

(2011) 04 P&H CK 0015
In the Punjab And Haryana At Chandigarh
Case No : C.W.P. No. 6484 of 2007

Anil Kaur

APPELLANT

Vs

Haryana Financial Corpn. and Others

RESPONDENT

Date of Decision : 08-04-2011

Acts Referred:

Companies Act, 1956 — Section 125, 433, 446, 529, 529A
Contract Act, 1872 — Section 128, 133, 134, 135, 141
Limitation Act, 1963 — Section 3
State Financial Corporations Act, 1951 — Section 29, 30, 31, 32, 32G

Citation : AIR 2011 P&H 140 : (2013) 1 BC 629

Hon'ble Judges : Permod Kohli, J

Bench : Single Bench

Advocate : Aryak Dutt, for the Appellant; Kamal Sehgal, for the Respondent

Judgement

Permod Kohli, J.—A Company, under the name and style of Punjab Malt Private Limited came to be incorporated on 1st December, 1973 having been promoted by the petitioner and her husband, namely, Ranjit Singh along with Mr. L.M. Thapar and late Kanwar Shamsher Singh who were also Directors of the Company along with the petitioner and her husband. The name of the Company was later on changed as "Punjab Malt Limited" (hereinafter referred to as "the Company"). The Company was set up as a heavily export oriented plant for the manufacture of malt from barley at Panchkula in Haryana, respondent No. 1 agreed to advance a loan of Rs. 30.00 lacs to the Company. The loan was secured by respondent No. 1 with the mortgage of the assets and properties of the Company along with personal guarantee of the petitioner and her husband as also personal guarantee of Kanwar Shamsher Singh and another Director of the Company. The Company also secured loan from IFCL, Syndicate Bank and New Bank of India (now merged into PNB). The pari passu charge was created in favour of IFCI. It is admitted factual position that the unit did not take off and production never commenced. It is alleged that even though respondent No. 1 agreed to pay loan of Rs. 30.00 lacs, however, only one-third amount was

disbursed. With a view to make its financial requirements and overcome other related problems, the petitioner floated a public offer by issuing 2,04,000/- shares of Rs. 1000/- each for cash at par. Despite that the Company could not go into production and became defaulter in payment of its dues to all the Financial Institutions referred to above respondent No. 1 vide letter dated 7th March, 1979 recalled the entire loan from the Company. It is alleged that at the time of recall, total outstanding amount was Rs. 11,23,229.65. The Company objected to the recall. In view of default, the Financial Institutions formed a consortium with IFCI as the lead partner and decided to take over the management and control of the Company by superseding the existing Board of Directors to be substituted by their own nominees. An understanding was arrived at between the management of the Company and the Financial Institutions. It is stated that under the said understanding the petitioner and her husband were to sell their shares in favour of Kanwar Shamsher Singh, nominee of the Financial Institutions and Banks at a consideration of Rs. 7,25,420/- and also to relinquish the management and control. It is further alleged that in view of the understanding, the personal guarantees given by the petitioner were to be released. The petitioner tendered her resignation from the Board of Directors vide letter dated 9th July, 1979 which was accepted by the then Board of Directors. An intimation in this regard was given by the petitioner to the financial institutions vide her letter dated 16th July, 1979. It is further alleged that the petitioner wrote communications to all the Financial Institutions to release personal guarantees on the basis of alleged package deal between the Financial Institutions, Kanwar Shamsher Singh, on the one hand and the petitioner and her husband on the other hand. Some of such communications have been placed on record as Annexure P-9 (collectively). It is also the case of the petitioner that after the exit of the petitioner and her husband, the Board was reconstituted with the nominees of respondent No. 1 as is evident from the Director's report dated 7th September, 1979 (Annexure P-10). To substantiate that the outstanding amount of respondent No. 1 upto 31st December, 1978 was only Rs. 9,67,215.95, reference made to the balance sheet dated 25th August, 1979 as it stood on 31st December, 1978 (Annexure P-11). A letter dated 25th February, 1980 was received whereby petitioner's husband was informed by IFCI that he is still liable for the payment of the Corporation dues on the basis of the bond of guarantee. The petitioner claims to have revoked her personal guarantee vide letter dated 7th March, 1980 (Annexure P-14). Some understanding reached between the Financial Institutions and Kanwar Shamsher Singh whereby the Board of Directors was reconstituted and some decisions were taken as is evident from Annexure P-15. In the meanwhile, a winding up petition No. 211 of 1980 u/s 433 of the Companies Act came to be filed in the High Court of Punjab and Haryana at Chandigarh by various persons. The Company was accordingly ordered to be wound up and Official Liquidator attached to the Court asked to take over the management and affairs of the Company vide order dated 27th July, 1984. It is alleged that the petitioner was informed by her tenant of SCO 12, Sector 17, Chandigarh that a warrant of attachment of rent has been issued by respondent

