IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.13373 of 2013

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1. Nirbhay Narayan Singh son of Late Binda Prasad Singh.
2. Bachchi Devi wife of Nirbhay Narayan Singh.

   Both resident of village – Ekauna Chorma, P.S. - Pakridayal, District – East Champaran.

   Being The Ex-Director of M/s Chorma Ice and Cold Storage Private Limited, Now Under Liquidation, having its registered Office at Chorma, Police Station - Pakridayal, District - East Champaran.

... ... Petitioners

Versus

1. The State of Bihar through the Principal Secretary, Finance Department, Bihar, Patna.
2. Bihar State Financial Corporation, through its Managing Director having its Office At Frazer Road, Patna.
3. The Managing Director, Bihar State Financial Corporation, Frazer Road, Patna.
4. The Branch Manager, Bihar State Financial Corporation , Motihari Branch, Motihari, East Champaran.
5. The Certificate Officer, Motihari, East Champran.

... ... Respondents

Appearance :

For the Petitioner/s	:	Mr. Jitendra Singh,Sr. Advocate
		Mr. Satyapal Singh, Advocate
		Mr. Shankar Kumar Thakur, Advocate
For the Respondent/s	:	Mr. Parth Sarthy, Advocate
		Mr. Shakib Ayaz, AC to AAG-13

CORAM: HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD
ORAL JUDGMENT

Date : 04-02-2019

Heard Mr. Jitendra Singh, learned Senior Counsel assisted by Mr. Satyapal Singh and Mr. Shankar Kumar Thakur, learned Advocates on behalf of the petitioners and Mr. Parth Sarthy, learned Advocate on behalf of respondent nos. 2, 3 & 4 and Mr. Shakib Ayaz, learned A.C. to A.A.G.-XIII on behalf of the State.

2. This writ application has been preferred for the following reliefs: -

> "(I) For issuance of a writ in the nature of certiorari or any other appropriate writ, order or direction for quashing the order dated 11.06.2013 passed in Certificate Case No. 01/2008-2009 (Bihar State Financial Corporation Versus M/S Chorma Ice Ex Cold Storage Private Limited Ex others) by the Certificate Officer, East Champaran, Motihari whereby and whereunder the learned Certificate Officer has been pleased to direct the Certificate debtors to deposit the amounts of public demand to the tune of Rs. 3,83,17,384.75/- along with 12% simple interest w.e.f. the date of institution of Certificate Case till 11.06.2013 to the Certificate holder. It has been further directed to deposit the said amount in the loan account of Bihar State Financial

Corporation (hereinafter referred to as Corporation) latest by 26.06.2013 failing which the movable and immovable properties of the Certificate debtors shall be attached under the Bihar Public Demand Recovery Act.

II. For issuance of an appropriate writ/order/ direction for restraining the respondents from taking coercive steps in pursuance of the order passed in Certificate Case No. 01/2008-2009.

III. For issuance of an appropriate writ, order or direction for commanding and directing the respondent to settle the issue in one time settlement (O.T.S.) on the basis of principal loan amount, i.e. about Rs. 21 Lacs along with simple statutory interest as the petitioner is ready to settle the matter.

IV. For issuance of an appropriate writ, order or direction for commanding and directing the respondent corporation that not to charge interest viz panel interest and compound interest over the loan amount worth about Rs. 21 Lacs, which has been disbursed to the petitioner in several installments out of sanctioned loan amount of Rs. 32,42,000/- as the industrial unit has suffered a lot because of non-payment of sanctioned amount.

V. For issuance of any other relief or reliefs which deems fit and proper to the facts and circumstances of the case."

3. The two petitioners in the present case are Ex-Directors of M/s Chorma Ice and Cold Storage Private Limited (in liquidation). They are facing a Certificate Proceeding vide Certificate Case No. 01/2008-2009 registered before the Certificate Officer, East Champaran, Motihari (respondent no. 5). The Certificate Officer has called upon the petitioners who are said to be the Certificate debtors to deposit the amount of Rs. 3,83,17,384.75 along with simple interest at the rate of 12% w.e.f. the date of institution of the Certificate Case till 11.06.2013.

