

(2006) 03 KAR CK 0026
In the Karnataka High Court
Case No : MFA No. 3353 of 2001

Gulhati and Another

APPELLANT

Vs

Karnataka State Financial Corporation and Others

RESPONDENT

Date of Decision : 01-03-2006

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 34

Contract Act, 1872 — Section 128, 141

State Financial Corporations Act, 1951 — Section 29, 30, 31 (1) (aa), 32 (7) (da), 44

Transfer of Property Act, 1882 — Section 69

Citation : (2007) ILR (Kar) 44 : (2007) 2 KCCR 76 SN

Hon'ble Judges : S. Abdul Nazeer, J;B. Padmaraj, J

Bench : Division Bench

Advocate : K.G. Raghavan and Dua Associates, for the Appellant; Kesthur N. Chandrashekar and B. Rudragowda, for the Respondent

Final Decision : Dismissed

Judgement

B. Padmaraj, J.—This Miscellaneous First Appeal filed by the appellant - guarantor u/s 32(9) of the State Financial Corporation Act is directed against the order dated 17.3.2001 of the II Addl. District & Sessions Judge, Bangalore Rural District, Bangalore, in Miscellaneous No.61/1993, whereby the Learned District Judge has allowed the petition filed by the 1st respondent Corporation (KSFC) u/s 31(1)(aa) of the State Financial Corporation Act in part holding that the appellant and the respondents 2 to 5 shall be jointly and severally liable to pay a sum of Rs. 1,11,91,338/- with interest at 12% per annum from the date of filing the petition, until actual payment. They have been directed to pay the amount within three months from the date of the order.

2. The 1st respondent Corporation filed a petition u/s 31(1)(aa) of the State Financial Corporation Act for directing the appellant and the Respondents 2 to 5 to pay Rs. 1,11,91,338/- with interest at 16.5% from 20.9.1993. In the petition filed before the District Judge, the 1st respondent Corporation contended inter alia that at the request of M/s Vioryl India(P) Limited, it had sanctioned a term

loan of Rs. 30,00,000/- for the establishment of industrial unit to be engaged in the manufacture of perfumery and aromatic compounds. The loan was sanctioned on 28.9.1993 and the same was communicated to the Company on 21.10.1983. The same was accepted by the Company. The Company had mortgaged its properties by a deed of mortgage dated 7.2.1984. That at the request of the said Company and also in consideration of the loan advanced by the Corporation in favour of the Company, the appellant alongwith the other respondents (respondents 2 to 4 in the Court below) had executed a Deed of Guarantee on 7.2.1984 for a sum of Rs. 30,00,000/- undertaking to pay the amount in case the Company has failed to pay the amount. The said deed of guarantee was filed at Annexure-A. The Respondent No. 5 had also executed a Deed of Guarantee at the request of the Company and in consideration of the loan advanced by the Corporation, thereby undertaking to pay to the Corporation with interest and other charges in case the Company has failed to pay the amount. That the 1st respondent Corporation had issued notice on 18.1.1989 to the Company marking copies to all the guarantors to see that the Company pays the amount to the Corporation. It was also informed in the notice that in case the Company fails to pay the amount, the 1st respondent Corporation would proceed to invoke the deeds of guarantee executed by the guarantors in favour of the Corporation. That the 1st respondent Corporation had clearly indicated in the notice dated 18.1.1989 at Annexure-C that the guarantors shall evince interest to see that the Company pays the amount. In spite of such notice, the appellant and the other respondents did not evince any interest to see that the amount is paid by the Company to the 1st respondent Corporation. That the Company failed to pay the amount in spite of demands made and hence the 1st respondent Corporation has invoked the Deeds of Guarantee executed by the appellant and the other respondents in favour of the 1st respondent Corporation dated 7.2.1984 undertaking to pay the amount in case the Company fails to pay the amount under a notice dated 14.5.1993 as per Annexure-D. In spite of issue of such notice dated 14.5.1993 invoking the Deeds of Guarantee executed by the appellant and the other respondents, they did not pay the amount and hence the 1st respondent Corporation filed the petition u/s 31(1)(aa) of the State Financial Corporation Act with a prayer for directing the appellant and the other respondents to pay jointly and severally a sum of Rs. 1,11,91,338/- with interest at 16.5% from 20.9.1993 on the footing of compound interest at quarterly rest basis till the date of realization.