No. 2, the Collector as per Recovery Certificate dated 22nd February, 2006 issued by respondent No. 1. A public notice in this regard was also issued by respondent No. 2 regarding attachment of the property. Order of winding up was challenged by respondent No. 1 in Company Appeal No. 19 of 1997 which came to be dismissed vide order dated 12th January, 2007. As a consequence of the winding up order properties of the Company were put to sale under the orders of High Court of Delhi u/s 30 of the State Financial Corporations Act, 1951. The sale was confirmed by the Hon'ble Delhi High Court vide its order dated 27th October, 2005 in favour of Chandigarh Malt Limited at the instance of IFCI. It is further case of the petitioner that respondent No. 1 did not initiate any action against the Company for recovery of its dues nor even got its charge registered with the Registrar of Companies in terms of Section 125 of the Companies Act. Respondent No. 1 did attempt by making an application for registration of the charge before the Company Law Board after seven years and seven months which was objected to by the Syndicate Bank and the Company Law Board vide its order dated 26th February, 1995 asked respondent No. 1 to obtain leave of the High Court u/s 446 of the Companies Act. Despite this order, no application was made before the High Court, respondent No. 1, however approached the Official Liquidator who declined the request. The petitioner has challenged the Recovery Certificate dated 26th February, 2006 and the warrant of attachment dated 22nd January, 2007 attaching the rent accruing from SCO No. 12, Sector 17E in the present petition.

2. The contesting respondents filed a detailed Written Statement. While, this petition was pending, Hamohinder Singh Chadha, Mrs. Varinder Chadha, Sandeep Bansal and Ranjeesh Bansal, filed CM. Nos. 12130-32 of 2009 for impleadment as party respondents claiming to be purchaser of the property on the basis of the decree of Civil Court. The applicant has also pleaded that the entire sale consideration amount i.e. Rs. 850 crores has been deposited in the Executing Court on 13th December, 2007. The applicants have also purchased the stamp paper amounting to Rs. 54,36,900/- for execution of the sale-deed, respondent No. 1 moved an application before the Executing Court for recall of the order passed by Executing Court and also asked for stay of release of the amount and a civil revision also came to be filed before this Court for setting aside the order dated 25th October, 2008, whereby the consideration amount was ordered to be released in favour of the judgment-debtor. In CR No. 6443 of 2008, operation of the order of the Executing Court was stayed vide order dated 20th November, 2008. The applicant on coming to know about the pendency of this writ petition had filed this application for impleadment claiming right over the property sought to be attached through the impugned order as a purchaser thereof and has pleaded that respondent No. 1 can only claim the sale consideration which has been deposited by the applicant before the Executing Court.

3. Respondent-Corporation in its written statement admitted that an amount of Rs. 30.00 lacs was sanctioned in favour of the PKL Malt Limited. However, an

amount of Rs. 21.62 lacs only was disbursed vide mortgage deed dated 23rd September, 1975. It is further stated that on failure of the Company to repay the loan, the Corporation recalled the loan on 7th March, 1979, followed by a possession notice dated 30th June, 1992. It is further mentioned that the Corporation could not take possession, as no responsible/authorized person was available to hand over the possession to it. It is also the case of the respondent that Recovery Certificate was secured by the Corporation under the Haryana Public Moneys (Recovery of Dues) Act, 1979 (hereinafter referred to as "the 1979 Act") on 26th/28th July, 1982 against the petitioner and other guarantor for recovery of Rs. 35.90/- lacs with further interest at the rate of 12.5% per annum w.e.f. 15th March, 1982. This Recovery Certificate was sent to the Collectors, Ambala, Kullu and Chandigarh for execution. Copies of these certificates have been placed on record as Annexures R-1 to R-3. It is further stand of the Corporation that in the meanwhile, Syndicate Bank filed suit for permanent injunction against the Corporation in the Court of Sub-Judge Ambala seeking injunction from taking over the possession of the Unit. Civil Court granted permanent injunction against the Corporation for taking over the possession of the Unit vide order dated 10th August, 1983. In the meanwhile, Company was ordered to be wound up under the orders dated 27th July, 1984 of the Punjab and Haryana High Court. The sale of the assets of the Company in liquidation was confirmed by the Delhi High Court on 27th October, 1995. The Corporation claims to have obtained another Recovery Certificate under the provisions of the 1979 Act from the Collector, Chandigarh as the earlier certificate issued in the year 1982 was not traceable.

4. The Corporation admitted that its charge was not registered with the office of Registrar of Companies within the prescribed time. It is, however, mentioned that the responsibility for filing the charge with the Registrar of Companies was with the Company (borrower). But Company did not get the charge of the Corporation registered with the Registrar of Companies. The Corporation approached the Company Law Board for condonation of delay for registration of the charge. However, its application was rejected. The Corporation thereafter approached the Official Liquidator for registration of the charge which request was declined by the Official Liquidator vide its order dated 3rd July, 1987, holding the Corporation to be unsecured creditor. An Appeal preferred by the Corporation before the learned Single Judge of this Court against the order of the Official Liquidator declaring the corporation as unsecured creditor, was dismissed by the learned Single Judge vide order dated 12th January, 2007 and further Appeals before the Hon''ble Division Bench and SLP before the Hon''ble Supreme Court also resulted into dismissal. According to the respondents, Recovery-Certificate issued by the Corporation on 10th January, 1994 remain in operation till 2005, but the Corporation was unable to recover any amount from the guarantors. In the meanwhile, Supreme Court judgment in the case of AIR 2003 SC 2103 came whereby the Corporation could not pursue the recovery under the provisions of the 1979 Act. Hon''ble Supreme Court held that the Corporation could only

