
(2010) 01 GUJ CK 0026

In the Gujarat High Court

Case No : Special Civil Application No. 2057 of 2000

Neetaben U. Chokshi

APPELLANT

Vs

Gujarat State Financial Corporation and Another

RESPONDENT

Date of Decision : 27-01-2010

Acts Referred:

Constitution of India, 1950 — Article 12

State Financial Corporations Act, 1951 — Section 29, 30, 31

Citation : AIR 2010 Guj 84 : (2010) 4 BC 571 : (2010) 2 GLH 301 : (2010) 51 GLR 652

Hon'ble Judges : Jayant Patel, J

Bench : Single Bench

Advocate : Shirish Joshi, for the Appellant; R.D. Dave and Bharat R. Pandya, for the Respondent

Final Decision : Allowed

Judgement

Jayant Patel, J.—The short facts of the case appears to be that the petitioner is the guarantor of a transaction of loan entered into between the respondent-Corporation and M/s. Deesa Agro Industries Ltd. It is not in dispute that the petitioner was the guarantor and the property of 11-Rudravadan Bunglow, Thaltej, Ahmedabad (hereinafter referred to as the "property in question") was by way of equitable mortgage given in collateral security to the transaction of law. It is the case of the respondent-Corporation that as the payment was not made of the loan transaction by the principal borrower, the action u/s 29 of the State Financial Corporation Act (hereinafter referred to as "the Act") was initiated against the petitioner and the property in question. As per the respondent-Corporation, the opportunity was also given to the petitioner to pay up the amount, but the amount was also not paid. Therefore, the notice u/s 29 of the Act was issued on 15-2-2000 calling upon the petitioner to pay the outstanding amount of the loan of Rs. 77.34 lakhs failing which the action u/s 29 of the Act for taking possession and sale of the property. It appears that thereafter, again the notice was also issued on 9-3-2000 of similar type and at that stage, the

petitioner has approached to this Court with the prayer to quash and set aside the notices dated 15-2-2000 and 9-3-2000 issued by the respondent-Corporation seeking to act against the petitioner for recovery of the amount.

2. It appears that this Court entertained the petition, but no interim relief was granted on the aspects of further action as per the impugned notice. It appears that the Corporation has proceeded u/s 29 of the Act against the property in question and has taken over the possession of the property from the petitioner on 25-1-2000. The Corporation also proceeded to sell the property by giving advertisement and as per the Corporation, 15 attempts were made to sell the property by giving various advertisement, but ultimately, the offer of the respondent No. 2 was received for Rs. 20.25 lakhs, though initial offer of respondent No. 2 was Rs. 19 lakhs. The Corporation had given opportunity to the petitioner to give matching offer. In response thereto, the petitioner communicated to the respondent-Corporation that she was agreeable to purchase the property for Rs. 20.25 lakhs, but the Corporation instead of accepting the said offer, communicated to the petitioner vide letter dated 25-1-2005 that if the petitioner deposits the amount of Rs. 50 lakhs, then the further action can be taken in this regard. The petitioner called upon the Corporation to give details of the terms and conditions of such offer vide letter dated 31-1-2005, but it appears that the Corporation did not respond, and in the meantime, on 22-2-2005, the Corporation accepted the offer of the respondent No. 3 for the amount of Rs. 20.25 lakhs and the sale certificate was issued and the possession was also handed over on 17-3-2005 to the respondent No. 3 by the Corporation. It appears that thereafter, the sale-deed is also executed on 3-5-2005 by the Corporation in favour of the respondent No. 3. As the matter was pending before this Court, the petitioner thereafter, has amended the petition by inserting the prayer of setting aside of the sale proceedings of 11-Rudravan Bunglow, the property in question and the petitioner has also prayed to direct the respondent Corporation to pay the amount of Rs. 5 lakhs on account of the damage caused to the furniture and fixtures and other household articles of the petitioner. At that stage, the matter is being considered for final disposal.

3. It may be recorded that it is the case of the respondent No. 2 that the amount of Rs. 11 lakhs has been spent for making renovation in the property and the details are at Para 5.23 of the affidavit in reply filed on behalf of the respondent No. 2. It also appears from the sale-deed that the expenses of Rs. 1.70 lakhs are incurred towards Stamp Duty, and approximately Rs. 30,630/- is paid as the registration charges of the said document, roughly Rs. 2 lakhs towards the expenses of the document of sale, total Rs. 13 lakhs.

4. I have heard the learned Counsel appearing for the petitioner Mr. Joshi, Mr. Dave for the respondent-Corporation and Mr. Pandya for respondent No. 2.

