

**(2005) 01 OHC CK 0016**  
**In the Orissa High Court**  
**Case No : O.J.C. No. 906 of 2001**

Crown Re-rollers Pvt. Ltd.

APPELLANT

Vs

The Orissa State Financial Corporation and Others

RESPONDENT

**Date of Decision :** 14-01-2005

**Acts Referred:**

Contract Act, 1872 — Section 172, 173, 174, 175, 176  
State Financial Corporations Act, 1951 — Section 29, 29(1), 29(4)  
Transfer of Property Act, 1882 — Section 54, 55(4), 57, 69, 69(4)  
Trusts Act, 1882 — Section 11, 17, 23

**Citation :** AIR 2005 Ori 92 : (2005) OLR 450 Supp

**Hon'ble Judges :** A.K. Patnaik, J;A.K. Parichha, J

**Bench :** Division Bench

**Advocate :** Bijay Ananda Mohanty, Akhil Mohapatra, R.C. Sahoo and J.M. Rout, for the Appellant; B.M. Patnaik, R. Sharma, S. Singhsamanta, S. Mohanty, A. Mishra and S. Nanda, (for Nos. 1 and 3), M. Kanungo, L. Kanungo, D. Pradhan, S. Satpathi, S. Nanda and B. Kanungo, (for No. 4) and S.K. Purohit and M.H. Niamati, (for No. 5), for the Respondent

## **Judgement**

A.K. Patnaik, J.—The petitioner took a term loan of Rs. 30.00 lakhs from the Orissa State Financial Corporation (for short "the O.S.F.C.") during the years 1986 to 1988 and set up a re-rolling mill at Industrial Estate, Kalunga, Rourkela, District-Sundergarh in the State of Orissa for manufacture of M. S. Rods, angles and flats etc. For the said re-rolling mill, the petitioner also availed cash credit and documentary discounting facilities to the extent of Rs. 12.00 lakhs and Rs. 3.00 lakhs respectively from the Bank of Baroda, Rourkela Branch, Rourkela. The re-rolling mill of the petitioner went into commercial production on 2-10-1987. After moratorium period of two years, the petitioner started repaying the term loan to O.S.F.C. but subsequently defaulted in making payments of instalments to the O.S.F.C. and on 17-5-1993, the O.S.F.C. took over the said re-rolling mill of the petitioner u/s 29 of the State Financial Corporations Act, 1951 (for short, "the Act") and attempted to sell the said re-rolling mill by inviting offers for sale by notices published in the newspapers. The petitioner filed a writ petition O.J.C.

No. 6040 of 1993 before this Court and on 6-1 -1994, the Court disposed of the writ petition after holding that the unit of the petitioner has been taken over by the O.S.F.C. u/s 29 of the Act and on negotiation the O.S.F.C. got an offer of Rs. 55.00 lakhs and In spite of the opportunity, the petitioner has not been able to offer better terms and, therefore, the action of the O.S.F.C. u/s 29 of the Act cannot be faulted. The Court, however, observed that since the outstanding dues of the petitioner to the O.S.F.C. was in the neighbourhood of Rs. 21.00 lakhs, as and when the amount outstanding against the petitioner is fully recovered, the balance of the sale proceeds shall be paid to the petitioner in terms of Section 29(4) of the Act. In the said order dated 6-1-1994, the Court also took note of the submission of the petitioner that certain assets which could not have been dealt with u/s 29 of the Act are in possession of the O.S.F.C. and observed that it is open to the petitioner to represent to the O.S.F.C. in this regard and if any representation Is made the same shall be dealt with by the O.S.F.C. Thereafter the re-rolling mill of the petitioner was sold to the opposite parity No. 4 but the1 surplus amount of sale proceeds over and above the amount of Rs. 21.00 lakhs and odd payable by the petitioner to the O.S.F.C. was not refunded to the petitioner and assets comprising of stock in trade and raw materials hypothecated to the bank but not given as security to the O.S.F.C. were not released despite request being made by the petitioner. The petitioner has, therefore, filed this writ petition praying, inter alia, for direction to the O.S.F.C. to pay the surplus of the sale proceeds along with 18% interest thereon to, the petitioner. The petitioner has also prayed for declaring the opposite party No. 5-Bank as guilty of laches, negligence and dereliction of duty in not taking possession of the pledged/hypothecated stock of goods and for this reason, disentitled to recover any amount upto the value of such goods.

