
(2004) 02 AHC CK 0170
In the Allahabad High Court

Case No : Civil Misc. Writ Petition No's. 7822 of 1999 and 8411 of 2000

Salil Chandra and Others

APPELLANT

Vs

Collector/District Magistrate and Others

RESPONDENT

Date of Decision : 17-02-2004

Acts Referred:

State Financial Corporations Act, 1951 — Section 29

Citation : AIR 2004 All 187 : (2004) 3 BC 342 : (2004) 2 UPLBEC 1144

Hon'ble Judges : R.S. Tripathi, J;M. Katju, J

Bench : Division Bench

Advocate : T.R. Singh, R.S. Misra, R.K. Pandey, U.N. Sharma and Usha Kiran, for the Appellant; H.R. Misra and A.K. Gaur, S.C., for the Respondent

Final Decision : Dismissed

Judgement

M. Katju, J.—Heard learned counsel for the parties.

2. Writ Petition No. 7822 of 1999 was filed against the recovery certificate dated 6-11-1998 and citation dated 18-2-1999 (vide Annexures 10 and 9 to the writ petition. This recovery and citation was regarding recovery of huge amount of money towards the loan taken by the petitioners which had not been re-paid as scheduled.

3. The aforesaid writ petition was dismissed on merits by the judgment of a Division Bench of this Court dated 24-2-1999. The aforesaid judgment dated 24-2-1999 states as follows :--

"The petitioners mention nothing about a notice u/s 29 in the present writ petition, but has taken a ground that the notice which was issued for taking over the possession was without any opportunity. The Court mentions this fact because during the course of consideration of the petition at admission, the Court was giving an indulgence to the petitioners to come to terms with the U.R Financial Corporation under a one time settlement. The record illudes the notice u/s 29 whereas on page 189, Annexure 12 to the writ petition, against item No.

7, the name of Messers. Shakti Glass Technical (Private) Limited has been mentioned. This is the company of which the petitioner Nos. 1 and 2 are Directors. In the array of parties, the company, Messers Shakti Glass Technical (Private) Limited, had not been made a party until the Court indicated it so. The company was made a party, thereafter.

With a Section 29 notice advertised as a public advertisement, which advertisement was issued on 19 August, 1998 and not being made part of the record, there is nothing the Court can grant as an indulgence to the petitioners.

Dismissed."

4. After the dismissal of the aforesaid writ petition the petitioners had filed Writ Petition No. 8411 of 2000 against citation dated 9-2-2000. When this petition was taken up, learned counsel for the respondents raised the preliminary objection that the earlier Writ Petition No. 7822 of 1999 had been dismissed on 24-2-1999, and hence the second writ petition was not maintainable. Accordingly a Division Bench of this Court on 31-3-2000 dismissed the Writ Petition No. 8411 of 2000 by the following order :--

"The petitioner had earlier filed a writ petition being Writ Petition No. 7822 of 1999 which had been dismissed by a Division Bench of this Court on 24-2-1999. This second writ petition in our opinion is not maintainable.

Learned counsel for the petitioner submitted that certain points were not taken before the earlier Bench. Even if that is to be principle of constructive resjudicata will apply.

In view of the above this petition is dismissed. However, it is open to the petitioner to move an application in the earlier writ petition and such an application if moved will be decided in accordance with law.

Sri A. K. Gaur learned counsel appeared for the respondents."

5. A perusal of the order dated 31-3-2000 shows that Writ Petition No. 8411 of 2000 was dismissed with a liberty to the petitioner to file application in Writ Petition No. 7822 of 1999. Accordingly an application was moved in Writ Petition No. 7822 of 1999 and by order dated 14-7-2000 the judgment dated 24-2-1999 was recalled and the respondent was given one month time to file counter-affidavit.

6. Thereafter by order dated 3-11-2003 the Writ Petition No. 7822 of 1999 was dismissed by the following order :--

"Heard.

The names of five counsels have been shown in the cause list and only one of them Miss Usha Kiran has sent illness slip. We are informed by Sri A.K. Gaur, learned counsel for the respondent that the U.P.F.C. has over Rs. one crore recovery due from the petitioner. We are not inclined to adjourn the case. The

petition is dismissed for default. Interim order if any is vacated."