3. Except the appellant herein, no other respondents contested or resisted the claim of the 1st respondent Corporation. The appellant-guarantor who resisted the claim of the 1st respondent-Corporation by filing the statement of objections has contended inter alia that he did not receive any notice dated 18.1.1989 informing to him that deed of guarantee would be invoked on the failure of the Company to pay the outstanding amount and that even otherwise, the claim made by the 1st respondent-Corporation appears to be barred by limitation having been brought more than three years after the date of the alleged recall of

the loan. He contended that the notice if issued on 18.1.1989, the suit ought to have been brought by January 1992 and the suit having been filed before the District Judge as on 22.11.1993, long after the period of limitation of three years, it is barred by time. It also stated that he ceased to be a Director of the Company w.e.f. 16.2.1984, much prior to the disbursement of any loan and since then, he had nothing to do with the running of the Company or its business or affairs. He would however admit the fact that the 1st respondent Corporation had sanctioned a term loan of Rs. 30,00,000/ for the establishment of an industrial unit and the loan might have been sanctioned on 28.9.1983. But he has no knowledge whether the loan amount had been disbursed to the Company. He further contended that he did not execute any Deed of Guarantee and as such the terms enumerated therein have been fabricated by the Corporation for the purpose of this case. He also contended that the 1st respondent-Corporation did not disclose as to what steps it had taken to preserve the security furnished by the Company and unless it is shown that the Corporation has diligently taken all steps to preserve the security taken over u/s 29 of the State Financial Corporation Act, the petition filed against him is liable to be dismissed. He further contended in the alternative that assuming that all such notices were issued and duly served on the parties, the suit of the 1st respondent-Corporation is barred by time as there is not even an averment as to any acknowledgment of debt by the appellant. As such, the claim if any is barred by the law of limitation. The petition has been filed after a lapse of more than three years after recalling of the loan by the alleged notice dated 18.1.1989 and secondly the alleged notice dated 14.5.1993 was issued more than three years after the recall of the loan. The cause of action could have arisen only on 18.1.1989 and not thereafter. That the cause of action arose by virtue of the alleged notice dated 14.5.1993 is denied by putting the 1st respondent-Corporation to strict proof of the same. On these and other averments made in the statement of objections, the appellant prayed for dismissal of the petition filed by the 1st respondent-Corporation before the Learned District Judge.

4. On the basis of the pleadings of the parties, certain relevant points for determination were framed by the Learned District Judge including the one whether the 1st respondent Corporation is entitled for a direction to the appellant and the other respondents to pay jointly and severally a sum of Rs. 1,11,91,338/-?

5. The 1st respondent-Corporation in order to substantiate its case had examined the two witnesses PWs. 1 and 2 and placed on record Ex. P1 to P9. As against this, the appellant had examined himself as RW-1 and placed on record Ex. R1 to R6. Of the two witnesses examined on behalf of the 1st respondent-Corporation, PW. 1 was the Manager of the Corporation and PW-2 was the Deputy Manager of the 1st respondent-Corporation. They both supported the claim of the 1st respondent-Corporation and substantiated the averments made in the petition.

6. At the conclusion of the enquiry, the Learned District Judge on careful

consideration of the entire materials placed on record and after hearing the submissions on both sides has by its impugned order allowed the petition filed by the 1st respondent Corporation in part as stated supra. Hence this appeal by the appellant-guarantor, who was respondent No. 3 in the Court below.

7. Learned Counsel appearing for the appellant -guarantor has mainly contended as follows:

The whole of the claim made by the 1st respondent-Corporation is barred by time. The petition u/s 31(1)(aa) of the SFC Act ought to have been filed by the 1st respondent-Corporation within three years from the date of the issue of 1st notice dated 18.1.1989 (Ex. P1) in view of the provisions contained under Article 137 of the Limitation Act. The guarantee, if any was valid till the appellant remained as the Director of the Company and when once he had ceased to be the Director of the Company as on 16.2.1984, he cannot be saddled with any liability. The liability of the Company, if any cannot be saddled on the appellant after he ceased to be the Director of the said Company on 16.2.1984. The 1st respondent-Corporation though taken possession of all the properties of the Company did not sell the same and thereby it had neglected to realize its dues by bringing the properties to sale and on account of such conduct on the part of the 1st respondent-Corporation causing wastage of the properties belonging to the Company, the guarantee, if any given by the appellant stood discharged under the provisions of the Contract Act. The borrower Company was not impleaded as a party respondent in the petition filed by the 1st respondent-Corporation before the District Judge which is fatal to the proceedings and that further except the deed of guarantee, no other document pertaining to the loan had been produced by the 1st respondent-Corporation. The 1st respondent-Corporation has deliberately withheld all those documents and hence an adverse inference has to be drawn against the 1st respondent-Corporation.

