

(2007) 05 GAU CK 0054
In the Gauhati High Court

Amulya Lal Chowdhury

APPELLANT

Vs

Tripura Industrial Development Corporation Ltd. and Another

RESPONDENT

Date of Decision : 22-05-2007

Acts Referred:

Constitution of India, 1950 — Article 226

Contract Act, 1872 — Section 128

State Financial Corporations (Amendment) Act, 1985 — Section 31, 32, 32(1A), 32(7), 32G

State Financial Corporations Act, 1951 — Section 29, 29(1), 31, 32, 32G

Citation : AIR 2007 Guw 113 : (2008) 1 BC 396 : (2007) 139 CompCas 594 : (2007) 3 GLR 776 : (2008) 1 GLT 137

Hon'ble Judges : U.B. Saha, J

Bench : Single Bench

Final Decision : Allowed

Judgement

U.B. Saha, J.—The moot question to be decided in this writ petition is whether the respondent No. 1/Corporation has the power to take over the possession of the mortgaged property of the Guarantor-writ petitioner u/s 29 of the State Financial Corporation Act, 1951 for short SFC Act, 1951") without any proper notice and also whether the Corporation can issue public notice (An-nexure-2 to the writ petition) for auction/ sale of the said property by way of tender for recovering its dues without issuing any prior notice to the guarantor for providing him an opportunity to fulfill his promise, as per his contract, in view of the agreement with the said Corporation, when the respondent No. 2, borrower/ loanee fails to make repayment of the loan to the Corporation, respondent No. 1 for which the petitioner stood guarantor.

2. Heard Mr. A.K. Bhowmik, learned senior Counsel assisted by Mr. S. Ghosh, learned Counsel for the petitioner and Mr. S.M. Chakraborty, learned senior Counsel assisted by Mr. S. Bhattacharjee, learned Counsel for the respondents.

3. To appreciate the moot question, it would be necessary to state the facts" involved in the writ petition, which are in brief are as follows:

The proforma respondent No. 2, son of the writ petitioner (hereinafter referred to as respondent 2), who had passed diploma in X-ray (Radio therapy) and ECG in the year 1989, prepared a project for self employment, borrowed a term loan amounting to Rs. 3,64,000 from the Tripura Industrial Development Corporation (hereinafter referred to as the Corporation) respondent No. 1 in the year 1994 for establishing his sole proprietorship X-ray Clinic namely, M/s. Chowdhury Diagnostic Clinic in the land and building of the petitioner situated at Dhaleswar (near Prachya Bharati School), Agartala and purchased a Siemens 100 ma X-ray Sm 377 machine comprising of and 302 MANIPHOS 100 x Ray Generator in combination with POLYSCOPE II hand tilt Diagnostic Examination table POLYSCOPE-II/ MANOPHOS 100 and complete Dark Room accessories by utilising the term loan sanctioned by the corporation respondent and. also by utilizing further amounts of two lakhs through other sources, started functioning since December, 1995 being requested by the said respondent No. 2, the writ petitioner stood guarantor for the aforesaid loan, mortgaging his residential land with domestic building for setting up an X-Ray clinic of respondent No. 2 in the part of the petitioner's domestic building with the finance from the above mentioned term loan. The loan was to carry an interest @ 17% per annum and/or such other sum or sums as may remain outstanding.

4. Thereafter, according to the writ petitioner, since the said X-ray clinic was in a residential area and away from the commercial part of the town, it did not run well as expected. The further contention of the writ petitioner is that although the respondent No. 2 made some repayments, he could not make regular repayment of the loan to the respondent/corporation at agreed installments and to improve his income of the X-ray clinic, in the month August, 1997, the respondent No. 2 the borrower shifted the X-ray machine with accessories in the house of one Shri Monoranjan Chowdhury but in the premises of one Nand Pathological Laboratory situated at 45 Office lane near Battala, Agartala, which is a commercial area and the said shifting was informed to the officers of the Corporation respondent orally. According to the writ petitioner, permission for shifting the X-ray machine was also sought by a letter, but the Corporation respondent did not allow the respondent No. 2/the borrower to run his X-ray clinic at its new place and since then the X-ray machine with the accessories remained idle.

