
(1992) 08 PAT CK 0029

In the Patna High Court

Case No : Civil Writ Jurisdiction Case No. 798 of 1992

Bihar Cotton Mills Ltd. and Another

APPELLANT

Vs

Bihar State Financial Corporation and Another

RESPONDENT

Date of Decision : 17-08-1992

Acts Referred:

Citation : (1992) 08 PAT CK 0029

Judgement

S.B. Sinha, J.—In this writ application the petitioners have prayed for assurance of writ of prohibition against respondents No. 1 and 2 restraining them from selling the properties of M/s. Bihar Cotton Mills Ltd. (Petitioner No. 1) at Phulwarisharif in Patna by notice dated 2-1-1992.

2. The fact of the matter lies in a very narrow compass.

3. The petitioner No. 1 had a Cotton Mill at Phulwarisharif Patna and the petitioner No. 2 is the Director of the said Mill. In the year 1975-76 the petitioners obtained financial assistance from the Bihar State Financial Corporation to the extent of Rs. 30 lakhs.

4. According to the petitioners they have regularly been paying the instalments with the agreed rate of interest. The petitioners have asserted that owing to recession in the Cotton Textile Market and several other factors which adversely affected the running of the said industries, petitioner No. 1 allegedly started suffering loss in running the said Cotton Mills. According to the petitioners there had been unfair labour practice also resulting in declaration of lock out of the said factory. The petitioners for the said purported reasons could not pay their dues to the Corporation.

5. The petitioners filed a writ petition in this Court being CWJC No. 2152 of 1983 wherein the legality and the constitutional validity of Section 29 of the State Financial Corporation Act, 1951 (hereinafter referred to as the "said Act") was questioned.

6. A Division Bench of this Court dismiss the said writ petition stating:

29-8-1983 the petitioners have questioned the validity of Section 29 of the State Financial Corporation Act, 1951. A Bench of this Court in the case of Arun Kumar Agrawal v. The Bihar State Financial Corporation, CWJC No. 5140/78 disposed of on 20-4-1979 has held that the said Section is not ultra vires. In such a situation we are left with no option but to dismissed the writ application in limine.

Sd/-N. P. Singh

Sd/-S. N. Jha.

7. The aforementioned decision of Arun Kumar Agrawal's case has since been reported in 1986 PLJR 858.

8. On or about 23rd September, 1983 the respondent No. 1 by its memo bearing No. 20 38 took possession of the assets of the said Mill of the petitioner No. 1.

9. The petitioners have contended that the respondent No. 1 did not run the said mill nor took any action for putting the said factory in auction for a long time.

10. On or about 2nd January, 1962, however the respondent No. 1 had issued an advertisement (Annexure-1) whereby tender notice for sale of the said cotton mills was issued by the respondent No. 1 purported to be in exercise of its power u/s 29 of the said Act.

11. The petitioners inter alia in this application has questioned the aforementioned advertisement.

12. A counter affidavit has been filed on behalf of the respondent No. 1 wherein it has been contended that it took possession of the mortgaged assets of the petitioner Company and thus it virtually became the owner thereof and as such the petitioners had no right to enter into the premiss of the factory and to peruse its documents etc.

13. It has been contended that the respondent No. 1 had been advertising for sale of the mortgaged assets taken over by it by several times, but, in absence of worthwhile tenders the said mill could not be sold.

14. According to the respondent No. 1 Corporation, one of the tenderers has offered about Rs. 1,50.51 lacs which is sufficient to meet the total outstanding dues of the corporation which amounts to about Rs. 1,30 lacs.

15. During pendency of this writ application, a supplementary affidavit has been filed on behalf of the petitioner wherein it was stated that they were ready to deposit the total dues outstanding against them as on 23-9-1983 i.e. a sum of Rs. 29.42,000 in the following manner:

(1) Rs. 5,00,000 (Rs Five Lakh immediately.

(2) Rs. 5,00,000 (Rs. Five Lakh) by 15-3-92.

(3) Rs.19,42,000 (Rs. Nineteen lakh forty two thousand) only by 30-4-1992.

16. the petitioners in that supplementary affidavit prayed that possession of the factory be directed to be delivered in its favour.

17. In this case an application for intervention has been filed on behalf of Sri Shailesh Rai, Sai Suresh Chaudhary, Sri Ram Briksh thakur, Sri Firoz Alam Siddiqui and Sri Tanweer Aahmad who are said to highest bidders in the tender for sale of the petitioners unit.

