

Case No. 8

II (2003) BC 372 (DB)

**KARNATAKA HIGH COURT**

Kumar Rajaratnam & K. Bhakthavasala, JJ

The Branch Manager, State Bank of Mysore & Ors

Appellants

Vs.

K. Amarnath & Ors

Respondents

Writ Appeal No.8340 of 1999 - Decided on 2.12.2002

Hypothecation agreement between parties -- default by the borrower -- bank brought the asset to auction -- borrower filed writ petition -- held writ petition not maintainable -- parties bound by agreement -- consequences flow from the terms of the agreement - Bank entitled to take possession and sell the security without the intervention of the Court.

Result: Ordered accordingly

Cases Referred :

- |                                 |           |
|---------------------------------|-----------|
| 1. (1998) 94 Comp. Cas.16 (Kar) | (para 18) |
| 2. AIR 1995 AP 134              | (para 19) |
| 3. AIR 1997 SC 1952             | (para 21) |

Counsel for the Parties :

For the Appellants : Mr. P.R. Ramesh, Advocate

For the Respondents : Mr. H.G. Gopalakrishna, General Power of Attorney

For the Party-in-person : Mr. K. Amarnath

**JUDGMENT**

Kumar Rajaratnam, J. - The appellant Bank being aggrieved by the judgment on 26.8.1999 passed by the learned Single Judge in W.P. 4364 of 1999 has preferred this writ appeal.

2. The State Bank of Mysore granted financial assistance for the purchase of Modi Xerox machine to the 1st respondent. Apparently the loan that was granted to the 1st Respondent was under Prime Minister's Rozgar Yojana Scheme.

3. Under the scheme a person who applies for the loan should be an unemployed person. It was submitted that the 1st respondent was not an unemployed person. However, after certain mutual discussion the application was entertained and the loan was granted for expanding the 1st respondent's business. The 1st respondent was sanctioned a loan of Rs.95,000/- on 21.5.1997 and was required to make payment from 21.6.1997 on monthly Instalments. The amount was to be cleared in 60 monthly instalments.

4. It was submitted by the appellant-Bank that right from the beginning the loanee, 1st respondent failed to keep up the commitment with the bank and in fact paid the first instalment only on September 11th,1997 and that to a sum of Rs.500/- as against  $\text{Rs.1,600} \times 3 = \text{Rs.4,800}$ .

5. Since the 1st respondent was a defaulter, the bank was compelled to adjust some monies available in Janatha Deposit Account and SB Account as Banker's lien.

6. On account of the default by the 1st respondent by December 1998 , the 1st respondent owed the bank a sum of Rs. 1,01,251/-. The appellant bank realized that the 1st respondent was a chronic defaulter and therefore had no alternative except to bring the Xerox machine for sale, since it was hypothecated to the bank.

7. It is not disputed that the 1st respondent entered into a hypothecation agreement dated 21.5.1997 hypothecating the Xerox machine to the bank.

8. The 1st respondent was notified about the proposed auction.

9. The bank independently got the Xerox machine valued at Rs.52,000/-

10. It was submitted by the appellant bank that the 1st respondent did not respond to the notice dated 16.1.1999 granting the 1st respondent 15 days time to pay the loan amount and there was also no response from the 1st respondent with respect to the sale notice dated 2.2.1999.

11.The bank on 10.2.1999 sold the Xerox machine in favour of the 7th respondent

through tender and possession of the Xerox machine was delivered to the 7th respondent on the same date.

12. The 1st respondent being aggrieved by the public auction of the Xerox machine and for the other alleged irregularities committed by the bank approached the Court under Article 226 of the Constitution of India.

13. The learned single judge curiously directed the appellant bank to hand over a sum of Rs.60,000/- with interest recovered from the sale proceeds of the Xerox machine and further directed the bank to sanction an additional loan to the 1st respondent to purchase a new Xerox machine. The learned single judge further directed a sum of Rs. 2,500/- to be paid by the bank towards cost of litigation and further the learned Single Judge granted liberty to the 1st respondent to initiate proceedings to claim damages against the Bank.

