

(2010) 06 KAR CK 0024
In the Karnataka High Court
Case No : Writ Petition No. 3397 of 2008

Sri H.I. Shamshuddin

APPELLANT

Vs

Karnataka State Financial Corporation and Others

RESPONDENT

Date of Decision : 17-06-2010

Acts Referred:

State Financial Corporations Act, 1951 — Section 29, 30, 31, 32

Citation : (2010) ILR (Kar) 3578 : (2010) 5 KarLJ 650

Hon'ble Judges : Ram Mohan Reddy, J

Bench : Single Bench

Advocate : V.N. Madhava Reddy and J.S. Shetty, for the Appellant; Rudragowda, for R1 to 3, Gururaj Joshi and Co., for R1 to 3 and 5 and Shivaswamy, for R4, for the Respondent

Final Decision : Allowed

Judgement

Ram Mohan Reddy, J.—Petitioner, a surety for the loan transaction between the first respondent Karnataka State Financial Corporation (for short "KSFC") and the sixth respondent loanee, mortgaged the petition schedule immovable property belonging to him, by way of memorandum of deposit of title deeds with the first respondent. As a consequence of the sixth respondent failing to repay amounts due under the loan and having committed breach of terms of the loan agreement, the first respondent in exercise of power u/s 29 of the State Financial Corporation Act, 1951 (for short "SFC" Act) opted to realise the amount due by way of sale of mortgaged property and in that regard, addressed a letter dated 02.11.2007 Annexure-"B" to the petitioner extending an opportunity to make payment of the amount due on or before 15.11.2007, failing which, the mortgaged property would be put for sale as indicated in the sale notification Annexure-"C" annexed to the said letter. According to the petitioner, sixth respondent being none other than his son was issued with a letter dated 09.01.2008 Annexure-"D" of the first respondent, and a copy marked to the petitioner, expressing its willingness to the one time settlement, provided Rs.

15,69,256/- is deposited within ten days therefrom, failing which the petition schedule property would be put to sale. The petitioner having not repaid the amount pursuant to the letter Annexure-"B" and the failure on the part of the sixth respondent to take advantage of the one time settlement offer in the letter Annexure-"D", led to the sale of the mortgaged property and execution of the sale deed dated 12.02.2008 Annexure-"E", in favour of the fourth respondent as communicated by letter dated 25.02.2008 Annexure-A of the first respondent informing that in the auction sale of the petition schedule property Rs. 19,00,000/- when realised as sale consideration was appropriated towards the outstandings in the loan amount. Hence, this writ petition for the following reliefs:

a) A writ of certiorari or any other writ or direction in the nature of writ to quash order No. Ka Ra Ha Sa/MJ/3026/8266/07-08, dated 25.02.2008, the copy of which has been produced at Annexure-A to quash the communication dated 02.11.2007 No. Ka Ra Ha Sa/MJ/3023/1831/07-08, issued by the first respondent as per Annexure-B and undated notification issued by the first respondent for sale of the property of the petitioner as per Annexure-C in so as the property of the petitioner mentioned at Sl. No. 3 and also the communication of the first respondent dated 09.01.2008, No. Ka Ra Ha Sa/MJ/3023/5080/5080/07-08, in so far as fixing the unreasonable time of 10 days is concerned, the copy of which has been produced herewith at Annexure-D;

b) declare that the sale deed dated 12.02.2008, registered before the Sub-Registrar, Malavalli on 13.02.2008, executed by the second respondent in favour of the fourth respondent, in respect of the property of the petitioner more fully described in schedule hereunder, under the alleged power u/s 29 of the State Financial Corporation Act, the copy of which has been produced at Annexure-E, is null and void and the same may kindly be set aside;

c) A direction may kindly be issued to the first respondent to settle the loan account of the petitioner and the sixth respondent by accepting the amount of Rs. 15,69,256/- and to release all the properties:

d) Any other writ or order or direction which this Hon'ble Court may deem fit to grant in the facts and circumstances of the case, may please be granted in favour of the petitioner-company with the cost of this writ petition, in the interest: of justice and equity.

2. Petition is opposed by filing statement of objection dated 02.12.2008 of respondents 1 to 3 inter alia contending that the sixth respondent having defaulted in the payment of dues, despite acknowledging the show cause notice and even after rescheduling the loan transaction as on 31.03.2001, the first respondent on 13.01.2001 took possession of the motor vehicle purchased from the loan extended to the sixth respondent and thereafter though sixth respondent on 10.10.2001 undertook to pay Rs. 75,000/- and Rs. 40,000/- per month, the vehicle when released, the sixth respondent made over two post dated cheques for Rs. 20,000/- each, which on presentation were dishonoured.

The loanee hailing failed to discharge the liability, the first respondent exercised power u/s 29 of the SFC Act, to take possession of the vehicle, but could not do so since the vehicle was under repairs. The cheques issued by the sixth respondent at that time, when presented were dishonoured.

3. The petitioner addressed a letter dt. 22.1.2004 seeking release of the mortgaged property which when responded to by letter of the 1st respondent, stating that the property would be released subject to the petitioner paying Rs. 15.60 lakhs there being no response, action was initiated u/s 29 of the "SFC Act" on 20.8.2004 whence the mortgaged property was brought to sale on four occasions. According to the 1st respondent though several correspondence were exchanged between the 6th respondent-loanee the petitioner and itself, there is no appreciable change in the conduct of either the petitioner or the 61" respondent to ensure repayment of the monies due to the KSFC under the Loan account. It is lastly stated that the sale of the mortgaged property, in exercise of power u/s 29 of the "SFC Act" is just, proper and valid and on realizing Rs. 19 lakhs was appropriated against the dues in the account of 6th respondent. Respondents 1 to 3 by a memo dt. 2.6.2010 produced six documents relating to the collateral security agreement; deposit of title deeds; letter of undertaking; the affidavit of petitioner and the members of his family: the power of attorney of the petitioner and his family members and the personal guarantee deed of the petitioner.