18. Mr. K.D.Chatterjee, the learned Senior Counsel appearing on behalf of the petitioner No. 1 submitted that admittedly the respondent No. 1 took possession of the assets of the petitioner in the year 1983 but did not run the business for all these years. It was submitted that the petitioners were kept out of possession and even the inspection of the books have been denied to them with the result that the petitioners had been unable to realise their due. the business for all these years it was submitted that the petitioners were kept out of possession and even the inspection of the book have been denied to them with the result that the petitioners had been unable to their dues.

19. It was further been submitted that the assets were not put to use and for the last eight years the interest mounted up while the property was kept unproductive.

20. According to Mr. Chatterjee, all these acts of commissions and commissions on the part of the respondent Corporation resulted in a huge loss to the petitioners and unjust enrichment to the Corporation which amounts to mala fide exercise of its power.

21. The learned Counsel submitted that when possession of assets of the petitioner No. 1 was taken over by the respondent No. 1 it became a trustee in respect thereof and thus it was incumbent upon it to manage the property in the same manner as "owner thereof.

Mr. Chatterjee, submitted that in this view of the matter, the respondent Corporation must be held to be not entitled to any interest for the period 1983-92.

22. The learned Counsel in this connection has placed strong reliance in Arun Kumar Agrawal v. Bihar State Financial Corporation reported in 1986 PLJR 858 , AIR 1986 85 (Privy Council) and in Suratsing Chandanmal Marwadi Vs. Nomanbhai Abdulhussein Bohari and Others, .

23. The learned Counsel further submitted that the object of the Corporation as enshrined in the preamble and Section 24 of the said Act being an extended arm of Welfare State it was bound to act reasonably and fairly in dealing with the property of the debtor.

24. The learned Counsel in this connection, has strongly relied upon a recent decision of the Supreme Court in Mahesh Chandra Vs. Regional Manager, U.P. Financial Corporation and others, .

25. Mr. Basudeo Prasad, learned Senior Counsel appearing on behalf of the petitioner No. 2 Submitted that the provisions of Section 29 of the said Act are ultra vires Article 14 of the Constitution of India as no guidelines has been provided in the said Act so as to ascertain as to in which cases the Corporation shall take possession of the assets of the mortgagor or shall take over management thereof or both and in which cases it will exercise its right to transfer the same by way of lease or sale for the purpose of realisation of its dues.

27. Mr. Shankar Prasad learned Counsel appearing on behalf of the respondent No. 1 on the other hand, submitted that the respondent Corporation had only taken over possession of the assets of the company and not its management.

The learned Counsel pointed out that in view of the fact that there had been other dues of the Industrial concern, it was not possible to take over the management as the petitioners have other liabilities as would be evident from Annexure-4 to the counter affidavit.

28. Mr. Prasad has drawn our attention to Section 32A to Section 32E of the said Act for the purpose of pointing out that if the management of the concern was to be taken over, it was necessary to comply with the said provisions.

29. According to the learned, counsel the respondent Corporation, in this situation is not a trustee within the meaning of Section 29(4) and Section 24(5) of the said Act as also Section 69 of the Transfer of Property Act.

30. Mr. Arshad Alam, learned Counsel appearing on behalf of the intervenors submitted that in view of the dismissal of the earlier writ application, filed by the petitioner, this writ application is not maintainable.

The learned Counsel in this connection has relied upon in Supreme Court Employees' Welfare Association and Others Vs. Union of India (UOI) and Another, and in Sarguja Transport Service Vs. State Transport Appellate Tribunal, M.P., Gwalior and Others, .

31. It was submitted that in view of the acts of omissions and commissions on the part of the petitioner itself, the respondent Corporation had to take over the possession of the Mills of the petitioner.

32. It was further submitted that the said Act is intra vires Articles 14 of the Constitution of India.

33. In view of the rival contentions of the parties, the following questions arise for consideration in this application:

(a) Whether Section 29 of the said Act is ultra vires the Constitution of India?

(b) Whether in the facts and circumstances of the respondents are entitled to charge any interest on the sum advanced to them by the Corporation.

(c) Whether in any event the action of the respondent Corporation was mala fide.

(d) Whether in view of the dismissal of CWJC No. 2152 of 1983 this writ application is maintainable?

(e) Whether the intervenors were necessary parties to this writ application?