7. Now an application has been filed for recalling the aforesaid order. In our opinion both these petitions being Writ Petitions Nos. 7822 of 1999 and 8411 of 2000 deserve to be dismissed.

8. Learned counsel for the petitioner has submitted that the recovery should first proceed against the principal debtor or against the mortgaged property and only thereafter against the guarantor. This submission is not correct. In *State Bank of India Vs. Messrs. Indexport Registered and others*, the Supreme Court held that the decree-holder cannot be forced to first exhaust the remedy by way of execution of the mortgage decree alone and then to proceed against the guarantor. u/s 128 of the Indian Contract Act the liability of the surety is co-extensive with that of the principal debtor. There is no legal requirement that the creditor must first proceed against the mortgage property, and only thereafter against the debtor or the guarantor.

9. In *Orissa State Financial Corporation and Another Vs. Hotel Jogendra*, the Supreme Court depreciated the dilatory tactics adopted by the debtor by protracting the litigation and taking indulgence of the Court's process. It was held that this practice is an abuse of the process of the Court, and hence should not be encouraged. Exemplary costs were imposed in that case.

10. In *Chhote Lal Misra Vs. General Manager, U.P. Financial Corporation. Kanpur and others*, the petitioner never showed his intention to pay any part of the debt. He had been merely putting forward one or the other ploy to keep the Financial Corporation at bay. He filed successive writ petitions in this Court. The Court dismissed his petition holding that this was only part of a game to avoid payment of dues.

11. In *Haryana Financial Corporation and Another Vs. Jagdamba Oil Mills and Another*, the Supreme Court overruled its earlier decision in *Mahesh Chandra Vs. Regional Manager, U.P. Financial Corporation and others*, and held that the guidelines issued in *Mahesh Chandra's* case (supra) placed unnecessary restrictions on the exercise of powers by the Financial Corporation contained in Section 29 of the Act.

12. In *Haryana Financial Corporation and Another Vs. Jagdamba Oil Mills and Another*, the Supreme Court observed (paras 6 and 8) :--

The Corporation as an instrumentality of the State deals with public money. There can be no doubt that the approach has to be public oriented. It can operate effectively if there is regular realization of the instalments. While the Corporation is expected to act fairly in the matter of disbursement of the loans, there is corresponding duty cast upon the borrowers to repay the instalments in time, unless prevented by unsurmountable difficulties. Regular payment is the rule and non-payment due to extenuating circumstances is the exception. If the repayments are not received as per the scheduled time frame, it will disturb the

equilibrium of the financial arrangements of the Corporations. They do not have at their disposal unlimited funds. They have to cater to the needs of the intended borrowers with the available finance. Non-payment of the instalment by a defaulter may stand on the way of a deserving borrower getting financial assistance.

As was observed by this Court in Gem Cap's case (AIR 1993 SC 1435) (supra), the legislative intent in enacting the statute in question was to promote industrialization of the States by encouraging small and medium industries by giving financial assistance in the shape of loans and advances, repayable within a stipulated period. Though the Corporation is not like an ordinary money-lender or a bank which lends money, there is purpose in its lending i.e. to promote small and medium industries. The relationship between the Corporation and the borrower is that of creditor and debtor. That basic feature cannot be lost sight of. A Corporation is not supposed to give loan and then to write it off as a bad debt and ultimately to go out of business. As noted, above, it has to recover the amounts due so that fresh loans can be given. In that way Industrialization which is the intended object can be promoted. It certainly is not and cannot be called upon to pump in more money to revive and resurrect each and every sick industrial unit irrespective of the cost involved. That would be throwing good money after bad money."

13. We accept the submission of learned counsel for the U.P.F.C. that it is not obligatory on the Corporation to first proceed against the mortgaged property before proceeding against the petitioner. It is entirely the discretion of the Corporation as to against whom it should proceed.

14. The petitioners have not paid a huge amount of money to the Financial Corporation. This is not a fit case for exercise of our discretion under Article 226 of the Constitution. Writ No. 7822 of 1999 is dismissed with costs. Interim orders, if any, are vacated. Writ Petition No. 8411 of 2000 has already been dismissed on 3-11-2003.