5. Under the aforesaid facts and circumstances, all of a sudden, the Managing Director of the Corporation Respondent No. 1 issued the impugned letter dated 23-12-1997 (Annexure-1 to the writ petition) to the borrower, respondent No. 2 for taking over possession of M/s. Chowdhury Diagnostic clinic pursuant to Section 29 of SFC's Act, 1951 whereby and whereunder the borrower was advised to keep his representative present in his factory premises on 1-1-1998 during normal office hours to hand over the possession of his mortgaged and hypothecated property to the Corporation after jointly making a list and in case, he or his representative fails to remain present at the time of taking over the possession, the Authorised Officer of the Corporation will break open the locks

and assume possession of the unit as per the provision of Section 29 of the SFC's Act. 1951 According to the petitioner, as the copy of the said letter was served to him as guarantor, he remained present on 1-1-1998, but no one from the office of the Corporation came to visit the clinic of the borrower-respondent No. 2 either at the homestead of the petitioner, i.e. place of mortgaged land at Dhaleswar or at the premises of Nandi Pathological Laboratory at 45 Office Lane, Agartala where the X-ray machine with accessories were lying after shifting.

6. Thereafter, failing to take over the possession of the mortgaged/hypothecated property of the respondent No. 2 as of first charge, the Managing Director of the Corporation respondent issued the impugned public notice dated 8-5-1998, Annexure-2 to the writ petition, in exercising of his power u/s 29 of the published in the local Bengali Daily "Dainik Sambad" on 12-5-1998 wherein the Corporation respondent invited tender for sale of the residential land with building etc. of the writ petitioner which was mortgaged to the Corporation-respondent by separate agreement and with individual promise.

7. By this writ petition under Article 226 of the Constitution of India, the writ petitioner has assailed the impugned letter dated 23-12-1997 and the public "notice dated 8-5-1998 published in "Dainik Sambad" dated 12-5-1998 (Annexure-1 and 2 to the writ petition respectively) on the ground that the Corporation has no right to issue the said notice in exercise of power u/s 29 of the SFC Act as, according to the writ petitioner, the said provisions only empower the State Financial Corporation to take action against the borrower i.e. the respondent No. 2 herein, not against the guarantor/the writ petitioner, no notice had been issued to the petitioner/guarantor providing him opportunity to fulfill his promise prior to issuing such letter as well as public notice. In other words, both the borrower and the guarantor are entitled to prior notice of an intended possession of the mortgaged land and auction thereof.

8. The Corporation-respondent has filed affidavit-in-opposition contending, inter alia, that during his visit on 19-8-1997 to the unit of the borrower respondent No. 2, the Managing Director of the Corporation found that the X-ray machine financed by the Corporation was not in the X-ray clinic and by letter dated 29-8-1997 the borrower was advised for placing/re-installing the X-ray machine within fifteen days. An FIR was also lodged on 5-9-1997 with the East Agartala Police Station informing the missing of the said X-ray machine financed by the Corporation. The Corporation-respondent further states that as no permission was taken by the borrower prior to such unauthorized act, the corporation-respondent had to take resort to the provisions of Section 29 of the SFC Act and as per the terms of the loan agreement took possession of the hypothecated asset on 1-1-1998. The action of the Corporation respondent in respect of taking over of the possession of the hypothecated asset was informed to the borrower-respondent No. 2 and also communicated to the concerned Government department on 2-1-1998. It is the further contention of the Corporation-respondent that the petitioner met the Chairman as well as the Managing

Director of the Corporation and requested them not to put the mortgaged property in auction, as it would lower down his prestige in the society with his assurance that the loan money would be repaid. The Corporation-respondent considered his request but the petitioner did not keep his commitment. As per terms of the loan agreement, if the borrower fails to pay the dues, the Corporation-respondent is legally entitled to realize the dues by selling out the land which was given as co-lateral security against the loan and for this purpose, a guarantee bond was executed.

