

CASE NO.:
Appeal (civil) 3054 of 2008

PETITIONER:
M/s. Ormi Textiles & Anr

RESPONDENT:
State of U.P. & Ors

DATE OF JUDGMENT: 29/04/2008

BENCH:
S.B. Sinha & Lokeshwar Singh Panta

JUDGMENT:
J U D G M E N T
REPORTABLE

CIVIL APPEAL NO. 3054 OF 2008
[Arising out of SLP (Civil) No. 17139 of 2006]

S.B. SINHA, J :

1. Leave granted.
2. Interpretation and application of Section 29 of the State Financial Corporations Act, 1951 (for short "the Act") is the core question involved herein.
3. Before, however, advertng to the said question, we may notice the basic factual matrix of the matter.
Appellant No. 1 is a partnership firm. It was constituted in the year 1973. It established a factory at Kadrabad in the town of Modi Nagar, U.P. A loan of Rs. 3.96 lakhs was applied for but a sum of Rs. 3.14 lakhs was sanctioned in 1974. Appellant No. 1 was in possession of 1100 sq. yards in Khasra Plot No. 397M, Khata No. 80 situated in Village Kadrabad Pargana Jalalabad. The factory is situated on a land measuring 800 sq. yards. The schedule of the land which was the subject matter of mortgage in favour of the respondent - Corporation reads as under:
"All that piece or parcel of land measuring 800 sq. yards out of Seven Biswas and Five Bigamain, bearing Khasra plot number 397 M Khata No. 80, situate in village Eadarkad, Pargana, Jalalabad, tehsil Ghaziabad district Meerut and bounded:

On the North by: remaining land of Khasra No. 397 F,
On the South by: remaining land of owned by Gur Charan Jit Kaur of Khasra No. 397 M
On the east by: D.K. Road
On the west by: Land belonging to other persons."

Appellant was furthermore granted loan for a sum of Rs.1.51 lakhs as also for a sum of Rs.3,19,800/- during the period 1977-79. According to the appellant, although a substantial part of the loan had been repaid, a sum of Rs.3,19,800/- is still owing and due to the respondent. It has been contended that the mortgaged land admeasuring 800 sq. yards continued to be the security for the said loans.

The industrial unit of the appellant, however, became sick. Efforts to revive the said unit failed. It was contended that the respondent \026 Corporation acknowledged that out of an area of 1350 sq. yards which was in possession of the appellant, only 800 sq. yards was mortgaged in its favour, wherefor a demand for demarcation was made by it in terms of a letter dated 17.07.1990, stating:
"The actual area of land belonging to your unit at

present is around 1350 sq. yards approx. So, therefore, it could not be indentified which portion of land has been mortgaged to the Corporation. In the absence of the demarcating of land mortgaged to the Corporation, we may not be in a position to evaluate the assets mortgaged at site. Keeping in view of this, you are hereby advised to submit the following papers for clarification/ indentification for the plot mortgaged to the Corporation so that we may take action at our end\005"

4. A notice dated 28.12.2005 under Section 29 of the Act was issued by the respondent - Corporation.

A writ petition was filed questioning the legality thereof. Pursuant to an interim order passed by the High Court in the said writ petition, the appellant deposited a further amount of Rs. 2 lakhs. In the meantime, another unit of the appellant became sick and subjected to a notice under Section 29 of the Act wherefor also a writ petition was filed before the High Court which was marked as Civil Misc. Petition No. 7219 of 2006.

5. An advertisement was issued for sale of the appellant's unit covering the land area 7 Siswa, 5 Biswansi (951.25 sq. mtr.) in a newspaper known as 'Amar Ujala' on or about 6.06.2006.

6. The High Court by reason of the impugned judgment dismissed the writ petition filed by the appellants questioning the validity of the said notice, stating:

"Admittedly, the Petitioner approached earlier also this Court against the proceeding initiated under Section 29, of the State Financial Corporations Act, 1951 in Writ Petition No. 6703 of 2006 wherein this Court granted indulgence permitting the Petitioner to pay certain amount within a prescribed time and in the meantime interim order was passed. Thereafter, again the said order was modified and further opportunity was granted to the Petitioner but the Petitioner failed to comply both the said order though undertaking has been given before this Court in the aforesaid Writ Petition in order to obtain the interim order. In the circumstances, the Respondent Nos. 2 and 3 proceed to take over possession under Section 29 of the State Financial Corporations Act, 1951 and hence the present Writ Petition is filed.

In my view, against the same cause of action the present Writ Petition is filed which is not maintainable. Further, the Petitioner has also approached this Court with unclean hands inasmuch as he has already got interim orders from this Court by giving certain undertakings but failed to honour the same and, thus, is not entitled for any equitable relief under Article 226 of the Constitution of India.

In view of the aforesaid facts and circumstances, the Writ Petition is dismissed in limine."

7. Mr. Tripurari Ray, learned counsel appearing on behalf of the appellants, would submit that on a plain reading of Section 29 of the Act, it would appear that the mortgaged property only can be the subject matter of sale.

8. Mr. Shrish Kumar Misra, learned counsel appearing on behalf of the respondents, on the other hand, would contend:

(i) Section 29 of the Act although is in two parts, each part thereof is separate and distinct.

(ii) Power of the Corporation to sell the property is not confined only

to the mortgaged property but the entire industrial unit as the power to redeem the mortgage provides for an additional remedy.

9. Section 29(1) of the Act reads as under:

"29. Rights of Financial Corporation in case of default \026 (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."

