(2000) 07 GAU CK 0030

In the Gauhati High Court

Case No : M.A. (F) No. 52 of 1996

M/s. M.S.M. Textiles Private Ltd. and others APPELLANT

Vs

Assam Financial Corporation RESPONDENT

Date of Decision : 26-07-2000

Acts Referred:
State Financial Corporations Act, 1951 — Section 31, 32(9)

Citation : AIR 2001 Guw 77

Hon'ble Judges : N.C. Jain, J;D. Biswas, J

Bench : Division Bench

Advocate : C.K. Sharma Barua, for the Appellant; B.K. Goswami, for the Respondent

Final Decision : Dismissed

Judgement

N.C. Jain, J.—The present appeal has been filed by the appellant under sub-section (9) of Section 32 of the State Financial Corporation Act, 1951 against the judgment of the learned District Judge,Nagaon dated 10-4-1996 allowing the application of the respondent u/s 31 of the State Financial Corporation Act, 1951 (hereinafter referred to as the Act). The application was filed on the allegations that the appellant wanted to set up a textile manufacturing unit at Gopal Nagar, Hojai and approached the respondent, Financial Corporation for a loan of Rs. 43 lakhs. After appraisal, the respondent sanctioned a term loan of Rs. 38.5 lakhs against hypothecation of properties and on additioal terms and conditions as intimated to the appellant. The appellant after accepting the terms and conditions executed the necessary documents of mortgage. Not only that hypothecation and personal guarantee etc. was also given. The loan was sanctioned for the following purposes

1.

Building construction

Rs. 4 lakhs

2.

Plant and machineries

Rs. 30 lakhs

3.

Electrification, installation,

water supply etc.

Rs. 2.5 lakhs

4.

Contingency provision

Rs. 2 lakhs

Rs. 38.5 lakhs

According to the terms and conditions, the loan was to be repaid within a period of eight years by 32 quarterly instalments that were to start from July 1993 and end up to April 2001. Further of the Corporation as pleaded in the application is that principal amount of Rs. 38.50 lakhs was disbursed at different times between the 29th April, 1992 and 5th January, 1994 in accordance with the requirements of the appellant which was duly acknowledged and the same stood reflected in the ledger account No. 2002 which was maintained in regular course of business. According to the allegations of the respondent the appellant did not pay even one instalment and, therefore, the respondent was left with no other option but to recall the entire loan amount after service of legal notice u/s 30 of the Act. On account of failure on the part of the appellant to comply with the notice, the application u/s 31 of the Act was filed with the averments detailed above. The appellant filed a written statement admitting the taking of loan. While the taking of loan was not disputed in the written statement, it was contended by the appellant that the respondent committed breach of terms and conditions by not disbursing the loan as agreed upon. It was pleaded by the appellant that the last instalment was to be paid in October 1992 but it was paid on 4-1-1994. It was further the plea of the appellant that the respondent was guilty of withholding disbursement of Rs. 3,15,435.05 paise till the date of filing the written statement. The further plea of the appellant in the written statement was that the respondent failed to issue no objection certificate for working capital assistance causing the appellant a loss of Rs. 50,000/-. A sum of Rs. 28.84 lakhs was claimed by way of compensation on account of the lapses on the part of the respondent. On the pleadings of the parties the following issues were framed by the learned District Judge-

(1) Whether the petition is maintainable or not?

(2) Whether the plaintiff has contravened the terms of agreement and thereby

caused loss to the defendant?

(3) Whether the plaintiff is entitled to any relief?

2. Under issue No. 1 it has been found that the petition was maintainable, as the grant of loan was not disputed and the appellant did not claim to have repaid the same. Under issue No. 2 it was found that the respondent did not contravene the terms of agreement and caused no loss to the appellant. Under issue No. 2 plaintiff was found entitled to the grant of relief as prayed.

3. The counsel for the appellant has vehemently argued that the application of the appellant deserved dismissal since mandatory procedure on several points was not complied with. Before discussing the contentions raised during the course of argument it would be apt to observe that none of the points argued before us that one which would be taken up in the end has been argued before the learned District Judge.

