

(2006) 01 GAU CK 0034
In the Gauhati High Court
Case No : F.A.O. No. 16 of 1999

Rajendra Prasad Borah and Another	APPELLANT
Vs	
Central Bureau of Investigation and Another	RESPONDENT

Date of Decision : 20-01-2006

Acts Referred:

Constitution of India, 1950 — Article 366(10), 372
Criminal Law Amendment (Amending) Ordinance, 1943 — Section 3, 4, 4(4), 5, 5(2)
India and Burma (Emergency Provisions) Act, 1940 — Section 1(3), 3
State Financial Corporations Act, 1951 — Section 29, 29(1), 30

Citation : (2009) 1 GLR 571 : (2006) GLT 338 Supp

Hon'ble Judges : Aftab H. Saikia, J

Bench : Single Bench

Advocate : J.M. Choudhury and P. Kataki, for the Appellant; B.D. Das and H.K. Sarma, for the Respondent

Final Decision : Dismissed

Judgement

Aftab H. Saikia, J.—Heard Mr. P. Kataki, teamed Counsel for the Appellants and Mr. B.D. Das, learned Counsel appearing on behalf of the Assam Industrial Development Corporation ("AIDC") on behalf of the Respondent No. 2.

2. This First Appeal from of Order witnesses a challenge to the order dated 9.4.1999 passed in Misc. Case No. 9 of 1996 arising out of Special Case No. 1(C)/96 by learned Special Judge, Assam, Guwahati wherein the interim attachment order dated 29.3.1996 passed in favour of the Respondent No. 1, Central Bureau of Investigation ("CBI") accepting the request made by them for attachment of the properties of the Appellants for their alleged involvement in unaccounted acquisition of properties through Veterinary Department to tile Government of Assam, was modified after entertaining an application filed on behalf of AIDC, a Govt. of Assam Undertaking with alms and objects, inter alia, to promote industrialisation in State of Assam by advancing loans to the entrepreneurs etc., to the extent that the order of ad-interim attachment passed on 29.3.1996 to attach the property of the hotel Chilarai Regency, Paltanbazar,

stood vacated with a condition that if the sale proceed of the property was more than that of their claim then remaining amount would remain under ad interim attachment.

3. The facts, in a short compass, necessary and essential for proper resolution of this first appeal, may be recapitulated. The CBI initiated the instant Special Case No. 1(C)/96 against the Appellants with allegations that both the Appellants in the year 1991-92 amassed a huge amount of money to the tune of Rs. 66,90,495 by submitting false bills, sanction orders, work orders, etc., through the Veterinary Department, Government of Assam and invested the money in acquiring assets, as detailed in their petition, including the investment for the purpose of purchasing Hotel Chilarai Regency and during the pendency of the said criminal proceeding, CBI, seeking the attachment of the said hotel, approached the learned Special Judge, Assam by filing an application u/s 3 of the Criminal Law (Amendment) Ordinance, 1944 ("the Ordinance") which was registered as Misc. Case No. 9/96 and the learned court, on being satisfied, passed ad-interim attachment order on 29.3.1999 in favour of the CBI against the Appellants granting the relief as prayed for.

4. During the operation of the above ad- interim attachment order, AIDC has preferred an objection in terms of Section 4(4) of the Ordinance for modification of the ad-interim attachment order, stating, inter alia, that initially one M/s. G.K. Enterprise (P.) Ltd. was granted loan to the extent of Rs. 66 lakh for construction of the hotel in question in Guwahati by AIDC, being a Public Financial Institution, for which a loan agreement was executed between the above parties on 7.4.1985 creating an equitable mortgage of the immovable properties namely land, building etc. of the said hotel. In 1991-92, the share of M/s. G.K. Enterprise (P.) Ltd. were entirely transferred to the Appellants who became new directors of the said company vide resolution of the Board meeting on 1.2.1992 and thereafter the name of the company was changed from M/s. G.K. Enterprise (P.) Ltd. to Raja Rama Brothers (P.) Ltd. by resolution on 7.4.1992 which was duly approved by the Registrar of Companies as well as AIDC. The loanee Raja Rama Borthers (P.) Ltd. owned by the Appellants, owed a huge amount to AIDC to the extent of Rs. 75,84,181.00 as on 31.12.1996. Since the property of hotel Chilarai Regency has been under mortgage to AIDC, the property of the said hotel belongs to the company and if the property of the hotel in question is allowed to continue and remain under attachment vide order dated 29.3.1996, AIDC would not be able to realise its outstanding dues due to default in repayment of the same by the Appellants by selling the property in accordance with law.