4. It is the case of the petitioners that the Certificate Proceeding was initiated in the year 2008-09 against the company and it's Director and Certificate Officer issued a demand notice under Section 7 of the Bihar and Orissa Public Demand Recovery Act, 1914 (hereinafter referred to as “Act of 1914”). The petitioners contested the Certificate Proceeding by filing objection under Section 9 of the Act. It is their case that the liability of the petitioners arise only because they stood as guarantors to the loans take up by the Company (in liquidation). A copy of the guarantee bond dated 15.06.1990 has been brought on record as Annexure-10 to the supplementary affidavit filed by the petitioners.

<u>Submission of the petitioner</u>

5. Mr. Jitendra Singh, learned senior counsel representing the petitioners has taken a specific plea that the guarantee bond as contained in Annexure-10 does not contain any recital saying that the alleged amount would be recovered as a public demand from the guarantors. It is his submission that in absence of an agreement by the guarantors as provided in Entry 15 to Schedule 1 of the Act of 1914, the money recoverable from the guarantors cannot be treated as ‘public demand’ and a proceeding under the Act of 1914 would not be maintainable against them.

6. Learned senior counsel for the petitioners has relied on the judgment of learned coordinate Bench of this court in the case of **Sunil Kumar Mehrotra Vs. State of Bihar** reported in **2003 (3) PLJR 757** to support his proposition that the Certificate Proceeding would lie against the guarantor only if he has agreed by a written instrument that the amount taken by the debtors shall be recoverable as public demand.

7. This court has been informed that the principal debtor has already been ordered to be wound-up in Company Petition No. 11/2011 vide order dated 09.08.2011. The Bihar State Financial Corporation is, though a secured creditor of the company in winding up but is said to be participating in the liquidation proceeding and has not remained outside the winding up.

8. Learned senior counsel submits that after winding up order of the Hon'ble Company Court, the Certificate Proceeding as against the Company in winding up has been dropped whereas the same is being continued against the petitioners. Learned senior counsel has also referred and relied upon Section 279 of the Companies Act, 2013 which according to him has the same effect as that of Section 446 of the Companies Act, 1956, whereunder it is provided that no suit or other legal proceeding shall be commenced or proceeded with except with the leave of the tribunal and subject to such terms as the tribunal may impose.

9. Learned senior counsel submits that the proceeding under Section 32G of the S.F.C. Act was initiated against the company as well as the petitioners herein without obtaining the prior permission of the learned tribunal in *seisin* of the liquidation proceeding. Reference in this regard has been made to the statement made in para-14 of the supplementary affidavit. It has also come on record that the proceeding under Section 32G of the S.F.C. Act shall initiate vide Case No. 207/2002 against the debtors on 03.08.2002 which could not have been initiated because of the lapse of the period of limitation.

<u>Submission of the Bihar State Financial Corporation</u>

10. On the other hand, Mr. Parth Sarthy, learned counsel representing the Bihar State Financial Corporation has drawn attention of this court towards Section 3(6) as well as Entry 4 and 15 of Schedule-1 of the Act of 1914. Learned counsel submits that a public demand has been defined under Section 3(6) which says that public demand means any arrears or money mentioned or referred to in Schedule-1 and includes interest which may in law be chargeable thereon on to the date on which certificate is signed.

11. According to Entry-15 in Schedule-1, any money payable to a company or a statutory body, including a registered society carrying on financial transactions owned by or in which, government has a majority of shares or which is managed by an authority appointed under any law for the time being in force, in respect of which the person liable to pay the same has agreed by a written instrument that it shall be recoverable as public demand.

