IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CWP No. 28693 of 2018 (O&M)
Date of Decision: 03.09.2019

KRISHNA ENGINEERING WORKS LIMITED, JALANDHAR
.... Petitioner
V/s.

PUNJAB STATE INDUSTRIAL DEVELOPMENT CORPORATION LIMITED AND OTHERS *........Respondents*

CORAM: HON'BLE MR. JUSTICE RAKESH KUMAR JAIN.
HON'BLE MR. JUSTICE ARUN KUMAR TYAGI.

Present: Mr. Nitin Thatai, Advocate
for the petitioner.

Mr. Vikas Mohan Gupta, Advocate,
for respondent No. 1.

Mr. Arun Jain, Senior Advocate with
Mr. Dhruv Mittal, Advocate,
for respondent No. 2.

Mr. Gautam Dutt, Advocate,
for respondent No. 3.

Mr. Aman Bahri, Advocate,
for respondent No. 4.

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RAKESH KUMAR JAIN, J. (Oral)

The petitioner, a limited company, has filed this petition praying for the issuance of a writ in the nature of *mandamus* to declare the action of respondent No. 1 as illegal by which possession of the non-hypothecated assets was taken on 17.07.2014, for the issuance of a writ in the nature of *certiorari* for quashing the sale deed 18.10.2018 in favour of respondent No. 2 and further to restrain the delivery of possession of non-hypothecated machinery to respondent No. 2 in the meantime. The petitioner has also prayed for a direction to refund a sum of ₹20,00,000/- with interest which was allegedly deposited in lien account of respondent No. 1 in pursuance of one time settlement scheme launched in the year 2015.

The facts given to us in Court, in brief, are that the petitioner secured a loan of ₹5.42 Crores from respondent No. 1 after hypothecating land, building and machinery which was purchased with the financial assistance given by respondent No. 1. The said loan was granted in between the years 1989 to 1996. The petitioner had allegedly purchased some more machines and equipments from his own sources for a sum of ₹28.79 Crores whereas the machines and equipments purchased with the financial assistance of respondent No. 1 was of a sum of ₹1.67 Crores as alleged.

Since, the petitioner was allegedly irregular in repayment of installments of loan to respondent No. 1, therefore, notice under Section 29 of the State Financial Corporation Act, 1951 (hereinafter referred to as "the Act of 1951") was issued on 16.07.2014 for taking possession of the mortgaged property, hypothecated and non-hypothecated assets. The petitioner, though, challenged the action of respondent No. 1 for taking possession of the aforesaid hypothecated, mortgaged and non-hypothecated assets but did not challenge the action of respondent No. 1 for taking possession of the non-hypothecated machinery as well.

Be that as it may, ultimately respondent No. 1 sold all the assets of the petitioner on 18.10.2018 by way of public auction which was purchased by respondent No. 2 for a sum of ₹4.60 Crores. It is submitted by respondent No. 1 that this sale could take place in the fourth auction as in the previous three auctions there was no bidder.

The petitioner is, thus aggrieved against the action of respondent No. 1 dated 17.07.2014 by which possession was taken and sale deed dated 18.10.2018 by which the said property has been sold to respondent No. 2.

At the time of issuance of notice in this petition, parties were directed to maintain *status quo*. During the pendency of this petition, two applications were filed i.e. ***CM-18555-CWP-2018*** and ***CM-3820-CWP-2019*** for impleading the applicants therein M/s Kohinoor India Private Limited, Jalandhar and UTI Trustee Company Private Limited (UTI Mutual Fund), Mumbai as respondents. Since, counsel for the petitioner did not raise any objection, therefore, both the applications were allowed by this Court on 29.03.2019 and the applicants therein were arrayed as respondents No. 3 and 4 respectively.

On 28.08.2019, after a brief hearing, the case was adjourned for today. The said order is reproduced as under:-

> *"The issue involved is about the interpretation of Agreement of Hypothecation (Annexure R-1). According to the petitioner, respondents could not have sold the property which was not hypothecated. Whereas, according to the respondents, the property which has been acquired by the petitioner from time to time was also deemed to have been hypothecated.*
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> *In view of the above, learned counsel for the petitioner prays for time to prepare his case.*
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> *Adjourned to 3.9.2019.*
>
> *To be shown in the urgent list."*

The sum and substance of the arguments of the counsel for the petitioner is that the respondent No. 1 may be well within its rights to take possession and sell the hypothecated assets of the petitioner but it had no right to sell the non-hypothecated assets of the petitioner. In this regard, respondents No. 1 and 2 drew the attention of this Court to the agreement dated 20.12.1988. It is submitted that as per the terms of the agreement, the property which was acquired by the petitioner and also the property which is to be acquired from time to time were deemed to have been hypothecated. In this regard they have referred to Clause 3 (1) and 3 (2) of the agreement which are reproduced as under: -