2. Mr. Bijay Ananda Mohanty, learned counsel for the petitioner relying on the averments made in the writ petition submitted that the very action of the O.S.F.C. in seizing the re-rolling mill of the petitioner in exercise of Its powers u/ s 29 of the Act was arbitrary inasmuch as the petitioner was a defaulter of only about five instalments totalling to a sum of Rs. 11,25,000/- approximately out of a term loan of Rs. 30.00 lakhs and the petitioner had already paid around Rs. 8.75 lakhs towards principal and over Rs. 21.22 lakhs towards interest. He submitted that the whole action of the O.S.F.C. in taking over the re-rolling mill of the petitioner u/s 29 of the Act and selling the same to the opposite party No. 4 was also vitiated by mala fide because the take over and the sale to opposite party No. 4 was influenced by extraneous considerations. He submitted that law is well settled that the financial corporation being a statutory and public authority must act fairly and reasonably while taking over an industrial concern financed by It and selling the properties of such industrial concern u/s 29 of the Act. In support of this submission he relied oh the decisions of the Supreme Court in Kasturi Lal Lakshmi Reddy, Represented by its Partner Shri Kasturi Lal, Jammu and Others Vs. State of Jammu and Kashmir and Another, , Fertilizer Corporation Kamgar Union (Regd.), Sindri and Others Vs. Union of India (UOI) and Others, ;

Swadeshi Cotton Mills Vs. Union of India (UOI), , G.B. Mahajan and others Vs. The Jalgaon Municipal Council and others, ; U.P. Financial Corporation v. Gem Cap (India) Pvt. Ltd. AIR 1993 SC 1435 , Chairman and Managing Director, SIPCOT, and Madras and others Vs. Contromix Pvt. Ltd. by its Director (Finance) Seetharaman, Madras and another, , Kharavela Industries Pvt. Ltd. Vs. Orissa State Financial Corporation and Others, ; Haryana Financial Corporation and Another Vs. Jagdamba Oil Mills and Another, and the decisions of the Orissa High Court in Kharavela Industries Pvt. Ltd. Vs. Orissa State Financial Corporation and Others, and Jagannath Minichem Pvt. Ltd. v. Orissa State Financial Corporation 2001 (2) Ori LR 67 and the decision of the Gujarat High Court in Gujarat State Financial Corporation Vs. Jayshree Industries, .

3. Mr. Mohanty next submitted a reading of Section 29(4) of the Act would show that when any action is taken against an industrial concern under sub-section (1) of Section 29 of the Act and pursuant to such action the financial corporation takes possession of an industrial concern and sells the property pledged, mortgaged, hypothecated or assigned to the financial corporation, the money which is received by the financial corporation is to be held by the financial corporation in "trust" to be applied firstly, in payment of such costs, charges and expenses incurred by it for take over of the industrial concern and sale of the properties, and secondly, in the discharge of the debt due to the financial corporation and the residue of the money so received is to be paid to the person entitled thereto. Mr. Mohanty vehemently argued that Section 29(4) of the Act, therefore, mandates that the financial corporation shall refund the excess of the sale proceeds to the owner of the industrial concern seized u/s 29(1) of the Act. He submitted that in the present case since the industrial concern of the petitioner was taken over and sold to the opposite party No. 4 for a sum of Rs. 55.00 lakhs, the O.S.F.C. was under a man date to adjust sum of Rs. 21.00 lakhs and odd towards its dues from the petitioner and refund the balance of the sale proceeds to the petitioner with interest. He submitted that if the O.S.F.C. instead of realizing the entire sum of Rs. 55.00 lakhs in one lump sum has chosen to recover the sum of Rs. 55.00 lakhs (instalments on deferred payment basis, the petitioner cannot be made to suffer because the petitioner is not a party to the sale agreement between the O.S.F.C. and the opposite party No. 4. Mr. Mohanty also submitted that the O.S.F.C. cannot be allowed to take a plea that it has no obligation to pay the) balance of the sale proceeds to the petitioner until the O.S.F.C. receives the entire amount of the sale proceeds from the opposite party No. 4. He submitted that Section 69(4) of the Transfer of Property Act, 1882 is similar to Section 29 of the Act and provides That the money which is received by the mortgagee is to be held by him in trust to be applied by him first, in payment of all costs, charges and expenses properly incurred by him as incident to the sale or any attempted sale and secondly, in discharge of the mortgage money and costs and other money if any, due under the mortgage and the residue of the money so received shall be paid to the person entitled to the mortgaged property. He further submitted that Sub-section (1) of Section 69A of