8. In support of his submissions, the Learned Counsel for the appellant has placed reliance upon the following decisions:

1. Unreported Judgment rendered by the Division Bench of this Court on 31.1.2005 in the case of R.N. Shetty and Anr. v. Karnataka Industrial Investment and Development Corporation Limited MFA No. 597/2004.
2. State of Madhya Pradesh Vs. Kaluram,
3. N. Narasimhaiah v. KSFC, Bangalore (2003) KarLJ 164.
4. Gopal Krishnaji Ketkar Vs. Mahomed Haji Latif and Others,

Besides placing reliance upon the above decisions, he also invited our attention to Section 141 of the Contract Act and Article 137 of the Limitation Act.

9. In response, the Learned Counsel for 1st respondent-Corporation has contended as under:

The industrial concern or the Company had mortgaged the properties by way of a

security for the loans advanced by the 1st respondent-Corporation on 7.2.1984 and hence to enforce payment of money secured by a mortgage or otherwise charged upon immovable property against the principal borrower would be Article 62 of the Limitation Act and it prescribes the period of limitation of 12 years when the money sued for becomes due. Therefore the claim against the principal borrower cannot be said to have become barred by time. Article 137 of the Limitation Act has no application to such cases where the period of limitation is provided under Article 62 of the Limitation Act and the same is applicable only when no period of limitation is provided elsewhere in the Limitation Act. Therefore the contention of the appellant that the claim of the 1st respondent-Corporation is barred by time cannot be sustained in law. Even otherwise, the period of limitation in so far as the appellant-guarantor is concerned, it starts when the 1st respondent-Corporation invokes the guarantee offered by the appellant. Admittedly, the 1st respondent-Corporation did not enforce the claim against the surety under Ex. P1 and it is only under the subsequent notice Ex. P. 2, the 1st respondent-Corporation sought to enforce the claim against the guarantor and hence the cause of action for enforcement of claim against the appellant arose from 14.5.1993 and the present petition filed by the 1st respondent Corporation u/s 31(1)(aa) of the Act for enforcement of claim against the appellant was within 3 years. Therefore enforcement of claim against the surety cannot be said to have become barred by time even assuming that the residuary Article 137 of the Limitation Act is applicable. The appellant-surety is not absolved of his liability in view of the specific Clauses 4, 5, 8, 9, 10, 11, 12, 13, 14, 15, 16 and 17 of the personal guarantee bond executed by the appellant in favour of the 1st respondent-Corporation. A cursory reading of the guarantee bond executed by the appellant would reveal that the liability of the guarantor besides being coextensive with that of the principal borrower u/s 128 of the Contract Act, it was a continuing guarantee. Therefore merely because the appellant says that he had ceased to be a Director of the Company on a particular date, that by itself will not absolve his liability under the guarantee bond executed by him in favour of the Corporation. That apart, the contention of the appellant that he had ceased to be a Director stands falsified from his own documents Ex. P8 and P9. Under the circumstances, therefore, the impugned order made by the Learned District Judge does not suffer from any such infirmity so as to call for interference in the appeal by this Court. Further the 1st respondent-Corporation has taken effective steps to sell the seized property of the principal borrower and an amount of Rs. 26,45,000/- that has been realised has been duly adjusted towards the loan amount of the principal borrower and consequently to that extent the liability of the appellant-surety stands reduced. All the relevant documents to establish the claim of the 1st respondent-Corporation had been produced before the Learned District Judge and the same have been proved through the evidence of PWs. 1 and 2. The material evidence placed on record before the Learned District Judge clearly revealed that a loan of Rs. 30,00,000/- had been advanced to the Company and the appellant had stood surety for the repayment of the said loan. The amount due to the 1st respondent