5. The learned Special Judge upon hearing the learned Counsel for the parties as well as having considered the objection preferred by AIDC, passed the impugned order modifying the ad-interim attachment order dated 29.3.1999 as indicated above holding that since the Appellants had admitted that they took the loan amount in question which was specifically mentioned in the petition itself and that Hotel Chilarai Regency was mortgaged to AIDC, the mortgagee AIDC

acquired a right and interest over the mortgaged property. In arriving at a decision in passing the impugned order by vacating the earlier order of attachment, the court referred to Section 5(2) of the Ordinance which was pressed into service by the counsel for the opposite party claiming that it was incumbent on the part of the objector AIDC to adduce evidence to prove that they had an interest over the property for which the court was bound to investigate the same by examining the parties and categorically opined its view that examination of any witnesses was not necessary in terms above provision of law as it was admitted fact that the AIDC had acquired a right over the mortgaged property as per own admission of the Appellants.

6. Challenging the impugned order, Mr. Kataki, learned Counsel for the Appellants, has forcefully argued that the impugned order was passed basically in contravention of Section 5 especially Section 5(3)(a) and (b) of the Ordinance. His contention is that the proviso to Section 5(3)(a) and (b) clearly prescribes a special procedure that needs to be followed by the learned Judge in varying any ad-interim order of attachment. In the case at hand, there is no whisper as regards any such compliance in the judgment itself which is apparent on the face of it and the impugned order is, therefore, liable to be quashed and set aside.

7. For the sake of convenience and ready reference, it would be prudent and necessary to quote Section 5 of the Ordinance herebelow. It would be noteworthy that the continuity of the Ordinance is still in force as nothing has been shown that the Ordinance has been annulled, repealed or rescinded by the Parliament of India or any competent authority. The Allahabad High Court in a Division Bench decision rendered in *M.M. Sales and Exports (India) (Pvt.) Ltd. and Others Vs. The State of Uttar Pradesh and Others*, in deciding a principal question as to whether the Ordinance was in force at the relevant time found that by virtue of Section 1(3) read with Section 3 of India and Burma (Emergency Provisions) Act, 1940, the Ordinance had unlimited duration, it being one of the Ordinances issued by the Governor-General of India during the period 26.6.1940 and 1.4.1946 and the Act of 1940 above ceasing to have effect did not affect the continuance of such Ordinances which remained in force till repealed. In paragraph 8, it was held at page 265 as follows:

8 Further Article 366(10) defines an "existing law" to mean any law, ordinance, order, bye-law, rule or regulation passed or made before the commencement of this Constitution by any Legislature, authority or person having power to make such a law, ordinance, order, bye-law, rule or regulation. Admittedly, the Criminal Law Amendment Ordinance was promulgated by the Governor-General who had the power to pass or make such an Ordinance and was thus an "existing law" on 26th January, 1950. Article 372 of the Constitution expressly provides for the continuance in force of existing laws, unless the said law is altered or repealed or amended by a competent Legislature or other competent authority. Nothing has been shown that the Criminal Law Amendment Ordinance has been repealed or rescinded by the Parliament of India or by any competent authority. Thus the

Criminal Law Amendment Ordinance, 1944 is not only an "existing law" within the meaning of Article 366(10) but continues to remain in force even today.

8. Section 5 of the Ordinance reads asunder:

5. Investigations of objections to attachment.- (1) If no cause is shown and no objections are made u/s 4 on or before the specified date, the District Judge shall forthwith pass an order making the ad-interim order of attachment absolute.

(2) If cause is shown or any objections are made as aforesaid the District Judge shall proceed to investigate the same, and in so doing, as regards the examination of the parties and in all other respects he shall, subject to the provisions of this Ordinance, follow the procedure and exercise all the powers of a court in hearing a suit under the Code of Civil Procedure, 1908 and any person making an objection u/s 4 shall be required to adduce evidence to show that at the date of the attachment he had some interest in the property attached.

(3) After investigation under Sub-section (2), the District Judge shall pass an order either making the ad-interim order of attachment absolute or varying it by releasing a portion of the property from attachment or withdrawing the order:

Provided that the District Judge shall not-

(a) release from attachment any interest which he is satisfied that the person believed to have committed a scheduled offence has, in the property, unless he is also satisfied that there will remain under attachment an amount of the said person's property of value not less than that of the property believed to have been procured by the said person by means of the offence, or

(b) withdraw the order of attachment unless he is satisfied that the said person has not, by means of the offence, procured any money or to other property.

