

(2001) 06 KAR CK 0072

In the Karnataka High Court

Case No : Writ Petition No. 5434 of 2000

Mysore Chest Care and Pain Therapy Centre (Private)
Limited, Mysore and another

APPELLANT

Vs

State of Karnataka and another

RESPONDENT

Date of Decision : 08-06-2001

Acts Referred:

Constitution of India, 1950 — Article 141, 226

Citation : (2001) 5 KarLJ 429

Hon'ble Judges : R. Gururajan, J

Bench : Single Bench

Advocate : Sri Udaya Holla, for the Appellant; Sri D.S. Joshi and Sri A. Padmanaba, Government Pleader, for the Respondent

Final Decision : Allowed

Judgement

R. Gururajan, J.—Petitioner-the Mysore Chest Care and Pain Therapy Centre (Private) Limited, has presented this petition seeking for a direction directing Karnataka State Industrial Investment and Development Corporation (for short the "Corporation") to forbear from proceeding with the sale of the assets of the petitioner in terms of the notification Annexure-M, dated 25-2-2000.

2. Facts of the case in brief are as under.

3. Petitioner 1 is a Company having its office at Mysore. Petitioner 2-Dr. Raj G. Pal is the Managing Director of the petitioner 1-Company. Petitioner 1 borrowed certain sums of money from the Corporation for purchase of medical laser equipment. Petitioner 2 has also borrowed certain sum in his individual capacity for purchase of certain other medical equipments. Equipments were purchased and put to use by the petitioners. Petitioner states that in spite of request to the Corporation, it did not grant any additional loan for purchase of additional equipments. For want of equipments and for want of funds, petitioner-Company became sick and could not pay its debts. Corporation exercising its power u/s 29

seized the equipments from the petitioner.

4. Petitioner states that respondent 2 filed a miscellaneous petition on the file of the Second Additional City Civil Judge, Bangalore, u/s 31 of the Act. The said proceedings are pending and an interim order of attachment was granted u/s 32 of the Act in the said petition. The interim orders of attachment were granted by the said Court in the said petition. In the meanwhile the Corporation also issued an advertisement with regard to sale of assets of the petitioner 1 as per Annexure-E. The petitioner 1 filed a petition u/s 151 of the CPC in the pending Miscellaneous Case No. 599 of 1997 initiated u/s 31 of the Act seeking an order to stay the sale of assets. The Trial Judge rejected the application by an order dated 6-7-1999. A civil revision petition in C.R.P. No. 2174 of 1999 came to be filed before this Court by the petitioners. This Court by its order dated 24-8-1999 dismissed the civil revision petition by holding that an application u/s 151 of the CPC is not maintainable in those proceedings. The Court however, ruled that it is open to the petitioners to challenge and question the legality and propriety of the Corporation's action initiated u/s 29 of the Act by any other independent action if they are so advised. After disposal of the civil revision petition the petitioners have now moved this Court under Article 226 of the Constitution of India, seeking an order to restrain the Corporation from enforcing the sale in terms of Section 29 of the Act. This Court has granted an interim stay of sale pursuant to Annexure-H. This Court later refused to vacate the stay and ordered the matter to be heard earlier. It is in these circumstances the matter is listed for final hearing.

5. I have heard the learned Counsel for the petitioner. The respondents have filed a detailed counter in the case on hand. They justify their action. Matter is heard for final disposal today. Elaborate arguments were advanced by either parties.

6. The learned Counsel Sri Aditya appearing for Sri Uday Holla for the petitioners took me through the pleadings and contended that the Corporation has already taken recourse to recovery of the outstanding in a proceeding initiated u/s 31 of the Act in Miscellaneous Case No. 599 of 1997. He contends that the Supreme Court in the case of Andhra Pradesh State Financial Corporation Vs. M/s. GAR Re-Rolling Mills and another, , has ruled in unmistakable terms that the Corporation cannot invoke its power u/s 29 after invoking its power u/s 31 of the Act. Counsel contends that the Corporation has to elect the remedies under the Act. According to him two simultaneous proceedings in terms of the provision of Sections 31 and 29 of the Act cannot be maintained, He strongly relies on the ruling of the Supreme Court (in para 13) in the said judgment. He also relies on the judgment of this Court in Branch Manager, Karnataka State Financial Corporation, Belgaum v Rafiq and Another. Counsel relies on two other judgments in U.P. Financial Corporation Vs. Goodman Drug House (Pvt.) Ltd., and in Ambika Prasad Mishra v State of Uttar Pradesh and Others and Ballabhadras Mathurdas Lakhani and Others Vs. Municipal Committee, Malkapur, . He further relies on a judgment of Bombay High Court in Krishna Madhaorao Ghatate and

Another Vs. The Union of India and Others, .