5. It is an admitted position that the exercise of the power by the Corporation for sale of the property is u/s 29 of the Act. On the aspects as to whether the Corporation could exercise power u/s 29 of the Act qua the property given as

collateral security by the guarantor or not, the question is no more res integra and is rather covered by the decision of the Apex Court in the case of Karnataka State Financial Corporation Vs. N. Narasimahaiah and Others, In the said decision, the Apex Court after considering the provisions of Sections 29, 30 and 31 of the Act has, inter alia, held at Paragraph 20 as under:

20. Section 29 of the Act nowhere states that the Corporation can proceed against the surety even if some properties are mortgaged or hypothecated by it. The rights 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....

6. Ultimately, it was held that the only remedy available is u/s 31 of the Act. Similar aspect has already been considered by this Court in its decision in the case of Narayanbhai Raichanddas Patel v. Managing Director and Ors. reported at AIR 2009 Guj. 24 and this Court, after following the decision of the Apex Court, has held that the action u/s 29 of the Act for taking over the possession of the property of a guarantor cannot be sustained in the eye of law, therefore, was declared as illegal and without authority and it was observed that the Corporation may take appropriate proceedings u/s 31 of the Act.

7. Therefore, if the action of the Corporation for taking over the possession of the property in question is tested in light of the aforesaid legal position, since it is an admitted position that the possession has been taken over by the Corporation in purported exercise of the power u/s 29 of the Act, the action cannot be sustained in the eye of law and could be said as without any authority under the law with the observations that the Corporation could resort to the proceedings u/s 31 of the Act against the petitioner in capacity as the surety, who had given property by way of mortgage as collateral security in the loan transaction.

8. Mr. Joshi, learned Counsel appearing for the petitioner did contend that there was no proper procedure followed for valuation or fixation of upset price, nor there was proper advertisement given, so as to enable all interested persons to offer higher amount and in his submission, the property has been sold at much lower price. He also submitted that the duty of the Corporation was to act as the trustee of the property, but the property has been sold in an arbitrary manner, consequently as the property is sold at a lower price than the market price, the petitioner has suffered loss. In furtherance to his contention, he relied upon the decision of the Apex Court in the case of Gajraj Jain Vs. State of Bihar and Others, for showing the required approach on the part of the Corporation to sell the property. He contended that if the measures and the yardsticks as observed by the Apex Court had been taken into consideration with the facts of the present case, the sale cannot be sustained and would be rendered arbitrary on the face of it.

9. Whereas, the learned Counsel appearing for the respondent Corporation submitted that the Corporation had got the property valued and the

advertisement was given for 15 times and in spite of the same, there was no proper offer forthcoming and in response to the advertisement dated 28-4-2004, the respondent No. 2 had submitted the offer. Thereafter also, the attempts were made by giving another advertisement dated 1-8-2004 to see if any higher offer is available, but there was no response. It was, therefore, submitted that ultimately respondent No. 2 raised the offer to Rs. 20.25 lakhs, which has been accepted. He submitted that the approach on the part of the Corporation cannot be termed as arbitrary or unreasonable.

10. The learned Counsel appearing for respondent No. 2 supported the action of the Corporation and contended that respondent No. 2 has acted in bona fide in submitting the offer, therefore, the action of the Corporation for sale of the property cannot be termed as arbitrary or illegal.

11. It does appear that the attempts were made by the Corporation for sale of the property earlier, but it has not materialized. Therefore, if the Corporation has considered the offer of respondent No. 2 in response to the advertisement dated 28-4-2004, and thereafter, has further invited offer by giving advertisement dated 1-8-2004, which remained responded, it may not be said that the Corporation has not made any sincere efforts for inviting offer for the property in question. It does appear that after the offer was received by the Corporation of Rs. 20.25 lakhs, communication was entered into by the Corporation with the petitioner for giving matching offer, the petitioner did submit the application for purchase of the property at Rs. 20.25 lakhs. The Corporation, instead of considering the said offer, called upon the petitioner to deposit the amount of Rs. 50 lakhs. There is absolutely no explanation given in the affidavit-in-reply on behalf of the Corporation for the same.