34. Re-question (a)--Sub-section (1) of Section 29 of the said Act reads as follows:

Mights to 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 of 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 shall have the (right to the Industrial concern), as the (right to transfer by way of lease or sale) and realise the property pledged, mortgaged, hypothecated or assigned to the Financial Corporation.

35. Admittedly the petitioner had earlier died a writ application being CWJC No. 2152 of 1983 questioning the vires of Section 29 of the said Act which was dismissed in view of a division bench decision of this Court in Arun Kumar Agarwal v. Bihar State Financial Corporation reported in 1986 PLJR 858.

The petitioners, therefore, in my opinion, cannot be permitted to re-agitate the said question as the same would be barred under the principles of resjudicata. It is further well known that the principles of constructive resjudicata apply even in a proceeding under Articles 226 and 227 of Constitution of India. The earlier petition filed by the petitioner having been dismissed, it is not open to the petitioner to raise the self same question in this writ application again only on the purported ground that the question raised in this application had not been raised therein. Such a contention would evidently be barred under the principles of constructive res judicata. In any event, the plea raised by Mr. Basudeo Prasad that Section 29 is ultra vires Article 14 of the Constitution of India cannot be entertained in view of the fact neither the petitioner had raised the said question in the writ petition nor the Union of India is a party respondent in this writ application.

36. Further the provisions of the said Act and in particular Section 29 thereof have been declared to be intra vires in several decisions.

In Chargule Tea Company Limited v. Assam Financial Corporation reported in AIR 1973 Gau.173 a division bench has held that the said Act is within the competence of the Parliament under Entries 43 and 45 of List I of the 7th Schedule of the Constitution of India.

37. Reference in this connection may also be made to Engineers (Oversees) Corporation Limited v. West Bengal Financial Corporation reported in AIR 1986 Cal 123 at pp. 138 and 142.

38. The constitutionality of Section 29 of the said Act came up for consideration before the Andhra Pradesh High Court and a Division Bench of the said High Court has held the same to be intra vires. (See Srinivasa Kandasari Sugars, Narasimhuni Vs. Government of Andhra Pradesh and Others, .)

39. Reference in this connection may also be made to Shreeshya Corwns and Screws Pvt. Ltd. v. Union of India, reported in AIR 1983 Kant 130.

40. For the reasons aforementioned, the first contention raised on behalf of the petition must be rejected.

41. Re-Contentions (b) and (c),--It is neither denied nor disputed that the petitioner No. 1 obtained a loan of Rs. 20 lacs from the respondent Corporation for the purpose of expansion of its Cotton Mills and for modernisation of the plant machinery in the factory. For the aforementioned purposes by way of security for due repayment of the said loan, the assets and properties of the said mill including the plant and machinery thereof were mortgaged with the respondent No, 1

42. It is also not in dispute that owing to various problems including the labour problem the petitioners had to declare a lock out on 24th July, 1981 which was lifted on 21st January, 1982. It is also admitted that since 1981, the petitioners faced tremendous financial crisis and other problems where for it closed the factory with effect from 20th July, 1982.

43. It is further not in dispute that on 23rd September, 1983, the possession of the mortgaged assets of the petitioner No. 1 was taken over by the respondent Corporation by issuance of a memo No. 2038, dated 23-9-1983 (Annexure-2).

44. The relationship of the petitioners and the respondent Corporation was thus governed by an instrument of mortgage. Apart from Section 29 of the said Act, Section 69 of the Transfer of property Act also empowers the respondent as a mortgagee to sale the mortgaged property without the intervention of the court if one or the other factors enumerated therein is satisfied. Such power of the sale however, has to be exercised only in the manner laid down under Sub-section (2) of Section 69 of the Transfer of Property Act are fulfilled.

45. Sub-sections (4) and (5) of Section 29 reads as follows:

(4) where any action has been taken against an industrial concern 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.

46. From a plain reading of the aforementioned provisions is thus evident that the position of the respondent Corporation becomes that of the trustee only in the event, any money is received by it during the subsistence of mortgage. Sub-section (4) of Section 29 of the said Act empowers the corporation to recover from the Industrial concern all costs, charges and expenses which in the opinion of the Corporation have been properly incurred by it or incidental thereto and any money received by it on account of said industrial concern may be applied firstly in payment of costs, charges and expenses and secondly in discharge of the debt due to Financial Corporation and the residue of the money so received, the same is required to be paid to the person entitled thereto.

