IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 17-11-2021

CORAM

THE HONOURABLE MR. JUSTICE S.M.SUBRAMANIAM

WP No.641 of 2011
And
MP No.2 of 2011

A.Dhandapani .. Petitioner

vs.

1. The Tamil Nadu Industrial Investment Corporation Limited,
Represented by its Branch Manager,
Special Loan Recovery Branch,
Division No.1,
No.692, Anna Salai,
Nandanam,
Chennai – 600 035.

2. M/s.Link World System,
Proprietor K.Arumugam,
No.4, V.O.C. Street,
2nd Main Road,
Kodambakkam,
Chennai - 24. .. Respondents

Writ Petition is filed under Article 226 of the Constitution of India, praying for the issuance of a Writ of Certiorarified Mandamus, calling for the records of the first respondent relating to the impugned Mahazar dated 01.07.2004 along with possession notice dated 15.07.2004 in taking over the petitioner's property situated at in Survey Nos.486/2, 486/1F, 486/1E in all measuring to an extent of 4.07 Acres in Malayankulam Village, Uthiramerur Taluk, Kanchipuram District under Section 29 of the State Financial Corporations Act, 1951 and quash the same consequently direct the first respondent to discharge the petitioner from surety on the ground of loss of security as stipulated in Section 141 of the Indian Contract Act, 1872.

For Petitioner : Mr.P.R.Thiruneelakandan

For Respondent-1 : Mr.K.V.Sundara Rajan

For Respondent-2 : Not Ready in Notice

O R D E R

The Mahazar dated 01.07.2004 along with the possession notice dated 15.07.2004, taking over the property belongs to the petitioner in Malayankulam Village, Uthiramerur Taluk, Kanchipuram District under Section 29 of the State Financial Corporation Act, 1951, is sought to be quashed and a direction is sought for to discharge the petitioner from surety on the ground of loss of security as stipulated in Section 141 of the Indian Contract Act, 1872

2. The petitioner states that through the impugned mahazar, the first respondent has taken possession of the property belongs to the petitioner on the ground that he stood as a surety in respect of the loan sanctioned in favour of the second respondent-Company.

3. The petitioner contends that the subject properties are self-acquired and he handed over all the original documents to one Mr.M.P.Balakrishnan and who in turn said that those documents were lost. The petitioner filed a complaint and it is contended by the petitioner that he sold the subject properties in favour of one Smt.Logambal on 04.02.1998.

4. The impugned order was passed in the year 2004 and possession was taken over by the first respondent-Corporation. The petitioner contends that he sold the subject properties to one Smt.Logambal on 04.02.1998 itself. Subsequently, the vendee Smt.Logambal filed a civil suit against the petitioner in O.S.No.82 of 2007 and the learned counsel for the first respondent informed that the said Civil Suit was dismissed and thereafter an appeal suit in A.S.No.8 of 2019 was filed and the same is pending.

5. The learned counsel for the petitioner reiterated that initial action taken against the surety under Section 29 of the State Financial Corporation Act, is improper and not in consonance with the provisions of the Act itself.

6. The first respondent lost the opportunity of realising the loan amount through the machineries, which were hypothecated and worth Rs.17,30,000/- and therefore, the surety is to be discharged and on that ground also the petitioner's surety is to be discharged.

7. The learned counsel for the petitioner, relying on Sections 29 and 31 of the State Financial Corporation Act and based on Sections 139 and 141 of the Indian Contract Act,

contended that the action against the surety is unsustainable and the provisions of the State Financial Corporation Act, is misinterpreted and the impugned order of taking over possession is done by the first respondent.

8. To substantiate the said contention, the learned counsel for the petitioner relied on the judgments to establish that actions of the first respondent is untenable.

9. In the case of Subhransu Sekhar Padhi vs. Gunamani Swain and Others [CDJ 2014 SC 680], the Hon'ble Supreme Court of India held that "the right of Financial Corporation in terms of Section 29 must be exercised only on a defaulting party. Section 29 does not empower the Corporation to proceed against the surety even if some properties are mortgaged or hypothecated to it. Our view is further strengthened by the provisions of sub-section (4) of Section 29 which lays down appropriation of sale proceeds with reference to only industrial concern and not surety or guarantor".

10. Perusal of the facts reveal that the purchaser of the property in an auction held under Section 29 of the State Financial Corporations Act, was the party before the Supreme Court. Thus, the said purchaser was not the surety in respect of the loan granted by the Financial Institution in the said case. Under those circumstances, the Hon'ble Supreme Court of India considered the issue as to whether the Financial Corporation was legally entitled to invoke Section 29 of the Act and bring the properties to sale as contemplated under Section 31 of the Act.

11. However, in the present case, the petitioner himself was the surety. Though it is disputed by the petitioner by stating that without his knowledge, the documents were handed over and a criminal case is registered. But the learned counsel for the first respondent states that as per the records of the Corporation, the petitioner stands as a surety. Thus, those facts are inapplicable with reference to the case of the petitioner.

12. The learned counsel for the petitioner mainly contended that the first respondent failed in their duty to conduct frequent inspections of the Industry and further not initiated action against the machineries, which were hypothecated with the first respondent-Corporation. The failure on the part of the first respondent resulted in non-realisation of the loan dues for which the petitioner cannot be penalised and therefore, the surety as far as the petitioner is concerned, is to be discharged.