4. The basic argument of the learned Counsel for the appellant is that the learned District Judge has violated the mandate of sub-section (8) of Section 32 of the Act. The argument of the counsel for the appellant is that an order of attachment or sale of property u/s 31 shall be carried into effect as far as practicable in accordance with the provisions made in the Civil Procedure Code. The counsel went on to argue that since the immovable and movable properties were attached by the District Judge at the initial stage, he was bound to follow the provisions of Order 21, Rule 43 in the case of movable property and Order 21, Rule 54 in the case of immovable property. It has further been argued that since no lawful order of attachment order was passed under the aforesaid provision, the learned District Judge could not confirm the same at the time of passing the final judgment now. On merits it has been argued that the Financial Corporation did not disburse the installments within time causing loss to the appellant. The precise submission of the counsel is that the last instalment paid by the Corporation was in January, 1994 and, therefore, the application of the Corporation deserves dismissal. In order to appreciate the argument of the counsel for the appellant it is necessary to have a look at the provision of Sections 31 and 32 of the State Financial Corporation Act. The learned Counsel has also referred to the provisions of Order 21, Rule 43 and Order 21, Rule 54 of the CPC the same would also need re-production. The provisions read as follows :

Section 31. Special provisions for enforcement of claims by Financial Corporation.-

(1) Where an industrial concern, in breach of any agreement, makes any default in repayment of any loan or advance of any installment thereof or in meeting its obligations in relation to any guarantee given by the Corporation or otherwise fails to comply with the terms of this agreement with the Financial Corporation or where the Financial Corporation requires an industrial concern to make immediate repayment of any loan or advance u/s 30 and the industrial concern fails to make such repayment, then, without prejudice to the provisions of Section 29 of this Act and of Section 69 of the Transfer of Property Act, 1882 (4

of 1882) and officer of the Financial Corporation, generally or specially authorized by the Board in this behalf, may apply to the district Judge within the limits of whose jurisdiction the industrial concern carried on the whole or a substantial part of its business for one or more of the following reliefs namely-

(a) for an order for the sale of the property pledged mortgaged, hypothecated or assigned to the Financial Corporation as security for the loan or advance, or for enforcing the liability of any surety, or

(b) for transferring the management of the industrial concern to the Financial Corporation, or

(c) for an ad interim injunction restraining the industrial concern from transferring or removing its machinery or plaint or equipment from the premises of the industrial concern without the permission of the Board, where such removal is apprehended.

(2) An application under sub-section (1) shall state the nature and extent of the liability of the industrial concern to the Financial Corporation, the ground on which it is made and such other particulars as may be prescribed."

Section 32. Procedure of district Judge in respect of application u/s 31-

(1) When the application is for the relief mentioned in clauses (a) and (c) of sub-section (1) of Section 31, the district Judge shall pass an ad interim order attaching the security, or so much of the property of the industrial concern as would not being sold realize in his estimate an amount equivalent in value of the outstanding licibility of the industrial concern to the Financial Corporation, together with the costs of the proceedings taken u/s 31, with or without an ad interim injunction restraining the industrial concern from transferring or removing its machinery, plant or equipment.

(1A) When the application is for the relief mentioned in clause (aa) of sub-section (1) of Section 31, the district Judge shall issue a notice calling upon the surety to show cause on date to be specified in the notice why his liability should not be enforced.

(2) When the application is for the relief mentioned in clause (b) of sub-section (1) of Section 31, the district Judge shall grant an ad interim injunction restraining the industrial concern from transferring or removing its machinery, plant or equipment and issue a notice calling upon the industrial concern to show cause on a date to be specific in the notice, why the management of the industrial concern should not be transferred to the Financial Corporation.

(3) Before passing any order under sub-section (1) or sub-section (2) or issuing a notice under sub-section (1A] the district Judge may, if he thinks fit examine the officer making the application.

(4) At the same time as he passes an order under sub-section (1), the district Judge shall issue to the industrial concern or to the owner of the security

attached a notice accomanied by copies of the order, the application and the evidence, if any, recorded by him calling upon it or him to show cause on a date to be specified in the notice why the ad interim order of attachment should not be made absolute or the injunction confirmed.

