IN HIGH COURT OF JUDICATURE AT MADRAS

Reserved On	15.11.2019
Pronounced On	04 .12.2019

CORAM

THE HONOURABLE MR.JUSTICE C.SARAVANAN

C.M.A.No.1675 of 2008

M/s Tamil Nadu Industrial
Investment Corporation Limited
having its Registered Office
at 473, Anna Salai
Nanadanam, Chennai and
Brach Office at
King Complex, Dr.Nanjappa Road
Coimbatore - 18. ... Appellant/Petitioner

vs

D.Mohan ... Respondent/Respondent

Prayer: Civil Miscellaneous Appeal filed under Section 32(9) of the State Financial Corporation Act, 1951, to set aside the Order and Judgment dated 22.07.2005 passed by the First Additional District Judge, Coimbatore in T.S.F.C.O.P.No.32 of 1997 and direct the First Additional District Judge, Coimbatore to restore the said Original Petition to file and dispose the same on merits in accordance with law.

For appellant : Mr.V.Kalyana Raman

J U D G M E N T

Though the present Civil Miscellaneous Appeal was filed on 23.06.2006 and was eventually numbered in the year 2008 as C.M.A.No.1675 of 2008, the appellant has not been able to serve notice on the sole respondent despite lapse of more than 11 years since the numbering of the present appeal. Therefore, the appeal is liable to be dismissed for want of service of notice on the respondent. Learned counsel for the appellant have requested for one more opportunity to serve notice.

2.I do however not see any point in keeping this appeal pending at this distant point of time despite lapse of 11 years since the present appeal was numbered. Therefore, I am taking up this case for final hearing even though no notice has been served on the respondent as no prejudice will be caused to the unserved respondent by this order.

3.Brief facts of the case are that the appellant, a State Financial Corporation had filed T.S.F.C.P.No.32 of 1997 before the 1st Additional District Court, Coimbatore under Section 31(1) and Section 31(1)(a)(a) of the State Financial Corporation Act, 1951 to recover a sum of Rs.28,59,080.55 with subsequent interest at 16.5% in respect of the Term Loan and Rs.33,160.00 with subsequent interest at 16.5% in respect of Soft Loan from the date of petition till realisation from the respondent.

4.By the impugned judgment and order dated 22.7.2005, the 1st Additional District Court, Coimbatore has dismissed T.S.F.C.P.No.32 of 1997 filed by the appellant on the ground of limitation. The said court has held that the loan was sanctioned on 22.05.1987 and various documents were executed on 23.06.1987 and the payment of 1st half yearly installment fell in the year 1989 and on the failure of the respondent to pay the amount as agreed, the appellant issued Ex.P5 foreclosure notice on 05.03.1991.

5.The appellant had taken possession of the assets of the respondent on 21.01.1993. The appellant had conducted three public auctions on 12.03.1993, 10.06.1993 and 10.09.1993 respectively for sale of the repossessed assets. However, since the highest bids in the three auctions did not conform to the valuation report in respect of the assets, the auctions were not confirmed. Subsequently, M/s Tamil Nadu Textile Corporation Ltd. offered Rs.18,00,000/- for the entire assets and the said offer was accepted by the appellant Corporation on 20.10.1993. Thereafter, M/s TamilNadu Textile Corporation Ltd. remitted the entire sale proceeds on 10.02.1994 and took delivery of the mortgaged assets. The aforesaid amount paid was later appropriated by the appellant by on 31.01.1994.

6.Thereafter, the appellant issued a legal notice dated 18.04.1994 to the respondent and called upon the respondent to pay the outstanding due as on the aforesaid date. The respondent also appears to have replied on 14.06.1994. Thereafter, the appellant filed T.S.F.C.P.No.32 of 1997 on 04.02.1997.

7.In T.S.F.C.P.No.32 of 1997, the respondent submitted that the proceeding initiated was time barred. According to the lower court, the suit ought to have been filed within 3 years from the aforesaid date of appropriation of the amount on 31.01.1994 i.e. on or before 31.1.1997.

