. What can be done by invoking Section 29 of the Act can inter alia be done by invoking Section 31 thereof also but therefore a different procedure has to be adopted. Section 31

also provides for a relief against a surety and not confined to the Industrial concern alone. (Para 33).

9. There have been subsequent amendments to law, the effect to which was spoken to by the Supreme Court in the same judgment.

34. Sub-section (1-A) of Section 32 of the Act lays down a procedure when clause (aa) of sub-section (1) of Section 31 thereof is invoked. Sub-section (4-A) of Section 32 also empowers the court to forthwith order the enforcement of the liability of the surety if no cause is shown on or before the date notified by the parties. However, in the event, a cause is shown upon making an investigation as provided for under sub-section (6) of Section 32, a final order can be passed in terms of sub-section (7) thereof.

35. Significantly, by Act 43 of 1985, Section 32-G of the Act was also inserted. It does not speak of an industrial concern. Section 32-G, therefore, can be resorted to both against the industrial concern as also the security.

10. There is simply no power to the Corporation to take possession of a surety u/s 29 and bring the properties secured for sale without the aid of the Court. The action of the Corporation is against law. The learned counsel for the Corporation relies on a judgment of a Full Bench of this Court in Paramajit Singh Ahuja v. PSIDC. C.W.P. 5397 of 2003, dated 18.10.2006 in support of the contention that the action of the Corporation was justified. This decision in so far as it legitimizes the action of the Corporation to take possession of the property of the surety u/s 29 is not good law and must be taken as impliedly overruled by the decision of the Supreme Court subsequently in Karnataka SFC Case referred to above.

11. The impugned sale is set aside. The Corporation shall be at liberty to take action against the assets of the petitioner, if it is so advised under the other provisions of the Act with the intervention of Court in the manner set down in the Act and explained by the Supreme Court in the decision.

12. The writ petition is allowed with costs assessed at Rs.10,000/- against the 1st respondent.