- Corporation by the industrial concern stands proved from the entries made in the statement of accounts produced by the 1st respondent - Corporation before the Learned District Judge as per Ex. P6. Section 44 of the SFC Act clearly envisages that the Financial Corporation shall be deemed to be a bank for the purposes of the Bankers Books Evidence Act, 1891 and that being so, the statement of accounts produced by the 1st respondent - Corporation is entitled for presumption under law with regard to the correctness of the entries made therein. The appellant has not been able to rebut the presumption to which the entries in the account books are entitled. All the contentions that were advanced on behalf of the appellant were duly considered by the Learned District Judge and they were found to be not sustainable in law. The order of the District Judge is well founded. There is a delay in filing the appeal which in the facts and circumstances of the case has not been reasonably and satisfactorily explained and hence the appeal filed by the appellant is to be dismissed as barred by time besides being devoid of merits.

10. Learned Counsel for the 1st respondent - Corporation has placed reliance upon the following decisions:

1. The Karnataka Bank Ltd. Vs. Gajanan Shankararao Kulkarni and Another,
2. Hukumchand Insurance CO. v. Bank of Baroda AIR 1977 204-C
3. R. Lilavati Vs. Bank of Baroda and Others,
4. State Bank of India Vs. Messrs. Indexport Registered and others,
5. Mrs. Margaret Lalita Samuel Vs. The Indo Commercial Bank Ltd.,
6. Maharashtra State Financial Corporation Vs. Jaycee Drugs and Pharmaceuticals Pvt. Ltd. and Others,
7. Everest Industrial Corporation and Others Vs. Gujarat State Financial Corporation,
8. Punjab National Bank and others Vs. Surendra Prasad Sinha,

Besides relying upon the above decisions, the Learned Counsel for the 1st respondent - Corporation has contended that the decision rendered by the Full Bench of this Court in Karnataka State Financial Corporation and Others Vs. Smt. Jaya Menon and Others, has been challenged in appeal before the Apex Court and the same has been admitted and even otherwise, it is per incurium. Even against the decision rendered by the Division Bench of this Court in the case of N. Narasimahaiah and Others Vs. Karnataka State Financial Corporation and Others, the 1st respondent - Corporation has preferred an appeal against that part of the decision whereby the KSFC has been directed not to proceed against the property of the surety and the matter has been stayed by the Hon'ble Supreme Court in petition for Special Leave to Appeal (Civil) No. 15423-15427/03. He therefore contended that the appellant cannot place reliance upon those two decisions.

11. By way of reply, the Learned Counsel for the appellant has contended that Article 62 of the Limitation Act has no application to the petition filed u/s 31 of the SFC Act and it has application only to suits; that the application u/s 31 of the SFC Act does not contemplate any period of limitation and hence Article 137 of the Limitation Act is applicable to such applications for which no period of limitation is provided elsewhere in the 3rd division of the schedule to the Limitation Act. He further contended that the appellant - surety could not have taken possession of the properties of the principal borrower in view of the fact that they were already taken possession of by the 1st respondent - Corporation u/s 29 of the SFC Act and that therefore it was for the 1st respondent-Corporation to have brought the properties for sale well within time and having not done so, it has allowed the properties to be wasted and hence the claim against the appellant stood discharged under the Contract Act.

12. Having heard the submission on both sides at a considerable length and having carefully perused the relevant case papers in the light of the series of decisions relied upon by the Learned Counsel on either side, the short question that would arise for consideration is whether the impugned order made by the Learned District Judge u/s 32(7)(da) of the SFC Act warrants any interference in the appeal by this Court?