(4A) If no cause is shown on or before the date specified in the notice under sub-section (1A) the district Judge shall forthwith order the enforcement of the liability of the surety.

(5) If no cause is shown on or before the date specified in the notice under sub-sections (2) and (4), the district Judge shall forthwith make the ad interim order absolute and direct the sale of the attached property or transfer the management of the industrial concern to the Financial Corporation or confirm the injunction.

(6) If cause is shown, the district Judge shall proceed to investigate the claim of the Financial Corporation in accordance with the provisions contained in the Code of Civil Procedure, 1908 (5 of 1908) in so far as such provisions may be applied thereto.

(7) After making an investigation under sub-section (6), the: district Judge may -

(a) confirm the order of attachment and direct the sale of the attached property,

(b) vary the order of attachment so as to release a portion of the property from attachment and direct the sale of the remainder of the attached property;

(c) release the property from attachment;

(d) confirm or dissolve the injunction,

(da) direct the enforcement of the liability

of the surety or reject the claim made in this behalf, or,

(e) transfer the management of the industrial concern to the Financial Corporation or reject the claim made in this behalf.

Provided that when making an order under clause (c) or making an order rejecting the claim to enforce the liability of the surety under clause (da) or making an order rejecting the claim to transfer the management of the industrial concern to the Financial Corporation under clause (e), the district Judge may make such further orders as he thinks necessary to protect the interests of the Financial Corporation and may apportion the costs of the proceedings in such manner as he thinks fit.

Provided further that unless the Financial Corporation intimates to the district Judge that it will not appeal against any order releasing any property from attachment (or rejecting the claim to enforce the liability of the surety or rejecting the claim to transfer the industrial concern to the Financial Corporation, such order shall not be given effect to, until the expiry of the period fixed under sub-section (9) within which an appeal may be preferred or, if an appeal is preferred, unless the High Court otherwise directs until the appeal is disposed of.

(8) An order of attachment or sale of property under this Section shall be carried into effect as far as practicable in the manner provided in the Code of Civil Procedure, 1908 (5 of 1908) for the attachment or sale of property in execution of a decree as if the Financial Corporation were the decree holder.

(8A) An order under this Section transferring the management of an industrial concern to the Financial Corporation shall be carried into effect, as far as may be practicable, in the manner provided in the Code of Civil Procedure, 1908 (5 of 1908) for the possession of immovable property or the delivery of movable property in execution of a decree, as if the Financial Corporation were the decree holder.

(9) Any party aggrieved by an order under sub-section (4A), sub-section (5) or sub-section (7) may, within thirty days from the date of the order, appeal to the High Court, and upon such appeal the High Court may, after hearing the parties, pass such orders thereon as it thinks proper.

(10) Where proceedings for liquidation in respect of an industrial concern have commenced before an application is made under sub-section (1) of Section 31, nothing in this Section shall be construed as giving to the Financial Corporation any preference over the other creditors of the industrial concern not conferred on it by any other law.

(11) The functions of a district Judge under this Section shall be exercisable-

(a) in a presidency town, where there is a city civil court having jurisdiction, by a Judge of that Court and in the absence of such court, by the High Court, and

(b) elsewhere, also by an additional district Judge (or by any judge of the principal court of civil jurisdiction.)

(12) For the removal of doubts it is hereby declared that any court competent to grant an ad interim injunction under this Section shall also have the power to appoint a Receiver and to exercise all the other powers incidental thereto.)"

Order 21 Rule 43. Attachment of movable property, other than agriculture produce, in possession of judgment-debtor where the property to be attached is movable property, other than agricultural produce in the possession of the judgment-debtor, the attachment shall be made by actual seizure, and the attaching officer shall keep the property in his own custody or in the custody of one of his subordinates, and shall be responsible for the due custody thereof.

Provided that when the property seized is subject to speedy and natural decay, or when the expense of keeping it in custody is likely to exceed its value, the attaching officer may sell it at once."