Referring to the above provision of Section 5(3)(a) and (b), the learned Counsel for the Appellants have submitted that both the proviso (a) and (b) have specifically contemplated that the court must be satisfied, prior to passing an order of release the property from attachment, that the Appellants believed to have committed a scheduled offence have, in the property, unless the court is satisfied that there will remain under attachment an amount of the said Appellants' property of value not less than that of the property believed to have been procured by the said Appellants by means of the offence and also the Appellants have procured any property by means of alleged offence; but no such finding whatsoever is reflected in the order itself. His contention is that the entire vacation modification order has been passed mechanically and cryptically without application of mind and in total violation of the procedural law laid down under the above provisions.

9. Supporting the impugned order, Mr. Das, learned Counsel appearing for the Respondent-AIDC, has vehemently contended that AIDC, being the mortgagee of the property, i.e., Hotel Chilarai Regency which was purchased out of the loan

money borrowed from AIDC and when the Appellants are admittedly in default in repayment of the said loan amount, AIDC has acquired a vested right and interest over the property and as such the learned Special Judge was wholly justified in modifying the ad-interim attachment order granting liberty to AIDC to realise the loan amount so due to them by selling the property.

10. In support of his submission, learned Counsel has invited attention of this Court to Section 29 of the State Financial Corporations Act, 1951 ("the Act"), relevant portion of which is quoted as under:

29(1). Rights of Financial Corporation in case of default.- (1) Where any industrial concern, which is under a liability to the Financial Corporation under an agreement, makes any default in repaying 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 concerns, 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....

11. Mr. Das has further contended that in view of the right so entrusted upon AIDC by Section 29 of the Act, they have acted legally and within the purview of the Act and the Ordinance in seeking vacation/modification of ad- interim attachment order dated 29.3.1996 passed by the Special Judge in favour of CBI and the learned Special Judge, on proper appreciation of the materials available on record and. Having accepted the admission as regards the outstanding loan amount payable by the Appellants to AIDC, came to the just finding of vacation/ modification of earlier attachment order and as such in the premises of the facts situation above, no interference by this Court in this instant case is required.

12. Having given my thoughtful consideration to the arguments canvassed by the learned Counsel re-presentating the rival parties and also on meticulous scanning of the materials available on record including the impugned order, it is revealed that concededly the Appellants are loanees mortgagors of AIDC pertaining to the hotel in question which has been mortgaged to AIDC and they have defaulted in making re-payment of the existing loan money. Ultimately the CBI has instituted a case before the learned Special Judge, Assam against the Appellants alleging their involvement in amassing a huge unaccounted wealth and has obtained the ad-interim attachment order of Hotel Chilarai Regency. Since the hotel in question has become the property of AIDC by virtue of mortgage against the loan taken by Appellants, AIDC has, in term of Section 29 of the Act, every right to take over the management or possession or both of the hotel in question.

13. As regards the contentions of Mr. Kataki, learned Counsel for the Appellants that there was a clear violation of provisos to Sections 5(3), i.e., (a) and (b) of the Ordinance, it appears from the perusal of the impugned order itself that learned Judge was satisfied with the factum that the property has been

admittedly under the mortgage to AIDC and as such a vested right has been accrued to AIDC to seek any modification/alteration or variance of the ad-interim attachment order so that AIDC can realise the outstanding loan amount, being due for repayment from the Appellants. In view of the same, this Court finds that there is no contravention of the provisos to Section 5.

14. The Ordinance basically postulates a procedural law when the Act itself is a substantive law. The jurisprudence of both substantive and procedural law is that substantive law defines the rights while procedural law determines the remedies. Unlike the procedural law which governs the process of litigation, the substantive law is concerned with the ends which administration of justice seeks to achieve and the procedural law deals with the means and procedure by which those ends can be achieved. [See Salmond: Jurisprudence (12th edn.) pp. 461-462]. It is pertinent to note that where the procedural law differs from the substantive law, the latter shall prevail over the former, because the procedural law deals with the form and not with the substance or the spirit of law. It is to be noted that the court would always look to the spirit of law and may even go beyond the procedural law for this purpose if so required. Further, there can be no estoppel against the statute and rule of estoppel would not be allowed to prevail over the provision of substantive law (See-Studies in Jurisprudence & Legal Theory: Paranjapa p. 229).

15. In a recent decision reported in Smt. Rani Kusum Vs. Smt. Kanchan Devi and Others, the Apex Court, analysing the scope of procedural law, in paragraphs 10, 11, 12, 13 and 14 ruled as under:

10. All the rules of procedure are the handmaid of justice. The language employed by the draftsman of processual law may be liberal or stringent, but the fact remains that the object of prescribing procedure is to advance the cause of justice. In an adversarial system, no party should ordinarily be denied the opportunity of participating in the process of justice dispensation. Unless compelled by express and specific language of the statute, the provisions of CPC or any other procedural enactment ought not to be construed in a manner which would leave the court helpless to meet extraordinary situations in the ends of justice.