9. Mr. A.K. Bhowmik, learned senior Counsel for the petitioner submits that admittedly the writ petitioner is not a borrower/loanee nor a surety, but a guarantor. The contract of guarantor is his own separate undertaking, in which the principal does not join. The original contract of the principal is not the guarantor's contract and the guarantor is not bound to take notice of its non-performance. The guarantor makes a separate and individual promise and is only liable secondarily if the borrower fails to discharge his primary liability and if the Corporation cannot realise the loan after selling the mortgaged and hypothecated property like X-Ray Machine and other accessories. He also contended that the guarantor's liability is contingent on default of his principal i.e. borrower and he only becomes absolute liable when such default takes place subject to issuance of proper notice thereof, as the guarantor makes a separate and individual promise. He further submits that the Corporation respondent has never informed the petitioner that the borrower fails to make repayment of the loan amount and the Corporation also fails to realise the loan amount after selling the hypothecated/mortgaged property of the borrower for which letter at (Annexure-A/1) was issued as of first charge. The Corporation only furnished a copy of Annexure-I by which petitioner is informed inter alia that the Corporation will go for taking over possession of the mortgaged and hypothecated property of the borrower. Without issuing proper notice, Corporation tried to sell out the property of the petitioner which is not permissible under law, particularly invoking provisions of Section 29 of the SFC Act as the said provisions do not say anything about the liability, of guarantor's and the petitioner/guarantor entered into a separate and individual contract with the Corporation. For recovery of loan amount from the guarantor, the proper remedy available to the Corporation is to file a civil suit, he contends. According to him, the provisions of Section 29 of the SFC Act only empowers the Corporation for recovery of loan money without taking shelter of Court from the borrower and not from the guarantor. His further contention is that even for argument sake, if it is admitted that provisions of Section 29 of the SFC Act empower the Corporation to take over the possession of the mortgaged property of the guarantor and sell the same, then also the said, right as required by the provisions of Section 29 of the SFC Act can be enforced only by taking recourse to the ordinary law constrained in the Transfer of Property Act and the CPC and not by any provisions of SFC Act as because a guarantor cannot be included as a borrower, who is a different person with different identity and enter into different contract with the Financial Corporation,

In support of his contention. Mr. Bhowmik relied on a full bench decision of the Allahabad High Court in the case of Munnalal Gupta Vs. Uttar Pradesh Financial Corporation and Another, . It is further contended by Mr. Bhowmik that it would be evident from the letter 23-12-1997, Annexure-1 to the writ petition, issued to the borrower/loanee to take possession of all assets mortgaged and hypothecated to the Corporation by the borrower/ loanee and who was also advised to remain present on 1-1-1998 at his factory premises but not to the guarantor for his mortgaged property: i.e. residential land with domestic building and the said letter cannot be treated as a notice as required under law to the petitioner and for non-issuance of any proper notice to the petitioner/guarantor before issuance of public notice in question (Annexure-2) is violative of principle of natural justice. Hence on that ground alone, the impugned letter and the public notice. (Annexure-1 and Annexure-2 to the writ petition) respectively/are liable to be quashed.

10. To knock down the submission of Mr. Bhpwmik, Mr. S.M. Chakraborty, learned senior Counsel for the Corporation-respondent submits that the provisions of Section 29 of the SFC Act empowers the Corporation-respondent to possess and sell the hypothecated and mortgaged property of the borrower as well as the guarantor, as because in the aforesaid provisions, it is specifically stated that the Corporation shall the right to take over the management or possession or both of the industrial concern as well as right to transfer by way of lease or sale and realise the property pledged, mortgaged, hypothecated or assigned to the Financial Corporation. Accordingly, the property of the petitioner has come within the purview of the word "mortgaged" as well as "assigned" to the Financial Corporation. Hence, the Corporation has the right to sell the said mortgaged and hypotheticated property of the borrower as well as the mortgaged property of the guarantor as because both of them failed to keep their promises made in the agreement. Mr. Chakraborty has further contended that if the borrower fails to comply his promise in accordance to the conditions of the agreement, then the liability is with the guarantor as, he promised that he would refund the loan amount if the borrower fails to pay the same and if he fails to repay the loan amount, then his mortgaged property will be vested to the Corporation as owner and the Corporation has the right to sell the same. He further contended that it is an admitted position in this case that the borrower, respondent No. 2, fails to make repayment of the loan as per agreement and the guarantor/petitioner was informed accordingly regarding the aforesaid facts and he also failed to comply his part of promise. Hence there was no other alternative except to take over the possession of the mortgaged property of the petitioner/guarantor and sell the same for which the impugned letter (Annexure-1) and the impugned public notice (Annexure-2) in question were issued by the Corporation and those are reasonable, legal and valid in the eye of law, in view of the decision of the Apex Court in the case of International Coach Builders Ltd. Vs. Karnataka State Financial Corpn., particularly paragraph 18 of the judgment and relying the case of Karnataka State Industrial Investment and Development Corporation Ltd. Vs.