Order 21 Rule 54. Attachment of immovable property.-- (1) where the property is immovable, the attachment shall be made by an order prohibiting the judgment-debtor from transferring or charging the property in any way, and all persons from taking any benefit from such transfer or charge.

(1A) The order shall also require the judgment-debtor to attend court on specified date to take notice of the date to be fixed for settling the terms of the proclamation of sale.

(2) The order shall be proclaimed at same place on or adjacent to such property by beat of drum or other customary mode, and a copy of the order shall be affixed on a conspicuous part of the court-house, and also, where the property is land paying revenue to the Government, in the office of the Collector of the district in which the land situate, and, where the property is land situate, in a village, also in the office of the Gram Panchayat having jurisdiction over that village.

5. The arguments of the counsel have to be examined in the light of the provisions of the Act and Order 21 of the CPC in general and with particular reference to Order 21, Rule 43 and Order 21, Rule 54 of the Civil Procedure Code. Section 31 of "the Act" as reproduced above gives the power of an officer of the Financial Corporation to apply to the District Judge within the limit of whose jurisdiction the industrial concern carries on its business in case of default for repayment of loan or any instalment thereof. The reliefs that can be sought by the Corporation are enumerated in Section 31(1)(a) i.e. for an order that the sale of property pledged or mortgaged to the Financial Corporation. Clause C of section 31(1) envisages that grant of ad interim injunction restraining the defaulting industrial concern from transferring or removing its machinery etc. from its premises.

6. Section 32 of the Act in clear terms lays down that when an application is filed before District Judge u/s 31(1) which has been so filed in the instant case, the District Judge shall pass an ad interim order attaching the security or so much of the property of the industrial concern as would realize the amount which is outstanding against industrial concern. The order of attachment may be passed with or without an ad interim injunction as mentioned in Section 31 of the Act. The District Judge thereafter would in accordance with the mandate of sub-section (6) of Section 32 investigate the claim of the Corporation in accordance with the provisions contained in CPC and after making an investigation pass an order as contemplated under sub-section (7) of Section 32 of the Act. The District Judge under sub-section (7) may either confirm the order of attachment and direct the sale of attached property or pass such orders which are mentioned in clause (b) to (d). In the instant case the learned District Judge has passed the order apparently under clause (a) of sub-section (7) of Section 32 of the Act. Sub-section (8) of the Act lays down that an order of attachment or sale of property under this Section shall be carried into effect as far as practicable in the same mariner which is provided for attachment or sale in execution of a decree in accordance with the provisions of CPC as if the Financial Corporation is a decree holder.

7. As regards the provisions of Civil Procedure Code, we have to keep in mind that Order 21 deals with execution of decree and orders. In fact Order 21 is that longest order in the entire schedule of the CPC running into more than one hundred rules giving description of different modes of execution of all types of decrees and orders and the procedure to be observed by the executing court. The proceedings in execution of decree are commenced by the decree holder under Rule 10 of Order 21 and such an application shall contain the particulars as laid down in Order 21, Rule 11. Rule 43 is one of the Rules contained in Order 21 under which moveable property is ordered to be attached. In the aforesaid provision it has been mentioned that the attachment of moveable property shall be made by actual seizure and the same would be kept by the attaching officer in his own custody and if the same is subject to speedy decay, it can be sold by the attaching officer at once. Order 21, Rule 43 in our considered view deals with the exercise of power only after the passing of the decree and not before. If Order 21. Rule 43 was to apply at the initial stage i.e. at the time of filing application u/s 31 of the Act and the attaching officer could seize the machinery etc. before the passing of the decree, it would amount to pre-judging the matter. The exercise of such a power could lead to miscarriage of justice inasmuch as during the pendency of the application u/s 31 an industrial concern might make the payment of the outstanding amount. Assuming for a moment that the moveable property of defaulting industrial concern is seized before the passing of the final decree, it would necessarily mean the stoppage of functioning of the inclustrial concern and if the payment is made by such an industrial concern at some stage during the pendency of the matter before the District Judge the seizure of the moveable property would cause an irreparable loss to the industrial concern. Rather an industrial concern would stand benefited if the moveable property is not seized at the initial stage and therefore, the appellant cannot have any legitimate grievance about non seizure as it admittedly remained with appellant during the pendency of the petition u/s 31 before the District Judge.

