
(2002) 12 RAJ CK 0004
In the Rajasthan High Court
Case No : Civil Writ Petition No. 917 of 1992

Vraj Tractors Industries

APPELLANT

Vs

State of Rajasthan and Another

RESPONDENT

Date of Decision : 13-12-2002

Acts Referred:

State Financial Corporations Act, 1951 — Section 29
Transfer of Property Act, 1882 — Section 29, 48, 57, 58, 69

Citation : (2003) 2 WLN 621

Hon'ble Judges : Rajesh Balia, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Rajesh Balia, J.—Heard learned Counsel for the parties.

2. This writ petition is filed by the petitioner. The petitioner purchased the property in question at an auction held on 21.3.1990 by the Rajasthan Financial Corporation in exercise of its power u/s 29 of the State Financial Corporation Act. After the petitioner had obtained possession of the property, the first demand, which the petitioner received from the respondent District Industry Centre, was dated 9.4.1991 calling upon the petitioner to pay the amount due to District Industry Centre, Jodhpur, which was due to M/s. Jodhpur Auto Agric Products as the property purchased by the petitioner was subject to second charge in favour of the Centre, for the loan of margin money advanced to M/s. Jodhpur Auto Agric Products whose property the petitioner has purchased at auction conducted by the Rajasthan State Financial Corporation as aforesaid.

3. The petitioner disputed his liability to pay that amount on the ground that he has purchased the property only subject to liabilities payable to RIICO, RFC and RSEB, no other liability was made subject to auction and therefore, he is not liable to discharge debt payable by the original debtor.

4. In response to this, the petitioner was informed by the District Industry Centre

that the sale agreement between the petitioner and the RFC contains a condition that he has to accept all other liabilities due to M/s. Jodhpur Auto Agric Products and, therefore, he has purchased property subject to all the liabilities of the original owner of the unit and he is liable to discharge the debts of M/s. Jodhpur Auto Agric under the agreement also.

5. This led to correspondence between the petitioner, Rajasthan State Financial Corporation and the DIC under which the RFC clarified to DIC that the petitioner's liability under the auction sale was to discharge the outstanding dues of Jodhpur Agric Products only to RIICO, RSEB and PHED and no other dues of M/s. Jodhpur Auto Agric Products was made subject to the auction. The "other dues", which has been initially written in the sale agreement was also deleted.

6. During the course of hearing the parties were directed to produce the auction notice and condition of sale advertised under which the auction took place, which justifies the contention of the petitioner atleast to the extent that properties were not sold subject to other liabilities as no such condition can be spelt out from the auction notice or the terms and conditions under which auction was being held.

7. Be that as it may, aggrieved with the action of District Industry Centre in refusing to grant permanent registration certificate to the petitioner as a small scale industry, which was necessary for him to avail other reliefs from different departments, unless he pays amount due from M/s. Jodhpur Auto Agric Products, the present writ petition was filed with the following reliefs:

(i) direct the respondent No. 2 to grant permanent registration to the petitioner as S.S.I. Unit.

(ii) quash the impugned orders Annex. 6 dated 9.4.1991, 24.4.1991 or any other adverse order passed by the respondent No. 2.

(iii) hold that the respondents are not entitled to recover the margin loan given to erstwhile firm M/s. Jodhpur Auto Agric Products from the petitioner.

(iv) Any other appropriate writ, order or direction to which the petitioner may be entitled to in the circumstances of the case may be passed.

(v) Costs of this writ petition may be awarded to the petitioner.

8. The reply was filed by the respondents on 2nd August, 1994 specifically taking the plea that the property in question was subject to second mortgage with the DIC, a government department and it has right to enforce its security against the property purchased by the petitioner. The fact that property is subject to second mortgage has not been denied by the petitioner in rejoinder filed by them on 28th August, 2002.

9. In the first instance, the interim order was passed on 12th April, 1993 ordering that unit may be registered provided the petitioner furnishes the bank guarantee in a sum of Rs. 59,675/- the amount then claimed as due by the DIC, in favour of the State of Rajasthan.

10. In the reply submitted by the respondents as noticed above, they stated that in compliance of the direction issued by this Court permanent registration certificate has already been issued to the petitioner, the interim order was, thereafter, vacated on 22nd February, 1995. I am further informed by the parties that thereafter, the petitioner has paid the amount due to the respondent under protest perhaps in connection with some other transactions in which co-operation from the respondent department was necessary.