10. The Act was enacted to provide for the establishment of the State Financial Corporations. Various statutory powers have been conferred upon the Corporation. It has power to take recourse to various remedies provided under the Act, apart from the terms of the contract entered into by and between it and the borrower as also the provisions of the Transfer of Property Act. It is a 'State' within the meaning of Article 12 of the Constitution of India. Its power is, thus, required to be exercised reasonably and fairly. The right of the Corporation in the case of a default on the part of the borrower is a statutory power. The provisions of the Act conferring such a power require to undergo a purposive construction.

For the purpose of invoking Section 29 of the Act, the borrower must have a liability to the Corporation under an agreement. It must make a default in repayment of any loan or advance, etc. The Corporation in such a situation shall inter alia have the right to take over the management or possession or both of the industrial concerns. This power is in addition to the power of the right to transfer by way of lease or sale and realize the property pledged, mortgaged, hypothecated or assigned to the Corporation. The right to transfer by way of lease or sale, however, is not an independent right. Only in case of default, such a right can be exercised. We must keep in mind that the powers contained in two parts of Section 29 of the Act are separate and distinct. The power to take over the management is ordinarily exercised when the concern is an ongoing one. But, when a power is conferred to sell the property unilaterally, the same must have a nexus with the mortgaged property. The power to sale cannot be read in isolation. It can also realize the mortgaged property which would mean that when a property had been sold, only the mortgaged property can be realized and not any other property which was not the subject matter of mortgage. What can be transferred by the mortgagee even in terms of the provisions of the Transfer of Property Act is the property which was the subject matter of mortgage and not any other. A power to take over the management or possession is a statutory power. As and when the debt is realized, the Corporation would be bound to handover the management or possession of the property, as the case may be, back to the industrial establishment.

11. A mortgagee can have a right to sell a property even under the contract. The same must necessarily mean that the property to be sold is the one over which he has the right, title and interest. A sale without any right would be a nullity.

12. For proper construction of the provisions of the Act, we may notice the provisions of Section 31 thereof. It provides for an additional remedy. Whereas Section 29 confers a power to sale the property unilaterally, Section 31 provides inter alia for the same power only through the intervention of the court.

Clause (a) of Sub-section (1) of Section 31 of the Act categorically states that the jurisdiction of the District Judge can be invoked for order of sale of the mortgaged or assigned property in favour of the Corporation.

Clause (b) thereof provides for transferring the management of the industrial concern. Clauses (aa) and (c) of Sub-section (1) of Section 31 of the Act provide for additional remedies. When an application is filed in terms of Section 31 of the Act, the procedures laid down in Sub-section (1A) of Section 32 of the Act are required to be followed. A further additional remedy has been provided to a Financial Corporation in terms of Section 32G of the Act.

13. We need not dilate on the interpretation of the aforementioned provision as the same is now covered by a decision of this Court in *Karnataka State Financial Corporation v. N. Narasimahaiah and Ors.* [2008 (4) SCALE 473] wherein it was held:

"26. While interpreting the provisions of a statute, the court employs different principles or canons. To interpret a statute in a reasonable manner, the court must place itself in the chair of a reasonable legislator/ author. [See *New India Assurance Company Ltd. v. Nusli Neville Wadia and Anr.* [JT 2008 (1) SC 31] Attempt on the part of the court while interpreting the provisions of a statute should, therefore, be to pose a question as to why one provision has been amended and the other was not? Why one terminology has been used while inserting a statutory provision and a different clause in another? It is well-known that *casus omissus* cannot be supplied. [See *Ashok Lanka v. Rishi Dixit* (2005) 5 SCC 598 and *J. Srinivasa Rao v. Govt. of A.P. & Anr* 2006 (13) SCALE 27 and *Southern Petrochemical Industries Co. Ltd. v. Electricity Inspector and E.T.I.O. and Ors.* (2007) 5 SCC 447]

27. The legislative intent, in our opinion, is manifest. The intention of the Parliament in enacting Sections 29 and 31 of the Act was not similar. Whereas Section 29 of the Act consists of the property of the industrial concern, Section 31 takes within its sweep both the property of the industrial concern and as that of the surety. None of the provisions control each other. The Parliament intended to provide an additional remedy for recovery of the amount in favour of the Corporation by proceeding against a surety only in terms of Section 31 of the Act and not under Section 29 thereof."

This Court therein has also taken into consideration the interpretative process required to be undertaken for construing the Act keeping in view the fact that right to property is also a human right.

The High Court, in our opinion, committed a serious illegality insofar as it failed to take into consideration the limited scope and effect of Section 29 of the Act. It wrongly proceeded on the basis as if the contention of the appellants stood covered by the earlier round of litigation. Interpretation of Section 29 of the Act did not fall for consideration in the earlier writ petition.

14. We, therefore, are of the opinion that the right to sell the property by the Corporation must be exercised only in respect of the mortgaged property and not the one which is not the subject matter thereof.

15. Keeping in view the fact that the extent of property mortgaged has been described in the deed of mortgage, it will be open to the respondents herein to get the area of the said property duly demarcated.

16. In the event, the sale is complete, the auction purchaser may be handed over only so much property which was the subject matter of mortgage. This, however, would not mean that for realization of the balance amount, if any, the respondents would be without any remedy. They will be entitled to take recourse to such remedies for realization of their balance due

to which they are otherwise entitled to in law.

17. The appeal is allowed to the aforementioned extent with costs.
Counsel's fee assessed at Rs. 25,000/-.

JUDIS