12. Mr. Dave, learned Counsel appearing for the respondent-Corporation made efforts to support the said action by making oral submission that as per the policy of the Corporation, if the valuation of the property in question was declared of higher amount, normally the Corporation would call upon the party to pay the higher amount, therefore, the amount of Rs. 50 lakhs was called upon to be deposited from the petitioner. I am afraid such oral submission can be accepted without there being any authenticated record produced for such purpose. Therefore, such an action of not considering the matching offer of the petitioner and calling upon the petitioner to deposit the amount of Rs. 50 lakhs as against the offer received by the Corporation of Rs. 20.25 lakhs could be termed as arbitrary and of not accepting the offer of the petitioner for Rs. 20.25 lakhs, which was at par with the offer of respondent No. 2 could also be termed as arbitrary. It appears to the Court that such aspect of non-acceptance of the offer of the petitioner of Rs. 20.25 lakhs or that the action on the part of the Corporation to call upon the petitioner to deposit the amount of Rs. 50 lakhs and then only to consider the offer of the petitioner to purchase the property, would not assume much importance in view of the peculiar aspects as per the above-referred legal position upon the interpretation and exercise of the power u/s 29

of the Act inasmuch as the Corporation had no authority to take possession of the property and to exercise the power u/s 29 of the Act qua the property in question of the surety, who is petitioner herein. Therefore, the only conclusion deserves to be recorded is that the action of the Corporation for taking possession u/s 29 of the Act cannot be sustained in the eye of law and is without authority, and therefore, illegal and ultra vires the powers of the Corporation, but would be subject to the observations that the Corporation may resort to the remedy as provided u/s 31 of the Act qua the property in question.

13. The matter does not end at that and the reason being that pending the petition the Corporation has further taken action for sale of the property and has also entered into sale of the property in favour of respondent No. 2. It is true that the contention of the respondent No. 2 is that he has acted in bona fide and it further appears that the Corporation, in the sale-deed, has not mentioned that the sale is subject to the outcome of the proceedings of the present petition. Therefore, it was submitted by the learned Counsel for respondent No. 2 that if respondent No. 2 has acted in bona fide and the officers of the Corporation did not point out the pendency of the present proceedings, nor there was any prohibitory order of this Court, even if the action on the part of the Corporation is declared as illegal in exercise of the discretionary jurisdiction of this Court, the property may not be ordered to be re-entrusted to the petitioner and may be permitted to be retained by respondent No. 2, more particularly in view of the fact that in addition to the amount of sale consideration, respondent No. 2 has incurred expenses of about Rs. 13 lakhs i.e. Rs. 2 lakhs towards expenses for conveyance deed and Rs. 11 lakhs for renovation of the property. He also submitted that as Ahmedabad is declared as Metro City, there is much appreciation in the price of the property, which has rather tempted the petitioner to pursue the present proceedings and if such is entertained, respondent No. 2, who has invested his life-long savings after his retirement will suffer a huge loss. Therefore, this Court may decline the exercise of equitable jurisdiction in favour of the petitioner.

14. It does appear that on behalf of the Corporation, no material is produced on record to show that the pendency of the present proceedings was ever brought to the notice of respondent No. 2, nor there is any recital in the sale-deed about the pendency of the present proceedings. In fact, in all fairness, and more particularly the respondent-Corporation being an instrumentality of the State within the meaning of Article 12 of the Constitution, it was expected for the Corporation to put to the notice of the purchaser about the pendency of the proceedings, since, in any case, the purchaser was not party to the proceedings at the relevant point of time, but the Corporation was party to the proceedings and was aware about the pendency of the present proceedings before this Court. Therefore, in absence of any material placed on record and in view of the aforesaid two important facts of no recital in sale-deed about the pendency of the present proceedings, it can be said that respondent No. 2 acted in bona fide for purchase of the property.

15. But the question would further be required to be considered on the aspects of authority of the Corporation to invite offer for sale of the property and to execute the sale-deed in purported exercise of the power u/s 29 of the Act. As observed earlier, the Corporation had no authority to take possession u/s 29 of the Act and further in view of the above-referred legal position in the case of *Karnataka State Financial Corporation v. N. Narsimahaiah*, (supra) read with *Narayanbhai Raichanddas Patel v. Managing Director*, (supra), if the Corporation could not exercise the power u/s 29 of the Act, all subsequent action, on account of the no authority available with the Corporation can rather be termed as without any authority under the law. If such being the situation if the property is conveyed by the Corporation for which it had no authority, and if the rule of law is to be upheld, the sale- deed, which is executed by the Corporation, would be required to be set at naught, may be even in favour of the bona fide purchaser. The question of protection of the interest of the bona fide purchaser essentially falls in the realm of equity and such equity, even if considered, at best, cannot be allowed to march over the law. If there is conflict of law and the equity, the Court has to uphold the law as against the equity. Therefore, if the sale is without authority, it can hardly be a valid defence available to the bona fide purchaser to contend that the sale may not be set at naught, since he was a bona fide purchaser. If the authority is not available to the vendor and the vendor could not convey title, such defence may not be available to the bona fide purchaser to the extent of conferment and the retention of the title of the property. At the most, such bona fide purchaser may claim for making the loss good if the Court is to render justice to the fullest extent or to do the complete justice. It may be recorded that this Court had an occasion to consider the question for dealing with a situation in a case where the prayer was to declare sale as void as permission under the Bombay Prevention of Fragmentation & Consolidation of Holdings Act was not taken in its decision in case of *Patel Ratilal Maganbhai and Others Vs. State of Gujarat and Others*, In the said case, the Division Bench of this Court declined the relief as was barred by the law of limitation, but certain observations were made inter alia at Paragraph 13 upon the rights and liabilities of purchaser and seller as under:

If the seller establishes that the seller himself as well as the purchaser, both were under the bona fide mistake that the permission of the competent authority for sale is not required, then in the given case, the Court keeping in view the intent of the legislature may declare the transaction of sale as void. But, in those circumstances also the Court may decline the equitable relief of restoring the possession back to the seller and even if the Court decides to restore the possession back to the seller, the Court may also put the seller on condition of repaying the sale consideration and the compensation also if circumstances so demand.

16. A question also came up for consideration before this Court under the Companies Act while declaring the sale as void or while considering the question of validating the transaction, which was otherwise barred by law, in the case of

Star Chemicals (Bombay) Ltd. v. Vitta Mazda Ltd. reported in 2005 (0) GLHEL-HC 216070 (in Company Application No. 157 of 1999 and allied matters). In the said decision, it was, inter alia, observed at Para 7 while summarizing the principles or approach by the Company Court as under:

1. xxx xxx xxx 2. xxx xxx xxx 3. xxx xxx xxx 4. xxx xxx xxx 5. xxx xxx xxx 6. xxx xxx xxx 7. ...If the transaction is in breach of any prohibitory order of any competent forum or there were prohibition of transfer of property of a company, then also while declaring the validity of the transaction, the Court may provide for suitable conditions to make loss good in case the Court is satisfied that the purchaser entered into the transaction in bona fide. As the whole exercise of the power of just and equitable consideration, the Court may also put the company in liquidation to fulfill suitable conditions even if the transaction is to be treated as invalid.

17. Applying the aforesaid principles upon the findings that the respondent No. 2 appears to have acted in bona fide, even if the action of the Corporation is to be declared as without authority, and consequently, the sale is to be set at naught, the equitable consideration would demand that the loss caused to the respondent No. 2 as bona fide purchaser may be made good and to make such loss good, suitable conditions deserve to be imposed, while considering prayer that the sale be set aside and this Court is to enforce the law.

18. As observed earlier, as per the record, it is undisputed position that the respondent No. 2 has spent the amount of Rs. 20.25 lakhs for purchase of the property and Rs. 2 lakhs towards expenses of stamp duty and registration charges. It has also come on record that as per respondent No. 2 he has incurred expenses of Rs. 11 lakhs towards further construction and renovation. Therefore, total of such amount would be Rs. 33.25 lakhs. The aforesaid would be the amount, excluding the interest by way of compensatory measure upon the amount of Rs. 33.25 lakhs and the loss towards appreciation of the property.

19. It was submitted by the learned Counsel appearing for the petitioner that as respondent No. 2 has enjoyed the possession of the property by occupying the house, no interest may be awarded by way of compensatory measure, whereas the learned Counsel appearing for respondent No. 2 had opposed the said submission, but he heavily contended on the aspects of loss on appreciation in the property had the amount been invested at any other place in the property by respondent No. 2.

20. It appears to the Court that in normal circumstances had it been a case where the respondent No. 2 could not enjoy the fruit of the investment by way of occupation of the property, the matter could have been considered for awarding of interest by way of compensatory measure, but as respondent No. 2 has been put into the possession and as per respondent No. 2 he has also occupied the property, it would not be just and proper to award interest, since the loss is, in any case, also to the original owner of the property towards deprivation of the

property without receipt of any money therefrom. As regards the loss towards appreciation is concerned, it appears to the Court that respondent No. 1-Corporation, as observed earlier, has not acted fairly at the time of accepting the offer of respondent No. 2, nor even at the time when the sale-deed is entered into by putting the respondent No. 2 at notice about the pendency of the present proceedings or orders, if any, may be passed by this Court. The normal appreciation even if considered on the basis of the principles, which are being considered under the Land Acquisition Act, would be at the rate of 10% per annum. The sale has taken place in the year 2005 (whereas the petition is being heard in the year 2010), therefore, it could be said that there would be loss of appreciation of the property for five years. If the matter is strictly considered on the basis of the principles as are being applicable under the Land Acquisition Act for awarding compensation the figure may be very high and would be approximately about Rs. 15 lakhs, but keeping in view the fact that the Corporation is a public body and public money is involved therein, respondent No. 2, in any case, would be deserved to be compensated by the Corporation to the extent of Rs. 5 lakhs towards the loss caused to respondent No. 2 by way of increase in the valuation of the property, since, in any case, respondent No. 2 will be required to purchase the other property, if taken over, as per the order, which may be passed by this Court hereinafter.