13. Undisputedly in the instant case, the 1st respondent-Corporation by filing the petition u/s 31 of the SFC Act before the District Judge was seeking for an order for enforcing liability of surety against the appellant and other respondents (respondents 2 to 4). Except the appellant herein, no other respondents have filed the appeal against the impugned order of the Learned District Judge. u/s 31(1)(aa) of the SFC Act, the Corporation can seek for an order for enforcing liability of any surety without prejudice to the powers of the Corporation u/s 29 of the SFC Act and Section 69 of the T.P. Act. Section 31 therefore will not have any effect on the powers of the Corporation u/s 29 or the rights available to the Corporation u/s 69 of the T.P. Act. The proceedings under the State Financial Corporation Act, are not in the nature of the suit and the application u/s 31, is also not a plaint, nevertheless in the very nature of the powers u/s 31, the District Judge, is required to inquire into the matter before granting relief. An application u/s 31 carries the little information provided for in Section 31(2) and does not contain the several details prescribed for a plaint under the CPC. The scope of enquiry under Sections 31 and 32 is very limited. In an enquiry of this nature, no claim for damages can be looked into or decided. Section 31 enables the Corporation alone to approach the District Courts for relief u/s 31 and 32. No other party can avail the benefit of Sections 31 and 32. It is needless to set out these provisions because the issue as regards scope of enquiry under Sections 31 and 32 is no more res integra. There are catena of judgments of the Apex Court wherein time and again this issue has been dealt with and it has been finally concluded that the scope of enquiry under Sections 31 and 32 is very limited and it is in the nature of an application for attachment of property in execution of a decree before a judgment. Where an application is filed by

Corporation u/s 31(1) for enforcing the liabilities of the sureties which are Co-extensive with the principal debtor who did not make the repayment of loan, the substantive relief sought in the application is like the relief sought in an execution proceedings. Hence it cannot be treated as a plaint and it would not be barred by limitation provided under Article 137 of the Limitation Act. It is now well settled that an application u/s 31(1) of the Act cannot be treated as plaint for the purposes of payment of Court Fee. Section 31(1) of the Act gives power to the Financial Corporation to enforce its claims by simply moving the District Judge by means of the petition and Section 32 of the Act lays down the prompt procedure to be followed by the said Judge. Section 32 has been enacted by way of speed remedy. It is nothing but an execution proceedings. The relief sought for in an application u/s 31(1) is something akin to an application for attachment of property in execution of a decree at a stage posterior to the passing of the decree. In an application u/s 31, the Corporation cannot ask for a personal decree against the mortgagors, or implead all parties that may be necessary to effectively dispose of all the claims of the Corporation against the mortgagors. It is a provision for a quick and expeditious but limited relief. The proceedings contemplated u/s 31(1) is something in the nature of an application for attachment of property in execution of a decree at a stage posterior to the passing of the decree. In this connection, a reference may be made to a decision of the Hon'ble Supreme Court in the case of Everest Industrial Corporation and Others Vs. Gujarat State Financial Corporation, wherein it is held that the proceedings instituted u/s 31(1) of the Act is something akin to an application for attachment of property in execution of a decree at a stage posterior to the passing of the decree, no question of passing any order u/s 34 of CPC would therefore arise since Section 34 of the Code would be applicable only at the stage of the passing of the decree and not to any stage posterior to the decree. It is thus clear from the decision of the Apex Court that the proceedings instituted u/s 31(1) of the Act is something akin to an application for attachment of property in execution. Since an application u/s 31(1) of the Act is held to be neither a plaint nor an application in the nature of a plaint and since it has been specifically held that such an application is not a suit by a mortgagee for the recovery of mortgage money, that the investigation therein of the claim of the Corporation, which is not a monetary claim, does not involve all the contentions that can be raised in a suit and that the substantive relief in such an application is something akin to an application for attachment of property in execution of a decree at a stage posterior to the passing of the decree. Hence we are unable to accept the contention advanced on behalf of the appellant - surety that all such contentions which were raised by the appellant -surety to repudiate its claim could be investigated in the proceedings instituted u/s 31(1) of the Act. Even a cursory glance at Section 31 would be enough to suggest that the application u/s 31 could result into the reliefs enumerated there under in Clauses (a), (aa), (b) and (c). Indeed, there is nothing from the language of Section 31 to indicate that the Court has any power to pass an order in the nature of the decree for the payment of any amount. The opening words of this Section in Sub-section (1)