8.Heard Mrs.Rita Chandrasekaran duly instructed by Mr.V.Kalyana Raman learned counsels for the appellant and perused the records of the case. Brief facts of the case are that the respondent had availed of a term loan of Rs.14.60 lakhs and a soft loan of Rs.3.80 lakhs on 11.05.1987. In connection with the loan advanced by the appellant, the respondent had executed Deed of Hypothecation and thereby hypothecated the plants and machineries. The respondent also executed Agreement of Guarantee on 23.06.1987 guaranteeing repayment of the aforesaid loan and had offered immovable property as security by way of mortgage on the same day.

9.Since the respondent was irregular the appellant took possession of the mortgaged property and hypothecated assets on 21.01.1993 and later auctioned and sold to M/s.Tamil Nadu Textile Corporation. The amount paid by M/s.Tamil Nadu Textile Corporation was appropriated on 31.01.1994.

10.As the auction amount did not satisfy the outstanding due and since the respondent also failed to pay the amount despite legal notice, the appellant filed T.S.F.C.O.P.No. 32 of 1997 to recover an amount of Rs.28,59,080.55 towards the term-loan and a sum of Rs.33,601.00 towards the soft loan on 04.02.1997.

11.It is the contention of the appellant that the 1st Additional District Court, Coimbatore erred in dismissing the application filed by the appellant on 04.02.1997 as time barred. The learned counsel for the appellant submits that the issue is squarely covered by a decision of this court rendered in appellant's own case against Decolyte Engineering Industries and Others (The Tamil Nadu industrial investment Corporation Ltd vs Decolyte Engineering Industries, (2013) 6 CTC 647 (DB) wherein an earlier decisions of the Division Bench of this court was followed.

12.Section 29 of the State Financial Corporations Act, 1951 merely enabled the Appellant Corporation to take possession and sell the assets for recovery of the dues under the main contract. On taking action under Section 29 the Appellant Corporation became a deemed owners of the asset.

13.The mortgage would have come to an end. However, the contract of indemnity, which was an independent contract, did not. The right to claim for the balance crystallized under the contract of indemnity once the sale proceeds were found to be insufficient.

14.Section 31 of the State Financial Corporation Act, 1951 contemplates a special dispensation for enforcement of claim by a financial Corporation to recover the amount. It has a non-obstante clause. Notwithstanding anything contained in section 69 of the Transfer of Property Act, 1882, measures can be taken. It permits a financial Corporation to apply to a District Court within the limits of whose jurisdiction the industry concerned carries on the whole or a substantial part of its business for one or more of the relief specified therein. It is by way of a legal fiction, procedure akin to execution of decrees under the Code of Civil Procedure has been permitted to be invoked under Section 29 of the Act. The legal fiction refers to a procedure to be followed to take steps to recover the amounts that are due.

15.In Deepak Bhandari vs H.P. State Industrial Development Corpn. Ltd., (2015) 5 SCC 518, the Hon'ble Supreme Court while dealing with a somewhat similar circumstances, observed as under:

> 27. We thus, hold that when the Corporation takes steps for recovery of the amount by resorting to the provisions of Section 29 of the Act, the limitation period for recovery of the balance amount would start only after adjusting the proceeds from the sale of assets of the industrial concern. As the Corporation would be in a position to know as to whether there is a shortfall or there is excess amount realised, only after the sale of the mortgaged/hypothecated assets. This is clear

from the language of sub-section (1) of Section 29 which makes the position abundantly clear and is quoted below:

"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 concern, as well as the right to transfer by way of lease or sale and realise the property pledged, mortgaged, hypothecated or assigned to the Financial Corporation."

28. It is thus clear that merely because the Corporation acted under Section 29 of the State Financial Corporations Act did not mean that the contract of indemnity came to an end. Section 29 merely enabled the Corporation to take possession and sell the assets for recovery of the dues under the main contract. It may be that on the Corporation taking action under Section 29 and on their taking possession they became deemed owners. The mortgage may have come to an end, but the contract of indemnity, which was an independent contract, did not. The right to claim for the balance arose, under the contract of indemnity, only when the sale proceeds were found to be insufficient. The right to sue on the contract of indemnity arose after the assets were sold. The present case would fall under Article 55 of the Limitation Act, 1963 which corresponds to old Articles 115 and 116 of the old Limitation Act, 1908. The right to sue on a contract of indemnity/guarantee would arise when the contract is broken.