the Transfer of Property Act provides that a mortgagee having the right to exercise a power of sale u/s 69 shall subject to the provisions of sub-section (2) be entitled to appoint, by writing signed by him or on his behalf, a receiver of the income of the mortgaged property or any part thereof and sub-section (3) of Section 69A of the Transfer of Property Act further provides that a receiver appointed by the mortgagee under the powers conferred by Section 69A shall be deemed to be the agent of the mortgagor and the mortgagor shall be solely responsible for the receiver's act or defaults, unless the mortgage deed otherwise provides or unless such acts or defaults are due to the improper intervention of the mortgagee. He argued that sub-sections (1) and (3) of: Section 69A of the Transfer of Property Act I have to be read along with Section 29(4) of the Act and so read, it would mean that the financial corporation and its officers act as receiver of the properties taken over u/s 29 of the Act and are agents of the owner of the said properties and are answerable to such owner of the properties and," therefore, the moment the industrial concern is taken over u/s 29(1) of the Act and the properties of the industrial concern are sold, the sale proceeds received or receivable are to be held on trust by the financial corporation as a trustee of the owner of the industrial concern in terms of Section 29(4) of the Act. Mr. Mohanty also" referred to the provisions of Sections 172 to 177 of the Indian Contract Act, 1872 to show" that there are similar provisions therein and in particular, Section 176, casting an obligation on the pawnee to pay over the surplus of the sale proceeds to the owner after realizing his dues therefrom. He also referred to the Indian Trust Act, 1982 and in particular, to the provisions of Section 11, 17 and 23 and argued that a trustee committing a breach of trust is liable to pay interest where the breach consists in unreasonable delay in paying the trust money to the beneficiary or where the breach consists in the employment of trust property or the proceeds thereof in trade or business. Mr. Mohanty submitted that the Act does not prohibit payment of interest by the financial corporation to the owner of the industrial concern and it does not also specifically provide for such payment of interest. He submitted that law is well settled that Court can award interest on equitable grounds to a party where the law does not expressly provide for such payment of interest. For this proposition, he cited the decisions of the Supreme Court in *Satinder Singh and Others Vs. Amrao Singh and Others*, , *Laxmichand Vs. Indore Improvement Trust, Indore and Another*, , *Sovintorg (India) Ltd. Vs. State Bank of India, New Delhi*, and *Himachal Pradesh State Financial Corporation, Shimla v. Prem Nath Nanda* AIR 2001 SC 5. He also cited the decision of the Madras High Court in *P.S. Duraikannoo v. M. Saravana Chettiar* AIR 1963 Mad 468 in support of his submission that the mortgagee holds a fiduciary position vis-a-vis the mortgagor. He relied on the decision of the Andhra Pradesh High Court in *Sri Devi Prasad Steels Pvt. Ltd. v. A. P. State Financial Corporation Ltd.* 1998 (94) Com Cas 837 (AP) wherein it has been held that excess sale consideration becomes due and payable to the owner as soon as the sale transaction was finalized and the financial corporation had no right to withhold the same as it was acting as a trustee and the owner would be entitled to claim interest for the delay on

account of withholding of the payment of excess sale consideration by the financial corporation. He also cited the decision of the Rajasthan High Court in Ram Niwas Gupta Vs. Rajasthan Financial Corporation and Others, in which the, take over and sale of an industrial concern by the financial corporation has been set aside by the Court.