recover the amount under the provisions of the State Financial Corporations Act, 1951. It has thus, been pleaded that in view of the aforesaid judgment, the Corporation approached the State Government who nominated Managing Director of the Corporation as specified authority u/s 32-GG of State Financial Corporations Act. Managing Director of the Corporation on being notified as the specified authority u/s 32-GG of the State Financial Corporations Act issued notice dated 29th December, 2005 for recovery of the amount as arrears of land revenue. The Corporation also issued letters dated 29th December, 2005 for appearance before the specified authority on 19th January, 2006 for determination of the amount. It is alleged that letters were issued at the available addresses with the Corporation, but none appeared and the specified authority determined the amount and issued a Recovery Certificate on 22nd February, 2006.

5. As regards the failure of the Company to take off and start production, it is stated that the Company could not complete the project as per the original project report by February, 1976. The project was actually completed in June, 1978 which resulted in overrun of the project costs from 82.39 lacs to 134.88 lacs. The shortfall of Rs. 52.49 lacs was to be arranged by the Company from its own resources, but the Company failed to mobilise the resources to implement the project. The Corporation further specified following reasons for failure of the Company to start the operations:

- (i) The Company could not arrange the import of malt testing and quality equipments.
- (ii) The leakage in the basement of the tanks, which was not rectified by the consulting engineers at the time of inspection.
- (iii) Inability to organize sales operation.
- (iv) Paucity of Working Capital funds.
- (v) Accumulation of heavy interest.
- (vi) One of the key reasons of not going into production is the tussle between the two groups of management/promoters of the company i.e. Sh. Ranjit S. Partap and Kanwar Shamsheer Singh and family, who are brothers from the very beginning of establishing of unit.

6. The petitioner has sought the quashment of the recovery notices and challenged the action of the respondents in effecting recovery from the petitioner on the following grounds:

- (1) That the claim of the Corporation against the petitioner is barred by limitation.
- (2) That the surety (petitioner) is discharged by variance in terms of the contract.
- (3) That the liability of the petitioner cannot go beyond the period when the petitioner was relieved from the Company as a Director and also surrendered her

shares in the Company as a shareholder with the concurrence and to the knowledge of the Corporation. It is stated that assuming the Corporation has any right to recover any amount from the petitioner, the amount outstanding the time of resignation of the petitioner on 9th July, 1979 was Rs. 9,67,215.95 as per the balance-sheet as stood on 31st December, 1978 and thus liability of petitioner cannot go beyond this amount.

(4) That the liability of the surety (petitioner) is co-extensive with principal debtor (Company). The Company having been wound up, the Corporation cannot recover any amount more than what can be recovered from the Company under the winding up proceedings. It is argued that the respondent Corporation has been treated as an unsecured creditor and the Official Liquidator has determined the amount payable to the respondent-Corporation to the tune of Rs. 41,96,355/- which is still lying with the Official Liquidator and could not be disbursed due to nonfiling of claim by the respondent-Corporation in the prescribed form. This fact has been brought on record by the petitioner vide CM application dated 14th April, 2009.

(5) The determination of the amount before issue of Recovery Certificate is in violation of the principles of natural justice as no opportunity was afforded to the petitioner before such determination. The Corporation can sell only mortgage property, the property of the petitioner being not mortgaged cannot be sold to recover any amount allegedly due and payable by the Company under liquidation.

(6) The respondent-Corporation did not opt out of the liquidation proceedings, but participated therein and now separate proceedings u/s 32-G of the State Financial Corporations Act are not maintainable.

Limitation:

7. On the question of limitation, Mr. Aryan Dutt, learned Counsel for the petitioner has submitted that in absence of any period of limitation, prescribed under the provisions of the State Financial Corporations Act for recovery of the dues Corporation, Article 137 of the Limitation Act, 1963 which deals with the residual limitation will govern the limitation. This Article reads as under:

8. Contention on behalf of the petitioner is that the loan, was recalled vide letter dated 7th March, 1979 and the liability of the Company crystallized on that date. Corporation was entitled to recover the amount through suit or otherwise within a period of three years as prescribed under Article 137 in absence of there being any specific period of recovery prescribed under the provisions of the State Financial Corporations Act. The Corporation, however, obtained the first Recovery Certificate under the provisions of 1979 Act on 26th/28th July, 1982 for a sum of Rs. 35.19 lacs. It is argued that even if date of issue of certificate is construed to be the date when the liability of the Company crystallised, the period within which the recovery could be made expired on 27th July, 1985. No recover has been effected within the specified period and subsequent Recovery Certificates dated 10th January, 1994 and 29th December, 2005 have been issued beyond

the prescribed period of limitation and are not enforceable in law. In support of his contention on the question of limitation, petitioner has relied upon various judgments referred to hereinafter.

