(1998) 02 DEL CK 0012

In the Delhi High Court

Case No : C.W. 2028/95 along with Ws. 3719/94. 3083/95 and 5014/93

Rajeev Anand and Others APPELLANT

Vs

Union of India and Others RESPONDENT

Date of Decision : 20-02-1998

Acts Referred:

Citation : (1998) 2 AD 436 : AIR 1998 Delhi 259 : (1998) 93 CompCas 89 : (1998) 72 DLT 355 : (1998) 45 DRJ 386 : (1998) 2 ILR Delhi 604

Hon'ble Judges : Y.K. Sabharwal, J;D.K. Jain, J

Bench : Division Bench

Advocate : Mr. Arun Khosla, Adv Mr. Arun Jaitley, Mr. Mukul Talwar and Mr. Amit Dayal, for the Appellant;

Judgement

Y.K. Sabharwal. J.

1. In these petitions the main question which falls for determination is about the validity of section 32-G of State Financial corporation Act, 1951 (for short ''the Act'') as also about the true scope and ambit of this Section.

2. One of the contention urged on behalf of the petitioners also is that Section 32G applies in respect of dues from an industrial concern and does not cover the case of dues from a surety. Yet another contention urged is that specifying the procedure contemplated by Section 32-G is a condition precedent for invoking the said section.

3. In order to appreciate the questions it would be necessary to first briefly examine the scheme of some of the provisions of the Act.

4. The object of the Act is to facilitate industrialisation of the country by financing medium and small scale industries. The financial corporations have been established as an extended arm of a welfare state and there can be no doubt that its approach has to be public oriented and helpful to the industry and the lone but that does not mean that such approach shall cause loss to the

Corporations. At the same time, however, the Corporation is required to act fairly and reasonably with a view to make the unit viable though bearing in mind that it is dealing with public money. Public money has to be used for public benefit and if the amounts advanced are not returned in time and defaults are committed in repayment of loans or advances or installments of interest, the whole object under the Act may be defeated since the amounts to be received back have to be utilised by granting loans and advances to others and all this has to be an on going process. The Legislature bearing these aspects in view enacted various provisions in the Act giving teeth to the Corporations to be able to recover loans, advances or installments with expedition so that it is not bogged down in lengthy proceedings for recovery by filing civil suits in civil courts. The various state Governments in exercise of power u/s 3 of the Act have established Financial corporations. The power and responsibility of the Corporations are conducted by the Board defined within the meaning of Section 2(a) of the Act. Section 24 provides that in discharging its functions under the Act the Board shall act on business principles due regard being had by it to the interest of industry, commerce and general public. An ''industrial concern'' has been defined in section 2(c) of the Act. The powers of Financial Corporation to take action against the defaulting parties are provided for in sections 29 to 32G of the Act.

5. Section 29, interalia, provides that where any industrial concern makes any default in repayment of any loan etc. or otherwise fails to comply with the terms of the 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 and also the right to transfer by way of lease or sale and realise the property pledged, mortgaged, hypothecated or assigned to the Financial Corporation.

6. Section 30 vests in the Financial corporation power to call for repayment before agreed period if it appears to the Board that false or misleading information in any material particular was given in the application for loan or advance and in other contingencies incorporated in the Section.

7. Section 31 interalia provides that where an industrial concern makes any default in repayment of any loan etc. or fails to make immediate repayment u/s 30 of the Act then, without prejudice to provisions of section 29 of the Act an authorised officer of the Financial Corporation may apply to the District Judge seeking an order for sale of property pledged, mortgaged, hypothecated or assigned; for enforcing the liability of any surety and for other orders stipulated in this section. Section 32 provides for the procedure to deal with the applications filed before the District Judge u/s 31 of the Act and also the orders that can be passed by the District Judge on application u/s 31. This section also provides for right of appeal to the High Court.