21. The aforesaid takes me to examine, the aspects on modalities to be effected, since the property has changed the hands and even if the property is restored back to the petitioner, the Corporation is, in any case, would be at liberty to exercise the power u/s 31 of the Act for recovery of the amount from the surety i.e. petitioner herein, including by sale of the property in question. The aforesaid observations and discussion would show that the respondent No. 2 herein would be entitled to the amount of Rs. 38.25 lakhs even if the sale is to be set at naught and the property is to be taken over from him and to be entrusted to the purchaser. Out of the said amount, as observed earlier, the amount of Rs. 33.25 lakhs would be required to be deposited by the petitioner and Rs. 5 lakhs will have to be paid by the Corporation, total Rs. 38.25 lakhs. It is only upon such payment, respondent No. 2 can be directed to hand over the possession to the Corporation or that the Corporation may be put to liberty to take over the possession of the property, thereafter, such property can be entrusted to the petitioner. After such amount is paid, process of re-entrustment of the property is completed, if the petitioner is to contend that the actual amount of Rs. 11 lakhs has not been spent by respondent No. 2 for renovation or further construction in the property, petitioner may file suit for recovery of the amount at which there will be a full-fledged inquiry on the aspect of expenses incurred and the proof thereof etc., but if the petitioner is to assert right to get back the possession by setting at naught the sale, such amount is required to be paid to respondent No. 2 may be through Gujarat State Financial Corporation or otherwise.

22. Further, after the re-entrustment of the possession to the petitioner, G.S.F.C.,

should be at liberty to resort to the proceedings u/s 31 of the Act against the petitioner as surety or if any, other mode of recovery is permissible in accordance with law against the petitioner, it may do so and out of the amount so realised from the petitioner or his property, which would include the property in question, G.S.F.C., may adjust the amount of Rs. 5 lakhs as to be paid to respondent No. 2 towards the loss of appreciation in the property, since, in any case, it would be in a position to realize much higher amount than the amount of Rs. 20.25 lakhs already realized from the property in question by the impugned transaction of sale. But before the possession is taken over from the respondent No. 2, the equitable consideration would demand that the amount of Rs. 5 lakhs, as assessed earlier, would be required to be paid by the Corporation to respondent No. 2.

23. In view of the aforesaid, the impugned action of the Corporation u/s 29 of the Act for taking over the possession of the property from the petitioner and further action of sale of the property to respondent No. 2 are quashed and set aside on condition that the petitioner deposits the amount of Rs. 33.25 lakhs with the respondent-Corporation within a period of two months from today. It is further directed that after the condition is complied with by the petitioner of deposit of the amount of Rs. 33.25 lakhs with the Corporation, the Corporation shall pay the amount of Rs. 38.25 lakhs (by adding the amount of Rs. 5 lakhs to be paid by it to respondent No. 2), and simultaneously, shall take over the possession of the property from respondent No. 2 and the said exercise shall be completed within a period of two months from the date of deposit of the amount of Rs. 33.25 lakhs by the petitioner. The Corporation thereafter shall also hand over the possession of the property received from respondent No. 2 to the petitioner within one week from the receipt of the possession. The Corporation shall be at liberty to take action against the petitioner and her properties, including the property in question u/s 31 of the Act or under any other law, if available. The petitioner shall also be at liberty to file suit for recovery of the amount against respondent No. 2, if, as per the petitioner, the expenses for renovation and construction is less than Rs. 11 lakhs and the suit could be filed for the amount, for which no actual expenses are incurred by respondent No. 2. At this stage, respondent No. 2 shall be at liberty to raise all contentions, including the aspect of expenses already incurred as claimed in the present proceedings and the concerned Court shall be at liberty to take independent view of the matter on the basis of the material available before it. The Corporation shall also be at liberty to set off the amount of Rs. 5 lakhs from the fund which may be from the person and the properties of the petitioner, out of the remedy, which may be resorted to u/s 31 of the Act or any other law, if available.

24. The petition is allowed to the aforesaid extent. Rule made absolute accordingly. No order as to costs. Direct Service is permitted.