suggest that where industrial concern, in breach of any agreement, makes any default in payment of any loan or advance or any installment thereof or fails to meet obligation in relation to any guarantee given by the Corporation or otherwise fails to comply with the terms of the agreement or where the Financial Corporation requires such industrial concern to make immediate repayment of any loan or advance u/s 30 and the industrial concern fails to make such repayment then without prejudice to the provision of Section 29 of the Act and of Section 69 of the Transfer of Property Act, any officer of the Corporation may apply to the District Judge within whose jurisdiction the industrial concern carries on the whole or a substantial part of its business for the reliefs enumerated in Clauses (a), (aa), (b) and (c). Section 30 contains that notwithstanding anything in any agreement to the contrary, the Corporation may, by notice in writing, require any industrial concern to discharge forthwith in full all liabilities. Thus, it is clear that Section 30 of the Act is in addition to and not in derogation of the provisions of Section 29 of the Act. The provision contained in Section 31 of the Act supports this view, because, it is emphatically mentioned that the follow up action in Court u/s 31 following the notice u/s 30 of the Act, may proceed without prejudice to the provision of Section 29 of the Act. This view has further been supported by the Supreme Court in its decision reported in the case of Orissa State Financial Corporation and Another Vs. Hotel Jogendra, . Section 31 of the Act provides special provisions for enforcement of claims by Financial Corporation, when an industrial concern in breach of any agreement makes any default in repayment of any loan or advance or any installment thereof given by the Corporation and repayment has not been made, an application can be submitted to the District Judge within the limits of whose jurisdiction the industrial concern carries on the business. Section 32 of the Act prescribes the procedure of District Judge in respect of an application u/s 31. The scope of enquiry under Sections 31 and 32 of the Act is very limited. If the appellant - guarantor has to claim that since he had ceased to be a Director in the Company, he has no obligation to discharge the liability as a surety, he can do so by filing a separate suit. In the claim filed u/s 31 of the Act, where there is a limited scope, the provisions of CPC will not be attracted, nor the general laws of the contract. This is very clear from the plain language of Section 32(6) of the Act. A conjoint reading of the provisions contained in Section 31 and Sub-section (6) of Section 32 of the Act would suggest that the scope of investigation within the contemplation of Sub-section (6) of Section 32 is very narrow and limited. This sub-section does not contemplate the investigation of each and every plea that might be raised before the District Judge by either party. The scope of the investigation is restricted to the claim of the Financial Corporation which has to be established in order to entitle it for any of the reliefs as mentioned in Sub-section (1) of Section 31. u/s 31 of the Act, the Financial Corporation can approach the District Judge for any of the reliefs mentioned in Sub-clauses (a), (aa), (b) and (c) of Sub-section (1) of that Section. Any of such reliefs can be granted to the Financial Corporation on its showing that the industrial concern in breach of any agreement has made any default in repayment of any loan or

advance or any installment thereof or that the industrial concern has otherwise failed to comply with the terms of its agreement with the Financial Corporation or that the Financial Corporation had required the industrial concern to make immediate repayment of the loan or advance u/s 30 of the Act and the industrial concern has failed to make such repayment. Added to this, in order to enforce the liability of any surety, the Financial Corporation will have to show that the surety has undertaken to pay the liability incurred by the Principal borrower. The scope of investigation is restricted to the claim of the Corporation, which has to be established in order to entitle it to any of the reliefs mentioned in Section 31(1). If the loanee or the surety intends to raise any other defense by way of any claim against the Corporation, they cannot raise such defense and ask for adjudication of the same in a petition by the Corporation for a relief u/s 31(1) of the Act. Section 31 of the Act enables the Corporation alone to approach the District Courts for the relief under Sections 31 and 32 of the Act. No other party can avail the benefit of Sections 31 and 32 of the Act. It is needless to set out these provisions because the issue as regards scope of enquiry u/s 31 and 32 of the Act is no more *res integra*. There are catena of judgments of the Supreme Court, wherein time and again this issue has been dealt with and it has been finally concluded that the scope of enquiry under Sections 31 and 32 of the Act is very limited and it is in the nature of an application for attachment of property in execution of a decree before judgment. Section 31 contains special provisions for enforcement of claims by the Financial Corporation. In the case of default of payment or compliance with the terms of agreement or demand u/s 30, without prejudice to the provisions of Section 29 of the Act and Section 69 of the Transfer of Property Act, any officer of the Corporation, may apply to the District Judge for one or more of the reliefs contemplated in Clauses (a) to (c). It is true that under the Act, the loan amount is governed by the terms and conditions of the agreement that takes place between the parties and in case of default, the Court has to proceed to recover the same from the defaulting party in terms of the agreement and the act. However, where there is dispute as to the total amount payable, that can be gone into by the Court. An application u/s 31 must disclose the nature and extent of the liability of the industrial concern as well as the ground on which the application is made. Section 32 is procedural in nature and provides for the procedure which is required to be followed when the District Judge takes cognizance of an application filed u/s 31 of the Act. Section 31 in terms provides that action under the said provision may be taken "without prejudice to the provisions of Section 29 of this Act and Section 69 of the Transfer of Property Act". What is the import of the term "without prejudice to the provisions of Section 29 of the Act". On the conjoint reading of Sections 29 and 31 of the Act, it is found that in case of default in repayment of loan or any installment or any advance or breach of an agreement, the Corporation has two remedies available to it against the defaulting industrial concern, one u/s 29 and another u/s 31 of the Act. The choice for availing the remedy u/s 29 or Section 31 of the Act is that of the Financial Corporation alone and the defaulting concern has no say whatsoever in the matter, as to which remedy should be taken