16.In Maharashtra State Financial Corpn. v. Ashok K. Agarwal, (2006) 9 SCC 617, the Hon'ble Supreme Court in observed as under:-

> 6. Article 137 of the Limitation Act applies in the facts of the present case. When Article 137 is applied, the application moved by the appellant Corporation on 2-1-1992 for proceeding against the sureties i.e. the respondents herein, was clearly barred by time and the courts below were correct in holding so. To recall the facts of the present case, the notice demanding repayment of the amount of loan was issued against the borrower, that is, M/s Crystal Marketing Private Limited on 8-3-1983 and the application under Sections 31 and 32 of the State Financial Corporation was filed against the said borrower on 25-10-1983. The liability of sureties had crystallised then.
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> 7.The amendment under Section 31 of the State Financial Corporation Act which authorises the State Financial Corporations to take action under Section 31 of the Act for enforcing the liability against the sureties, was brought about in the year 1985 by introduction of sub-section (aa) in Section 31(1) of the Act. Even after this amendment the appellant did not wake up to take any step against the sureties in the present case. Notice was issued to the sureties only on 7-12-1991 and the application for enforcement of liability against them was filed on 2-1-1992. The application, therefore, was clearly barred by time and the decisions of the courts below cannot be faulted. The courts below rightly dismissed the application on the ground that it was barred by limitation. The appeal has no merit. It is dismissed with no order as to costs.

17.There, amounts under the loan were disbursed to the borrower M/s.Crystal Marketing Private Limited from time to time in the year 1979. The company however failed to repay the loan amounts. The Corporation issued various letters calling upon the borrower to clear its dues. Ultimately, the Corporation issued a legal notice dated 08-03-1983 and called upon the borrower to repay the entire amounts due.

18.On 25-10-1983, the Corporation moved an application under Sections 31 and 32 of the State Financial Corporations Act, 1951 in the Court of the District Judge, North Goa, Panaji. On 11.06.1990 the attached properties of the borrower company were put to sale. Because there was a shortfall in the amount realized on sale of the hypothecated property, the appellant Corporation sent notices on 27.12.1991 to the sureties, that is, the respondents therein. An amount of Rs 16,79,033/- was claimed as due from the sureties together with interest at the rate of 14.5% per annum.

19.On 02.01.1992, the appellant Corporation therein filed an application under Section 31(1)(aa) of the State Financial Corporation Act against the respondents for steps for recovery of the amount due. The respondents took various objections against the application and the reliefs prayed therein including that the application was barred by limitation. The learned Additional District Judge vide his order dated 16.04.1994 upheld the objection regarding the application being barred by limitation. The application was accordingly dismissed. It was in that back ground, the Court held as above.

20.In the facts of the case, it is evident that the possessions of the assets of the respondent were taken on 21.01.1993. These assets were auctioned and the sale was confirmed on 10.02.1994. The auction amounts were finally appropriated on 31.01.1994 by the appellant. However, the proceedings to recover the amount were initiated only on 04.02.1997.

21.As per two decisions of the Hon'ble Supreme Court, right to sue crystallized on the date of appropriation of the amount realized from auction purchaser.

22.Since the right to recover the amount crystallized on 31.01.1994 with appropriation of the amount, the appellant should have filed a suit on or before 30.03.1997. Thus, the suit filed on 04.02.1997 was clearly time barred. Therefore, there are no merits in the submission of the learned counsel for the appellant.

23.In the light of the above observation. I find no merits in the present Civil Miscellaneous Appeal. Accordingly, the present Civil Miscellaneous Appeal is dismissed.

Sd/-
Asst.Registrar

/true copy/
Sub Asst. Registrar

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To

1.The First Additional District Judge,
Coimbatore.

2.The Section Officer,
V.R.Section. High Court,
Madras.

+1 cc to M/s.Aiyar & Dolia Advocate sr101126

Pre-Delivery Judgment
in
C.M.A.No.1675 of 2008

pvs(co)
aa12/05/2020