Cavalet India Ltd. and Others, particularly paragraph 19, he also contended that the High Court can only exercise its jurisdiction under Article 226 of the Constitution on two grounds namely, (i) when there is a statutory violation on the part of the Corporation or (ji) where the Corporation acts unfairly and unreasonably Mr. Chakraborty tried to smash the submission of Mr. Bhowmik contending that not admitting but for argument's sake, if the loanee and the guarantor are different persons with different identity and have entered into different contract with the respondent is accepted, then also as per provisions of Section 29 of the SFC Act, the guarantor is liable to repay the loan amount of the loanee including interest accrued thereon as and when the borrower fails to refund the same and when the guarantor also fails to pay its liability, the Corporation has the right to adjust the loan amount with interest by way of selling his mortgaged property as because the guarantor mortgaged/assigned his land property to the Corporation in response to Mr. Bhowmik submission regarding the status of the guarantor, Mr. Chakraborty submits that the meaning of surety and guarantor are same the liability of them are also similar. In the instant case the petitioner is the surety cum-guarantor, and he cannot deny his liability, when his son borrower/loanee fails to discharge his primary liability and as per Section 128 of the Indian Contract Act, for repayment of loan amount, liability of guarantor is co-extensive. He again contended that no separate notice need be required to the guarantor petitioner as he has already been informed vide notice dated 23-12-1997 (Annexure-1 to the writ petition) by the Corporation and according to him no case is made out by the petitioner for interfering with the impugned letter dated 23-12-1997 (Annexure-1 to the Writ Petition) and Public notice dated 8-5-1998 (Annex-ure-2 to the writ petition), hence the writ petition is liable to be dismissed.

11. For better appreciation of the pleaded case of the parties as well as the rival submissions of the learned Counsel, it would be appropriate to reproduce the provisions of Section 29 of the SFC's Act, 1951 as well as the Section 128 of the Indian Contract Act as under:

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

(2) Any transfer of property made by the Financial Corporation, in exercise of its powers under Sub-section (1), shall vest in the transferee all rights in or to the property transferred (as if the transfer) had been made by the owner of the

properly.

(3) The Financial Corporation shall have the same rights and powers with respect to goods manufactured or produced wholly or partly from goods forming part of the security held by it as it had with respect to the original goods.

(4) Where any action has been taken against an industrial concerned under the provisions of Sub-section (1), all costs, charges and expenses which in the opinion of the Financial Corporation have been properly incurred by it (as incidental thereto) shall be recoverable from the industrial concern, and the money which is received by it shall, in the absence of any contract to the contrary, be held by it in trust to be applied firstly, in payment of such costs, charges and expenses and, secondly, in discharge of the debt due to the Financial Corporation, and the residue of the money so received shall be paid to the person entitled thereto.

(5) Where the Financial Corporation has taken any action against an industrial concern under the provisions of Sub-section (1), the Financial Corporation shall be deemed to be the owner of such concern, for the purposes of suits by or against the concern, and shall sue and be sued in the name of the concern."

128. Surety's Liability.-- The liability of the surety is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract.

12. The Full Bench decision of Allahabad High Court in *Munnalal Gupta Vs. Uttar Pradesh Financial Corporation and Another*, their Lordships, considering the facts of that case, held that the preamble of the Agreement describes the industrial concern as a borrower and the petitioner, Munna Lal as "mortgager" who has mortgaged his property as security of the loan and the distinction between the borrower and surety has been kept throughout the agreement, which has been signed separately by the borrower and also by Munna Lal as the mortgager. A borrower obviously is a person who borrows and took loan includes the surety who guarantees or secures the loan, and for such a Corporation could not be proceeded against the mortgager u/s 31 of the Act. In the case of *Industrial Construction (supra)* the Apex Court held that the provisions of the SFC's Act were primarily intended to give an expeditious remedy to the State Financial Corporation without having through the procedure of enforcing the mortgage under the Transfer of Property Act, 1882 as because the procedure prescribed in the general law requires intervention for selling the mortgaged property and that would create a considerable delay and holding up of public money due to SFC. The provision of Section 29 of the SFC Act empowers the SFC to recover the loan amount without interference of the Court from the borrower. In *Haryana Financial Corporation and Another Vs. Jagdamba Oil Mills and Another*, the Apex Court held that being the State Financial Corporation is an instrumentality of the State, deals with the public money, and there can be no doubt that the approach has to be public oriented. It can operate effectively if there is regular realisation of the instalment and while the Corporation is expected to act fairly in the matter of

disbursement of the loan.

