

(1975) 05 AHC CK 0004
In the Allahabad High Court
Case No : F.A.F.O. No. 293 of 1969

Munna Lal Gupta

APPELLANT

Vs

Uttar Pradesh Financial Corporation and Another

RESPONDENT

Date of Decision : 07-05-1975

Acts Referred:

State Financial Corporations Act, 1951 — Section 2, 25, 25(1), 25(2), 29
Transfer of Property Act, 1882 — Section 69

Citation : (1975) AWC 332

Hon'ble Judges : K.B. Asthana, C.J; R.L. Gulati, J; Gopi Nath, J

Bench : Full Bench

Judgement

R.L. Gulati, J.—This is a F.A.F.O. against the judgment and decree of the Second Addl. District Judge, Kanpur, dated 20th September, 1969.

2. The first Respondent, the U.P. Financial Corporation, entered into an agreement with an industrial concern called "M/s. Raki Electronics, Kanpur" through its proprietor, Sri Ram Kishan Gupta, for the grant of a loan to the latter of a sum of Rs. 70,000 for purposes of setting up a factory for the production of radios and allied equipments. The loan was secured by taking a mortgage of the machineries and properties of the debtor as also by a collateral security in the shape of a house mortgaged by Munna Lal, the Appellant. The property mortgaged by Munnalal is detailed in Schedule "B" of Annexure I to the agreement, while the properties mortgaged by the debtor are detailed in Schedules "A" and "C" to the aforesaid Annexure I. The agreement evidencing the loan dated 13th December, 1961 is a composite document embodying the terms and conditions for the repayment of loan with interest and for the mortgage of the properties of the debtor as well as of Munnalal, the surety. According to the terms and conditions in the aforesaid deed, the loan carried interest at the rate of 5 per cent and the principal amount and interest were payable in instalments. In the case of default, the entire outstanding principal with interest at enhanced rate became payable. It appears that out of a sum of Rs. 70,000/- agreed to be advanced, only a sum of Rs. 26,000/- was advanced

to begin with. The debtor committed default in the payment of interest as also in the payment of instalments of the principal amount. Thereupon the Financial Corporation filed a petition before the District Judge, Kanpur u/s 31 of the State Financial Corporation Act, 1951 (hereinafter referred to as the "Act"), claiming a sum of Rs. 26,000/- as principal and Rs. 2,746.84 as interest. In the aforesaid application the following prayer was made:

It is, therefore, prayed that following reliefs may be granted to the Petitioner against the opposite parties:

(a) Order for the sale of the properties detailed in Schedules "A", "B" and "C" to this petition.

(b) an ad interim injunction restraining the opposite party No. 1 from transferring or removing machinery, plant or equipment particularly those mentioned in schedule "C" from its premises without permission of the Board of Directors of the Petitioner.

(c) Interest from 16-3-1964 to the date of filing of this petition and pen-dentilite and future interest.

This petition has been allowed by the District Judge and the Appellant Munna lal has come up in appeal against it.

3. The appeal came up for hearing before a Division Bench. One of the question that arose before the Bench was whether an application u/s 31 of the Act was maintainable against the surety so that the property mortgaged by him could be ordered to be sold. A decision of another Division Bench of this Court in Uttar Pradesh Financial Corporation v. Deekey Industries (P) Ltd. 1971 ALJ 756 : 1971 AWR 48 was brought to the notice of the Bench. In that case it was held that such a petition u/s 31 of the Act was maintainable even against a surety. The correctness of this decision was doubted by the Bench. Hence the following question has been referred to a larger Bench:

Whether the Appellant Munnalal as surety who had mortgaged his property in favour of the Financial Corporation to secure or guarantee the loan advanced to Messrs Raki Electronics, an industrial concern, could be proceeded against at the instance of the Financial Corporation before the District Judge u/s 31 of the State Financial Corporation Act, 1951 ?

This is how the matter has come up before us. As the entire F.A.F.O. has not been referred to us and only a question has been referred, we shall attempt to answer the question only and shall send the case back to the Division Bench for disposal.

4. The Act provides for the establishment of a State Financial Corporation for purposes amongst others of advancing loans to industrial concerns as defined in Section 2(c) of the Act. This is clear from Section 25(1)(g) of the Act. Section 25 defines the various kinds of businesses which Financial Corporation may transact.

