(2001) 05 AHC CK 0159

In the Allahabad High Court

Case No : F.A.F.O. No. 610 of 2001

U.P. Financial Corporation — APPELLANT

Vs

Garlon Polyfeb Industries and others — RESPONDENT

Date of Decision : 24-05-2001

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2, Order 43 Rule 1, 151
Contract Act, 1872 — Section 128
Recovery of Debts Due to Banks and Financial Institutions Act, 1993 — Section 16, 17
State Financial Corporations Act, 1951 — Section 29, 31
Uttar Pradesh Public Moneys (Recovery of Dues) Act, 1972 — Section 3

Citation : AIR 2001 All 286 : (2001) 3 AWC 1790 : (2001) 2 UPLBEC 1558

Hon'ble Judges : S.K. Jain, J;G.P. Mathur, J

Bench : Division Bench

Advocate : P.S. Baghel, for the Appellant; Rajesh Srivastava, for the Respondent

Final Decision : Allowed

Judgement

G.P. Mathur, J.—This appeal under Order XLIII, Rule 1 (r) C.P.C. has been preferred by the defendant against the order dated 6.1.2001 of Civil Judge (Senior Division), Kanpur Nagar, by which injunction application filed by the plaintiffs was allowed and the defendant-appellant has been directed to take recourse to proceedings u/s 29 of the State Financial Corporation Act (hereinafter referred to as the Act) and to recover the amount by enforcing the personal liability only if entire amount due is not recovered in the aforesaid manner.

2. The case set up by the plaintiffs-respondents is as follows. The plaintiff Nos. 1 and 2 are companies registered under the provisions of Indian Companies Act and plaintiff Nos. 4 and 5 are common directors In both the companies. The plaintiffs applied for loan and the Uttar Pradesh Financial Corporation (for short U.P.F.C.) granted a term loan of Rs. 45.50 lacs, a working capital term loan of Rs. 55 lacs and ERS loan of Rs. 81 lacs to the plaintiff No. 1. The plaintiff No. 2 was sanctioned a working capital term loan of Rs. 13 lacs. There was some dispute

with the authorities of Central Excise Department, due to which working of the unit was stopped. The plaintiffs made request to the defendant for rescheduling the payment of the balance amount. The assets and properties of plaintiff Nos. 1 and 2 are mortgaged with the defendant. The defendant intimated on 9.2.2000 to the plaintiffs that it had decided to issue recovery certificates against the directors of the plaintiff-companies. The defendant had not taken any step u/s 29 of the Act to take over the assets of the companies and it was threatening to issue personal recovery against the plaintiff Nos. 3. 4 and 5 who are the directors of the companies. The relief claimed in the suit is that a decree for permanent injunction be passed restraining the defendant from realising any amount from the plaintiffs or their guarantors Without resorting to action u/s 29 of the Act. i.e., disposing of assets and primary security which have been mortgaged.

3. The plaintiffs also moved an application under Order XXXIX, Rules 1 and 2 read with Section 151, C.P.C. praying that an ad interim injunction be passed in favour of the plaintiffs restraining the defendants and Its officials from realising any amount from the plaintiffs or their guarantors without resorting to action u/s 29 of the Act, i.e., disposing of assets/primary security already mortgaged till the final disposal of the suit. The application was accompanied with an affidavit of plaintiff No. 5 wherein the same facts have been stated as in the plaint.

4. The defendant-appellant filed an objection against the injunction application filed by the plaintiffs. The case set up in the objection is that an amount of Rs. 2,24,44,177 was due against plaintiff No. 1 and an amount of Rs. 13,67,704 was due against plaintiff No. 2. The plaintiff Nos. 1 and 2 had neither paid the principal amount nor the interest on the due dates as per the agreement. The defendant rescheduled the instalments of the loan but even after availing of the said facility, the plaintiffs did not pay the instalments as per the agreed reschedulement. It was also pleaded that the directors of the plaintiff companies had stood as guarantors or sureties and they are also liable to repay the loan in their personal and individual capacity. The U.P.F.C. was entitled to take legal proceedings both against the principal borrower and also the guarantors to recover the entire amount. The liability of the guarantors was co-extensive with the liability of the borrower and, therefore, personal recovery certificate could be issued against the guarantors of the loan under the terms of the personal guarantee bonds executed by them. It was also asserted that the plaintiffs have neither prima facie case nor balance of convenience in their favour, and the injunction application filed by the plaintiffs was misconceived and it is also barred u/s 3 of the U. P. Public Moneys (Recovery of Dues) Act.