Section 32-A of the Act vests in the Financial Corporation a power to appoint directors of the industrial concern, the management of which has been taken over by the Financial Corporation Section 32-B interalia provides for the effect of the orders made u/s 32-A on the persons holding the office of the directors immediately before the issue of notified order u/s 32-A. Section 32D provides that no managing agent, managing director or any other director shall be entitled to any compensation for loss of office or premature termination under the Act of any contract of management entered into by him with the industrial concern. Section 32-E interalia restricts the applicability of the Companies Act, 1956 on the management of an industrial concern which is a company within the meaning of the said Act and Section 32-F interalia provides that in the cases where the management of industrial concern not being a company as defined in Companies Act has been taken over by the Financial Corporation no suit or proceedings etc. shall lie in any court except with the consent of the Financial Corporation.

8. Section 32-G, which has been the bone of contention before us, inter alia, provides that the amounts due to the Financial Corporation can be recovered as arrears of land revenue on a certificate being issued by the State Government or by specified authority for the amount so due, to the Collector.

9. For facility of reference it would be useful to reproduce Section 32-G which reads as under :-

"Section 32-G - Recovery of amounts due to the Financial Corporation as an arrear of land revenue where any amount is due to the financial Corporation in respect of any accommodation granted by it to any industrial concern, the Financial Corporation or any person authorised by it in writing in this behalf, may, without prejudice to any other mode of recovery, make an application to the State Government for the recovery of the amount due to it and if the State Government or such authority, as that Government may specify in this behalf, is satisfied, after following such procedure as may be prescribed, that any amount is so due, it may issue a certificate for that amount to the Collector, and the Collector shall proceed to recover that amount in the same manner as an arrear of land revenue." Section 2(d) States that "Prescribed" means prescribed by rules or regulations made under the Act. Section 47 is rule making power of the State Government. Section 48 is regulation making power of the Board."

10. It is not in dispute that procedure for purposes of proceedings u/s 32-G has not been provided for by either framing rules u/s 47 or making regulations u/s 48 of the Act.

11. The contention urged for the petitioners is that without prescribing procedure, Section 32-G cannot be invoked and given effect to. In our view, however, the absence to specify procedure by making appropriate rule or regulation cannot nullify the legislative intent. The statutory provision cannot be held to remain a dead letter till such time the procedure is prescribed, in the absence of clear words in the Act which may show such an intention on the part of Legislature. We are unable to find any such intention from the provisions of the Act. Under the Act the procedure is to be prescribed by either State Government framing the rule or Board framing requisite regulations. The

provisions in the Act do not show operation of section 32-G would depend upon the action of the State Government or the Board and on account of their inaction, the legislative intent would remain in abeyance. In absence of the procedure being prescribed, the authority u/s 32-G would be required to follow and apply such procedure which is just, fair and reasonable and is in consonance with the principles of natural justice. We are unable to accept the aforesaid contention (See : Mysore State Road Transport Corporation Vs. Gopinath Gundachar Char, , U.P. State Electricity Board Lucknow Vs. City Board, Mussoorie and Others, and Surinder Singh Vs. Central Government and Others,). These decisions would also show that there is no legal impediment in enforcing the statutory provisions like Section 32-G in absence of prescribed procedure.

12. Having said this we may note that although more than decade has passed when section 32-G was incorporated the procedure required to be followed before taking action u/s 32-G has not been prescribed and no Explanation whatsoever was furnished as to why even after lapse of such a long period procedure has not been prescribed. Therefore, while rejecting the contention of the petitioner we direct that the procedure as contemplated by Section 32-G read with Section 2(d) shall be prescribed by the appropriate authority within a period of six months.

13. The next question to be considered is can the amount due to the Financial Corporation be determined by the State Government or specified authority while exercising powers u/s 32G of the Act. According to the petitioners Section 32-G can be invoked only for a pre-determined amount. They have laid great emphasis on the sub title of the section, in particular, to the words ''Recovery of amounts due'' and the words'' any amount is due'' occurring at the beginning of the section and the later words ''for recovery of the amount due occurring in this section. On the plain language of Section 32-G, we find it difficult to accept the contention that Section 32-G can be invoked only for a pre-determined amount and the same cannot be determined u/s 32-G. A reading of the section shows that on an application being filed before the State Government by the Financial Corporation, the State Government or specified authority has to record its satisfaction about the amount due and it is only thereafter a certificate for the amounts so due can be issued to the Collector for recovery of the amount as arrears of land revenue. In this respect it would be useful to refer to Gujarat State Financial Corporation Vs. Natson Manufacturing Co. Pvt. Ltd. and Others, . In the said case the Supreme Court has held that looking at the whole conspectus of the provisions of Section 32 coupled with the nature of relief sought u/s 31(1) it becomes clear that special provision is made for certain types of reliefs that can be obtained by a Corporation by an application u/s S which could not be styled as substantive relief for repayment of mortgage money by sale of mortgaged property. It further held that such proceedings can also not said to be proceeding to obtain substantive relief capable of being valued in terms of monetary gain or presentation of monetary loss. The form of the application, the nature of the relief, the compulsion to make interim order, the