12. Referring to paragraph - 4 & 5 of the deed of guarantee as contained in Annexure-12 to the supplementary affidavit of the petitioner, learned counsel submits that a careful reading of Clause – 4 & 5 of the guarantee bond would show that under those provisions, in order to give effect to the guarantee conditions the corporation shall be entitled to act as if the guarantors were the principal debtors to the corporation for all payment and the covenants guaranteed by them as aforesaid to the corporation. It is further submitted that guarantee is a deed of continuing guarantee for all accounts advances or to be advanced in future by the corporation to the concerned under the mortgage.

13. Learned counsel has drawn attention of this court towards section 32G of the S.F.C. Act whereunder the corporation has been empowered to issue certificate of recovery to the Certificate Officer for recovery of it's dues as arrears of land revenue. Learned counsel submits that Section 32G has been incorporated in the S.F.C. Act, 1951 in the year 1985 in order to give effect to the recovery of outstanding debts of the financial corporation. The Act itself is in nature of a special statute and as such the contention of learned senior counsel for the petitioners that any leave of the court would be required in terms of Section 446 of the Companies Act, 1956 or under Section 279 of the Companies Act, 2013 to proceed against the Ex-Director who are guarantors of the loan is wholly misconceived. Further Mr. Parth Sarthy, learned counsel has relied upon Section 278 of the Companies Act, 2013.

14. It is submitted that the judgment of this court in the case of Sunil Kumar Mehrotra (supra) would not be applicable in the facts of the present case as neither a provision similar to section 32G of the S.F.C. Act 1951 nor the Clause – 4 & 5 present in the guarantee bond executed by these petitioners were similar to those provided by BICICO in the case of Sunil Kumar Mehrotra (supra). Learned counsel submits that the judgment of this court in the case of Sunil Kumar Mehrotra (supra) is clearly distinguishable.

Consideration

15. Having heard learned senior counsel for the petitioner and learned counsel representing the Bihar State Financial Corporation as also the State, this court finds much force in the submission of Mr. Parth Sarthy, learned Advocate for the Corporation. Section 3(6) as also Entry-15 in Schedule-1 of the Act of 1914 are quoted hereunder for ready reference:

> "3(6) "public demand" means any arrear or money mentioned or referred to in Schedule 1, and includes any interest which may, by law, be chargeable thereon upto the date on which a certificate is signed under Part II."

Entry 4 under Schedule 1 to the Act of 1914 reads as under:

> "**4.** Any money which is declared by any enactment for the time being in force -
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> (i) to be a demand or public demand; or
>
> (ii) to be recoverable as arrears of a demand or public demand, or as a demand or public demand; or

> (iii) to be recoverable under the Bengal Land-Revenue Sales Act, 1868 (Ben. Act VII of 1868)."

Entry 15 in schedule 1 to the Act in so far as relevant for this case is as follows:

> "15. Any money payable to -
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> (i) State Bank of India constituted under the State Bank of India Act, 1955 (No. 23 of 1955); or
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> (ii) a Bank specified in column (2) of the first schedule to the Banking Companies (Acquisition and Transfer of Undertaking) Act, 1970 (Act V of 1970); or
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> (iii) a company or statutory body, including a registered society carrying on financial transactions, owned by or in which, Government has a majority of shares or which is managed by an authority appointed under any law for the time being in force; or
>
> (iv) the Bihar State Electricity Board.

in respect of which the person liable to pay the same has agreed, by a written instrument that it shall be recoverable as public demand."

It is not in dispute that Bihar State Financial Corporation is covered under Clause (iii) above.

16. Section 32G of the State Financial Corporation Act seems to have been inserted in the statute by Act 43 of 1985 w.e.f. 21.08.1985 which reads as under:

> " **32G. Recovery of amounts due to the Financial Corporation as an arrear of land revenue –** Where any amount is due to the Financial Corporation in respect of any accommodation granted by it to any industrial concern, the Financial Corporation or any person authorised by it in writing in this behalf, may, without prejudice to any mode of recovery, make an application to the State Government for the recovery of the amount due to it, and if the State Government or such authority, as that Government may specify in this behalf, is satisfied, after following such procedure as

> may be prescribed, that any amount is so due, it may issue a certificate for that amount to the Collector, and the Collector shall proceed to recover that amount in the same manner as an arrear of land revenue."