47. Sub-section (5) of Section 29 of the said Act creates a legal fiction to the effect that the Financial Corporation would be deemed to be the owner of the such concern, for the purpose of suits, by or against the concern and it becomes also entitled to sue in the name of the said concern.

48. Thus, the stand of the respondent Corporation to the effect that after taking over possession of the mortgaged property, it became owner thereof for all intent and purport does not thus appear to be correct.

49. Mr. Chatterjee, as indicated hereinbefore, took us through the statements made in paragraphs 18, 22, 29 and 30 of the writ petition and submitted that the said statements have not been controverted by the respondent. It appears from the aforementioned statements that the respondent No. 1 Corporation did not allow the petitioners to inspect their books of accounts etc. and further kept the entire factory idle and unproductive.

50. Mr. Chatterjee, therefore, submitted that in this view of the matter, the respondent No. 1 Corporation is not entitled to any interest during the aforementioned period.

51. In this case the respondent No. 1 Corporation has not taken over the management of the Industrial Undertaking. It has merely taken over the possession of the property in question.

There cannot be any doubt that there exists a distinction between taking over of possession of the property simpliciter and taking over of management thereof. In case the management of the property is taken over, the requirements of Section 32A to Section 32E of the said Act have to be complied with.

52. The said provisions were inserted by reason of Section 17 of the State Financial Corporation (Amendment) Act, 1956. Thus in a case where the respondent Corporation takes over the management of the company, it steps into the shoes of the owner and thereby takes over not only control over the assets of

the company but also exercises its control over the affairs of the company itself.

53. On the other hand, where the Corporation merely takes over possession of the property, it does not have to manage the property of the industrial concern nor can it run the factory in question. However, in a case where possession is taken over, the Corporation is in apparent control and has power to hold the same as a result whereof the rights of others to possess and hold the same are to be excluded. In terms of Section 29 of the said Act when possession is taken over, the same means actual possession but thereby the title in the property of the Industrial concern would not pass to the respondent Corporation.

54. Section 76(g) of the Transfer of Property Act casts an obligation upon the mortgagee in possession of the mortgaged property to keep clear, full and accurate accounts of all sums received and spent by him as mortgagee and, at any time, during the continuance of the mortgage, give to the mortgagor) at his request and cost, true copies of such accounts and the vouchers by which they are supported.

55. However, in this case our attention has not been drawn to any document whereby any demand was made by the petitioner from the respondent Corporation calling for the details of such accounts nor in fact any averment has been made that during the subsistence of mortgage the respondent Corporation has received any amount on their behalf.

56. In a supplementary affidavit filed on 20th July, 1992, i.e. on the day when this case was taken up for hearing the petitioners have averred that the respondent Corporation failed and neglected to protect the property properly as a result whereof some articles were stolen a way by miscreants. No leave of the court was taken before filing such affidavit.

57. In this case a copy of the counter affidavit were served by the respondent Corporation upon the counsel for the petitioner on 10-24992.

58. In reply to the said counter affidavit for the first time the petitioners have inter alia contended as follows:

Without discharging duties and obligation as mortgagee in possession and without fulfilling its obligation both as an authority under Article 12 and as a mortgagee in possession to act fairly and reasonably to enjoy upon and peaceful possession under Article 12 of the Constitution of India, the respondent Corporation cannot claim interest from the period from the date of taking over possession of the said cotton mill. In any case it is not open to the respondent Corporation to enjoy the best of both the worlds and to take over the control, management and possession of the Mill with a view to recover its dues and to fasten liability of accumulating interest on the unpaid principal which remained sub-stantially the same. What is more significant is the faster depreciation suffered by the mill for its non-operation and non-maintenance. In any event, the amount of interest would be much less than the amount which the

respondent Corporation would have earned out of the said cotton mill after taking over possession thereof. In the premises the respondent Corporation is not entitled to claim interest for the period subsequent to taking over possession of the said cotton mill.

In any event, the respondent Corporation by calculating interest at the penal rate and at the compound rate is really taking advantage of its own redemption of mortgage by the petitioner.

In the claim disclosed in the affidavit of the respondent Corporation, several items of expenses for security, inspection fees and other incidental expenses have been included and interest thereon have also been calculated. The respondent Corporation has not in any even right to charge interest on such items. The respondent Corporation did not even consult the petitioner regarding the expenses to be incurred or salary to be paid for securities. The agreement for loan does not provide for payment of interest on the expenses for security, inspection fees and other incidental charges as claimed by the respondent Corporation and to calculate thereon. The respondent Corporation cannot invoke merely any clause in the agreement which the petitioner had no other alternative but to accept due to distress and necessity particularly when the Corporation is itself in default.