5. The learned Civil Judge (Senior Division) held that the plaintiffs had paid more than Rs. 1 crore towards repayment of the loan by the year 1998. No production was being made in the unit of the plaintiffs and in that connection, they had made several representations to the defendant for re-schedulement of loan. This showed that the plaintiffs had no mala fide intention not to repay the amount. It was further held that the proceedings for recovery of the loan from the personal

property of the directors should be initiated only if the outstanding amount cannot be recovered from the hypothecated properties. Since the value of the hypothecated property was much more than the outstanding dues, the defendant should first proceed to recover the amount by initiating proceedings against the said property. On these findings, the injunction application was allowed and injunction in terms already mentioned above was granted.

6. We have heard learned counsel for the parties and have perused the record. It is an admitted fact that the plaintiff Nos. 4 and 5 who are the directors of the companies (plaintiff Nos. 1 and 2) had stood as guarantors for payment of the loan. A copy of the bond of the guarantee executed by the plaintiff Nos. 4 and 5 was produced before us by the learned counsel for the appellant. This contains several conditions. The condition Nos. 2, 4, 6 and 7 read as follows :

"2. That I/We waive all rights which I/We may become entitled to as surety/ sureties to compete with you in obtaining payment of the money due or to become due to you in respect of your said loan as against the said company/firm.

4. That it shall not be necessary for you to sue the said company before suing me for the amounts due here under.

6. That till such time as this guarantee is not released by you I/We and my/our property/ properties and all money that belongs to me/us shall be available to you for repayment of all moneys which shall at any time be due from the said company/firm subject to the limit aforesaid.

7. That the liability to repay the amount due to you shall arise on demand being made by you on the above address and the amount due to you may also be recovered as arrears of land revenue."

7. The terms of the guarantee executed by the plaintiff Nos. 4 and 5 show that they executed the bond wherein it was agreed that the money due from, the company could be recovered from them and it was not necessary for the defendant to first proceed against the company for recovery of the amount. The condition No. 7 shows that the liability of the plaintiff Nos. 4 and 5 shall arise on demand being made and the amount due could be recovered as arrears of land revenue. There is no condition in the bond of the guarantee executed by plaintiff Nos. 4 and 5 that the defendant U.P.F.C. shall first initiate proceedings u/s 29 of the Act or shall first proceed to recover the amount from the properties which had been hypothecated in its favour and only thereafter, proceed against the plaintiff Nos. 4 and 5. Under the terms of the guarantee, U.P.F.C. could straightaway proceed to recover the amount from the plaintiff Nos. 4 and 5 even before taking any step to recover the same from the companies (plaintiff Nos. 1 and 2).

8. Section 128 of the Contract Act provides that the liability of the surety is co-extensive with that of the principal debtor unless it is otherwise provided by the contract. This provision was considered in State Bank of India Vs. Messrs.

Indexport Registered and others, , and it will be useful to reproduce the paragraphs 14, 15, 16, 17 and 18 of this judgment:

"14. In Pollock and Mulla on Indian Contract and Specific Relief Act, Tenth Edition, at page 728 it is observed thus :

"Co-extensive -- Surety''s liability is co-extensive with that of the principal debtor.

A surety''s liability to pay the debt is not removed by reason of the creditor''s omission to sue the principal debtor. The creditor is not bound to exhaust his remedy against the principal before suing the surety, and a suit may be maintained against the surety though the principal has not been sued."

15. In Chitty on Contracts, 24th Edition, Volume 2 at page 1031 paragraph 4831 it is stated as under:

"Conditions precedent to surety.--Prima facie the surety may be proceeded against without demand against him, and without first proceeding against the principal debtor."