4. Finally, Mr. Mohanty submitted that it will be clear from the copy of the stock statement annexed to the writ petition as Annexure 13 that as on 30-11-1992 the value of the stock of the petitioner hypothecated to the opp. party- No. 5-Bank was Rs. 13,60,400/- and after the said stock statement was prepared as on 30-11-1992, the petitioner made further purchases between 1-12-1992 and 17-5-1993 and the value of raw materials and finished products taken over by the O.S.F.C. on 13-5-1993 was approximately Rs. 20.00 lakhs. Thus, stock of raw materials and finished products was not pledged or hypothecated to the O.S.F.C. but was hypothecated to the opp. party No. 5-Bank and this fact was brought to the notice of the Court at the time of hearing of O.J.C. No. 6040 of 1993 and in the order dated 6-1-1994 passed in the said O.J.C. No. 6040 of 1993, the Court directed that the petitioner may represent to the O.S.F.C. for release of the said assets and pursuant to the said order dated 6-1-1994 of this Court, the petitioner made several representations and yet, the O.S.F.C. did not release the stocks of raw materials and finished products. He argued that since the O.S.F.C. has misappropriated the said value of raw materials and finished products to the tune of Rs. 20.00 lakhs it is liable to make good the loss of Rs. 20.00 lakhs to the petitioner with interest at the rate of 18 per cent per annum from the date of seizure till the date of refund. Alternatively, he submitted that since the opp. party No. 5-Bank was guilty of dereliction of duty with regard to the said stocks of the petitioner, the opp. party No. 5-Bank is liable to compensate; the petitioner to the extent of Rs. 20.00 lakhs with interest.

5. Mr. B. M. Patnaik, learned counsel for the O.S.F.C, on the other hand submitted that the action of the O.S.F.C.} in taking over the re-rolling mill of the petitioner u/s 29(1) of the Act and, in selling the same had been challenged by the petitioner in the earlier writ petition O.J.C., No.6040 of 1993 and by order dated 6-1-1994 this Court had refused to interfere with the take over and sale of the re-rolling mill of the petitioner after holding that the action of the O.S.F.C. u/ s 29 of the Act cannot be faulted and, the petitioner cannot again challenge the take over and sale of the re-rolling mill again in this writ petition. He submitted that the contention of Mr. Mohanty that the petitioner was not consulted in making the sale to the opp. party No. 4 on deferred payment basis is misconceived because it has been held by the Supreme Court in Haryana Financial Corporation and Another Vs. Jagdamba Oil Mills and Another, that the defaulting unit holder is not. to be consulted at every stage in the sale of the property.

6. In reply to the submission of Mr. Mohanty that the petitioner was entitled to refund of the excess of the sale price over and above the dues of the petitioner

to the O.S.F.C, Mr. Patnaik submitted that in the order dated 6-1-1994 of this Court in O.J.C. No. 6040 of 1993 it was held that "as and when the amount outstanding against the petitioner is fully recovered, the balance shall be paid to the petitioner in terms of Section 29(4) of the Act. He submitted that since the O.S.F.C. has only received the down payment towards the sale price and has not yet received the entire amount of dues of the petitioner payable to the O.S.F.C., the question of paying any excess amount of the sale proceeds to the petitioner in terms of Section 29(4) of the Act does not arise. He argued that u/s 29(1) of the Act, the Financial Corporation can sell a property of the borrower given by way of security to the Financial Corporation on deferred payment basis also because Section 54 of the Transfer of Property Act, 1882 defines "sale" to include not only a transfer of ownership in exchange for a price paid but also a transfer of ownership in exchange for a price that is promised.

