

# **SUPREME COURT OF INDIA**

Subhransu Sekhar Padhi

Vs.

Gunamani Swain

C.A.No.7936 of 2014

(J.Chelameswar and A.K.Sikri JJ.)

21.08.2014

## **JUDGMENT**

### **CHELAMESWAR, J.**

1. Leave granted.

2. Aggrieved by the judgment dated 6.12.2010 of the High Court of Orissa in Writ Petition (C) No. 13033 of 2009, one of the respondents therein who is the purchaser of the property in an auction held under Section 29 of the State Financial Corporations Act, 1951 (for short the Act) preferred the instant appeal. Some time in the financial year 2002-2003, the 9th respondent i.e. the Orissa State Finance Corporation (hereinafter referred to as OSFC) sanctioned a term loan of Rs. 5,26,500/- for purchase of a TATA truck in favour of the 6th respondent who is wife of the 7th respondent. The said loan transaction is secured by a mortgage of certain piece of land by the father-in-law of the 6th respondent and father of the 7th respondent (since died).

3. As the borrower did not make the repayments in terms of the agreement between OSFC and the borrower, the OSFC attempted to seize the truck which was also hypothecated to the OSFC. As the same was not traceable, the OSFC proceeded against the mortgaged property. The value of the said property was estimated at about Rs. 10,08,000/-. Eventually, the property was brought to sale by auction on 9.2.2009

where the appellant became the highest bidder for an amount of Rs.10,09,000/-. The OSFC confirmed the sale in favour of the appellant. On 31.3.2009, possession of the mortgaged property was handed over to the appellant.

4. On 10.6.2009, the OSFC after appropriating the amounts due to it intimated the three sons of the mortgagor (respondent Nos. 2, 7 and 8 herein) to collect the residue amount of Rs.2,86,460/- from the Corporation.

5. Challenging the seizure and sale of the mortgage property, the writ petition came to be filed by the wife and children of the mortgagor. The appellant herein and OSFC contested the writ petition. By the impugned judgment herein, the writ petition was allowed, hence the appeal.

6. Two questions arise for our consideration;

Whether the OSFC was legally entitled to invoke Section 29 of the Act and bring the properties of guarantors to sale without resorting to the procedure contemplated under Section 31 of the Act.

Whether the High Court was right in entertaining a challenge to the sale from 150 days after the sale took place and the property was handed over to the auction purchaser (appellant herein)

7. In the impugned judgment, the High Court answered the first question emphatically against the OSFC.

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.

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In view of the above, we are of the considered view that the OSFC in exercise

of power vested under Section 29 of the SFC Act cannot sell out the properties mortgaged to it by the guarantors.

As a consequence of such conclusion, the second question is also answered against the OSFC.

14. In view of the above, sale of the properties of the guarantors and subsequent execution of deed of transfer under Annexure-5 are liable to be quashed for being done in flagrant violation of the statutory provision contained in Section 31 of the SFC Act which we direct accordingly.

8. The High Court rested its judgment rightly on a decision of this Court reported in *Karnataka State Financial Corporation v. N. Narasimahaiah & Others*, (2008) 5 SCC 176. In that case, this Court categorically held[1] that it is only the properties of the defaulter which can be proceeded against under Section 29 of the Act but not against the properties of the third parties whether they are guarantors, mortgagors etc.

9. A submission is sought to be made that the impugned judgment is contrary to the ratio of the decision of this Court in *A.P. State Financial Corporation v. M/s. GAR Re-rolling Mills & Another*, (1994) 2 SCC 647. In our opinion, the said decision has no application to the facts of the present case. It was a case where the APSFC initially proceeded against Section 31 of the Act against the properties mortgaged by the borrower (industrial concern) and obtained an order/decreed but subsequently invoked the powers under Section 29. The question before this Court was “ whether the Financial Corporation set up under Section 3 of the State Financial Corporation Act is entitled to take recourse to the remedy available to it under Section 29 of the Act even after having obtained an order or a decree after invoking the provisions of Section 31 of the Act but without executing that decree/order? This Court held[2] that it is always open to the State Financial Corporation to resort to such a course of action.