11. The mortality of justice at the hands of law troubles a judge's conscience and points an angry interrogation at the law reformer.

12. The processual law so dominates in certain systems as to overpower substantive rights and substantial justice. The humanist rule that procedure should be the handmaid, not the mistress, of legal justice compels consideration of vesting a residuary power in the judges to act *ex debito justitiae* where the tragic sequel otherwise would be wholly inequitable. Justice is the goal of jurisprudence, processual, as much as substantive.

13. No person has a vested right in any course of procedure. He has only the right of prosecution or defence in the manner for the time being by or for the

court in which the case is pending, and if, by an Act of Parliament the mode of procedure is altered, he has no other right than to proceed according to the is altered, he has no other right than to proceed according to the altered mode. A procedural law should not ordinarily be construed as mandatory; the procedural law is always subservient to and is in aid to justice. Any interpretation which eludes or frustrates the recipient of justice is not to be followed.

14. Processual law is not to be a tyrant but a servant, not an obstruction but an aid to justice. Procedural prescriptions are the handmaid and not the mistress, a lubricant, not a resistant in the administration of justice.

16. In the instant case, the learned Judge was, it appears, satisfied with the admission of the Appellants in regard to their liabilities with AIDC and there was no dispute to the fact that the hotel in question belonged to AIDC; however, the property of the said hotel was attached of CBI which instituted a Special Case against the Appellants with the allegation that they dishonestly acquired a huge amount of money in the year 1991-92. As such, AIDC has acquired a vested right to deal with the property which was attached on request of CBI. Accordingly by the impugned order said attachment order was released in favour of AIDC. Significantly, it is also seen that CBI did not object against such vacating the attachment order.

17. Assuming there was a violation of the provisos to Section 5 of the Ordinance, as pleaded, in the case at hand, in the light of legal position as discussed hereinabove, it can therefore be safely said that when substantive law, i.e., the Act entrusts the right as regards taking over the management of possession of the defaulting establishment concerned, the provisos as cited above, being a procedural law, cannot come on the way for implementation and enforcement of the relevant provisions of the Act.

18. Since the AIDC is an instrumentality of the State of Assam dealing with public money, they must be given free hand in exercising their right vested with them by Section 29 of the Act so long they act fairly and reasonably in taking and executing any administrative action.

19. The Supreme Court in a case of Orissa State Financial Corporation and Another Vs. Hotel Jogendra, delving upon Sections 29 and 30 of the Act, in paragraphs 8 and 9, observed as follows:

8. It would, thus, be seen that the Respondent is only interested in delaying the repayment of the dues and has abused the process of the court taking indulgence of the court's direction. Under these circumstances, we find that no indulgence would be shown to such a recalcitrant defaulter in repayment of the loan. Public money is meant to be recycled to all the needy entrepreneurs. The dilatory tactics defeat the public policy and the court process becomes an instrument of abuse. Court would protect only honest and sincere litigants.

9. The appeal is accordingly allowed with exemplary costs of Rs. 10,000. The

Corporation is at liberty to take action against the Respondent as, required u/s 29 of the Act, irrespective of the orders passed by any court.

20. The Apex Court in Haryana Financial Corporation and Another Vs. Jagdamba Oil Mills and Another, in dealing with Section 29 of the Act, in paragraphs 6 and 16, has held that the approach of the State Financial Corporation, being an instrumentality of the State dealing with public money, has to be public oriented. It can operate effectively only if there is regular realization of instalments. A duty has been cast upon the borrowers to repay the instalments in time, unless prevented by insurmountable difficulties. Regular payment is the rule and non-payment due to extenuating circumstances is the exception.

21. The Apex Court, in paragraph 16 of the said judgment, has approved the right entrusted upon the Financial Corporation by Section 29 of the Act which gives a right to the Financial Corporation, inter alia, to sell the assets of the industrial concern and realize the property pledged mortgaged, hypothecated or assigned to it and accordingly this right accrues when the 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 as envisaged in Section 29 of the Act. Section 29(1), it has been held gives Financial Corporation, in the event of default, the right to take over the management or possession or both and thereafter deal with the property.

22. Having regard to the above judicial authorities and also upon hearing the learned Counsel for the parties as well as on close inspection of the impugned order, this Court does find no illegality or irregularity or any judicial error in passing the impugned order so as to dislodge the same.

23. In the result the appeal fails and stands dismissed.

24. Interim order, passed earlier, if any stands vacated.