4. The only contention advanced by the learned Counsel for the petitioner is that the petitioner being a surety had collaterally secured the loan extended to the 6th respondent by mortgaging the petition schedule immovable property and as the KSFC had no power u/s 29 to sell the mortgaged property without invoking Section 31 of the "SFC Act", the action of sale of mortgaged property culminating in the sale deed and appropriation of Rs. 19 lakhs are nonest. Learned Counsel places reliance upon the decision of the Apex Court in Karnataka State Financial Corporation Vs. N. Narasimahaiah and Others, .

5. Per contra learned Counsel for the 1st respondent contends that Section 29 of the "SFC Act" empowers KSFC to recover its dues by enforcing the security offered by the petitioner, in the form of mortgage of the petition schedule property, by way of deposit of title deeds. According to the learned Counsel the second part of Section 29 of the "SFC Act" having not referred to "industrial concern", any property pledged, mortgaged, hypothecated or assigned to the Financial Corporation can be sold. In support of the said contention, learned Counsel places reliance upon the decision of the larger Bench of the Apex Court in Haryana Financial Corporation and Another Vs. Jagdamba Oil Mills and Another, ; Karnataka State Financial Corporation Vs. N. Narasimahaiah and Others, ; Ormi Textiles and Another Vs. State of U.P. and Others, ; Bihar State Financial Corporation v. Chhotanagpur Minerals and Ors. (2009) 2 SCC ; Karnataka State Industrial Investment and Development Corporation Ltd. Vs. S.K.K. Kulkarni and Others, ; and Punjab Financial Corporation v. Surya Auto

Industries (2010) 1 SCC 297.

6. Learned Counsel for the 4th respondent-auction purchaser contends that 4th respondent having participated in public auction and offered the highest bid of Rs. 19 lakhs, being a purchaser for value, his rights be protected.

7. Having heard the learned Counsel for the parties and perused the pleadings, the question for decision making is, whether Section 29 of the "SFC Act" invests a jurisdiction in the KSFC to sell any property pledged, mortgaged, hypothecated or assigned to it other than that of the Industrial Concern ?

8. The answer to the question need not detain the court for long as it is no more res integra in the light of the authoritative pronouncement of the Apex Court in Karnataka State Financial Corporation Vs. N. Narasimahaiah and Others, The Apex Court having regard to Section 29, 30, 31, 32 and 32G interpreted Section 29 as a special provision made in derogation to the general right of the citizen and hence should receive a strict construction. Having regard to the definition of "industrial concern" under the SFC Act, the State Financial Corporation, for the purpose of enforcing its liability of the industrial concern, it is held, could take recourse both u/s 29 and 31 of the SFC Act. The default contemplated u/s 29 is said to be that of the "industrial concern", and the creation of a liability of the "industrial concern" which may arise due to default in repayment of any loan or advance or any instalment under an agreement or failing to meet its obligation in relation to any guarantee given by the Corporation or complying with the terms of the agreement with the financial corporation. Their lordships interpreting the use of the words "as well as" in the second part of Section 29 of the SFC Act held that the said Section nowhere states that the Corporation can proceed against the surety even if some properties are mortgaged or hypothecated by the surety. The observations of their lordships, in the circumstances, is apposite:

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 right 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. The liabilities of a surety or the guarantor to repay the loan of the principal debtor arises only when a default is made by the latter.

21. The words "as well as" in our opinion play a significant role. They confer two different rights but such rights are to be enforced against the same person viz. The industrial concern. Submission of the learned Senior counsel that the second part of Section 29 having not referred to "industrial concern", any property pledged, mortgaged, hypothecated or assigned to the financial corporation can be sold, in our opinion cannot be accepted. It is true that Sub-section (1) of Section 29 speaks of guarantee. But such a guarantee is meant to be furnished by the corporation in favour of a third party for the benefit of the industrial concern. It does not speak about a surety or guarantee given in favour of the

corporation for the benefit of the industrial concern.

9. Although Sri. Joshi, learned Counsel for KSFC points out to the other reported opinion on which reliance is placed, I find no necessity to advert to all those judgments since the decision in Karnataka State Financial Corporation Vs. N. Narasimahaiah and Others,), is neither modified, reconsidered, distinguished, nor set-aside, but infact is followed in the subsequent judgments and hence holds the field as on date. The contention advanced by the Learned Counsel for the respondent KSFC stands repelled.

10. The petitioner-surety and mortgagor of the petition schedule immovable property, to secure the loan extended to the 6th respondent, cannot be said to be aggrieved by the communication dt. 9.1.2008 Annexure-D addressed to the 6th respondent fixing 10 days time to make payment under the OTS scheme. In that view of the matter the reliefs to quash Annexure-"D" and to direct the 1st respondent to settle the loan account by accepting Rs. 15,69,256/- and release the property, too, must stand rejected.

In the result, the writ petition is allowed in part. The communications dt. 2.11.2007 and 25.2.2008 Annexures-B and A respectively and the sale notification Annexure-"C" are quashed. As a consequence the sale deed dt. 12.2.2008 Annexure-E executed by the 2nd respondent in favour of the 4th respondent conveying the petition schedule property is declared as null and void. It is unnecessary to state that respondents 1 to 3 shall forthwith refund the sum of Rs. 19 lakhs with interest at the rate of 6% p.a. from the date of deposit upto the date of payment, including stamp duty and registration charges paid by the 4th respondent. The Respondent KSFC is at liberty to recover the money due to it by enforcing the security offered by way of mortgage of the petitioner's property in a manner known to law.