17. From a reading of Section 32G along with Entry 4 of Schedule 1 of the Act of 1914, it appears that a special provision has been incorporated whereunder any amount due to the financial corporation in respect of any accommodation granted by it to any industrial concern, shall be realised as an arrear of land revenue. Once it is statutorily provided that it will be realised as a land revenue, by virtue of Entry 4 in Schedule 1 it becomes recoverable as a 'public demand' under Section 3(6). Thus as provided under Section 32G of the Act of 1951, the given authority may issue a Certificate for that amount to the Collector and the Collector shall proceed to recover that amount in the same manner as an arrear of land revenue.

18. It is thus, apparent from this special provision that the dues of the financial corporation in the present case arising out of any accommodation granted to any 'industrial concern' may be realized by way of a certificate for that amount, of course after following the procedures and the Collector shall proceed to recover that amount as an arrear of land revenue.

19. In this view of the matter alone, this court is of the considered opinion that a Certificate Proceeding would be liable to be registered if a Certificate is issued by a person duly authorized in the manner prescribed under Section 32G. The requirement of containing a stipulation in the guarantee bond is not even required to make a guarantor liable to be proceeded against in a certificate proceeding initiated in terms of the Section 32G of the State Financial Corporation Act, 1951.

20. I also agree with the submission of Mr. Parth Sarthy, learned Advocate for the Corporation that the judgment of the learned coordinate Bench of this court in the case of Sunil Kumar Mehrotra (supra) is clearly distinguishable. In the said case the deed of guarantee executed by the sureties contained altogether different conditions, moreover there was no provision like the one present in Section 32G of the State Financial Corporation Act, 1951, Thus, the ratio of the judgment in the case of Sunil Kumar Mehrotra (supra) cannot be applied in the facts of the present case where a special provision and altogether different terms and conditions of the guarantee bond have been placed before this court. This court is conscious of the line of judgment laying the law that a director of a company would not be liable for the dues against the company but those are the cases where the directors have not executed any deed of guarantee in their personal capacity. Here it is not in dispute that these petitioners have taken upon themselves the liability in question by executing a deed of guarantee.

21. In the facts and circumstances of the case where it is an admitted position that the Financial Corporation has extended financial assistance to M/s Chorma Ice Ex-Cold Storage Private Limited which is in liquidation and these petitioners have stood a guarantors to the accommodation in respect of the financial assistance provided to the said company, their liabilities are coextensive and coincidental. Clause 4 and 5 of the guarantee deed clearly provide that these petitioners, in the matter of realisation of loan are to be taken as if they are the principal debtors. This court finds that the order dated 11.06.2013 has been passed for realization of the certificate amount due in terms of Section 32G of the S.F.C. Act 1951. The order passed under Section 32G of the S.F.C. Act, 1951 has not been challenged by the petitioners in the writ application.

22. This court is also of the considered opinion that to proceed against the guarantors in the certificate case there was neither any need to take leave under Section 446 of the old Companies Act nor under Section 279 of the Companies Act, 2013. A bare perusal of Section 279 would show that it talks of a suit or other legal proceeding against the Company. In the present case, these petitioners are the guarantors who do not come within the purview of Section 279 of the Companies Act, 2013.

23. For the reasons stated above, the court does not find any error in the impugned order. No case for interference could be made out on behalf of the petitioners.

24. The application is, thus, dismissed.

(Rajeev Ranjan Prasad, J)

Rajeev/-

AFR/NAFR	AFR
CAV DATE	
Uploading Date	07.02.2019
Transmission Date	