limited enquiry contemplated by sub-section (6) of Section 32 and the nature of relief that can be granted and the manner of execution clearly show that application u/s 31(1) is neither a plaint as contemplated by Article 1 of Schedule I nor an application in the nature of a plaint as contemplated by /Article 7 of Schedule I of the Bombay Court Fees Act. It has to be borne in mind that the object of the Act is the development of the industry and also that the money advanced to the industry must come back to the Corporation expeditiously sot that it can be further advanced to the industrial concerns and, Therefore, the purpose would be lost if the Corporation is to wait for years in civil court for recovery of the amount which it may advance to the industrial entrepreneurs. Keeping in view this object, the Act has provided for determination of the amount due to the Corporation in summary proceedings. In this view of the object and intention of the Act and; the language of the section we find it difficult to accept the contention that Section 32-G can be invoked only when there is an earlier determination of the amount by any court or authority.

14. Next, it was contended that Section 32-G has no applicability to the sureties. The contention is that since Section 32-G cannot be invoked in case of sureties, the recovery certificates issued against the sureties and the attempt of the Financial Corporation to recover the amount alleged to be due from sureties as arrears of land revenue is wholly illegal and without jurisdiction. It has been pointed out that wherever the Legislature had intended a particular provision to be applicable to the sureties it so said specifically. Reference has been made by the petitioner''s learned counsel to incorporation of clause (aa) in Section 31 by amending Act No. 43 of 1985 to provide that the Financial Corporation may apply before the District Judge for enforcing the liability of any surety. Before insertion of clause (aa), it is submitted, that Section 31 had no applicability to the case of sureties. We may also notice that Section (da) in sub-section (7) of Section 32 was also inserted by 1985 amendment to provide that after making an investigation under sub section (6) of Section 32 the District Judge may direct the enforcement of liability of the surety or reject the claim made in this behalf. The scheme of the Act makes it clear that power of the District Judge under the Act is not that of a civil court. The powers of the District Judge under these provisions are slightly more that than of the executing court but certainly the same are not powers of adjudication as civil courts powers are summary. The District Judge has the power to investigate and not power to adjudicate which is primarily the function of a civil court. Sub-section (6) of Section 32, interalia, provides that when cause is shown the District Judge shall proceed to ''investigate the claim'' of the Financial Corporation in accordance with the provisions of CPC in so far as such provisions may be applied thereto. Reverting now to the contention that Section 32-G is not applicable to sureties it seems that the language of this provision is very wide and does not restrict its applicability to industrial concern only. What Section 32-G says is where any amount is due to the Financial Corporation is respect of any accommodation granted by it to financial concern, the Financial Corporation can make an

application before the State Government for recovery of the amount due to it. It cannot be held that the claim against the surety is not in respect of accommodation granted by Financial Corporation to any industrial concern. The acceptance of the contention would amount to making the words ''in respect of accommodation granted'' in Section 32-G redundant. If the Intention of this section was to restrict its applicability only to industrial concern, the opening words of Section 32 would have been something like "where amount is due to Financial Corporation from any industrial concern....." In view of clear language of the provision, we are unable to accept the contention that applicability of Section 32-G is restricted to only industrial concerns and it cannot be invoked against the sureties.