59. Mr. Chatterjee in this connection, however, submitted that the respondent Corporation at least is not entitled to charge any interest from 1983 to 1992. However, as noticed hereinbefore no foundational facts have been stated in the writ petition for the purpose of invoking the provisions of Section 76(g) of the Transfer of Property Act. In that view of the matter the decision relied upon on behalf of the petitioners in AIR 1933 85 (Privy Council) and in *Suratsing Chandanmal Marwadi Vs. Nomanbhai Abdulhussein Bohari and Others*, are of no assistance to the petitioners in the instant case, inasmuch as, as noticed hereinbefore, it is not the contention of the petitioners that during the period the respondent Corporation remained in possession of the property in question, it had received any amount on behalf of the petitioner.

60. In *Surat Singh's case* (supra) the Bombay High Court was dealing with an appeal from a decree. In that case a suit was filed by the mortgagee. However, in that case the defendant No. 1 also prayed for redemption of the mortgage.

It is, therefore in a suit, where the mortgage failed to produce the account, it was held that when the mortgagee fails to comply with statutory obligations envisaged under Clause G of Section 76 of the Transfer of Property Act, he must be held to have waived his right to claim interest.

61. It, is therefore, clear that a mortgagee may not be held entitled to claim interest and/or may become liable to pay damages to the mortgagor, in the event allegations of acts of omissions are made by the mortgagor and the same are adjudicated in a suit. The questions as to whether by reason of any act of omissions and commissions on the part of the respondent Corporation, the

petitioners have suffered any damages or not can only be enquired into in a properly constituted suit wherein it would be possible for the civil court not only to consider the evidences adduced by both the parties but also to examine the documents produced by the parties as also the accounts which must have been maintained by the respondent Corporation.

62. In writ petition under Articles 226 and 227 of the Constitution of India, this Court cannot enter into a thicket of disputed question of fact nor this Court can adjudicate upon the quantum of damages allegedly suffered by the petitioner for alleged acts of neglect on the part of the respondent Corporation and its officers.

63. In *Arun Kumar Agrawal v. State of Bihar* reported in 1986 PLJR 858 a Division Bench of this Court has held that a claim for redemption of mortgaged property can be advanced only by filing a suit and not otherwise.

64. Further as noticed hereinbefore, it is not a case where the management of the Industrial concern had been taken over and thus the question as to whether the same should have been done or not, does not fall for our consideration.

65. As indicated hereinbefore, in the counter affidavit filed on behalf of the respondent-Corporation it has been stated that taking over of the management of the Mill was not possible so to do in view of the fact that the same was lying closed since 1983. In a report submitted by the Managing Director of Corporation to the Secretary Industrial Development Corporation, Department of Industries, Government of Bihar, Patna, 31st January, 1992 as contained in Annexure-A to the counter affidavit, it has been pointed out that the dues of Corporation would be round about 130.00 lakhs and pursuant to the notice for sale of the mortgaged assets of the company, two type of tenders have been received, one by M/s. Shanti Kunj Sahkari Grih Nirman Samiti Limited and M/s. New Millat Sahkari Grih Nirman Samiti and the second and M/s. Suryodaya Estates (P) Ltd., Calcutta. Whereas the first set of tenders had offered a sum of Rs. 150.51 lakhs, the second tenderer had offered Rs. 150.00 lakhs besides taking over the liabilities of the company.

66. According to the Managing Director of the respondent Corporation the said company had the following liabilities as per its information:

Rs. in lakhs. Central Bank of India 50.00 Gramya Vidyut Sahkari Samiti 14.00 Commercial Taxes 1.50 Provident Fund Liabilities 8.00 ESI liabilities 4.00 Co-operative Loan 1.50 Electricity dues 12.00 Arrear Salary and wages 7.00 Sundry Creditors 4.00 Unsecured loans 9.00 (These liabilities, will however have to be verified from the concerned institutions people).

67. In *Mahesh Chandra Vs. Regional Manager, U.P. Financial Corporation and others*, , the Supreme Court no doubt held that the Corporation was under a legal obligation to release the entire working capital.