Sub-clause (g) of Clause (1) of Section 25 provides for granting loans or advances to or subscribing to debentures of, an industrial concern, repayable within a period not exceeding twenty years from the date on which they are granted or subscribed to, as the case may be. Sub-section (2) of Section 25 provides:

(2) No accommodation shall be given under Clauses (a), (b) and (g) of Sub-section (1) unless it is sufficiently secured by a pledge, mortgage, hypothecation or assignment of Government or other securities, stock, shares, or secured debentures, bullion, movable or immovable property or other tangible assets in the manner prescribed by regulations or unless it is guaranteed as to the repayment of the principal and the payment of interest by the State Government a scheduled Bank or a State Cooperative Bank.

Thus a loan to an industrial concern cannot be advanced unless it is secured by a mortgage of movable or immovable property or the repayment of the loan and the interest is guaranteed by the State Government, a scheduled Bank or a State Cooperative Bank. There was some discussion as to whether the Corporation was entitled to take mortgage of the property of a third person as a surety. But it appears to us that Sub-section (2) of Section 25 is so widely worded that the Corporation can take the mortgage of property even belonging to a surety, besides the property of the borrower. Section 29 enumerates the rights of the Corporation in cases of default. Amongst the rights conferred upon the Corporation is the right to take over the management of the industrial concern and the right to transfer by way of lease or sale and realise the property pledged, mortgaged, hypothecated or assigned to the Financial Corporation. Section 31 contains special provisions for enforcement of claims by Financial Corporation. This section is material and is reproduced below:

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 or any instalment thereof or otherwise fails to comply with the terms of its agreement with the Financial Corporation or where the Financial Corporation requires an industrial concern to make immediate payment 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, any officer of the Financial Corporation, generally or specially authorised by the Board in this behalf, may apply to the District Judge within the limits of whose jurisdiction the industrial concern carries 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

(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 plant 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.

5. Section 31, no doubt, contains a speedy and summary mode of recovery of loan by making an application to the District Judge for any of the reliefs contained in Clauses (a), (b) and (c) of Sub-section (1). Clauses (b) and (c) contemplate action against the borrower. The management of the borrower industrial concern can be taken over by the Financial Corporation or an ad interim injunction can be obtained against it restraining it from removing its machinery, plant, equipments etc. Under Clause (a) it can ask for the sale of the property pledged. The question that arises is as to whether under Clause (a) the property of a surety can also be put to sale in the summary manner as provided in Section 31. The argument is that the property of the surety can, no doubt, be put to sale for purposes of securing the repayment of the loan and interest, but that can be done only in accordance with the provisions of Section 69 of the Transfer of Property Act and the relevant provisions of the Code of Civil Procedure. It cannot be attached and sold in the summary manner by the District Judge on a mere application of the Corporation.

6. It is contended that Section 31 is restricted only to actions against the borrower industrial concern or the property mortgaged by it, but if the Corporation wanted to proceed against the surety also, it has to resort to the normal remedy provided in the Transfer of Property Act and the Code of Civil Procedure.

7. Now, Clause (a) of Section 31(1) unlike Clauses (b) and (c) does not refer to the property of the borrower only. It extends to all the properties mortgaged, hypothecated or assigned to the Financial Corporation as security for loan or advances. But when we come to Section 32 it becomes abundantly clear that the contention put forward on behalf of the Appellant is correct. Section 32 of the Act provides the procedure which the District Judge has to follow in respect of application u/s 31 and reads:

32. (1) When the application is for the reliefs 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 on being sold realise in his estimate an amount equivalent in value to the outstanding liability 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.

(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 specified 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) 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 a notice accompanied by copies of the order, the application and the evidence, if any, recorded by him calling upon it 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.

(5) If no cause is shown on or before the date specified in the notice under Sub-Section (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.

Now a close reading of Section 32 shows very clearly that the relief which a District Judge can grant u/s 31 must be confirmed against the borrower of the industrial concern and its property. The District Judge can pass an ad interim order attaching the security or so much of the property of the industrial concern as would be sufficient in his opinion to satisfy the outstanding liability. The order of attachment is restricted to the property of the industrial concern given to the Corporation by way of surety. It does not empower him to attach the property of a person other than an industrial concern. Clearly a surety, who is not a partner or otherwise interested in the industrial concern, cannot be proceeded against u/s 31 so that his property, even if mortgaged with the Corporation, cannot be attached by the District Judge. Moreover, the District Judge in the first instance has to attach only that much of property of the borrower industrial concern as would be sufficient to meet the outstanding liability against the borrower. It cannot order the attachment and sale of the entire mortgaged property. It follows, therefore, that District Judge upon an application made to him Under Clause (a) of Section 31(1) can only proceed against the property of the borrower and that too against such portion of the property as would be sufficient to discharge his liability towards the Corporation.