15. It was then contended on behalf of the petitioners that no officer of Financial Corporation can be appointed as an authority to issue a certificate u/s 32-G of the Act since that would violate the basic and fundamental principle well recognised in law that no one shall be a judge in his own cause. The certificate specifying the amount to be recovered as arrears of land revenue, u/s 32-G can be issued either by the State Government or by such authority as that Government may specify. The "State Government" under the Act, in relation to a Union Territory, means the Administrator thereof. In the present case, it is not in dispute that power u/s 32-G has been delegated in favor of the Managing Director of the Corporation itself. The effect is that when an application is made by an officer of State Financial Corporation u/s 32-G of the Act, the specified authority (Managing Director of the same Corporation) issues notice to the concerned parties and on being satisfied u/s 32-G, the requisite certificate for recovery of the amount deter-mined is issued, for being recovered by the Collector as arrears of land revenue. The Managing Director of the Corporation gets power, authority and competence to deal with applications u/s 32-G of the Act, on being granted such powers by the State Government. The Financial Corporation, of which the Managing Director is the head, is one of the parties in proceedings u/s 32-G of the Act, being in the position of almost a creditor. The fact that some other officer and not Managing Director may sign an application to be filed on behalf of the Financial Corporation is of no relevance. The overall control of the Financial Corporation admittedly vests in the Managing Director and the officer who may sign an application u/s 32-G would be under the administrative control of the Managing Director. The question is not whether the Managing Director acting as an authority u/s 32-G on being so appointed by the State Government would be biased or not. The real question is whether his appointment as an authority u/s 32-G to determine and issue the recovery certificate would inspire confidence of the entrepreneur or not. The answer has to be in the negative. The question is not of the bias but of the reasonable likelihood of bias. The question is about reasonable apprehension of the opposite party. It is against all canon of justice to make a man judge in his own cause. The justice should not only be done but should be seen to be done as well. The contention that this court, when a certificate issued u/s 32-G is challenged, has a

limited jurisdiction of judicial review in such matters, further demonstrates the requirement, desirability and propriety of appointing such a person an authority u/s 32-G who inspires the confidence of both the parties. We are not suggesting that consent or opinion of entrepreneur is required to obtained before specifying authority u/s 32-G of the Act. We are only holding that an officer of the Financial Corporation should not be appointed as an authority u/s 32-G of the Act. If one of the parties or its representative is appointed as an authority u/s 32-G of the Act by the State Government in exercise of its power to specify any authority under this section it would certainly be against the principles that no one shall be judge in his own cause. The other party can have a reasonable apprehension of bias against such an authority. (See : A.K. Kraipak and Others Vs. Union of India (UOI) and Others, Gullapalli Nageswara Rao and Others Vs. Andhra Pradesh State Road Transport Corporation and Another, , Manak Lal Vs. Dr. Prem Chand, Institute of Chartered Accountants of India Vs. L.K. Ratna and Others, and Krishna Bus Service Pvt. Ltd. Vs. State of Haryana and Others,).

16. In view of the aforesaid discussion the contention urged on behalf of the respondents that there is no bar in appointing Managing Director as an authority u/s 32-G or that the Managing Director is best person to be so appointed because he can get a substantial number of matters settled for the reason, interalia, of his knowledge about the facts of the case before him and also his experience about the problem of the entrepreneurs is wholly misconceived. We are, Therefore, of the view that though Section 32-G is not unconstitutional but it postulates appointment of an independent person and thus it deserves to be declared that the Managing Director or any other officer of the Financial corporation can not be appointed by the State Government as an authority u/s 32-G of the Act. We, however, clarify that the concluded matters will not be reopened and certificate u/s 32-G of the Act which were earlier not questioned would not be open to challenge now on the ground of competence and authority of the Managing Director of the Corporation.

17. These writ petitions are, Therefore, partly allowed in the above terms and only the impugned certificates dated 9th February, 1994 in C.W. Nos. 2028/95 & 3719/94, dated 11th May 1992 in C.W. 5014/93 and impugned notice dated 8th August 1995 in C.W. 3083/95 are quashed with liberty to the State Government to appoint such other person as an authority u/s 32-G as such Government may deem proper keeping in view the observations made in this judgment. The interim orders passed in these cases restraining transfer etc. of properties and directing payments of certain amounts, in the facts and circumstances of these cases, would continue till fresh decision by an appropriate authority u/s 32-G of the Act. Parties are left to bear their own costs.