11. It is the contention of the learned Counsel for the petitioner that since auction was held by the State Financial Corporation in exercise of its power u/s 29 of State Financial Corporation Act and the auction notice of the terms of sale did not inform that sale of assets is stringed with transfer of other liabilities alongwith it, the petitioner cannot be held liable for the amount due against the original debtor namely; M/s. Jodhpur Auto Agric Products towards the respondent District Industry Centre, a part of the department of Industry of the Govt. of Rajasthan. He invited attention of the Court to the notice of auction and terms of sale, which was circulated before the auction was made, which documents have been produced during the course of arguments as required by the Court in furtherance of his contention. In this connection, it was also urged that it was not a transfer of unit as going concern on the basis of its global value, but assets only had been subjected to sale by auction. Therefore, liability of the erstwhile unit whose assets were being sold did not pass on to the buyer.

12. learned Counsel for the petitioner also contended that contrary to conditions of auction though in the sale deed executed in the first instance, a term regarding liability of the buyer to pay the outstanding dues other than RSEB, RIICO with regard to lease of land and PHED, were shown to be dischargeable by the buyer, but the liability towards other departments of the original owner was finally excluded from such transfer by the State Financial Corporation itself when representation to that effect was made. This was a bilateral transaction and third party like DIC could not derive any right or benefits of the agreement initially executed, when finally such condition as to transfer of other liabilities was deleted by bilateral action of parties to sale.

13. Mr. Jain, learned Counsel for the petitioner, invited attention to two letters issued by the State Financial Corporation to the Director of Industries, District Industries Centre time and again that the buyer is responsible only to discharge the liabilities of the original owners towards RSEB, RIICO and PHED none else. Those documents are Annexure-3 dated 16.11.1991, Annexure-4 dated 4.6.1991, Annexure-5 dated 11.3.1991.

14. learned Counsel also invited my attention to the fact that infact the words "dues of other departments" were deleted by rectifying the agreement to sale. In this connection, it was also urged that since DIC was not a party to that agreement and agreement to sale was not a tripartite agreement, on the basis of that agreement, no right can be vested in the respondent District Industry Centre to recover the amount due from M/s. Jodhpur Auto Agric Products from

the petitioner.

15. On the other hand, it was contended by Mr. Bhojak, learned counsel for the respondents, that the sale has been made subject to liability of other departments to be discharged by the buyer expressly as per term of agreement to sale, executed immediately after confirmation of sale in favour of the petitioner, therefore, the petitioner as a buyer cannot deny to discharge the liability to be discharged by him, which is due to the District Industry Centre from the original owner of the assets and therefore, the principle enunciated in Isha Marble's case and Mecson Pvt. Ltd.'s case cannot be invoked in the present case.

16. He also urged that even if there were no agreement to transfer the liability of original owner of the factory under the auction, the assets in question having already been subject to second charge with the respondent through a registered deed and the sale having been affected by the Corporation without notice to subsequent mortgagee namely; the respondent, its right to enforce mortgage against the petitioner as a transferee of the assets, which as a charge attached to it is not destroyed and the respondent can enforce that security against the property in the hands of buyer. The petitioner is now not entitled to any relief.

17. I have carefully considered the rival contentions and am of the opinion that in view of undisputed fact about the existence of second mortgage, which creates an interest in property so mortgaged and goes with the property, the petitioner is not entitled to any relief.

18. The rights of subsequent mortgage are well defined.

19. Mortgage has been defined u/s 58 of the Transfer of Property Act as a transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability. Therefore, a mortgage debt creates an interest in property in favour of mortgagee whether it is by way of first mortgage, second mortgage or successive mortgages.

20. So far as showing the receipt of sale of mortgage property sold at Court auction by the successive mortgagees are concerned, the priorities are determined in accordance with Section 48 of the Transfer of Property Act.

21. Section 91 of Transfer of Property Act provides an independent right to vest in the subsequent mortgagee to redeem the earlier mortgage. By the second or successive mortgage an interest in equity of redemption is created, which otherwise vest in the mortgagor. This is so because once a property is mortgaged creates an interest in such property in favour of the mortgagee, the mortgagor retains only balance of interest which is his right to redeem property before the property is sold in enforcement of such mortgage or right to redeem or foreclosed. Hence after the first mortgage the mortgagor can only transfer or

charge his interest of equity of redemption. This right is created in favour of subsequent mortgagee in addition to right of mortgagor to redeem the mortgaged property.