7. Regarding the claim of interest of the petitioner on the balance of the sale price over and above the dues of the petitioner towards the O.S.F.C, Mr. Patnaik submitted that there is no provision in the Act for payment of interest by the O.S.F.C. to the owner of the industrial concern. He relied on the decision of the Supreme Court in Himachal Pradesh State Financial Corporation, Shimla v. Prem Nath Nanda and Ors. (supra) in which the Supreme Court has held that in the absence of any agreement and statutory provision for payment of interest to the owner of the industrial concern, no such interest can be claimed by the owner of the industrial concern as a right.

8. In reply to the contention of Mr. Mohanty that the O.S.F.C. did not release the stock of raw materials and finished products which were not pledged or hypothecated to the O.S.F.C, Mr. Patnaik submitted that there was no such stock of raw materials and finished products taken by the O.S.F.C. when the industrial concern was taken over on 27-5-1993 as would be evident from the copy of the seizure list dated 17-5-1993 and the petitioner was informed accordingly by letter dated 16-3-1994.

9. Finally, Mr. Patnaik argued that the tripartite agreement between the petitioner, O.S.F.C. and the opp. party No. 5-Bank in Annexure-16 to the writ petition would show that the opp. party No. 5-Bank has second charge over the fixed assets of the petitioner mortgaged to the O.S.F.C. and, therefore, after recovery of the dues of the O.S.F.C. from sale proceeds of the assets of the petitioner, the residue money will be paid not to the petitioner but to the opp. party No. 5-Bank as the opp. party No. 5-Bank is the person entitled to receive the residue money u/s 29(4) of the Act and no direction, therefore, can be given by the Court directing the O.S.F.C. to pay the excess money over and above the dues of the O.S.F.C. to the petitioner.

10. Mr. K. M. H. Niamati, learned counsel for the opp. party No. 5-Bank submitted that when the opp. party No. 5-Bank had granted a cash credit and documentary discounting facility up to a limit of Rs. 15.00 lakhs to the petitioner and for the outstanding dues in the accounts, the opp. party No. 5-Bank filed

T.M.S. No. 34 of 1994 in the Court of the Civil Judge (Senior Division), Rourkela and the said unit was transferred to Debts Recovery Tribunal at Patna and thereafter to the Debts Recovery Tribunal at Cuttack and has been renumbered as T.C. No. 172 of 2001 in the Debts Recovery Tribunal, Cuttack. He further submitted that the said T.C. No. 172 of 2001 has been disposed of by the Debts Recovery Tribunal, Cuttack with an order for recovery of Rs. 20,46,037/- from the petitioner but the recovery of the amount from the petitioner has been stayed by the Court by order dated 5-12-2003 in Misc. Case No. 1399 of 2003 in the present writ petition.

11. The first question to be decided in this writ petition is whether the petitioner can still challenge the action of the O.S.F.C. in taking over and selling the re-rolling mill of the petitioner u/s 29(1) of the Act when the petitioner had earlier approached this Court in O.J.C. No. 6040 of 1993 against the take over of the re-rolling mill of the petitioner u/s 29 of the Act and this Court had refused to interfere with the said action of the O.S.F.C. while disposing of the said writ petition by its order dated 6-1-1994. The said order dated 6-1-1994 of this Court passed in O.J.C. No. 6040 of 1993 is quoted hereinbelow :

"6-1-94. Heard Mr. Mohapatra for the petitioner and Mr. Deepak Mishra for the Corporation. The unit of the petitioner has been taken over by the Corporation u/s 29 of the S.F.C. Act, 1951 (in short the Act). It is stated that the Corporation in a negotiation held with M/s. Jagannath Rolling Mills, Rourkela got an offer for Rs. 55 lakhs. In spite of opportunity petitioner has not been able to offer better terms. So the action of the Corporation u/s 29 cannot be faulted. So far as the petitioner is concerned, the outstanding is neighbourhood of Rs. 21 lakhs. Any amount received by the Corporation in excess of the outstanding dues against the petitioner, is to be refunded to the petitioner in terms of Section 29(4) of the Act. It is accepted by the Corporation that as and when the amount outstanding against the petitioner is fully recovered, the balance shall be paid to the petitioner in terms of Section 29(4). It is submitted by the petitioner that certain assets which could not have been dealt with u/s 29 of the Act, are in the possession of the Corporation. It is open to the petitioner to represent to the Corporation in this regard and if any representation is made in this regard, the same should be expeditiously dealt with by the Corporation.