13. This Court considered the case of Smt. Hiranyaprava Samantray Vs. Orissa State Financial Corporation and Others, , wherein almost similar facts are involved and also identical question arose like the case in hand for decision and their Lordships of Orissa High Court held that liability of guarantor is co-extensive with that of the borrower but it cannot also be disputed that though Section 29 of the Act does not provide issuance of any notice, the principles of natural justice and fair play are not excluded. Their Lordships also held that the opposite parties of that case were duty bound to issue a notice regarding their intended auction u/s 29 of the Act. Relevant portions of the aforesaid report are reproduced hereunder for proper appreciation.

6. Having considered the contentions raised by the parties, we are of the opinion that the petition deserves to be allowed and the notice dated 29-7-1993 (Annexure-1) is liable to be quashed. There can be no dispute in the proposition that the liability of a guarantor is co-extensive with that of the borrower. It cannot also be disputed that though Section 29 of the Act does not provide for issuance of any notice, the principles of natural justice and fair play are not excluded. In view of this, the two contentions which are more in the nature of preliminary objections deserve to be overruled indeed, this is now the settled position in view of the pronouncement of the Apex Court in the case of Kharavela Industries Pvt. Ltd. Vs. Orissa State Financial Corporation and Others, . Therefore, the opposite parties were duty bound to issue a notice regarding their intended auction u/s 29 of the Act.

7. In support of their contention that a notice under registered post was issued on 8-2-1990, a xerox copy of the notice has filed as Annexure-A. A mere perusal of this document shows that it was sent by registered post with A.D. to "Sri Banshidhar Samantray". The endorsement in the notice shows that a copy was, amongst others, also marked to Smt. Hiranyaparava Samantray, the petitioner herein. As there was a dispute between the parties regarding issuance of this notice by registered post, we called upon the opposite parties to produce the Despatch Register. The entry 5488 in the Despatch Register shows that a notice under Registered A.D. post was sent to Bansidhar Samantray and a postal receipt has been affixed in the Despatch Register against the said entry. The subsequent entry does show that copies were sent to the R.T.O., Regional Manager, O.S.F.C. Branch Manager, O.S.F.C. and Smt. Hiranyaprava Samantray, the petitioner but no postal receipt is affixed against this entry nor is there any entry regarding the cost incurred by way of postage or otherwise. Indeed, in the column where the cost of postage is to be incurred, something written therein has been scored off. Thus, the contention of the learned Counsel for the opposite parties in para 8 of the counter-affidavit "that before the sale of the vehicle the guarantor was requested vide our registered letter bearing No. 5488 dated 8-2-1990 to appear before the DAC to be held on 14-2-1990 for settlement of the loan dues and for release of the vehicle...." does not appear to be correct. Had the notice been

issued under registered post as alleged, the postal receipt would have been affixed against the entry like in the case of the borrower and, as also the cost incurred towards postage charges would have found place in the appropriate column in the Despatch Register in view of the above, we are of the view that registered notice as alleged, was not sent to the petitioner by the opposite parties. The contention of the petitioner, therefore, that action u/s 29 of the Act was taken without any notice to her deserves to be upheld. The question, therefore, is what would be the effect of this omission on the proposed action of the opposite parties against the petitioner/guarantor in terms of Annexure-1 is some what similar facts in the case of *Balaram Das v. Orissa State Financial Corporation*, OJC No. 3013 of 1992, decided on 8-7-1993, a Division Bench of this Court consisting of Hon''ble Mr. Justice L. Rath and Hon''ble Mr. Justice R.K. Patro have held as under:

Since in law, the liability of the loanee and the guarantor stands on the same footing, the legal protections available to the loanee are also available to the guarantor. Since admittedly the petitioner had no notice of taking over of the press to a third party, which is by now a fait accompli, there is no doubt that the interest, of the petitioner has been grossly affected by the action of the opposite parties taken behind his back. That being so. the further action taken u/s 29 of the Act to take over the property of the petitioner cannot be sustained in law nor can the demand be raised against him for recovery of the short-fall, though (sic) we must add that since the provisions of the Act were complied with so far as the loanee is concerned, the remedy against the loanee remains unaffected.

