

(2008) 01 PAT CK 0045
In the Patna High Court

The Bihar State Financial Corporation and Others	APPELLANT
Vs	
Parmanand Kumar etc.	RESPONDENT

Date of Decision : 31-01-2008

Acts Referred:

Constitution of India, 1950 — Article 14
State Financial Corporations Act, 1951 — Section 29

Citation : AIR 2008 Patna 105

Hon'ble Judges : Rajesh Balia, C.J;Barin Ghosh, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

1. Heard counsel for the parties.
 2. All these cases raise common issue and have been decided by learned Single Judge by a common order 12-2-2007. We propose to do the same.
- 2A. Shorn of all elaborations, the key issue raised in these appeals is about the classification made in the scheme framed by the appellant Corporation established under the State Financial Corporation Act, 1951 (hereinafter referred to as the Act) for the State of Bihar. The scheme is known as BSFC OTS (One Time Settlement) Scheme. The scheme is meant for inviting willing applicants who are debtors defaulters of the Corporation for one time settlement under the terms and conditions of the Scheme. For the purpose of scheme the original promoters of the Unit in default have been classified in two categories (i) those defaulter promoters against whom no action u/s 29 of the Act has been taken by the Corporation for taking over the management or possession or both of industrial concerns with a right to transfer by way of lease or sale and realize the property pledged, mortgaged, hypothecated or assigned to the Financial Corporation as well those industrial concerns against which action has been taken u/s 29 of the Act, but no attempt for transfer of such assets of the industrial unit has been made by the Corporation are classified as one Class and (ii) those industrial unit against whom action u/s 29 of the Act has been taken

and an abortive attempt has been made to transfer the assets of such unit, in the control and management of the Corporation, as distinct class for more onerous treatment.

3. As per the Scheme originally framed the former class of promoters were only entertained under the scheme for One Time Settlement but the latter was totally kept out. However, the scheme was modified and the latter class was also entertained in the scheme but on condition that in addition to amount payable by defaulter promoter under terms and condition of the OTS Scheme, the latter class of defaulter promoters also pay the retention money as per the aborted attempt to transfer these properties to those buyers who had come at the auction but failed to purchase such assets, and no transfer of assets took place.

4. Initially the proviso as originally inserted in Clause (1) was challenged. But during the pendency of the writ application the original provision was amended as explained about. We shall presently notice the texture of the scheme excluding the second category of promoters from entering the OTS Scheme.

5. The contention of the respondents petitioners had been that this classification of the promoters in two classes is without any reason and such classification having no rational nexus with the object sought to be achieved for introducing one time settlement scheme (OTS), is violative of Article 14 of the Constitution.

6. The learned Single Judge has accepted the contention of the petitioners respondents and has quashed the relevant provision of the scheme requiring defaulting promoters, where attempt to transfer their assets by the Corporation, have failed are required to pay the retention money in addition to money payable under the settlement scheme.

7. Before us, there is no dispute that all the petitioners respondents have either deposited the settlement amount required to be paid under the scheme in full or have made the initial deposit for inviting consideration of their OTS application but due to aforesaid controversy the balance amount remained outstanding. Some of them, it is stated, have also paid retention money.

8. The object of the one time scheme is stated to be to reduce the old Non Performing Assets (NPA) accounts of the Corporation and enhance recovery from them. The Board has approved one time settlement scheme for settlement with the loanee concerns. Thus the object of scheme is to reduce Non Performing Assets accounts by making recoveries from existed debtors--whether promoters or transferee of assets, when sale price has been converted into term loan in favour of buyers under One Time Settlement Scheme and the same is primarily meant for the original debtors of the Corporation to whom loans have been advanced.

9. Clause (1) of the Scheme which deals Eligible Categories, is relevant for our purposes. This Clause I, originally framed rules which read as under:

I. Eligible Categories:

The following categories of loanees/purchasers/promoters/guarantors would be eligible for One Time Settlement under this scheme:

a) All Original Promoters/Guarantors of NPA units categorized in the Doubtful and Loss categories as per records or BSFC as on 31-3-2005.

b) All promoters of the units who applied for BSFC OTS Scheme 2004 but could not liquidate the dues. Such units are at liberty to apply for BSFC OTS Scheme 2006 as a new case and their settlement amount shall be as for category 1(a). Normally those who opted for OTS 2004 whether defaulted or not and whether withdrawn or not are at liberty to apply afresh OTS 2006. If they so apply on that date they would be deemed to have withdrawn from OTS 2004 if not already withdrawn. In such cases all payment made previously under OTS 2004 including the forfeited amount will be adjusted towards normal repayment and their POS will be calculated as on date of applying for OTS 2006 and new settlement worked out accordingly.