8. Sub-section (4) of Section 32 contemplates a notice to the borrower industrial concern after an interim order has been passed to show cause why the ad interim injunction should not be made absolute. This provision does not contemplate a notice to the surety. It would unthinkable that the legislature intended that property of the surety may be attached and put to sale without even a notice to him. This position fortifies the view that the District Judge can proceed only against the industrial concern which alone is entitled to the show

cause notice, otherwise a show cause notice should have been provided for the surety also.

9. The learned Advocate General, who appealed for the Corporation, laid emphasis upon Section 29. Section 29, no doubt, defines the rights of the Financial Corporation to take over the management of the industrial concern or realise the mortgage property by way of lease or sale. As we have already mentioned, the right given to the Corporation u/s 29 will extend to the property of the surety also. But such a right can be enforced by taking recourse to the ordinary law contained in the Transfer of Property Act and the Code of Civil Procedure. The special and speedy remedy contained in Section 31 of the Act cannot be availed of by the Corporation. There is no conflict between the two provisions. Section 29 defines the general rights of the Corporation in cases of default and Section 31 provides for a speedy and summary remedy. From the scheme of the Act, it is clear that the speedy remedy contained in Section 31 is available not against the surety but against the borrower only. Now, in the instant case the Corporation has sought to avail of the special remedy contained in Section 31. As is evident from Section 32, the relief contained in Section 31 can only be granted against the borrower and his property mortgaged with the Corporation. If the Corporation wants to proceed against the property of the surety also, it may do so by taking recourse to the ordinary law.

10. In the case of the U.P. Financial Corporation. v. Deekey Industries (P) Ltd. (Supra) the Bench laid emphasis on Section 29 of the Act and took the view that the unfettered right of the Corporation to proceed against all the mortgaged property could not be cut down by Section 31 or Section 32. There is no conflict between Section 29, Section 31 and Section 32. Section 29 defines the right of the Corporation in general to proceed against the mortgaged property. That right remains in tact but is enforceable by modes other than that contained in Section 31. Sections 31 and 32 read together make it amply clear that a speedy remedy of an application to the District Judge is Available to the Corporation only against the borrower industrial concern and if the corporation wants to enforce its right against the surety, it must take recourse to the ordinary law of realising the debt secured by mortgaged property as contained in the Transfer of Property Act and the Code of Civil Procedure. We are, therefore, unable to agree with the view taken by the Division Bench in the case of U.P. Financial Corporation v. Deckey Industries (P) Ltd. (supra).

11. The learned Advocate General then referred to the statement of objects and reasons of the Act and Clause (ix) of paragraph 2 thereof, which says:

The Corporation will have special privileges in the matter of enforcement of its claim against borrowers.

To us it appears that the objects and reasons read with Clause (ix) of paragraph 2 really support the view that we have taken. The special privileges granted to the Corporation in respect of enforcement of its claim is limited to the borrowers

and the borrowers have to be industrial concerns. It is not possible to accept the contention of the learned Advocate General that the word "borrower" would include a surety. He says that any person who is a party to a contract of loan with the Corporation will come within the term "borrower" and since Munnalal is also a party to the agreement, he should also be deemed to be a borrower. We have perused the agreement. The preamble of the agreement describes the industrial concern as borrower and describes Munnalal as the "mortgagor" who has mortgaged his property in security of the loan. The distinction between the borrower and the surety has been kept throughout the agreement. The agreement has been signed separately by the borrower as also by Munnalal as the mortgagor, A borrower is obviously a person who borrows and it cannot include the surety who guarantees or secures the loan. No doubt, in the ultimate paragraph of the agreement it is provided:

Whenever the context so demands qua the property mortgaged the term borrower shall include the "mortgagor".

But this clause clearly shows that a mortgagor and the borrower are two separate entities and it is only when the context so demands that the word "borrower" may include the mortgagor. This clause does not, however, in any way modify or amend statutory provision contained in Sections 31 and 32 of the Act. Indeed, it would not be open to the parties to enter into a contract contrary to the statutory provisions. We have already shown above that for the purposes of Sections 31 and 32 of the Act the borrower and the surety could not be placed at par. The clause in question refers to the context of the agreement and does not refer to the context of the statutory provisions.

12. For all these reasons we answer the question by saying that the Appellant Munnalal, who mortgaged his property as surety to the Financial Corporation, could not be proceeded against u/s 31 of the Act. Let the case be now remitted to the Bench concerned for disposal.