7. Per contra Mr. Joshi, learned Counsel for the respondent with equal vehemence invites my attention to a judgment of the Supreme Court in the case of Maharashtra State Financial Corporation Vs. Jaycee Drugs and Pharmaceuticals Pvt. Ltd. and Others, . He contends that proceedings u/s 31(1)(aa) initiated against sureties cannot be a bar for invoking proceedings u/s 29 against the Company and the Counsel also says that if facts are properly considered, the judgment of the Supreme Court cannot be made applicable to the facts in this case. Counsel refutes the allegations of the petitioners with regard to its bar under the Act.

8. After giving my careful consideration to the rival pleas of the parties, I pass the following order:

9. The State Financial Corporation Act (for short the "Act") is an Act to provide for establishment of State Financial Corporation. Chapter III provides for powers and duties of the Board, and essentially it provides for finance in the business sector. Section 25(A) provides for acquiring rights and Section 27 provides for imposing condition for accommodation. Section 28 provides for prohibited business. Section 29, the crucial section provides for rights of financial corporations in case of default. It is useful to quote this very section for the purpose of proper understanding of the case between the parties. Section 29 reads as under:

"(1) Where any industrial concern, which is under a liability to the Financial Corporation under an agreement, makes any default in repayment of any loan or advance or any instalment thereof or in meeting its obligations in relation to any guarantee given by the Corporation or otherwise fails to comply with the terms of its agreement with the Financial Corporation, the Financial Corporation shall have the right to take over the management or possession or both of the industrial concern, as well as the right to transfer by way of lease or sale and realise the property pledged, mortgaged, hypothecated or assigned to the Financial Corporation.

(2) Any transfer of property made by the Financial Corporation, in exercise of its powers under sub-section (1), shall vest in the transferee all rights in or to the property transferred as if the transfer had been made by the owner of the property.

(3) The Financial Corporation shall have the same rights and powers with respect to goods manufactured or produced wholly or partly from goods forming part of the security held by it as it had with respect to the original goods.

(4) Where any action has been taken against an industrial concern under the provisions of sub-section (1), all costs, charges and expenses which in the opinion of the Financial Corporation have been properly incurred by it as incidental thereto shall be recoverable from the industrial concern and the money

which is received by it shall, in the absence of any contract to the contrary, be held by it in trust to be applied firstly, in payment of such costs, charges and expenses and, secondly, in discharge of the debt due to the Financial Corporation, and the residue of the money so received shall be paid to the person entitled thereto.

(5) Where the Financial Corporation has taken any action against an industrial concern under the provisions of sub-section (1), the Financial Corporation shall be deemed to be the owner of such concern, for the purposes of suits by or against the concern, and shall sue and be sued in the name of the concern".

10. Section 30 provides for power to call for repayment before the agreed period. Section 31 is a special provision providing for enforcement of claims by Financial Corporation. It is necessary to quote that section also which reads as under:

"(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 in meeting its obligations in relation to any guarantee given by the Corporation 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 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), 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 property pledged, mortgaged, hypothecated or assigned to the Financial Corporation as security for the loan or advance; or

(aa) 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 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".

Section 32 provides for a procedure in respect of applications u/s 31.

11. In the light of these provisions I see that this Act provides for a right to take over the management or possession or both of the industrial concern as well as the right to transfer by way of lease or sale and right to take over the

management or possession or both of industrial concern as well as right to transfer as well as right by way of lease or sale and realise the property pledged, mortgaged, hypothecated or assigned to the Corporation u/s 29 of the Act. Sub-section (4), provides for recovery of all costs, charges and expenses which the Corporation incurred in this regard. It further provides for discharge of the debt due to the Corporation in terms of this provision. The residue is payable to person entitled thereto. In addition to Section 29, Section 31 has been incorporated as a special provision for enforcement of claims by the Corporation. It provides for an application to District Judge for an order for the sale of property pledged, mortgaged, hypothecated or assigned to the Corporation as security for the loan or advance or for enforcing the liability of any surety or for transferring the management of industrial concern to the Financial Corporation or for ad interim injunction restraining industrial concern from transferring or removing its machinery or equipment from the premises.