9. In *State of Kerala and Ors Vs. V.R. Kalliyankutty and Anr*, in the case before Hon'ble Supreme Court, recovery was sought under the provisions of the Kerala Revenue Recovery Act, 1968 in respect of the public dues by the State Financial Corporation and the Bank, High Court of the Kerala held that notwithstanding recovery under the Kerala Revenue Recovery Act, the period of limitation prescribed for recovery has to be attracted. Hon'ble Supreme Court while dealing with the issue held as under:

8. Looking to the object of Section 71 we have to examine whether time-barred claims of the State Financial Corporation and the Banks can be recovered under it. Is the object only speed of recovery or is it also enlargement of the right to recover? The respondent-institutions rely on the words "amount due" in Section 71 as encompassing time-barred claims also. Now, what is meant by the words "amounts due" used in Section 71 of the Kerala Revenue Recovery Act as also in the notifications issued u/s 71? Do these words refer to the amounts repayable under the terms of the loan agreements executed between the debtor and the creditor irrespective of whether the claim of the creditor has become time-barred or not? Or do these words refer only to those claims of the creditor which are legally recoverable? An amount "due" normally refers to an amount which the creditor has a right to recover.....

10. In the case of *Maharashtra State Financial Corporation Vs. Ashok K. Agarwal and Others*, the Hon'ble Supreme Court has held as under:

6. Article 137 of the Limitation Act applies in the facts of the present case. When Article 137 is applied, the application moved by the appellant-Corporation on 2nd January, 1992 for proceeding against the sureties i.e. the respondents herein, was clearly barred by time and the Courts below were correct in holding so. To recall the facts of the present case, the notice demanding repayment of the amount of loan was issued against the borrower, that is, Crystal Marketing Private Limited on 8th March, 1983 and the application under Sections 31 and 32 of the State Financial Corporations Act was filed against the said borrower on 25th October, 1983. The liability of sureties had crystallised then.

11. It is common case of the parties that earlier the proceedings for recovery were initiated by the Corporation under the provisions of 1979 Act and no recovery was made pursuant to two certificates issued in the years 1982 and 1994 and later the proceedings have been initiated u/s 32-G of the State Financial Corporations Act. Section 32-G whereunder these proceedings have been initiated reads as under:

32-G. Recovery of amounts due to the Financial Corporation as an arrear of land revenue.--Where any amount is due to the Financial Corporation in respect of any accommodation granted by it to any industrial concern, the Financial

Corporation or any person authorized by it in writing in this behalf, may without prejudice to any other mode of recovery, make an application to the State Government for the recovery of the amount due to it, and if the State Government or such authority, as that Government may specify in this behalf, is satisfied, after following such procedure as may be prescribed, that any amount is so due, it may issue a certificate for that amount to the Collector and the Collector shall proceed to recover that amount in the same manner as an arrear of land revenue.

12. The aforesaid provision provides for recovery of amount due to the Corporation as arrears of the land revenue on the basis of a certificate to be issued by an officer authorized in this regard. On the basis of such certificate, the Collector is entitled to recover the amount in the same manner, as an arrear of land revenue. These proceedings are said to be in the nature of execution proceedings. Mr. Sehgal, learned Counsel for respondents, while controverting the contention of the petitioner about the application of the Limitation Act, particularly, Article 137 thereof, has submitted that the proceedings u/s 32-G are purely in the nature of execution on the basis of a pre-determined certificate. His contention is that neither Section 32-G nor any other provision of the State Financial Corporation prescribe any period of limitation for recovery of the dues of the Corporation. His further contention is that even Limitation Act does not prescribe any period for effecting recovery under the provisions of the State Financial Corporations Act and thus invoking Limitation Act is impermissible. It is further argued that Section 3 of the Limitation Act can only be attracted if there is period of limitation prescribed under any law for any action. In absence of any period of limitation under the State Financial Corporations Act or any other law provisions of Limitation Act cannot be invoked to prevent the Corporation from effecting recovery in accordance with the prescribed procedure through the agency created u/s 32-G of the State Financial Corporations Act. His further contention is that the controversy is no more *res integra* having been concluded by Division Bench judgment of this Court Jagdish Rai Vs. The Haryana Financial Corporation,

13. This argument of Mr. Sehgal has been seriously contested by Mr. Dutt, learned Counsel appearing for the petitioner as also Mr. Chetan Mittal, learned Counsel appearing on behalf of the applicant. It has been strenuously argued on behalf of the petitioner and the Applicant that the Division Bench judgment of this Court is contrary to law laid down by Hon"ble Supreme Court in case of V.R. Kalliyankutty (supra) and Ashok K. Agarwal (supra). Their argument is that the provisions of Section 32-G are similar to the provisions of the Kerala Revenue Recovery Act, 1968 wherein the Hon"ble Supreme Court has held that by change of forum for recovery, the provisions of the Limitation Act cannot be done away with. Such Forum only prescribes for speedy recovery and the bar of limitation for recovery is attracted. Further referring to Maharashtra State Financial Corporation case (supra), it is further contended that any proceedings under Sections 31 and 32 of the State Financial Corporations Act which are also

initiated by way of application, Hon''ble Supreme Court has clearly held application of the Limitation Act, particularly, Article 137, however, Hon''ble Division Bench while deciding the Jagdish Rai (supra) overlooked this important aspect.