22. I may notice that provisions relating to parties to suit for foreclosure, sale, or redemption of mortgage were initially included in the Scheme of Transfer of Property Act itself. From Section 185 to Section 90, which have been repealed by the Code of Civil Procedure, 1908 when the provisions in that regard were made in Order 34 of the CPC. The Order 34 Rule 1 requires that subject to the provisions of the Code, all persons having an interest either in the mortgage security or in the right of redemption shall be joined as parties to any suit relating to the mortgage. Explanation to Order 34 Rule 1, CPC further provides that a puisne mortgagee may sue for foreclosure or for sale without making the prior mortgagee a party to the suit and prior mortgagee need not be joined in a suit to redeem a subsequent mortgage. This is on the principle that subsequent mortgagee by enforcing his right against mortgagor, who hold the property subject to first mortgage, really enforces his right against equity of mortgage vesting in the mortgagor and what is sold or foreclosed against the mortgagor is equity of redemption vesting in mortgagor. In case of foreclosure, the mortgagor's equity of redemption comes to vest in subsequent mortgagee and in the case of sale the buyer acquires the mortgagor's equity of redemption to redeem the first mortgage as by sale of equity of redemption in enforcement of the second mortgage, the equity of redemption against the second mortgage shall stand extinguished.

23. Corollary to above provisions, Sub-Rule (3) of Rule 2 of Order 34 provides that where in a suit for foreclosure, subsequent mortgagees or persons deriving title from, or subrogated to the rights of, any such mortgagees are joined as parties, the preliminary decree shall provide for the adjudication of the respective rights and liabilities of the parties to the suit in the manner and form set forth in different form prescribed therein. Very pertinently it speaks that "where the subsequent mortgagee or persons deriving title from him are joined as parties. This provision obviously does not come into play where subsequent mortgagees or persons claiming their rights are not made parties to a suit for foreclosure or a suit for sale. Where such mortgagees or any person deriving title therefrom are made parties, and their rights are adjudicated, obviously by passing of the decree of sale of property, equity of redemption vesting in mortgagor or anyone of the person interested in parties to suit stand extinguished and thereafter, the buyer in these proceedings get the property free from all encumbrances.

24. But the question arises where the said subsequent mortgagee is not a party to suit filed by the prior mortgagee for enforcement of his mortgage and the property is sold in a decree passed in such suit.

25. In that event law appears to be well settled that subsequent mortgagee has right to enforce his mortgage against the mortgagor or the buyer, who acquires

the rights and title of the mortgagor in equity of redemption. However, subsequent mortgagee's interest is not extinguished. He can either sue for enforcement of his mortgage subject to prior right of first mortgage or he can sue for enforcement of his equity of redemption against the first mortgagee. In either case his remedy of enforcing the security against the persons who are holding the property for the time being vis a vis him is not extinguished.

26. If that be so, in the case of sale of property in enforcement of a prior mortgage in a proceeding in which subsequent mortgagee is not a party, his right to enforce the property in the hands of the buyer is not lost.

27. The question arises where the property has been sold by mortgagee without intervention of the Court in exercise of power u/s 69 of the Transfer of Property Act or in the exercise of power u/s 29 of the State Financial Corporation Act which is on the lines of Section 69 of the Transfer of Property Act, giving the State Financial Corporation a right to sell the property mortgaged with it without intervention of the Court.

28. The result, in my opinion, is not different, if auction is conducted after notice to the second mortgagee and he decides to participate in the proceeds of the sale conducted in exercise of right of prior mortgage. The buyer will get the interest in property free from encumbrances of the first mortgagee.

29. But where the second mortgagee has no chance to exercise his right of redemption against the prior mortgagee for want of any notice of such sale by prior mortgagee his right to pursue his remedy or security in the property in the hands of buyer cannot be defeated by unilateral act of first mortgagee without informing the subsequent mortgagee giving him a chance to redeem the first mortgage and put himself in place of first mortgagee.

30. However, there is a vital difference in two aspects in the exercise of right of a mortgagee u/s 69 and u/s 29 of the State Financial Corporation Act in the case of default. Firstly, that Section 29(2) of the State Financial Corporation Act makes it abundantly clear that any transfer of property made by the Corporation in exercise of its powers under Sub-sections (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. The Corporation in the matter of sale is placed in the shoes of mortgagor, who transfers his property to discharge the debts of the Corporation nothing more nothing less. The like provision is not to be found in Section 69. The second major difference in the scheme of two provisions, is that about disbursement of the proceeds of the sale arising from the mortgaged property. This is apparent by reading Section 69(4) of the Transfer of Property Act and Section 29(4) of the State Financial Corporation Act in comparison as under:

Transfer of Property Act:

Section 69(4). The money which is received by the mortgagee, arising from the

sale, after discharge of prior incumbrances, if any, to which the sale is not made subject, or after payment into Court u/s 57 of a sum to meet any prior incumbrances, shall, in the absence of a contract to the contrary, be held by him in trust to be applied by him, first, in payment of all costs, charges and expenses properly incurred by him as incident to the sale or any attempted sale; and, secondly, in discharge of the mortgage-money and costs and other money, if any, due under the mortgage; and the residue of the money so received shall be paid to the person entitled to the mortgaged property, or authorised to give receipts for the proceeds of the sale thereof.