The writ application is disposed of accordingly."

It will be clear from the aforesaid order dated 6-1-1994 that the Court had found that after the take over of the re-rolling mill of the petitioner, the O.S.F.C. on negotiation got an offer of Rs. 55.00 lakhs for sale of the said re-rolling mill and in spite of opportunity, the petitioner had not come forward with a better offer and the Court held that the action of the O.S.F.C. u/s 29 of the Act cannot be faulted. The petitioner, therefore, cannot again challenge the action of the O.S.F.C. u/s 29(1) of the Act in taking over its re-rolling mill and selling the same at a price of Rs.55.00 lakhs approximately to the opp. party No. 4. For this reason, the Court cannot again consider the submission on behalf of the

petitioner that the action of the O.S.F.C. in taking over the re-rolling mill of the petitioner and selling the same to opp. party No. 4 was arbitrary, unfair and unreasonable. Perhaps for this reason also, no such relief has been sought in this writ petition praying for setting aside the said sale made by the O.S.F.C. in favour of opp. party No. 4.

12. The next question which arises for decision in this case is whether the O.S.F.C. is bound to pay to the petitioner any amount in excess of the amounts recovered towards the dues out of the sale of the properties of the petitioner and, if so, when. Section 29(4) of the Act and Section 69(4) of the Transfer of Property Act, 1882 on which great reliance has been placed by Mr. Mohanty, learned counsel for the petitioner, are quoted hereinbelow :-

"29. Rights of Financial Corporation in case of default: (1) xxx xxx

(2) & (3) xxx xxx

(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."

"69.(1) Power of sale when valid : xxx

(2) & (3) xxx xxx

(4) The money which is received by the mortgagee, arising from the sale, after discharge of prior encumbrances, if any to which the sale is not made subject, or after payment into Court u/s 57 of a sum to meet any prior encumbrance, shall, in the absence of a contract to the contrary, be held by him in trust to be applied by him, first, in payment of all costs, charges and expenses properly incurred by him as incident to the sale or any attempted sale; and, secondly, in discharge of the mortgage-money and costs and other money, if any, due under the mortgage; and the residue of the money so received shall be paid to the person entitled to the mortgaged property or authorized to give receipts for the proceeds of the sale thereof."

13. It will be clear from of Section 29(4) of the Act that it is only after action is taken by the O.S.F.C. against industrial concern under the provisions of sub-Section (1) of Section 29 by way of take over of the industrial concern and sale of the property pledged, mortgaged, hypothecated or assigned to the financial corporation that the money which is received by the financial corporation shall, in the absence of any contract to the contrary be held by it in trust to be applied firstly in payment of costs, charges and expenses incurred by the financial

corporation 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. Thus, it is "the money which is received" on sale of the property pledged, mortgaged, hypothecated or assigned to the financial corporation that is held in trust by the Corporation and it is only the residue of the "money so received" which is to be paid to the person entitled thereto after payment of costs, charges and expenses of the financial corporation and after discharge of the debt of the industrial concern to the financial corporation. In our considered opinion, therefore, until the financial corporation "receives" the money and until the financial corporation meets the costs, charges and expenses of the financial corporation as well as the debt due to the financial corporation, there is no obligation on the part of the financial corporation even as a trustee to make any payment out of the surplus money out of the sale to the person entitled thereto u/s 29(4) of the Act.