Under the circumstances, the proposed action contemplated against the petitioner by Annexure-1 cannot be sustained and Annexure-1 is thus liable to be quashed.

14. This Court also notice the judgment of the Apex Court in the case of *Delhi Fin. Corpn. and Another Vs. Rajiv Anand and Others*, wherein their lordships observed that, "The borrower and the surety or the guarantor know what the amounts due are, they know what amounts have been repaid, they know when the amounts were to be repaid, what has not been repaid or how belatedly amounts have been repaid. They know what the rate of interest is. Thus a mere calculation has to be made to ascertain the amount due. If on such calculations it is found that an amount due is due to the financial corporation then a certificate or recovery can be issued. Undoubtedly, the provision is in the nature of an execution proceeding but it is not a recovery proceeding pursuant to a decree of a Court. It is a recovery proceeding on the amount being found to be due by a simple verification by the State Government or the authority appointed by it." In *Delhi Financial Corporation (supra)* the learned Counsel of borrower urged that Section 32 of the Act can only apply to a principal debtor and not against a surety and, in support of the said contention, reliance had been placed on the case of *Munna Lal Gupta (supra)* decided by the Full Bench of Allahabad High Court but the Apex Court disapproved the said contention of learned Counsel and

the decision of the Allahabad High Court in *Munna Lal Gupta (supra)*. Relevant para Nos. 15 and 16 of the said report is quoted hereunder:

15. It is urged that Section 32G of the Act can only apply to a principal debtor and not against a surety. In support of this submission it is pointed out that prior to amendment of Section 31 in 1985, a Court had taken the view that the provisions of Section 31 could not be invoked against a surety or a guarantor. In support of this submission reliance was placed upon the authority of the Allahabad High Court in the case of *Munnalal Gupta v. U.P. Financial Corporation*. A Full Bench of the Allahabad High Court, on a consideration of Sections 29, 31 and 32 of the State Financial Corporation Act held that Section 31 could not be invoked against a surety. It was submitted that in view of this decision the legislature amended Section 31 by incorporating therein Clause (aa). It was submitted that Section 32 was amended by incorporating Sub-sections (1-A), (r-A) and (7) (da) therein. It was submitted that the legislature was specifically incorporating provisions in Sections 31 and 32 enabling financial Corporations to proceed against sureties. It was submitted that by the same Amendment Act Section 32G was also incorporated. It was submitted that the legislature did not specifically provide, in Section 32G, that it could be availed of against a surety. It was submitted that this clearly indicated that the intention of the legislature was that Section 32G was meant to be used only against the industrial concern which had borrowed the amounts.

16. We see no substance in this submission. A plain reading of Section 32G negates such an argument. Section 32G provides that "when any amount is due" to the financial corporation, an application can be made to the State Government "for recovery of the amount due". The amount would be due to a financial corporation either from the industrial concern and/or from a surety/ guarantor. If the intention were to limit the procedure u/s 32G only to the principal debtor then the legislature would necessarily have had to use the words "amount due from the principal debtor" or a "amount due from the industrial concern". The legislature has purposely omitted to use those words. Further Section 32G was incorporated by the same amending Act which incorporated provisions for enforcement against a surety. The fact that it is incorporated at the time when provisions permitting proceedings against a surety were being incorporated indicates that the legislature was aware that proceedings u/s 32G could apply even against a surety. If at this time the legislature intended that Section 32G was not to apply to a surety then the legislature would have specifically so provided. It is, therefore, clear that the remedy u/s 32G is available even against a surety.

15. The case law cited by the learned Counsel for the Corporation respondent are the case wherein the Corporation went for recovery the loan amount from the borrower/loanee either by transfer of the hypothecated and/or mortgaged property of the borrower/loanee, not the mortgaged property of the guarantor and/or surety and the action of the Corporation was also challenged by the

borrower, not by the Guarantor and in those cases the Apex Court considered namely the provisions of Section 32G of SFC Act 1951, not regarding the liability of guarantor under the provisions of Section 29 of SFC Act and hence those cases have no direct bearing on the case in hand.