68. It was further held that the Corporation or its employees were bound to act reasonably and fairly in dealing with the property of the debtor.

69. It has further been held:

Dishonesty in discharge of duty vitiates the action without anything more. An action is bad even without proof of motive of dishonesty; if the authority is found to have acted contrary to reason. Power u/s 29 of the Act to take possession of a defaulting unit and transfer it by sale requires the authority to act cautiously, honestly, fairly and reasonably. Default in payment of loan may attract Section 29. But that alone is insufficient either to assume possession or to sell the property. Neither should be resorted to unless it is imperative. Even though no rules appear to have been framed nor any guideline framed by the corporation was placed, yet the basic philosophy enshrined in Section 24 has to be in mind. Rational of action and motive in exercise of it has to be judged in the light of it. Lack of reasonableness or even fairness at either of the two stages renders the take over and transfer invalid. Unfortunately the Corporation was guilty of not acting in accordance with law either at the stage of take over or in transferring the unit.

70. It was further held that the respondent Corporation as a trustee in terms of Sub-section (4) of Section 29 of the said Act must try to obtain the best price and thus should not use reasonable diligence in inviting competition to that end.

71. The Supreme Court further quoted with approval a passage from N. Suryanarayan Iyer's Indian Trust Act, Third Edition, 1987 at p. 275 to the following effect:

Where a contract of sale has been entered into bona fide by a trustee the court will not allow it to be rescinded or invalidated because another purchase comes forward with a higher price. It would, however be improper for the trustee to contract in circumstances of haste and improvidence. Where in a trust for sale and payment of creditors the trustee sold of a gross under valuation showing a preference to one of the creditors, he was held guilty of be each of trust.

72. The Supreme Court, in that case gave the following directions:

Keeping these various factors giving rise to conflicting interest the following directions are necessary to be issued to be observed by the Corporation while exercising power u/s 29.

Every endeavour should be made, to make the Unit viable and be put on working condition. If it becomes unworkable;

(i) Sale of unit should always be made by public auction.

(ii) Valuation of a unit for purposes of determing adequacy of offer or for determining if bid offered, was adequate, should always Le intimated to the unit holder to enable him to file objection if any as he is vitally interested in getting the maximum price.

(iii) If tenders are invited then the highest price on which tender is to be accepted must be intimated to the unit holder.

4 (a) If unit holder is willing to offer the sale price, as the tenderer, then he should be offered same facility and unit should be transferred to him. And the arrears remaining thereafter should be rescheduled to be recovered in instalments with interest after the payment of last instalment fixed under the agreement entered into as a result of tendered amount.

(b) If he brings third parties with higher offer it would be tested and may be accepted.

(5) Sale by private negotiation should be permitted in very large concerns where investment runs in very huge amount for which ordinary buyer may not be available or the industry itself may be of such nature that normal buyers may not be available. But before taking such steps there should be advertisements not only in daily newspapers but business magazines and papers.

(6) Request of the unit holder to release any part of the property on which the concern is not standing of which he is the owner should normally be granted on condition that sale proceeds shall be deposited in loan account."

73. However, in that case the fact of the matter was absolutely different. The Managing Partner of the firm before the Supreme Court offered to pay to the Corporation the entire dues of the firm. He made an offer to pay Rs. 5 lakhs at a time but despite the same the respondent Corporation sold the properties for a sum of Rs, 2,55,000 only and allowed the purchaser to pay only 1/4th of the price and the rest in 4 instalments. In the case before the Supreme Court, the appellant thereof also sought for permission of the Corporation to sell a part of the property in order to pay off the entire dues but the said proposal was turned down by the Corporation. In that case further the appellant had already paid a sum of Rs. 3,29,000. In that situation the Supreme Court noticed:

The release of plot No. 220 for private sale along with other unencumbered two plots would have given necessary amount to pay-off the debt. Even the offer to receive Rs, 5,00,000 in full quids would have salvaged the problem. Any prudent businessman with least acumen would have agreed to the proposal of the release of the plot for sake of recovering its debts. Instead of agreeing to receive five lacs in lump sum, it opted for two lacs-fifty thousands that too in four yearly instalments. It was neither business principle, nor in the interest of commerce and industry, nor good of general public. Any reasonable approach which of course is not only desirable but necessary, while dealing with such matters, would have immediately demonstrated that the Corporation by such step of releasing the plot, which was of no consequence to it, was going to gain and perpetuate the objectives of the Act. Instead it adopted an attitude which was contrary to the spirit and scheme of Section 24 of the Act. Did the Corporation gain from its ultimate decision of taking over possession and transferring the unit? Total loan disbursed was Rs. 3,78,660. The applicant paid in all Rs. 74,000 and if it is added to the amount paid by the appellant comes to Rs. 3,29,000 only whereas the appellant was willing to pay Rs, 5,00,000 and odd in 1986 over and