14. I have carefully examined the judgments for the Hon''ble Supreme Court in of V.R. Kalliyankutty (supra) and the Ashok. K. Agarwal (supra). Admittedly, in both these cases, Hon''ble Supreme Court has invoked the provisions of the Limitation Act to non-suit the claimant on the ground of limitation. I have also carefully gone through the judgment of the Hon''ble Division Bench of this Court. It is noticed that both these Supreme Court judgments have been duly noticed by Hon''ble Division Bench, however, Court has drawn a distinction between the judgments of the Hon''ble Apex Court and ruled that those judgments have no application where the recovery is initiated u/s 32-G of the State Financial Corporations Act for which no limitation has been prescribed under the Act. I have no reason to take another view, the Division Bench judgment having created a binding precedent. Thus, the plea of the petitioner that the proceedings u/s 32-G are barred by limitation is rejected.

15. Other points raised by the petitioner are in fact inter-related and thus are being dealt with collectively.

16. Argument advanced on behalf of the petitioner is that the petitioner was a mere surety in respect of the loan advanced to the Company for which a personal surety bond was executed in respect of only Rs. 30.00 lacs which was to be advanced to the Company. It is further submitted that the Corporation, however, advanced only Rs. 21.95 lacs to the Company. As per its own admission and, thus, the liability of the surety was only confined to the amount advanced. It is further submitted that the surety is discharged of its liability on account of failure of the Corporation to recover the amount from the principal borrower on account of various acts of omission and commission. To substantiate the contention, following points have been raised:

(a) After having recalled the loan vide letter dated 7th March, 1979, the Corporation did not recover the amount from the Company till it was wound up by the order of the Court dated 27th July, 1984.

(b) The Corporation did not register its charge with the Registrar of Companies to become a secured creditor having preferential claim against the properties and assets of the Company at the time of winding up;

(c) The Corporation along with other Financial Institutions took over possession of the assets and properties of the Company in the year 1979 and the petitioner also resigned on 9th July, 1979 which was accepted by the Board of Directors of the Company. The petitioner further revoked her personal guarantee vide letter dated 7th March, 1980 as such petitioner is absolved of all her contractual obligations under law.

17. Based upon these facts, it is submitted that the petitioner being a surety is discharged of her liabilities. With a view to appreciate the contention of the petitioner, it is relevant to notice some of the provisions of the Indian Contract Act, 1872:

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.

Illustration

A guarantees to B the payment of a bill of exchange by C, the acceptor. The bill is dishonoured by C. A. is liable not only for the amount of the bill but also for any interest and charges which may have become due on it.

xxx xxx xxx

133. Discharge of surety by variance in terms of contract.--Any variance, made without the surety's consent, in the terms of the contract between the principal debtor and the creditor, discharges the surety as to transactions subsequent to the variance.

Illustrations

(a) A becomes surety to C for B's conduct as a Manager in C's Bank. Afterwards B and C contract, without A's consent, that B's salary shall be raised, and that he shall become liable for one-fourth of the losses on overdrafts. B allows a customer to overdraw, and the Bank loses a sum of money. A is discharged from his suretyship by the variance made without his consent, and is not liable to make good this loss.

(b) A guarantees C against the misconduct of B in an office to which B is appointed by C, and of which the duties are defined by an Act of the Legislature. By a subsequent Act, the nature of the office is materially altered. Afterwards, B misconducts himself. A is discharged by the change from future liability under his guarantee, though the misconduct of B is in respect of a duty not affected by the later Act.

(c) C agrees to appoint B as his clerk to sell goods at a yearly salary, upon A's becoming surety to C for B's duly accounting for moneys received by him as such clerk. Afterwards, without A's knowledge or consent C and B agree that B should be paid by a commission on the goods sold by him and not by a fixed salary. A is not liable for subsequent misconduct of B.

(d) A gives to C a continuing guarantee to the extent of 3,000 rupees for any oil supplied by C to B on credit. Afterwards B becomes embarrassed, and, without the knowledge of A, B and C contract that C shall continue to supply B with oil for ready money, and that the payments shall be applied to the then existing debts between B and C. A. is not liable on his guarantee for any goods supplied after this new arrangement.

(e) C contracts to lend B 5,000 rupees on the 1st March, A guarantees repayment. C pays the 5,000 rupees to B on the 1st January. A is discharged from his liability, as the contract has been varied, inasmuch as C might sue B for the money before the 1st of March.

134. Discharge of surety by release or discharge of principal debtor.--The surety is discharged by any contract between the creditor and the principal debtor, by which the principal debtor is released or by any act or omission of the creditor, the legal consequence of which is the discharge of the principal debtor.

Illustrations.

(a) A gives a guarantee to C for goods to be supplied by C to B, C supplies goods to B, and afterwards B becomes embarrassed and contracts with his creditors (including C) to assign to them his property in consideration of their releasing him from their demands.

Here B is released from his debt by the contract with C, and A is discharged from his suretyship.

(b) A contracts with B to grow a crop of indigo on A's land and to deliver it to B at a fixed rate, and C guarantees A's performance of this contract. B diverts a stream of water which is necessary for irrigation of A's land and thereby prevents him from raising the indigo. C is no longer liable on his guarantee.