However OTS 2004 concerns who have not defaulted and are continuing and who do not opt for OTS 2006 can also opt for special concessions as given Para 14.

(c) All such purchasers who have purchased assets on or above or below Balance Outstanding Amount and have subsequently become NPAs in the Doubtful and Loss categories as per records or BSFC as on 31-3- 2005 for the purpose of their balance consideration amount deemed as loan.

(d) All promoters/guarantors whose mortgaged assets have been sold below Balance Outstanding Amount and who have not repaid the balance amount or outstanding dues shown as outstanding in the loan ledger of the original unit, which amount remains to be recovered from the original promoter(s)/ guarantor(s) of the unit.

However Promoters/guarantors of the unit for which sale order has already been issued and action for retention of unit as per terms of the sale order has not been taken by them shall not be eligible for taking benefits of this OTS scheme.

10. This scheme was promulgated by the Corporation vide its Circular No. 05/06-07. After amendment in the aforesaid Clause 1, the following provision was made which reads-

Where sale order was issued in past and the promoter failed to retain the unit and purchaser also did not purchase the unit thus rendering the sale order ineffective, and unit could not be handed over and sold thereafter, promoters of such unit may be allowed to avail the facilities of OTS under any appropriate eligible Plan but the must now deposit the specified initial money for retention before applying for OTS. The delay in time for deposit of initial retention money will be deemed condoned.

11. It will be apposite here to notice the scheme of Section 29 about transfer of assets of the debtors by the Corporation which has been acquired by it u/s 29

with right to transfer the same in the manner stated in that section.

12. Section 29 of the Act reads as under:

29. 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 repayment 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 realize the property pledged, mortgaged, hypothecated or assigned to the Financial Corporation.

(2) Any transfer of property made by the Financial Corporation, in exercise of its powers under Sub-section (1), shall vest in the transferee all rights in or to the property transferred (as if the transfer) had been made by the owner of the property.

(3) The Financial Corporation shall have the same rights and powers with respect to goods manufactured or produced wholly or partly from goods forming part of the security held by it as it had with respect to the original goods.

(4) (Where any action has been taken against an industrial concern) under the provisions of Sub-section (1), all costs, (charges and expenses which in the opinion of the Financial Corporation have been properly incurred) by it (as incidental thereto) shall be recoverable from the industrial concern and the money which is received by it shall, in the absence of any contract to the contrary, be held by it in trust to be applied firstly, in payment of such costs, charges and expenses and, secondly, in discharge of the debt due to the Financial Corporation, and the residue of the money so received shall be paid to the person entitled thereto.)

(5) (Where the Financial Corporation has taken any action against an industrial concern) under the provisions of Sub-section (1), the Financial Corporation shall be deemed to be the owner of such concern, for the purposes of suits by or against the concern, and shall sue and be sued in the name of (the concern).

13. A perusal of Section 29 of the Act makes it very clear that notwithstanding management, control and possession of the assets pledged, mortgaged, hypothecated or assigned to the Financial Corporation, may have been taken over by the Corporation, yet the ownership right remain with the Corporation until such assets are transferred and vested to transferee. Sub-section (2) of Section 29 of the Act unequivocally states that any transfer of property made by the Financial Corporation, in exercise of its powers under Sub-section (1), shall vest in the transferee all rights in or to the property transferred had been made by the owner of the property. This is indicative of the fact that merely by taking