recourse to by the Corporation against it for effecting the recovery. Section 31 of the Act has been enacted also to take care of a situation where any industrial concern, in breach of any agreement, makes default in repayment of the loan or advance or any installment thereof, or the Corporation requires immediate repayment which the defaulting industrial concern fails to make. The Corporation may in any such event without prejudice to its rights and remedies u/s 29 of the Act, apply to the District Judge within the local limits of whose jurisdiction, the industrial concern carries on the whole or a substantial part of its business inter alia for any of the orders under Sub-sections (a), (aa), (b) and (c). An application made u/s 31 must disclose the nature and extent of the liability of the industrial concern as well as the ground on which the application is made. Section 32 is procedural in nature and provides for the procedure which is required to be followed when the District Judge takes cognizance of an application filed u/s 31. Section 31 in terms provides that action under the said provision may be taken "without prejudice to the provisions of Section 29 of the Act and of Section 69 of the T.P. Act". On a conjoint reading of Sections 29 and 31 of the Act, it appears to us that in case of default in repayment of loan or any installment or any advance or breach of an agreement, the Corporation has two remedies available to it against the defaulting industrial concern, one u/s 29 and another u/s 31 of the Act. The choice for availing the remedy u/s 29 or Section 31 of the Act is that of the Financial Corporation alone and the defaulting concern has no say whatsoever in the matter, as to which remedy should be taken recourse to by the Corporation against it for effecting the recovery. It is settled law that where a petition is filed by the Corporation under Sections 31(1) and 32 of the Act for enforcing the liabilities of the sureties, which are co-extensive with the principal debtor, who did not make the repayment of the loan, the substantive relief sought in an execution proceeding and hence, it cannot be treated as a plaint and, therefore, it would not be barred by limitation provided under Article 137 of the Limitation Act. This has been laid down by the Apex Court in the case of Maganlal Vs. Jaiswal Industries, Neemach and Others, and Rajasthan Financial Corporation Vs. Banwari Lal and Others, . The first respondent-Corporation is entitled to enforce the guarantee as the guarantee is a continuing one as could be seen from the deed of guarantee placed on record. With reference to enforcement of the liability of surety, it has been introduced in Sections 31 and 32 of the Act by Act 43 of 1985. But the said provision is to be incorporated in the background of the Rules of interpretation of statutes. As we have already stated, this is a case of enforcement of the liability of surety. In this connection what is significance is that Clause (aa) inserted in Sub-section (1) of Section 31 of the Act by Act 43 of 1985 uses the word "any surety". On its plain grammatical meaning there can be no doubt that the term, "any surety" will include not only a surety who has given some security but also one who has given only a personal guarantee. The procedure for enforcing the liability of a surety who has given only a personal guarantee would, after the amendment introduced by Act 43 of 1985, be that an application u/s 31(1) shall lie for enforcing the liability of such surety as contemplated by Clause (aa) of the said

Section. On such an application being made, notice shall be issued to the surety as contemplated by Sub-section (1-A) of Section-32. If no cause is shown in pursuance of the notice served on him by the surety Sub-section (4-A) of Section-32 contemplates passing of an order forthwith for the enforcement of the liability of surety. If, on the other hand, cause is shown the claim of the Financial Corporation shall be determined as contemplated by Sub-section (6) of Section-32 and thereafter a direction as contemplated by Clause (da) of Sub-section (7) shall be issued for the enforcement of the liability of the surety or rejecting the claim made in this behalf. This is exactly what has been done by the Learned District Judge in this case and hence, he cannot be faulted.