14. Similarly a reading of Section 69(4) of the Transfer of Property Act, 1882 quoted above would show that it is "the money which is received" by the mortgagee from the sale that in the absence of any contract to the contrary is held by the mortgagee in trust to be applied by him first in payment of all costs, charges and expenses properly incurred by him as incident to the sale or any attempted sale and, secondly, in discharge of the mortgage-money and costs and other money, if any, due under the mortgage and the residue of the "money so received" is to be paid to the person entitled to the mortgaged property or authorized to give receipts for the proceeds of the sale thereof. Until, therefore, the sale money is received by the mortgagee and until the costs, charges and expenses incurred by the mortgagee as incident to the sale and in the discharge of the mortgage money and costs and other money, if any, due under the mortgage are paid, there is no obligation of the mortgagee as a trustee to pay the surplus money to the person entitled to the mortgaged property. This view has also been taken in P.S. Duraikannoo Vs. M. Saravana Chettiar and Another, , in which the Madras High Court relying on Halsbury Laws of England, Vol. XXVII, 3rd Edition has held :

".....It is no doubt settled law that a mortgagee exercising the power of sale is not a trustee for the mortgagor as he exercises the power for his own benefit. But he will undoubtedly be holding a fiduciary position in regard to any surplus that may remain after the discharge of his claim. Acting as he does under a power to convey another man's property, he should act bona fide so as not to imperil the interest of the other....."

It will be clear from the aforesaid decision of the Madras High Court that while exercising the power of sale, the mortgagee does not act as a trustee for the mortgagor but it becomes a trustee only with regard to the surplus that may remain after discharge of the claim. By taking recourse to the provisions of Section 69A of the Transfer of Property Act, 1882 we cannot hold contrary to the plain language of Section 29(4) of the Act and Section 69(4) of the Transfer of

Property Act, 1882 that the financial corporation becomes a trustee of the owner of the industrial concern immediately on sale of the properties of the industrial concern before the entire sale money is received.

15. The next question which arises for decision in this writ petition is whether the O.S.F.C. is at all liable to pay interest on the surplus money over and above its dues received by the O.S.F.C. from the opp. party No. 4 towards the sale of the re-rolling mill of the petitioner. u/s 29(1) of the Act, the financial corporation can sell the property pledged, mortgaged, hypothecated or assigned to it and Section 54 of the Transfer of Property Act defines "sale" as a transfer of ownership in exchange for a price paid or promised or part paid and part promised. Hence, the financial corporation can always sell the property pledged, mortgaged, hypothecated or assigned to it by transferring ownership therein for a price which is not immediately paid but promised to be paid. But sub-section (4)(b) of Section 55 of the Transfer of Property Act makes it clear that the seller is entitled for the interest on the amount of the purchase money or any part of the purchase money remaining unpaid from the date on which possession has been delivered to the buyer. The financial corporation as a seller, therefore, can recover interest on the purchase money or part of the purchase money remaining unpaid by the buyer for a property pledged, mortgaged, hypothecated or assigned to it but any amount of interest so recovered will also be "money received" by the financial corporation in terms of Section 29(4) of the Act and, accordingly, will have to be held in trust to be applied firstly In payment of costs, charges and expenses and, secondly, in the discharge of debt due to the financial corporation and the residue of the money so received shall be paid to the person entitled thereto.

16. In *Himachal Pradesh State Financial Corporation, Shimla v. Prem Nath Nanda* AIR 2001 SC 5 (supra), the corporation did not earn interest on the sale price as would be clear in Paragraph 3 of the said judgment as reported in the AIR and the Supreme Court held that the High Court has not assigned any reason much less a cogent one for payment of interest to the industrial concern whose unit has been taken over and sold to the buyer. But in the present case, the agreement between the O.S.F.C. and the opp. party No. 4 annexed to the writ petition in O.J.C. No. 9474 of 1997 which was heard analogously with the present writ petition shows that the O.S.F.C. is charging interest from the opp. party No. 5-Bank on the sale price which remains to be paid by the opp. party No. 4. Obviously, such interest as and when recovered by the O.S.F.C. from the opp. party No. 4 on sale price will be part of the money received by the O.S.F.C. to be held in trust by the O.S.F.C. and to be applied in the manner indicated in Section 29(4) of the Act.