16. This Court also noticed the judgment of this Court in the case of Assam Financial Corporation Vs. Dutta Barua and Company and Another, wherein this Court discussed the power of the financial corporation u/s 29 of the SFC Act regarding recovery of the loan amount after taking over possession of the mortgaged property and putting it into sale by making advertisement in the local daily newspaper. Division Bench of this Court in Assam Financial Corpn. (supra) quashed the order of the learned single Judge wherein the learned single Judge directed the Assam Financial Corporation to initiate process for sale by public auction de novo by way of advertising the auction notice in three local dailies so that the interest of the borrower to fetch reasonable price of the land through multiple tender. There is no quarrel with the said proposition laid down by the Division Bench of this Court but the question that arises in this case for decision was not before the said Division Bench and their Lordships had also got no opportunity to decide the question involved in the instant case.

17. To find out the exact meaning and difference between the word "surety", and "guarantor", this Court looked up various Dictionaries including "Black Law Dictionary 6th Edition" and it appears from page 441 of the said Dictionary that there are points of differences between "surety" and "guarantor" though they are bound for another person. For better appreciation, relevant portions of Black Law Dictionary 6th Edn. are extracted hereunder:

Guarantor and surety compared. A surety and guarantor have this in common, that they are both bound for another person yet there are points of difference between them. A surety is usually bound with his principal by the same instrument, executed at the same time and on the same consideration. He is an original promisor and debtor from the beginning, and is held ordinarily to every known default of his principal. On the other hand, the contract of guarantor is his own separate undertaking, in which the principal does not join. It is usually entered into before or after that of the principal, and is often founded on a separate consideration from that supporting the contract of the principal. The original contract of the principal is not the guarantor's contract, and the guarantor is not bound to take notice of its non-performance. The surety joins in the same promise as his principal and is primarily liable; the guarantor makes a separate and individual promise and is only secondarily liable. His liability is contingent on the default of his principal, and he only becomes absolutely liable when such default takes place and he is notified thereof. "Surety" and "guarantor" are both answerable for debt, default, or miscarriage of another but liability of guarantor is, strictly speaking, secondary and collateral, while that of surety is original, primary and direct. In case of suretyship there is but one contract, and surety is bound by the same agreement which binds his principal,

while in case of guaranty there are two contracts and guarantor is bound by independent undertaking.

18. The Apex Court as well as the High Court decided the matter in the aforesaid cases regarding liability of borrower and the power of the financial Corporation u/s 29 and Section 32G of the SFC Act but not the liability of the surety/guarantor except in the case of Smt. Hiranyaprava Samantray Vs. Orissa State Financial Corporation and Others, Hence, according to this Court except the judgment in Smt. Hiranyaprava Samantray (supra) all other judgments are not squarely covered and applicable to the case in hand. In the present case, it is an admitted position that the guarantor-petitioner, though stood as guarantor for repayment of the loan, obtained by his son the borrower/loanee from the Corporation, he made a separate and individual promise through a separate agreement and liable secondarily so far as repayment of loan including the interest is concerned, as the borrower-respondent No. 2 has already entered into an agreement with the Corporation respondent on making an individual promise and liable primarily. As there is a difference between the liability of "surety" and "guarantor" as per Black Law Dictionary 6th Edn, this Court is unable to accept the contention of Shri Chakraborty, learned Counsel for the Corporation inter alia that the meaning of surety and guarantor and his liability are not similar. According to this Court, though the borrower and the guarantor has the common liability for repayment of the loan amount, but the liability of the borrower and guarantor are different, as borrower's liability is primary one and liability of guarantor is secondary and when the borrower fails to make the repayment, only then the liability of guarantor for repayment of loan as he is the only secondarily liable, there is also difference between surety and the guarantor as the surety is usually bound with its principal borrower by the same instrument, executed at the same time and on the same consideration and he is the original promisor and debtor from the beginning and is held ordinarily to every known default of his principal and the contract of guarantor is bound by his own separate undertaking, in which the borrower principal does not join, and he is only liable as and when the borrower principal who is primarily liable for repayment of the loan amount fails to comply his act of agreement, and when the Corporation also so fails to recover the same from the borrower even after selling the hypothecated and mortgaged property of the borrower, then only the guarantor is liable. Before proceeding for transfer of mortgaged property of guarantor by way of sale to other persons through public notice (Annexure-2) the financial corporation is bound to give proper notice to the guarantor expressing its intention for such sale of the said mortgaged property and not only that, before sale of the said property the Corporation has also to allow the guarantor an opportunity to make repayment of the loan if possible from his other sources and if the guarantor fails to make such repayment of loan then only the Corporation can issue public notice like Annexure-2 to the writ petition for sale of the mortgaged property after providing proper notice to the guarantor, which is absent in the present case. Non issuance of any notice prior to issuance of public notice for sale in the newspaper is not

only unfair but also unjust and as the same is unjust is also unreasonable and when such action is unreasonable, the same is also arbitrary and an arbitrary action is always ultra vires.