(c) A contracts with B for a fixed price to build a house for B within a stipulated time, B supplying the necessary timber. C guarantees A's performance of the contract. B omits to supply the timber. C is discharged from his suretyship.

135. Discharge of surety when creditor compounds with, gives time to, or agrees not to sue, principal debtor.--A contract between the creditor and the principal debtor, by which the creditor makes a composition with, or promises to give time to, or not to sue, the principal debtor, discharges the surety, unless the surety assents to such contract.

18. From the conjoint reading of the aforesaid provisions, it emerges that surety's liability is co-extensive with that of the principal debtor unless contrary is provided under the contract. The surety is discharged of its liability if any variance is made in the terms of contract with the principal borrower by the creditor without the consent of the surety. The surety is also discharged on the basis of any contract between the principal debtor and the creditor by which the principal debtor is released or if on account of any act of omissions or commissions of the creditor, principal debtor is discharged. The surety is also discharged where creditor compounds with the principal debtor or gives time or not to sue.

19. Corporation in its written statement specifically admitted to have recalled loan on 7th March, 1979. It has also come on record that the petitioner and her husband who were shareholders in the Company transferred their shares in

favour of other Directors vide agreement dated 18th July, 1979 (Annexure P-8). There is another important aspect of the matter. After the exit of the petitioner and her husband as Director/Shareholders of the Company, the remaining Directors of the Board of Company entered into an arrangement with the Financial Institutions, including the Corporation and a new Board of Directors was constituted comprising of four representative of promoters and six representatives of Financial Institutions including that of the Corporation. Virtually, the Management of the Company was taken over by the Financial Institutions. Specific averment contained in Para 28 of the writ petition has been replied by the Corporation in the following manner:

28. That in reply to the contents of this para, it is submitted here that these steps have been taken for the betterment of the Company and remedial measures to start the production by the Financial Institutions.

20. These facts do establish variance in the original terms of the contract between the Company (borrower) and the Financial Institutions, including Corporation. Obviously, the variance was after exit of the petitioner and, thus, without the concurrence of the petitioner. The Corporation in its wisdom chose to take over the management of the Company in association with other Financial Institutions which is a complete deviation from the principal contract where the relationship of the Company with the Corporation was only that of a loanee. Under these circumstances, Section 133 of the Indian Contract, 1872 is clearly attracted. Section 128 of the Contract Act provides that liability of the surety is co-extensive as that of the principal creditor meaning thereby surety will continue to have the liability till the principal borrower has liability. However, Section 134 of the Contract Act further provides that where the creditor and the principal debtor enters into some contract which amounts to releasing the principal debtor of its liability or on account of any act or omission of the creditor if the legal consequence is discharge of principal debtor, the surety stands discharged. Similarly, Section 135 of the Contract Act also absolves the surety where the creditor compounds with the principal debtor or promises to give time or not to sue the principal debtor unless such promise or arrangement is with the consent of the surety. In the present case, after the exit of the petitioner as a shareholder, various arrangements took place between the Company and the Financial Institutions, including the Corporation. Reference to which has been made hereinabove. The Corporation did not take any action, till 1982. It was for the first time in 1982 that the Corporation initiated proceedings under the 1979 Act which were not perused further to its logical end. Even two more certificates dated 10th January, 1994 and 29th December, 2005 were not enforced against the petitioner and/or any other person liable to pay debt to the Corporation. No valid reason has been indicated by the corporation, except that the certificates were misplaced. It is beyond imagination that right from 1982 to 2005, the Corporation could not enforce recovery against the petitioner. This clearly demonstrates negligence on the part of the Corporation. It was only in the year 2006 that the Corporation proceeded u/s 32-G of the State Financial

Corporations Act against petitioner herein. As a matter of fact, Corporation remained silent for a period of almost 24 years. This period has not been adequately explained in the reply of the Corporation, except securing certificates, but without perusing the same. During this period, winding up proceedings were initiated against the Company (borrower). It is intriguing that the Corporation never opted out of the winding up proceedings. The Corporation is thus bound by the winding up order and all subsequent proceedings having not opted out of the proceedings by seeking leave of the Company Court u/s 446 of the Companies Act, 1956. There is an additional factor which disentitles the Corporation to make its entire claim against the petitioner. The assets of the Company, including land, building and machinery were subjected to charge of Corporation and other Financial Institutions. A pari passu agreement was executed by the Company, the Corporation and the other Financial Institutions, namely, I.F.C.I. This charge was required to be registered with the Registrar of Companies. Indubitably, charge has not been registered with the Registrar of Companies. Consequently, in winding up proceedings, Corporation has been treated as unsecured creditor. There is a blame game between the parties on this issue. According to the petitioner, the Corporation failed to register its charge. To the contrary, it is pleaded by Mr. Sehgal, learned Counsel appearing for the Corporation that it was contractual obligation of the Company to secure the registration of the charge of Corporation with the Registrar of Companies. For this purpose, Mr. Sehgal has referred to condition No. 21 of the mortgage deed dated 23rd September, 1975 executed between the Company and the Corporation (Annexure P-1). Condition No. 21 reads as under:

(21) The Company hereby undertakes to file the prescribed particulars of the mortgage and charge hereby created with the Registrar of Companies, under the provisions of the Companies Act, 1956, within 30 days of the execution of these presents.