State Financial Corporation Act:

Section 29(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.

A perusal of the aforesaid two provisions in comparison goes to show that on the sale of property u/s 69 the receipts vest in the mortgagee not for the benefit of himself, but for the benefit of persons, who were otherwise entitled to mortgaged property or who were authorised to give receipts for the proceeds of the sale thereof. The payment realised by the sale of the property is to be applied first in payment of all costs, charges and expenses properly incurred by the mortgagee as incident to the sale or attempted sale. This priority is common to both the provisions. Secondly, in discharge of the mortgage money and costs and other money, if any due under the mortgage here the first difference comes.

31. In the Scheme of Section 29, it does not confine to discharge the mortgage debt, but the receipts are to be applied to the discharge of all debts to Corporation. The requirement in the case of sale effected u/s 69 of the Transfer of Property Act is that the residue of money is to be paid to the persons entitled to mortgaged property or to persons authorised to give receipts for the proceeds of the sale thereof. This part may include debt to be paid to the persons interested, who had an interest in the property arising out of the creation of a security by charging property for repayment of the loan or enforcement of any contract as envisaged u/s 58 of the Transfer of Property Act. Those persons are entitled to hold the mortgaged property and also entitled to give receipts for the proceeds of the sale as they have right to proceed arising out of sale of mortgaged property after satisfying the claim of first mortgage in contrary to scheme.

32. Section 29 clearly envisages if any due under the mortgage and the residue

of the money so received shall be paid to the person entitled, it has no reference to subsequent mortgagors or the persons with whom the property is mortgaged as security. Obviously, in such event, if the property is sold by State Financial Corporation without notice to the subsequent mortgagees, denying subsequent mortgagee as chance to redeem the property by making payment of such sum only for which property stands security and on such payment he steps in shoes of the first mortgagee, himself acquiring the right to enforce the mortgage in its entirety against the original owner. The result may still be different, if the same is affected after giving notice to subsequent mortgagee giving him chance to redeem the mortgage in favour of Corporation so as to safeguard his own rights. In the absence of any safeguard, it cannot be held that rights created subsequently come to an end by unilateral resort by Financial Corporation to the selling of property in enforcement of their right to realise security u/s 29.

33. When the District Industry Centre had the right to enforce the equity of redemption against the buyer which we think it had, and buyer has paid amount for whatever reason to safeguard his own interest by discharging debt of the earlier owner, in these circumstances the case for interference in extraordinary jurisdiction is not made out. In such event if buyer can sue or seek remedy through any appropriate proceeding that since the property was sold after notice to the subsequent mortgagee and he has failed to avail his right to redeem property which is vested him and the property to be sold in enforcement of mortgage against mortgagor whose equity of redemption is extinguished, still he cannot claim thereafter equity of redemption to survive.

34. In view of the aforesaid, it is apparent that demand for payment of debt due from Jodhpur Agric Products by the respondent from the petitioner was not wholly without foundation, and could have been made subject matter of enforcement of right by the respondent or by the petitioner which could have been determined by considering the rival pleadings and facts about the prior notice and establishing the contingency for disbursement of the surplus amount by the first mortgagee on the principle applicable to the sale u/s 69 in the light of provision of Section 29 of the SFC Act, 1951 and other provisions of the CPC and Transfer of Property Act.

35. Moreover, after the grant of permanent registration certificate and vacation of interim order the amount has not been paid to get over the subject matter of this writ petition, but to seek some other advantages, which are not subject matter of the writ petition under what circumstances to avail what benefits the amount has been paid by the petitioner is also not before the Court to find whether there was any nexus between such payment to be made to the respondent and securing benefits for the proceeds of the sale at hand.

36. In these circumstances, I am of the opinion that no relief of restitution of amount paid by him can be given to the petitioner in this case. If the petitioner has any remedy under any law to recover the amount from the respondent, he may pursue the same in accordance with law.

37. Accordingly, the petition is dismissed with no order as to costs.