action u/s 29 of the Act the Corporation does not become owner of the property nor in any sense the ownership rights in assets vesting in the promoters extinguish. Corporation is only authorized by law to effect transfer of such assets for recovery of its dues. The transfer of debtor's assets is allowed by the Corporation, not as property of Corporation but only as property of the debtor unit. It is considered as transfer by the owner vesting the owner's interest in the property in the transferee. Until the transfer actually takes effect, the proprietary rights continues to vest in the promoters and that right is not defeated even if the Corporation has made abortive attempt to transfer the property by any of the methods envisaged under the provisions. Therefore, the rights, title of the defaulter promoter qua the property remains the same until his/its rights are extinguished by completion of transfer. Until the transfer is completed and the promoter's rights are extinguished, his status continues to be a defaulter owner of the assets and the Corporation continues to be in control of its assets which has been pledged, mortgaged, hypothecated or assigned by way of security for the purpose of management, with a right to effect recoveries therefrom by exercising its right of transferring the property and appropriate the recoveries towards its dues.

14. In the context of the present controversy, Sub-section (4) also assumes importance inasmuch as it provides that all the expenses incurred for taking steps for transfer of the property are the liability of the owner of the assets and to be deducted from the recovery made from such assets. It is only after deducting or adjusting the expenses or cost of expenses of transfers, the remainder is adjusted against the outstanding dues to Corporation. After outstanding of Corporation is satisfied the balance is to be applied to satisfy the other debts of the loanee. Residue if any, goes to the promoters or its successors. Under the statutory scheme the Corporation while transferring the assets of debtor, acts only as a person authorized by law to deal with assets of debtor and acts only as such in applying the proceeds of transfer for discharging the liabilities of owner of assets so transferred. This provision conclusively establishes the statutory scheme of continued ownership of debtor promoters until assets vest in transferee as transferees from the owners.

15. It is therefore to be seen whether a promoter's position is altered or becomes different if no transaction of transfer is attempted or an attempt to transfer does not fructify.

16. To us, it appears that for the purposes of OTS scheme the object with which it has been framed, no distinction can be made amongst the defaulters promoters whose assets are with the Corporation for entertaining them under one time settlement scheme of 2006, and different terms cannot be offered for this reason alone.

17. Whenever the assets of debtor is sought to be transferred for realization of dues, whether under statutory power as u/s 29 of the Act or in execution of a decree of the Court under Code of Civil Procedure, it is now well accepted norm

that before the sale is concluded and debtor's rights in property to be transferred are extinguished, an opportunity is required to be given to the defaulter to pay the realizable sale price as has been offered for it by the prospective buyer and retain the same for himself. It is only after this exercise that the sale can be concluded by the Corporation and the cost of conducting such transfer may be first adjusted against the realization. Only remainder can be appropriated towards the outstanding of the creditor--Corporation in the first place, and thereafter towards other debts. But this stage is reached only if sale or transfer actually becomes effective. But by merely not accepting the opportunity, the rights of debtor in asset are not extinguished. Rights of ownership in such asset continues to vest with debtor until the sale is concluded. The action of attempting to sale or transfer the asset of debtor is not depended on the debtor's will but is the action of Corporation vested with statutory authority to take such action, Hence until transfer of assets actually takes place by vesting all interest of owner In transferee, the position of promoter debtor, owner of both assets vis-a-vis Corporation and such assets remain as before. His position as a defaulter-promoter does not get worse.

18. It is not in dispute before us that under the rules relating to transfer of assets u/s 29 of the Act, which belongs to loanees, before conclusion of a transaction of a transfer, option is to be given to the loanee promoters for paying the retention price, so that transfer may not be concluded and his rights may not be lost on such conclusion.

19. But merely because the owner of the property failed to exercise option, his rights in the property is not extinguished until sale actually is concluded. If sale is not concluded for any reason, the owner's title in the property continues to be the same as before, be it for the failure on the part of the prospective buyer to appear and pay the purchased price or for any reason the auctioneer does not proceed further in the matter.

20. The position is very obvious from the scheme also. From Paragraph (c) of Clause (1), it is clear that it is only such purchaser in whom the property has been vested as a result of conclusion of transfer has been made eligible to participate in OTS Scheme. This position has been further clarified when the following clause has been inserted as explanatory clause in respect of defaulter buyers.