17. In *Sri Devi Prasad Steels Pvt. Ltd. v. A.P. State Financial Corporation Ltd.* 1998 (94) Com Cas 837 (supra), the Andhra Pradesh High Court had found that excess sale consideration of Rs. 11,37,150.60 over and above the dues of the Andhra Pradesh State Financial Corporation Limited had been realized by the said

corporation and yet, the said sum of Rs. 11,37,150.60 had not been remitted to the State Bank of India which held the second charge over the assets of the unit which was taken over and sold by the corporation and the said excess sale consideration was remitted to the State Bank of India only in February, 1992. For these reasons, the High Court held that the corporation has rendered itself liable to pay interest at the same rate at which it has stipulated interest from the purchaser, i.e. 18% per annum from April, 1991 up to the date on which the amount was remitted to the State Bank of India.

18. In the present case also, there are I cogent and good reasons for holding that the O.S.F.C. is liable to pay interest to the person entitled to u/s 29(4) of the Act. The O.S.F.C. has sold the industrial concern of the petitioner to opp.party No. 4 at Rs. 55.00 lakhs but has recovered only Rs. 9.00 lakhs from the opp.party No. 4 and yet, given possession of the industrial concern to the opp.party No. 4 and under the agreement with the opp.party No. 4 is charging interest to the opp.party No. 4. The opp. party No. 5-Bank which has second charge over the properties of the petitioner also appears to have claimed interest over the dues in the cash credit and document discount accounts of the petitioner. Any interest payable on the unpaid price, therefore, must accrue to the person entitled to the residue of the money over and above the dues of the financial corporation u/s 29(4) of the Act.

19. The next question which arises for decision is whether the petitioner is entitled to any compensation from either the O.S.F.C. or the opp.party No. 5-Bank for the loss suffered on account of take over of the stock of raw materials and finished products by the corporation when such stocks of raw materials and finished products were not pledged or hypothecated to the opp. party No. 5-Bank. The O.S.F.C. has denied that any such stock of raw materials and finished products were actually seized and taken over by the O.S.F.C. along with all other assets of the petitioner and has relied on the inventory list prepared at the time of seizure u/s 29 of the Act. There is, thus, a factual dispute as to whether the stock of raw materials and finished products of the value of Rs. 20.00 lakhs were seized and taken over by the O.S.F.C. at the time of seizure of all other assets of the petitioner by the O.S.F.C. Such a factual dispute cannot be decided in this writ petition. Hence, no compensation can be granted by this Court in the present writ petition for the loss of said stock of raw materials and finished products said to have been suffered by the petitioner either against the O.S.F.C. or against the opp. party No. 5-Bank.

20. We have to finally decide whether the petitioner is the person entitled to the residue of the money received by the O.S.F.C. after payment of costs, charges and expenses and in the discharge of the debt of the petitioner due to the O.S.F.C. in accordance with Section 29(4) of the Act. Obviously, if the opp. party No. 5-Bank has second charge over the properties of the petitioner sold by the O.S.F.C. u/s 29(1) of the Act to the opp. party No. 4, the opp. party no. 5-Bank would be entitled to such residue and only if there is any residue left after

meeting the debt of the petitioner to the opp. party No. 5-Bank, the petitioner would be entitled to such residue unless there are some persons who have prior claim under law over that of the petitioner to the said residue.

21. In the result, we hold that the O.S.F.C. would be liable to pay to the person entitled to the money that it receives towards price and interest from the opp. party No. 4 towards the sale of re-rolling mill of the petitioner after meeting all its costs, charges and expenses and after recovering the amount due from the petitioner to the O.S.F.C. in terms of Section 29(4) of the Act. We accordingly direct that the balance price and interest be recovered by the O.S.F.C. from the opp. party No. 4 and after meeting the costs, charges and expenses and recovering the dues of the O.S.F.C. the surplus be paid to the persons entitled to u/s 29(4) of the Act within a reasonable time. The writ petition is allowed to the extent indicated above. Considering the facts and circumstances of the case, parties shall bear their own costs.

A.K. Parichha, J.

22. I agree.