13. The petitioner mainly relied on the judgmnets of the

Karnataka High Court in the case of M.R.Chakrapani Iyengar vs. Canara Bank [CDJ 1996 Kar HC 486], wherein the Hon'ble Karnataka High Court considered the scope of Section 139 of the Indian Contract Act, as below:-

> "2. The principal contention raised by the petitioner's learned advocate is that undoubtedly the liability of the surety is co-extensive with that of the principal debtor but he contends that having regard to the provisions of Section 139 of the Contract Act, that it was obligatory on the part of the bank to have ensured that the hypothecated property did not vanish and more so, when his client pointed out precisely where that property was, for the bank to have taken all necessary steps to have seized it, that by not having done so, the bank has virtually forfeited the remedy that was open to it to recover the sums in question and that this situation brings the case clearly within the four corners of Section 139 of the Contract Act whereunder his liability stands discharged. In this regard, the learned advocate has relied on a decision of the Supreme Court (State Bank of Saurashtra vs. Chitranjan R. Raja) wherein the Court held that if such negligence was established on the part of the bank, the surety would stand discharged. The Court had occasion to refer to some of the earlier decisions reported in (1872) 7 QB 756, (1873) 8 Ex 73, AIR 1967 SC 1105 and AIR 1968 SC 1432. The learned advocate also relied on another decision reported in AIR 1983 Punj and Har 244, wherein, on more or less similar facts the Court took the view that the liability of the surety stood completely discharged. The petitioner's learned advocate submitted that the principle enunciated in Section 139 is well defined in so far as if the bank creates a situation whereunder the liability which could easily have been discharged gets unnecessarily foisted on the surety, that the law in such a situation immunises the surety. He therefore submits that as far as the present case is concerned, the decree passed against the petitioner is liable to be set aside.

> 7. In this regard, I need to lay down that in the case of hypothecated goods a greater degree of vigilance is required on the part of the banks. While it may be true that periodical checks are very essential, it is equally important that the banks must take all available measures which have hitherto not been resorted to. In a situation where it is pointed out to the bank that the hypothecated property has disappeared, it is always assumed that the only remedy open to the bank is to file a suit or for an attachment order but what is overlooked is that the law gives the banks straight remedies by way of a complaint to the police or to a criminal Court whereby the property can be traced out, and whereby the bank can take possession of the property and have it sold and clear the dues. This is an aspect of the matter which undoubtedly may not have been focussed upon but it is essential that it should be brought to the notice of the financial institutions and their officers for future guidance.”

The abovesaid case was also filed against the decree passed in a civil suit.

14. The learned counsel for the first respondent objected the contentions of the learned counsel for the petitioner, by stating that the petitioner admittedly sold the subject properties in the year 1998 and the purchaser Smt.Logambal instituted a Civil Suit in O.S.No.82 of 2007 and the said Civil Suit was dismissed and an Appeal Suit in A.S.No.8 of 2019 was filed and the same is pending.

15. Beyond all these facts, the first respondent filed OP No.201 of 2017 before this Court against all the parties and the said original petition was filed under the State Financial Corporations Act, is pending. Thus the writ petition is not maintainable and all such issues are to be adjudicated in the original petition filed under the provisions of the State Financial Corporations Act.

16. This Court is of the considered opinion that the complex nature of issues of civil nature arose in the present writ petition between the parties deserve an elaborate adjudication with reference to the original documents and evidences.

17. The petitioner claims that he is not the surety and he never handed over the original documents to the first respondent-Corporation for the loan availed by the second respondent.

18. Per contra, the first respondent states that as per their records, the petitioner stood as the surety and handed over the original title deeds of the documents to the first respondent. This apart, the petitioner himself admitted that he sold the property in the year 1998 in favour of one Smt.Logambal.

19. When all these disputed facts are placed in the writ petition, this Court is of the opinion that an elaborate adjudication is imminently necessary and such an adjudication cannot be made under Article 226 of the Constitution of India. In the absence of adjudication and a specific finding in these issues, the rights of the parties cannot be crystallised. If the rights of the parties are unable to be crystallised, then questioning of discharging the surety would not arise, as the petitioner claims that he is not at all a surety. When the basic facts are disputed, an adjudication must be done in the manner known to law.

20. The petitioner claims to be an alien to the contract with the first respondent. The first respondent states that the petitioner is part of contract as surety. Such contractual obligations with reference to the terms and conditions cannot be adjudicated in the writ proceedings under Article 226 of the Constitution of India.

21. The principles laid down by the Apex Court and the interpretation considered in various judgments relied on by the petitioner, are not disputed even by the learned counsel for the first respondent. However, the facts and circumstances of each case plays a pivotal role for the application of those ratio laid down by the Apex Court with a scope of Section 29 and 31 of the State Financial Corporations Act, as interpreted by the Hon'ble Supreme Court of India, is also not disputed by the first respondent. But the point to be considered is that the basic factum regarding the surety itself is disputed by the petitioner and the subject properties were sold in favour of Smt.Logambal and the first respondent says that the petitioner is the surety and the original documents are with the first respondent and they have initiated all actions against all the parties and there are certain fraudulent activities involved in these transactions and therefore, the first respondent filed O.P.No.201 of 2017 under the State Financial Corporations Act, before the High Court and the said original petition is pending.

22. This being the factum, all the parties are at

liberty to adjudicate the issues before the appropriate Court in the manner known to law.

23. With the abovesaid observations, the writ petition stands dismissed. However, there shall be no order as to costs. Consequently, connected miscellaneous petition is also dismissed.

Sd/-
Assistant Registrar(CS-VI)

//True Copy//

Sub Assistant Registrar

Svn

To

The Branch Manager,
The Tamil Nadu Industrial Investment Corporation Limited,
Special Loan Recovery Branch,
Division No.1,
No.692, Anna Salai,
Nandanam,
Chennai - 600 035.

WP 641 of 2011

GPL(CO)
SU(01/12/2021)