16. In Halsbury''s Laws of England. Fourth Edition, Vol. 20, paragraph 159 at page 87 it has been observed that "it is not necessary for the creditor, before proceeding against the surety, to request the principal debtor to pay, or to sue him, although solvent, unless this is expressly stipulated for".

17. In Hukumchand Insurance Co. Ltd. v. Bank of Baroda, a Division Bench of the High Court of Karnataka had an occasion to consider the question of liability of the surety vis-a-vis the principal debtor. Venkatchaliah, J. (as His Lordship then was) observed :

"The question as to the liability of the surety, its extent and the manner of its enforcement have to be decided on first principles as to the nature and incidents of suretiship. The liability of a principal debtor and the liability of a surety which is coextensive with that of the former are really separate liabilities, although arising out of the same transaction. Notwithstanding the fact that they may stem from the same transaction, the two liabilities are distinct. The liability of the surety does not also, in all cases, arise simultaneously."

18. It will be noticed that the guarantor alone could have been sued, without even suing the principal debtor, so long as the creditor satisfies the Court that the principal debtor is in default."

Thus, there cannot be even a slightest doubt that the U.P.F.C. is entitled to recover the amount even before taking any proceedings against the principal debtor, i.e., plaintiff Nos. 1 and 2.

9. Under the State Financial Corporation Act, several modes have been given to recover the loan. In Andhra Pradesh State Financial Corporation Vs. M/s. GAR Re-Rolling Mills and another, , it was held that the Corporation is not bound to adopt only one of the remedies provided under the Act and it can recover the amount

by taking recourse to Section 31 of the Act but withdraw or abandon it at any stage and take recourse to the provisions of Section 29 of the Act. It was further held that while the Corporation cannot simultaneously pursue two remedies, it is under no disability to take recourse to the rights and remedy available to it u/s 29 of the Act, even after an order u/s 31 has been obtained but without executing it and withdraw from those proceedings at any stage. This authoritative pronouncement clearly shows that it is open to the U.P.F.C. to recover the amount in any manner. If the law permits several modes to recover the amount, the debtor can not dictate which mode should be adopted by the creditor. It is, therefore, not permissible for a court to issue an injunction directing U.P.F.C. to first proceed u/s 29 of the Act. Such an order is wholly against the provisions of the State Financial Corporation Act and also the Contract Act. The impugned order dated 6.1.2001, therefore, cannot be sustained and has to be set aside.

10. Sri R. N. Singh learned senior counsel for the plaintiff-respondents has submitted that in view of Section 17 of the Recovery of Debts due to Banks and Financial Institutions Act, 1993, the Tribunal alone has the authority and jurisdiction to entertain and decide the applications from the financial Institutions for recovery of debts due to them and such a power cannot be exercised by any other Court or authority in view of Section 18 of the aforesaid Act. Learned counsel has further submitted that in view of the fact that U.P.F.C. has been notified by means of notification issued on 28.3.1995 u/s 4K of the Indian Companies Act as a financial institution, the debt due to it can only be recovered by moving an application u/s 17 of the Act and provisions of U. P. Public Moneys (Recovery of Dues) Act cannot be invoked. An identical plea was repelled by a Division Bench of this Court in Civil Misc. Writ Petition No. 13738 of 2001, M/s. Unique Bubile Tube Industries v. U.P.F.C., decided on 27.4.2001. We do not want to express any concluded opinion on this question as such a plea has not been taken in the plaint. This plea was neither raised nor considered by the learned Civil Judge (Senior Division). We have already referred to the reasons given by the learned Civil Judge for granting ad interim order and, in our opinion, they are totally contrary to the settled principles of law. We are, therefore, of the opinion that the impugned order must be set aside.

11. In the result, the appeal succeeds and is hereby allowed. The impugned judgment and order dated 6.1.2001 of the learned Civil Judge (Senior Division) is set aside and the injunction application No. 5C moved by the plaintiffs is rejected.