14. Being aggrieved by the order of the learned Single Judge the bank has come up on appeal.

15. It is not denied that the 1st respondent entered into hypothecation agreement with the bank dated 21.5.1997. The hypothecation agreement was also under the category known as composite term loan agreements for small - scale industries under a scheme to provide self - employment to educate unemployed youth. The bank according to hypothecation agreement dated 21.5.1997 granted a sum of Rs.95,000/- to enable the 1st respondent to purchase a Xerox machine. The terms of the agreement was that the same advanced was subject to a minimum of 14% interest p.a. A sum of Rs. 7,000/- was also given as capital subsidy as provided by the Government and it was kept in term deposit. As per the clauses in the agreement the bank was entitled to take possession or recover the security or sell by public auction or by private contract or otherwise deal with security and appropriate the proceeds towards the outstanding loan. This was without prejudice to the bank taking action for the recovery of the loan by other means.

16. The 1st respondent according to the bank has committed default and notice was sent in accordance with terms of the hypothecation agreement and no reply was forthcoming from the 1st respondent. Even with regard to the Xerox machine which was brought to auction, notice was issued to the 1st respondent and the 1st respondent did not reply to the notice. It was only after that the Xerox machine was sold in public auction.

17. When there are contractual obligations entered into between the 1st respondent and the bank, it would not be open for this Court to interfere with the enforcement of the contract unless such enforcement is contrary to the terms of the contract.

18. Reliance was placed on a number of judgements of this court, particularly in Shivayya Basaryya Mathad Vs. The Vijaya Bank, M.G.Road, Bangalore and Another, (1998) 94 Comm.Cas. 16 (Kar), where this Court took the view that in such situation as is presently before us, it would not be open for this Court under Article 226 of the Constitution of India to grant relief on disputed questions of fact.

19. The Division Bench of Andhra Pradesh High Court in the case of State Bank of India Vs. S.B. Shah Ali (dead) by LRs and Others, AIR 1995 AP 134, also took the view that the power of hypothecation to sell a hypothecated property ultimately depends on the terms of the hypothecation agreement.

20. Mr. Gopalakrishna, who argued on behalf of the 1st respondent submitted that the hypothecation agreement entered into between the 1st respondent and the Bank cannot be the basis for the bank to take action, since, the Bank has violated various circulars. It was further submitted that the bank has taken the law into its own hands and has appropriated the Xerox machine without giving an opportunity to the 1st respondent to settle the account. It was further submitted that the accounts furnished by the bank are erroneous and that the bank had no right to appropriate other savings accounts.

21. We are not able to persuade ourselves to accept the submissions of Mr. Gopalakrishna. If there are any instances where the bank has not complied with the regulations that would be a matter for the Reserve Bank of India to take suitable steps. On this aspect reliance was placed on the judgment of the Supreme Court in B.O.I. Finance Limited vs The Custodian and Others, AIR 1997 SC 1952

22. There is no dispute that there was a default on the part of the 1st respondent. There is also no dispute that there was a hypothecation agreement by which a Xerox machine was hypothecated to the bank. There is also no dispute that before the Xerox machine was sought to be auctioned the 1st respondent was put on notice. It is also not in dispute that the 1st respondent was called upon to clear the arrears.

23. In the light of these circumstances it is difficult to think that the Court can take up on itself the role of an Arbitrator and direct fresh loans to be issued to the

Borrower and also direct the Bank to give a new Xerox machine to the 1st respondent.

24. All these aspects are purely contractual and are disputed questions of fact. There are no materials Prima facie to show that the bank acted contrary to the terms of the Hypothecation Agreement. Once it is established that the Bank and the 1st respondent are bound by the hypothecation agreement then consequences must flow from the terms of the agreement.

25. The circulars referred to by Mr. Gopalakrishna cannot be read in isolation of the contract entered into between the Bank and the 1st respondent.

26. It was also submitted by Mr. Gopalakrishna that auction should have been taken under the provisions of the Karnataka Public Monies (Recovery of Dues) Act, 1979 (Karnataka Act 16 of 1980)

27. This submission cannot be accepted since section 4 of the Act clearly exempts a banking company from the provisions of this Act.

28. In that view of the matter of the learned Single Judge is set aside. This, however, will not foreclose the 1st respondent's right to claim damages if permissible under law, there will be no order as to costs.

*Ordered accordingly.*