12. These two provisions provide for two types of recovery of the dues to the Corporation.

13. The Supreme Court in the case of Andhra Pradesh State Financial Corporation, *supra*, considered both the provisions of Sections 29 and 31 and ruled that on conjoint reading of Sections 29 and 31 of the Act it appears to us that in case of a default in repayment of loan or any instalment or any advance or breach of agreement, the Corporation has two remedies available to it against defaulting industrial concern, one u/s 29 and another u/s 31 of the Act, the choice for availing the remedy u/s 29 or 31 of the Act is that of the Financial Corporation alone and the defaulting concern has no say whatsoever in the matter by the Corporation against it for effecting the recovery". Again the Supreme Court has ruled in para 13 as under:

"13. It left the choice to the Corporation to act in the first instance u/s 31 of the Act and save its rights and remedies u/s 29 of the Act to be availed at later stage, with the sole object of enabling the Corporation to recover its dues. It is not, however, obligatory on the part of the Financial Corporation to invoke the special provisions of Section 31 of the Act, it can even without taking recourse to the provisions of the said section invoke the procedure prescribed u/s 29 of the Act for realisation of its dues. Where the Corporation takes recourse to the provisions of Section 31 of the Act and obtains an order from the Court, it shall ordinarily and invariably seek its enforcement in the manner provided by Section 32 of the Act, which provisions are aimed to act in aid of the orders obtained u/s 31 of the Act and it cannot simultaneously initiate and take recourse to the remedy available to it u/s 29 of the Act unless it gives up, abandons or withdraws the proceedings u/s 31 of the Act, at whatever stage those proceedings may be. The Corporation cannot simultaneously pursue two remedies at the same time. The reach and scope of the two remedies is essentially different even if somewhat similar result flows by taking recourse to either of the two provisions in certain respects".

(emphasis supplied)

14. A reading of the provisions of the Act in the light of the clear pronouncement of law on the subject by the Apex Court it is clear to me that an option is given to the Corporation with regard to its remedy and the Company has no choice in the matter. It is also clear to me that the Corporation cannot simultaneously pursue both the remedies (at the same time). It is further clear to me that a remedy u/s 29 is available even after invocation of a remedy u/s 31 but those proceedings are to be abandoned or withdrawn, The Supreme Court is categorical in para 13 in this regard,

10. In the case on hand admittedly the Corporation has invoked its remedy u/s 31 in the pending application before the learned District Judge and after invocation and without abandoning the said proceedings has initiated simultaneously proceedings u/s 29 which in my opinion as rightly contended by the Counsel for the petitioner cannot be permitted to be done in the light of the clear pronouncement of law by the Supreme Court.

16. Mr. Joshi, however, has tried to distinguish the said judgment by contending firstly that the said case does not deal with a proceeding u/s 31(1)(aa) of the Act in a case of a proceeding against sureties. His argument cannot be accepted for the simple reason that any proceeding u/s 31(1)(aa) is part of proceeding u/s 31. The Supreme Court in Andhra Pradesh State Financial Corporation's case, supra, in various places has noticed the power both u/s 29 and u/s 31 of the Act, The Supreme Court has noticed both the provisions including Section 31(1)(aa) in the judgment and after noticing these two provisions the Supreme Court in para 8 -says that a perusal of the aforesaid provisions of the Act shows that they deal with the rights and procedures to be followed to enable the Corporation in the event of breach of agreement or default for payment of loan or advance or an instalment thereof by the loanee to recover the same. The Court held that:

"The Corporation does not require the assistance of the Court to enforce its rights while invoking the provisions of Section 29 of the Act to recover its dues from defaulting concern".

In paras 10 and 11 the Court notices Sections 30 and 31. It is thereafter in para 13 Supreme Court holds that the creditor viz., the Corporation has to chose one remedy and there cannot be two remedies running simultaneously in the light of the scheme of the Act. In the light of the reading of judgment as a whole and particularly this paragraph, I am unable to accept the argument of Mr. Joshi that this judgment is not applicable to the case on hand on account of a proceeding initiated by Corporation u/s 31(1)(aa) of the Act. Argument of Mr. Joshi in the circumstances require rejection and I reject the same.