In cases where, after issue of the sale order and on failure of the promoter to retain the assets, purchasers have deposited the initial consideration amount and after execution of the agreement, assets have been handed over to the purchaser in such cases only purchaser is to pay the dues in terms of sale order and they may settle their dues under eligibility category 1 (c) and plans C or D of the Scheme. For the promoters in such cases settlement is available only under eligibility category 1 (d)--Plan E for the loan outstanding against them. But they will not get back the unit.

21. It may be noticed under Sub-section (4) of Section 29, where assets of the debtor is transferred for less than the outstanding amount, while the sale consideration is adjusted against dues of promoter, though such consideration is converted into term loan in favour of buyers on receipt of initial deposit, the promoter continues liable towards Corporation for unadjusted outstanding amount. This speaks for the reason behind above clause, Buyer as well as promoter both can enter into OTS Scheme qua their respective out standings. But since on transfer right of ownership vest in the buyer and ownership rights of promoter in transferred asset extinguish, he is precluded from getting back the unit in such case, though the buyer by entering the settlement avoid action against him u/s 29.

22. This makes out the distinction between position of a purchaser under a concluded transaction and a promoter whose property have not been transferred. That is to say eligibility to enter into OTS Scheme by the promoter is for two fold objects. One in case owner's proprietary interests in assets continues, the other is that on settlement the owner gets back the unit, Where right of ownership is extinguished, OTS is only for reducing the outstanding as per the Scheme.

23. The impugned provision in fact tries to make distinction between defaulter promoter whose ownership property has not been extinguished but who continues to be owner on the basis of no attempt having been made to transfer by the Corporation on one hand and on the other where the promoter defaulter continues to be owner of such assets because the Corporation has failed in making such transfer even after attempts to do so. The reason for this classification amongst the defaulter promoters whose property is in possession of the Corporation but ownership continues to vest in the defaulter is unfathomable. The scheme does not throw any light on the reasons for making such classification on the basis of an abortive attempt to transfer and where no attempt made in transfer of the property, amongst defaulter promoters whose ownership rights have not extinguished.

24. The only reason which has been stated under the memo of appeal of deliberations before modifying the scheme to get the information, is based on hypothesis that had the purchaser paid the money of initial deposit, the promoter would have lost his right. It reads-

(a) Sale order was issued in past from 1995 onwards when option of retention by promoter was given. In number of cases promoter did not retain the unit in terms of the sale order but the purchaser also failed to deposit initial consideration price, failed to execute agreement and take over the assets and thus failed to purchase the assets. The assets continued to remain with the promoters, and it has not been sold so far.

In this situation when further sale offer has not been received and the Corporation is to recover its dues, promoters of such unit can be allowed to avail the benefit of OTS scheme.

(b) Arising out of above, one situation can be visualized where, after issue of the sale order and on failure of the promoter to retain the assets, purchaser may have deposited the initial consideration amount and after execution of the agreement assets might have been handed over to the purchaser. In such cases rights of the promoters have extinguished on the assets and only purchaser is to pay the dues in terms of sale order and on failure to pay Corporation can take further action for sale or they may settle their dues under eligibility category 1 (c) of the scheme. For the promoters in such cases settlement is available only under eligibility category 1 (d)--Plan E.

25. These reasonings show that because purchaser could at the relevant time have taken a property on deposit of initial money but has failed to do so a Corporation is not able to recover its dues because of continued NPA, under OTS, the promoter is sought to be made liable for purchaser's default in deposit of initial money. Classification based on such ground can hardly have any nexus to object sought to be achieved viz recovery of dues from NPA of debtor promoter who continued to be owner of assets pledged, secured or assigned as security with the Corporation. No distinction can be made for classifying defaulter promoter who continued to be owner of assets when OTS Scheme is introduced for the reason not attributable to such promoter for failure of attempts to sale, but which is attributable to default of purchaser or reasons not attributable to promoter. If the sale would have been affected as envisaged in the reason, the promoter's rights would have been extinguished. Such case is otherwise dealt in the scheme as noticed above.

26. We are, therefore, in agreement with the findings of the learned Single Judge that the classification of defaulter promoters and owners of assets of such unit results in discrimination being founded on reasons having no nexus with object sought to be achieved is therefore violative of Articles 14 of the Constitution of India and not sustainable.

Accordingly, the appeals fail and they are hereby dismissed.