21. Based upon the aforesaid clause, it is argued that it was the contractual obligation of the Company to obtain the registration of the charge with the Registrar of the Companies under the provisions of the Companies Act. No doubt the Company did not register the charge with the Registrar of Companies, in accordance with the above quoted stipulations. However, it is also admitted position that the management of the Company was virtually taken over the Corporation and other Financial Institutions in the year 1980 and even, thereafter when the Financial Institutions had larger number of nominees on the Board of Directors, no steps were taken to register the charge of the Corporation with the Registrar of Companies. In any case, the stipulation is a condition in the mortgage deed in respect of the properties and assets of the Company and does not relate to any property of the present guarantor. On account of inaction on the part of either the Company or the Corporation, Corporation has been treated as unsecured creditor in winding up proceedings and an amount of Rs. 41,96,305/- is lying with the Official Liquidator which is in fact payable to the Corporation. Corporation is silent as to why this amount has not been accepted by the

Corporation from the Official Liquidator. Thus, there is complete failure on the part of the Corporation, the creditor to recover the amount from the principal debtor i.e. the Company and the Corporation is now trying to enforce its claim against the petitioner. Liability of the guarantor being coextensive with the principal debtor the liability of the petitioner should terminate when the liability against the principal debtor stood crystallized on completion of the winding up proceedings. There has also been failure on the part of the Corporation to recover debt from the Company on various factors noticed herein-above. As a matter of fact, the liability of the principal borrower i.e. the Company is confined only to the debt when winding up order was passed. The debt and the interest should freeze on the date of passing of the winding up order. The Corporation being a party to the winding up proceeding and having not opted out of the same, nor initiated any proceedings by seeking leave of the Company Court u/s 446, it cannot claim anything beyond the amount determined by the Official Liquidator on the date of winding up. In the case of Haryana Financial Corporation Vs. The Official Liquidator and Others, , wherein this Court observed as under:--

12.....Thus from the above legal position, it is clear that once a winding up proceeding has commenced, the liquidator is in charge of the assets of the Company being wound up and the sale proceeds of the security is to be distributed in accordance with the provisions of the Act, i.e. Section 529 read with Section 529-A of the Act and the rules made thereunder. In the instant case also, the appellant-Corporation has not set in motion any proceeding under the SFC Act, rather the appellant-Corporation has participated in the liquidation as well as the sale proceedings. Therefore, it cannot be said that the appellant-Corporation stands outside the winding up. Even otherwise, it is immaterial whether a creditor stands outside the winding up or not as distribution of the sale proceeds after the winding up order is to be made in accordance with the provisions of the Act. Thus, the judgment of this Court in State Bank of Patiala Vs. Northland Sugar Complex Ltd., .S.J. Banking 448:: 2004 C.L.C. 951, is not applicable to the facts and circumstances of this case and on the basis of the said judgment, it cannot be held that a secured creditor, who stands outside the winding up can claim interest out of the sale proceeds of the Company in liquidation after the order of winding-up. Thus, in view of the aforesaid legal position, the Official Liquidator has rightly valued the claim of the appellant-Corporation on the date of winding up order and it has been rightly held that on that date, an amount of Rs. 21,89,932/- was outstanding and the remaining amount, which was of interest, was to be considered u/s 530 of the Act being unsecured preferential creditor.

22. Mr. Sehgal has relied upon a judgment of the Hon''ble Supreme Court in the case of Industrial Finance Corporation of India Ltd. Vs. The Cannanore Spinning and Weaving Mills Ltd. and Others, . In the case before the Hon''ble Supreme Court, liability of the guarantor and the Company was being examined, in view of the enforcement of the Sick Textile Undertakings (Nationalization) Act (57 of

1974) whereunder all properties and the management of the two Textile Companies vested with the Central Government. The Financial Institutions i.e. the Industrial Financial Corporation of India had secured a decree against the Company and the guarantor. The guarantor took refuge u/s 141 of the Contract Act to plead that its liability stood absolved as the guarantor is unable to recover the money from the principal debtor, in view of the provisions of the Sick Textile Undertakings (Nationalization) Act. It was in this context that Hon"ble Supreme Court, while setting aside the Division Bench order of the High Court ruled that the liability of the guarantor cannot, but be stated to be strict liability and even if the principal debtor is discharged from his liability, unless such discharge is through the act of the creditor, without consent of the surety/guarantor, the creditor's right of action against the surety is preserved. Hon"ble Supreme Court in fact has referred to earlier judgment of the Hon"ble Supreme Court passed in the case of State Bank of Saurashtra v. Chitranjan Rangnath Raja, AIR 1980 SC 1528. In case of State Bank of Saurashtra (supra), the liability of the sureties was held to be discharged where owing to negligence of the creditor existence of another security i.e. pledged goods are lost. The relevant observations of the Hon"ble Supreme Court are contained in para 8 which reads as under:

8. Before however adverting thereto certain further factual details ought to be noticed for correct appreciation of the matter in its proper perspective. The facts disclose-

Having intended to set up another spinning unit at Mane (Pondicherry State), the respondent No. 1 approached the appellant/plaintiff for financial assistance and obtained sanction for Term Loan Facility of Rs. 35,00,000/-. Pending legal formalities, the appellant/plaintiff granted Rs. 15,00,000/- as interim loan on 25th March, 1963 on which date the respondent No. 1 deposited the title deeds of certain immovable properties with the plaintiffs branch at Madras and, thus, agreed to create an equitable mortgage thereby. The respondent No. 1 also executed a deed of hypothecation in respect of movable assets such as plant, machineries, etc. and a promissory note for the said amount of Rs. 15,00,000/-. This, however, later was merged in the Term Loan amount of Rs. 35,00,000/- secured by a deed of mortgage executed by the respondent No. 1 on 2nd May, 1963.

The respondent No. 1 executed a legal mortgage under a document registered with the then Notary of Pondicherry as security for the repayment of the entire term loan of Rs. 35,00,000/- on 30th April, 1963, which also included the deferred payment guarantee facility of Rs. 5,62,230.40. This was followed by an equitable mortgage by the deposit of title deeds in respect of the movables at Cannanore as security for the Deferred Payment Guarantee facility for Rs. 5,62,230.40 on 3rd August, 1963, in addition to a promissory note for the said amount. The defendant No. 1 also executed bipartite agreement embodying the terms and conditions contained in the memorandum of final terms and conditions for the Deferred Payment Guarantee amount.

23. Dictum of this case is clearly attracted in the present case. The mortgage deed (Annexure P-1) is admitted by the parties. Rather the Corporation has also relied upon same very mortgage deed. Under this mortgage deed, all assets and properties of the Company, including land, building were mortgaged with the Corporation. Thus, the parties had clear understanding of the existence of other securities as well in addition to the personal guarantee of the petitioner. By sheer inaction and negligence of the Corporation, as noticed in detail hereinabove, the Corporation lost its right to recover its debt from the Company (Principal Borrower).

24. It is further argued that property sought to be attached is also not mortgaged with the Corporation, hence Corporation cannot enforce its claim against this property. The petitioner has relied upon *Ormi Textiles and Another Vs. State of U.P. and Others*, . In this judgment, it has been held by the Court that State Financial Corporation, while initiating proceedings u/s 29 exercises power under Sections 29 and 31 of the State Financial Corporations Act. It has right to sell only the mortgaged property and it cannot exercise such right in respect of the property which is not subject-matter of mortgage. This judgment is of no help to the writ petitioner. Hon'ble Supreme Court was examining the rights of the Financial Corporation in case of mortgage deed which, inter alia, empowers the Corporation to take over the management or possession or both of the industrial concerns and also to transfer by lease or sale of the mortgaged property. The observations of the Hon'ble Supreme Court that in exercise of powers under Sections 29 and 31, only mortgaged property can be sold or in the context of the statutory provisions contained u/s 29. In the present case, a Corporation has not exercised the powers u/s 29 for unilateral sale of the property of the guarantor, admittedly, not mortgaged with the Corporation. The Corporation has only initiated proceedings u/s 32 of the State Financial Corporations Act to recover the amount due to the Corporation as arrears of land revenue. Where the amount is to be recovered as arrears of land revenue, any of the property of the borrower and/or guarantor can be attached to recover the amount. Of course, subject to the liability of the guarantor under law. The submission of petitioner in this regard is totally devoid of any legal force and is rejected. It is Corporation's own case that the debt was recalled in March, 1979 and thereafter certificate of recovery was obtained in the year 1982. However, no action was taken by the Corporation to recover the money from the Company or even from the present petitioner till 2006. Under these circumstances, can the Corporation be permitted to charge interest for a period of 24 years for its own inaction and negligence, the simple answer would be "No". Otherwise also, the component of interest should freeze as on the date of winding up of the Company. The Company was ordered to be wound up on 27th July, 1984. Therefore, the Corporation at the best can be said to be entitled to the amount payable to the Corporation as on that date, including interest whatever on the contractual rate. Under these circumstances, the Corporation is entitled to work out the amount payable on the said date, along with contractual interest. The

Corporation is also entitled to Deceive the amount lying with the Official Liquidator and if the amount lying with the Official Liquidator is less than the amount payable to the Corporation, the balance amount can be recovered from the petitioner. The Corporation will carry out this exercise within one month. If any amount is found recoverable from the petitioner, the same shall be deposited by the petitioner within four weeks, failing which the recovery shall be effected from the amount deposited with the Executing Court in respect of the sale of the property of the petitioner, on the basis of decree of the Civil Court in favour of the applicants in CM Nos. 12130-32 of 2009. These directions are being issued keeping in view the fact that the money with the Corporation is public money, but the Corporation cannot be beneficiary of its own inaction and negligence to recover interest for a period of 24 years. With these observations, any direction issued by this Court preventing the Applicants in CM Nos. 12130-32 of 2009 from seeking execution of the sale-deed shall stand vacated.