8. Adverting to the argument of the counsel that attachment of immovable should have been made in accordance with Order 21, Rule 54 by an order prohibiting the judgment debtor from transferring or charging the property in any way, we hasten to add that Rule 54 also applies to a stage after the passing of the decree. The perusal of sub-rule 1(A) of Order 21, Rule 54 clearly shows that the court would, after the passing of the order under sub-rule (1) of the aforesaid order would require the judgment-debtor to attend court on a specific date for settling the terms of proclamation of sale. The very fact that terms of proclamation of sale are to be settled after attachment of immoveable property, it would go to show that Order 21, Rule 54 is intended to apply after the passing of the decree and not before. The terms of proclamation of sale are settled under Order 21, Rule 66 which need not be gone into in detail at this stage. We have gone through the order of attachment made by the District Judge at the initial stage and the same in our view has righly been passed while exercising the powers u/s 32(1) of the Act.

9. Equally untenable is the argument of the counsel for the appellant that the District Judge should have attached that much of the property of the industrial concern as could be said to be sufficient for realization of the outstanding amount against industrial concern. Although Section 32 of the Act vests discretion with the District Judge to attach security or so much of the property as would realize the outstanding amount but the exercise of such a discretion in the present case attaching the entire property cannot be held to be illegal as the appellant did not repay even one instalment. Moreover the District Judge had attached only that much property which already stood mortgaged with the Financial Corporation. In any case the appellant raised no objection to the attachment order which was passed at the initial stage during the pendency of the application before the District Judge and thereore it is too late for him to raise such an objection after the passing of the final order u/s 32 of the Act.

10. It also deserves to be noticed that sub-section (8) of Section 32 specifically lays down that the provisions of CPC would apply in so far as they are practicable. It appears to us that the legislature while using the words, ''in so far as practicable'' intended to give powers to the District Judge to take the help of the provisions of CPC whenever it was practicable. Can it be said that the District Judge should order the seizing of the moveable property immediately on presentation of the application u/s 31 of the Act. Our answer would certainly be in the negative. The adoption of such a course would neither be practicable nor equitable and the same if applied, it may cause miscarriage of justice rather than serve ends of justice.

11. The above mentioned interpretation is the only one which can be placed by us in so far we could think of, particularly when as has been observed in the beginning of the judgment that no such point was taken before the District Judge and more particulaly so when no decided case has been cited by either of the counsel while addressing arguments. The interpretation placed by us is on the simple wording of relevant provisions of the statute, the scheme of the Act and the CPC and the intention of the legislature behind enacting the provisions of the State Financial Corporation Act and the Civil Procedure Code. No other interpretation is possible. Any other interpretation, in our considered view, would be doing violence to the provisions of State Financial Corporation Act and to the provisions of the Civil Procedure Code.

12. Adverting to the provisions of the counsel on the merits of the case it was on the request of the appellant himself that the disbursement of last instalment of loan was adjusted towards repayment of interest amount which the appellant was to pay to the Financial Corporation. Once the appellant made a request for adjustment, the industrial concern cannot be heard to say that the application should be dismissed on account of late disbursement of loan. In any case no evidence has been led on record and none has been referred during the course of the arguments proving the loss of Rs. 28,00,000/- to the industrial concern for late disbursement of a part of the loan amount. Major portion of the sanctioned

loan was disbursed in time and some delay even if the same has taken place did not prejudice the functioning of the industrial concern on account of which the present petition filed before the District Judge could be dismissed. Once the Financial Corporation has proved on record that no repayment has been made and once even the appellant admitted before the District Judge that no repayment was made, we do not find any legal or factual infirmity in the impugned judgment of the learned District Judge which in our considered view deserves to be affirmed.

13. For the reasons recorded above we do not find any merit in the appeal and the same is ordered to be dismissed with no order as to costs.