17. Mr. Joshi, however, strongly relies on a judgment in Maharashtra State Financial Corporation's case, supra. It is no doubt true that the said judgment provides for proceedings being initiated against a surety. Section 31(1)(aa) provides for a proceeding against surety. There cannot be any quarrel over this

proposition with regard to maintaining a proceeding against a surety u/s 31(1) (aa) in the light of the provision under the Act and in the light of the law laid down by the Supreme Court. However, the argument of Mr. Joshi, that a valid proceeding initiated u/s 31(1)(aa) cannot be construed to be "not a proceeding u/s 31 is not acceptable to me in the light of my discussion in the earlier paragraph in the light of Supreme Court judgment (Andhra Pradesh State Financial Corporation's case, supra),

18. Both the Counsels invite my attention to the proceedings before the learned District Judge, Bangalore, in Miscellaneous Case No. 599 of 1997. Petitioner's Counsel contends that in the said proceedings the petitioner is arrayed as defendant 1 and the petitioner 2 is respondent 2. Per contra Mr. Joshi, contends that reading of the petition would show that the claim is only against sureties. In the light of the rival claims I have gone through Annexure-C. It is no doubt true that directions are sought against (sureties) respondents 2 and 3 in the matter of recovery. I may make it clear at this juncture that I am not deciding the validity or legality of that petition in this petition. All that I am concerned is as to whether this proceeding is a bar for invoking power u/s 29. Admittedly this petition is filed u/s 31(1)(aa) and this is also recovery proceedings in terms of the Act. Therefore, in the light of the pronouncement of law by the Apex Court in the case of Andhra Pradesh State Financial Corporation, supra, it cannot be said that it is not a proceeding u/s 31 of the Act. Therefore, I am clear in my view that the proceedings in Miscellaneous Case No. 599 of 1997 is a bar in any further proceedings u/s 29 of the Act against petitioners.

19. Counsel for the petitioner relies on a judgment of the Allahabad High Court in Uttar Pradesh Financial Corporation's case, supra, on a similar plea. I do not want to deal with this judgment in the light of the judgment of the Supreme Court in Andhra Pradesh State Financial Corporation's case, supra.

20. Counsel for the petitioner invites my attention to a judgment of the Supreme Court in Ambika Prasad Mishra's case, supra, to contend that reconsideration of a binding proceeding is not permissible in the light of Article 141 of the Constitution of India. In the case on hand I am bound by the judgment of Supreme Court in Andhra Pradesh State Financial Corporation's case, supra. If the argument of the Corporation is accepted it would result in my violation of the constitutional compulsion in not following a binding judgment of the Apex Court in terms of Article 141 of the Constitution. In fact in this judgment the Supreme Court has cautioned with regard to binding proceedings in the following words:

"Every new discovery or argumentative novelty cannot undo or compel reconsideration of a binding precedent. In this view, other submissions sparkling with creative ingenuity and presented with high pressure advocacy, cannot persuade us to reopen what was laid down for the guidance of the nation as a solemn proposition by the epic fundamental rights case".

21. The Bombay High Court has noticed the duty of a High Court with regard to a

binding precedent of the Supreme Court in the judgment of Krishna Madhaorao Ghatate, supra, in the following words:

"It is not open to the High Court to little down the import of the Supreme Court decision by drawing fine and subtle distinctions. If in substance the provisions of law considered by the Supreme Court are the same, as the one under consideration of this Court, then the Supreme Court decision must be applied. Even obiter dicta of the Supreme Court are binding upon the subordinate Courts. If the Supreme Court had no occasion to consider the true scope of Article 359(1) of the Constitution, then the observations on that point would naturally bind the High Court even on the assumption that they were obiter in nature. It will not be open to the High Court to ignore the same by showing that these observations are per incuriam, nor it could be ignored because somebody feels that relevant provisions were not brought to the notice of the Court or the occasion to consider the true scope of Article 359 was the Presidential order which was a conditional one".

If the argument of the Corporation is accepted I will be failing in my duty in not following the precedent under the Constitution.

22. In the case on hand as I mentioned earlier that the Corporation having invoked its power u/s 31 cannot be now permitted to invoke its power u/s 29 of the Act. Any invocation of its power u/s 29 is contrary to law as declared by the Supreme Court. Therefore, I have no hesitation in allowing this petition by granting the prayer as sought for by the petitioner.

23. Petition stands allowed. A direction is issued to the respondent not to implement or enforce the impugned notice against the petitioners during the pendency of the proceedings u/s 31 of the Act before the learned District Judge, Mysore.

24. In the result writ petition is allowed. On the peculiar facts of this case the parties are directed to bear their own costs.