above, the amount which he had paid if plot No. 220 was released or one time payments scheme was accepted. Similar offer was accepted in relation to mill at Meerut. It did not get back the interest. Even what it disbursed was the borrowed public money. Of course, the transferee got a mill with project cost estimated at 6 lacs and odd in 1980 at Rs. 2,55,000 in 1986 when the value must have gone up instead of going down.

74. In the fact of that case, therefore, the Supreme Court, held:

In the light of the above guidelines it becomes clear that though tenders were invited the 3rd respondent alone had given the tender for a sum of Rs. 2 lacs. On negotiation it was said to have been raised to Rs. 2,25,000. But deferred payments. On initial deposit of 25% and balance payments within four years of half yearly instalments, were given. This solicitous attitude at the expense of the appellant, appears to be unjust and unfair and no reasonable prudent owner would accept such an offer. The appellant himself, long prior to sale, offered to pay Rs. 5 lacs and odd in full quids. Section 29 does not exclude the application of the principles of natural justice. It is not a straight jacket formula. It depends on facts in each case. Nothing prevented the Corporation to have given the appellant a chance for payment thereof at reasonable instalments with interest thereon. Nothing prevented them to release the open site, the subject of mortgage on condition that the entire sale price of the plots should be paid to discharge the liability and it be a condition of the sale deed itself. Before accepting the tender of the third respondent, an opportunity should have been given to the appellant as to why such offer of the third respondent be not accepted. The appellant would have come forward to give his own offer or brought third parties with higher offers. No such bona fide actions have been taken or attempted by the Corporation. Thus the acts smack of bona fides or responsibility or reasonableness as an ordinary prudent businessman/trustee/owner acting in or dealing with such trust. Thus the sale of the property is vitiated by unjust and unreasonable act on the part of the Corporation or its Officers or employees and is liable to be set aside.

75. However, in this case, the facts are absolutely different. NJ attempt was made by the petitioners to pay-off the dues or a part thereof to the respondent-Corporation during the period in which the properties remained in possession of the Respondent Corporation. The petitioners have made no offer either to sale a part of the property in order to pay-off the entire dues of the company nor put any suggestion therefore for liquidation of the debt forms.

76. There is nothing on records to show that even any alternative schemes was provided to the Corporation either for leasing out the property or for running the same.

77. Even before the possession of the mortgaged property was taken over, the respondent corporation filed a writ petition in this Court questioning the vires of Section 29 of the said Act but after the said writ petition was dismissed and the

possession of the mortgaged assets was taken over it did not take any further steps. The petitioners woke up from their deep slumber only when the advertisement for sale of the properties was issued in a newspaper on 2nd January, 1992, as is evident from Annexure-1 to the writ application.

78. By reason of the said advertisements tenders were invited for sale of as many as 65 concerns, in the counter affidavit and particularly in the report of the Managing Director (Annexure-A).

Even before this Court no offer to pay-off the dues of the Corporation was made initially. Only by way of a supplementary affidavit a proposal was given to pay a sum of Rs. 30 lacs by June, 1992. No deposit was made by the petitioners even in terms of the said offer to show its bona fide.

As indicated hereinbefore at the time of hearing against an untenable argument that Section 29 of the Act was ultra vires was advanced.

79. In main writ petition, no plea was raised that the Corporation was not entitled to any interest. Such a plea was raised for the first time in the rejoinder to the counter affidavit.

80. Further, it is not the contention of the petitioner that the offers made by the tenderer are abnormally low. The petitioners themselves evidently are not willing to offer the said amount to Corporation.

81. It has been brought on records that the Corporation made efforts earlier to put the property on auction, but it did not receive any fair offer therefor.

82. In our opinion, when the Corporation has received offers which are sufficient to meet its liabilities as also suggested liabilities of other creditors, the acceptance thereof would not be an arbitrary action on the part of the Corporation.