10. Therefore, we do not see any merit in the appeal.

11. However, the appellant before us is the purchaser of the property sold under Section 29 of the Act, who parted with the money in order to purchase the property. He is a victim of an illegal procedure adopted by the Orissa State Financial Corporation. The law regarding the authority of the State Financial Corporations to

invoke the provisions of Section 29 with respect to properties other than those belonging to defaulter industrial concern is clearly declared by this Court in Karnataka State Financial Corporation (supra) by its judgment dated 30th March, 2008 whereas the sale in question before us is dated 9th February, 2009, almost a year later. The authorities of the 9th respondent Corporation sold the properties to the appellant herein in flagrant violation of the settled position of law. We, therefore, direct the 9th respondent to refund the amount of Rs.10,09,000/- (rupees ten lakhs nine thousands) to the appellant with interest calculated at the rate 12% per annum. However, it is open to the Orissa State Financial Corporation to recover the amounts either from the defaulter - industrial concern or from such other third party against whom the Corporation has a legal right to proceed.

12. Appeal is dismissed. Costs quantified at Rs.1,00,000/- (rupees one lakh) to be borne by the 9th respondent Corporation. It is open to the 9th respondent Corporation to recover the said amount from such of those officers who are responsible for taking a wrong decision to proceed against the property in question under Section 29 of the Act.

13. All the payments, as directed above, shall be made within a period of 30 days from today.

[1] Para 20. Section 29 of the Act nowhere states that the corporation can proceed against the surety even if some properties are mortgaged or hypothecated by it. The right of the financial corporation in terms of Section 29 of the Act must be exercised only on a defaulting party. There cannot be any default as is envisaged in Section 29 by a surety or a guarantor. The liabilities of a surety or the guarantor to repay the loan of the principal debtor arises only when a default is made by the latter. [2] Para 17. The relief available to the Corporation under Section 29 of the Act to realise its dues in the manner rescribed therein is wider in scope than the limited reliefs available to it under Section 31 of the Act and is not controlled by Section 31 of the Act. The Legislature clearly intended to preserve the rights of the Corporation under Section 29 of the Act, by expressly stating in Section 31 of the Act, that its recourse to action under that section is without prejudice to the provisions of Section 29 of the Act. What alone is not desirable or permitted, by the Act is to pursue both the remedies simultaneously by the Corporation and not that it cannot withdraw or abandon the proceedings initiated under Section 31 at any stage and then take recourse to the

provisions of Section 29 of the Act. Any interpretation which frustrates the right of the Corporation to recover its dues must be eschewed. Similarly, if in a given case, the Corporation has taken recourse to the provisions of Section 29 of the Act, there is no bar for it without taking those proceedings to their logical conclusion to abandon them and approach the court under Section 31 of the Act to seek one or more of the reliefs available to it under that section. Where, the defaulting party fails to honour the order or decree of the court made under Section 31 of the Act, it has neither any legal nor even a moral right to object to the Corporation from taking recourse to the provisions of Section 29 of the Act only on the ground that it has obtained a proper relief under Section 31 of the Act which relief it does not wish to pursue any further. Indeed, if the order of the court issued under Section 31 of the Act has been fully complied and honoured with by the defaulting concern, no occasion would arise for the Corporation to invoke the provisions of Section 29 of the Act. However, to hold that since the Corporation has initially taken action under Section 31 of the Act and obtained an order/decree from the court, the Corporation is prohibited from invoking the provisions of Section 29 of the Act, notwithstanding the fact that the defaulting concern has not honoured the court order or decree made under Section 31 of the Act, would amount to putting premium of the activities of the defaulting concern aimed at frustrating the order/decree of the court and depriving the Corporation of recovering its legitimate dues and thereby rendering the expression "without prejudice to ..." occurring in Section 31 otiose. Courts do not favour such a course.