> *"**Clause 3 (1) :** For the consideration aforesaid, all the plant and machinery and equipment, fixtures and fittings, electrical installations, furnitures, cars, trucks, vehicles, tractors, trollies, pipe lines, typewriters, calculating machines, refrigerators, coolers, air-conditioners, modern electric and other appliances and all other tangible movable properties and assets of the Borrower acquired .or to be acquired from time to time and which are lying or hereafter from time to time during the continuance of this Agreement be acquired or brought into or stores in or about the Borrower's premises, factories, warehouses, godowns or elsewhere or wherever they are in transit or on high seas or on order (hereinafter) collectively referred to as "the machinery and equipment"). (main items of which are given in the schedule hereunder written) are hereby hypothecated to the Corporation by way of first charge as security for repayment by the Borrower to the Corporation of the loan, interest, commitment charge and other moneys and all costs, charges and expenses which may be incurred by the Corporation in relation at this security and for repayment by the Borrower to the Corporation, if thereon alongwith all costs, charges, other monies and expenses which may be incurred by the Corporation in relation to this security.*
>
> ***Clause 3(2):** For the consideration aforesaid the Borrower both hereby also hypothecate in favour of the Corporation all the stocks, raw materials, stock-intrade, finished and semi-finished products, consumeable stores, documentary bills, book-debts,*

> *uncalled capital, etc. for the time being both present and future (all which assents are hereinafter collectively referred to as "the other assets") as security for the due payment of all the moneys remaining due and outstanding by the Borrower to the Corporation from time to time under theses presents and/or under the loan agreement and /or central subsidy Agreement PROVIDED however that the Borrower shall be at liberty to deal with, sell or dispose of the other assets in the ordinary course of business and also to create charge over the said other assets in the ordinary course of its business ranking in priority to the charge created under this Clause in favour of the Corporation in order to secure overdrafts and/or cash credit arrangements or other facilities from its bankers for working capital."*

Although enough time was given to the counsel for the petitioner to prepare his case but he has fairly conceded that he has no precedent to cite in his favour in regard to the interpretation of Clause 3 (1) and (2) of the agreement dated 20.12.1988.

On the contrary, learned counsel for respondents No. 1 and 2 have referred to the definition of ***"Hypothecation"*** which is provided under Section 2(n) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short "the Act of 2002") which read as under:-

> *"2 (n) "hypothecation" means a charge in or upon any movable property, existing or future, created by a borrower in favour of a secured creditor without delivery of possession of the movable property to such creditor, as a security for financial assistance and includes floating charge and crystallization of such charge into fixed charge on movable property."*

It is also submitted that any accession to the mortgaged property would also be a part of the security and a reference has been made in this regard to Section 70 of the Transfer of Property Act, 1882 (hereinafter referred to as "the Act of 1882") which is reproduced as follows: -

> *"70. Accession to mortgaged property.—If, after the date of a mortgage, any accession is made to the mortgaged property, the mortgagee, in the absence of a contract to the contrary, shall, for the purposes of the security, be entitled to such accession."*

Learned counsel for respondents No. 2 and 3 have also referred to the illustrations appended to Section 70 of the Act of 1882 and more particularly illustration (b) which reads as under:-

> *"(b) A mortgages a certain plot of building land to B and afterwards erects a house on the plot. For the purposes of his security, B is entitled to the house as well as the plot."*

On the other hand, learned counsel for the petitioner has referred to two decisions of the Supreme Court rendered in the case of *M/s Ormi Textiles and Another* Vs. *State of U.P. and others*; ***2008 AIR(SC) 2177*** and in the case of *Bihar State Financial Corporation* Vs. *M/s Chhotanagpur Minerals and Others*; ***2009(5) RCR (Civil) 417*** and a division bench judgement of this Court rendered in the case of *Shree Jagdambey Steel Tubes Pvt. Ltd.* Vs. *State of Punjab and others*: ***2012(5) RCR Civil 143***.

Learned counsel for the petitioner has been candid enough to admit that in the aforesaid three judgements there was no such clause in the agreement which is there in the present case or any discussion by the Court on such type of clauses where future acquisition was also agreed by the borrower to be a part of the hypothecated property. Therefore, in the peculiarity of the facts of the present case where the petitioner has bound itself at the time of securing loan from the financial institution that it would not only hypothecate the assets which are acquired but also any asset which would be acquired in future would be part of the hypothecation.

Thus, in view of the above, arguments raised by counsel for the petitioner that non-hypothecated assets cannot be taken possession of by respondent No. 1 and further would be sold by it for the purpose of recovering its dues cannot be accepted. The writ petition is, thus, found to be without any merit and the same is hereby dismissed.

At this stage, respondent No. 3 has prayed that though it had become a party but he may be treated to have not contested this petition and may be allowed to take its remedy elsewhere in accordance with law.

Learned counsel for the petitioner has not raised any objection in this regard and thus, the prayer made hereinabove by respondent No. 3 is allowed accordingly.

[RAKESH KUMAR JAIN]
JUDGE

September 3, 2019
Ess Kay

[ARUN KUMAR TYAGI]
JUDGE

Whether speaking / reasoned : Yes / No

Whether Reportable : Yes / No