83. This court in exercise of its writ jurisdiction under Articles 226 and 227 of the Constitution of India cannot enter into the thicket of a disputed question of fact. It is also well known that quality begets equity. In view of the fact that the petitioners themselves did not assert their rights for a long time, they are not entitled to any equitable relief. Further when the petitioners themselves hold to close the mill it would not be proper for us to presume that the Corporation could have run the same after taking over the management thereof. The question as to whether, in a situation of this nature the petitioners is entitled to obtain damages from the respondent Corporation and/or waiver of interest can in our views be decided only by a competent civil court. It would also be open to the petitioners to approach the respondent-Corporation for waiver of interest which should be considered on its own merit.

84. However, in the facts and circumstances of the case, we do not find that the respondents are guilty of malice in law. Further in our opinion no case has been made out for setting aside the auction sale in view of the fact that even the

petitioners do not contend that the authorities of the respondent-Corporation have acted mala fide in that matter.

85. Re-Contention (b):-Mr. Chatterjee has placed before us a copy of the writ petition filed in this Court being CW.TC No. 2152 of 1983. In that case only constitutionality of Sections 29 and 31 of the said Act was in question.

86. Admittedly the possession of the mortgaged assets of the petitioners have been taken over by the respondent Corporation after dismissal of the said writ petition. Further in this case, the petitioners have merely questioned the tender notice issued by the respondent-Corporation by reason of the advertisement in the newspaper dated 2-1-1992 as contained in Annexure-1 to the writ application.

87. It is, therefore, clear that the cause of action of the aforementioned CWJC No. 2152 of 1983 and cause of action of the present writ applications are absolutely distinct and different.

88. In this view of the matter, the principles of res judicata have no application.

89. In Supreme Court Employees' Welfare Association and Others Vs. Union of India (UOI) and Another, , the Supreme Court held as follows:

Thus a decision on an abstract question of law unrelated to facts which give rise to a right cannot operate as res judicata. Nor also can a decision on the question of jurisdiction be res judicata, in a subsequent suit or proceeding. But, if the question of law is related to the fact in issue, an erroneous decision on such a question of law may operate as res judicata between the parties in a subsequent suit or proceeding, if the cause of action is the same. The Delhi High Court judgments do not decide any abstract question of law and there is no question of jurisdiction involved. Assuming that, the judgment of the Delhi High Court are erroneous, such judgments being on questions of fact would still operate as res judicata between the same parties in a subsequent suit or proceeding over the same cause of action.

90. In Sarguja Transport Service Vs. State Transport Appellate Tribunal, M.P., Gwalior and Others, , a writ petition was withdrawn and in that situation the Supreme Court in that case held that fresh petition under Article 226 in respect of the same cause of action will not be maintainable on the provision analogous to in Rule 1, Order XXIII of the C. P. C. Such is not the position here.

91. In this view of the matter, in my opinion, this writ petition is maintainable.

92. Re-Contention (e):-It is not disputed that in this case during pendency of this writ application the Intervenor had participated in the auction. Their bids are highest and are likely to be accepted by the Respondent-Corporation.

In this situation, in my opinion, it cannot be said that the intervenors had no right to intervene this application at all.

93. The intervenors participated in the auction pursuant to the notice dated 2-1-1992 which is the subject matter of the present writ application. It is true that their tenders may be accepted or may not be accepted but it cannot be denied that they participated in action pursuant to a notice and thus they have a right to oppose the contentions of the petitioners that the said notice was invalid in law.

The decision of the Supreme Court in Ramesh Hunam Kundanmal v. Municipal Corporation of Greater Bombay and Ors. reported in AIR 1992 SC 846 relied upon by Mr. Chatterjee has no application, in as much as in that case the plaintiff was being proceeded against by the Municipal Corporation for the alleged action for violation of the Municipal lease in relation where to H. P. C. L. had no say in the matter.

94. The Supreme Court in that situation held that as the grievance of the H. P. C. L. against the plaintiff, if any, could only be for violation of the agreement and that is based on a different cause of action, the said Corporation was neither a necessary party nor a proper party. It was also held that the suit filed by the H. P. C. L. cannot be directed to be consolidated with the suit filed by the plaintiff of the said case.

95. For the reason aforementioned, it must be held that in this case the intervenors had a locus standi to intervene in this application.

96. For the reasons aforementioned, there is no merit in this application which is accordingly dismissed subject to the observations made hereinbefore.-

97. However, in the facts and circumstance of the case, there will be no order as to costs.

S. Hoda, J.

98. I agree.