19. In the instant case, as confronted by this Court, Mr. Chakraborty, learned senior counsel for the Corporation respondent has also admitted that no such notice was issued to the guarantor-petitioner before taking possession of the petitioner's mortgaged land and hypothecated property vide letter dated 23-12-1997 and only copy of such letter was issued but no notice was issued prior to issuance of public notice on 8-5-1998 (Annexure-2). This Court is of the considered opinion that for non issuance of prior notice to the petitioner-guarantor the impugned letter (Annexure-1) by which possession of mortgaged and hypothecated property has been taken away by corporation and public notice published in the newspaper (Annexure-2) for sale of the property of guarantor, is unreasonable, unjust and also arbitrary and violative of the principle of natural justice, though Section 29 of the SFC Act empowers the financial corporation to recover the loan amount even from the guarantor on the basis of his contract agreement and provisions of SFC's Act as he separately entered into an agreement with the corporation to the effect that if the loanee fails to repay the installments, the same shall be recovered from him by selling his land and property and as the liability of the guarantor is also co-extensive with that of the borrower. But in strict sense the provisions of Section 128 of the Indian Contract Act (for short Contract Act) has no application in case of a guarantor as the said provisions of Contract Act does not say anything about the liability of the Guarantor and the guarantor being himself named as a principal debtor and the liability of guarantor arising notwithstanding the performance or non performance by the debtor, rather Section 128 of the Contract Act fixed the liability of surety only. However, being a trustee of the borrower as well as guarantor, it is the duty of the Corporation to issue proper notice to the guarantor for discharging his liability though Section 29 of the Act does not provide for issuance of any such notice, but the principle of natural justice requires the same, as because the said provisions of Section 29 does not exclude the principle of natural justice and fair play on the part of the Corporation as laid down by their Lordships in the case of Smt. Hiranya Prava Samantray (supra). In the case of Karnataka Industrial Investment (supra) the Apex Court observed that the exercise of the right of the financial corporation under Section 29 of the Act should be fair and reasonable, ultimately where the action of the financial corporation is bona fide or not as is appearing in the instant case. It is also settled that writ Court cannot act as an appellate authority over the decision of State Financial Corporation so far as taking over possession of the mortgaged property as well as transfer of the same by way of sale for recovering its dues are concerned. Writ Court can only interfere with the decision of Financial Corporation, if such decision is contrary to statutory provision and unfair, unjust, unreasonable and arbitrary. Every delinquent borrower and guarantor expect that the financial corporation being a trust of borrower, surely and guarantor, would

initially try to help them to repay loan from their own sources and if falls, then only the Corporation should try for selling the mortgaged and hypothecated property after providing proper notices. In the instant case it appears from the affidavit in opposition of the corporation/respondent that the writ petitioner requested the appropriate authority of the corporation, including its Chairman, not to put the mortgaged property in sale/auction, as it would lower down his position and prestige in society, the corporation did not take any proper steps for providing him reasonable time for repayment except mere consideration for rejection of request, before issuance of the impugned letter and public notice. According to this Court, in view of the facts and circumstances involved in the instant case the action of the corporation respondent is not only unfair, unjust, unreasonable and arbitrary also ultra vires so far issuance of the impugned letter for taking over possession of the land property of writ petitioner mortgaged to the corporation respondent and impugned public notice for sale of the said mortgaged property is concerned. Hence, taking over of possession of petitioner's land mortgaged vide letter (Annexure-1) is bad in law and the public notice (Annexure-2 to the writ petition) issued by the corporation for selling such land as mortgaged by the petitioner/ guarantor is also impermissible under law, as the corporation had failed to discharge its duty before issuing the letter and public notice impugned, therefore both the letter (Annexure-1) and Public notice (Annexure-2) are hereby set aside and quashed. The Corporation respondent No. 1 shall restore the possession of hypothecated property as well as the mortgaged land of the petitioner to him forthwith.

20. In the result, writ petition is allowed. No order as to costs. However, it is made clear that the Corporation respondent can proceed de-novo in accordance with law for realization of its dues.