14. In the case of Maganlal Vs. Jaiswal Industries, Neemach and Others, which related to the relief contemplated by Clause (a) of Section 31(1) of the Act it was pointed out that the purpose of enacting Sections 31 and 32 of the Act was apparently to provide for a speedy remedy for recovery of the dues of the Financial Corporation and that these Sections had the effect of cutting across and dispensing with the provisions of the CPC from the stage of filing a suit to the stage of obtaining a decree in execution whereof such properties are referred to in Clause (a) of Sub-section (1) of Section 31 could be sold. On the same principle, even in a case where the relief claimed in the application u/s 31(1) of the Act is for enforcing the liability of a surety who has given only a personal guarantee, Sub-section (4-A) of Section 32 where no cause is shown and Clause (da) of Sub-section (7) where cause is shown contemplate cutting across and dispensing with the provisions of CPC from the stage of filing a suit to the stage of obtaining a decree against the surety, the passing of an order which can straightaway be executed as if it were a decree against the surety which may be passed in the event of a suit being filed. As seen above, Sub-section (2) of Section 31 enjoins upon the Financial Corporation to state the extent of liability of the industrial concern in the application to be made under Sub-section (1) thereof. Since the liability of the surety is co-extensive, the same shall, in the absence of anything contrary in the surety bond, be the liability of the surety also. In a case where there is any provision confining the liability of the surety, the extent of the liability to be shown in the application shall be such as is in conformity with the surety bond. When no cause is shown by the surety on being served with the show cause notice the order which will be passed under Sub-section (4-A) of Section-32 would be for the enforcement against the surety of that liability which is stated in the application. Where, however, cause has been shown by the surety the extent of his liability shall be determined as contemplated in Sub-section (6) of Section-32 and it is the liability so determined which shall be enforced under Clause-(da) of Sub-section (7) of Section 32. It does not require any elucidation that the extent of the liability referred to above will necessarily have to be in the very nature of things in terms of monetary value even though it may not be possible to call it a decree *stricto sensu* as defined in Section 2(2) of CPC for recovery of money. In terms of Section 46-B, the provisions of the SFC Act and the rules made thereunder shall have effect

Notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in the memorandum or articles of association of an industrial concern or in any other instrument having effect by virtue of any law other than this Act, but save as aforesaid, the provisions of this Act shall be in addition to, and not in derogation of any other law for the time being applicable to an industrial concern. On its plain language, in the absence of anything inconsistent in the Act, the provisions of CPC shall obviously be applicable for the enforcement of the liability of the surety directed to be enforced as aforesaid in the same manner as a decree is enforced in a suit instituted in this behalf. It is to be seen therefore that the scope of investigation within the contemplation of Sub-section (6) of Section 32 is very narrow and limited. This sub-section does not contemplate the investigation of each and every plea that might be raised before the District Judge by either party. The scope of investigation is restricted to the claim of the Financial Corporation which has to be established in order to entitle it for any of the reliefs as mentioned in Sub-section (1) of Section-31. On same principle, the scope of the investigation is restricted to the determination of the liability of the surety as contemplated by Sub-section (6) of Section-32 of the Act in order to pass an order as contemplated by Clause (da) of Sub-section (7) of Section 32 of the Act to enforce the liability so determined against the surety. Therefore we are unable to accept the contention advanced on behalf of the appellant that Section 32(6) contemplate the investigation of each and every plea that might be raised before the District Judge by the surety. It may be pointed out that with regard to the enforcement of liability of a surety, it is held by the Hon"ble Supreme Court in the case of Maharashtra SFC v. Jaycee Drugs and Pharmaceuticals (Supra) as under:

Clause (aa) inserted in Sub-section (1) of Section 31 of the Act by Act 43 of 1985 uses the words "any surety". Or its plain grammatical meaning that term will include not only a surety who has given some surety but also one who has given only a personal guarantee. The procedure for enforcing the liability of a surety who has given only a personal guarantee would, after the amendment introduced by Act 43 of 1985, be that an application u/s 31(1) shall lie for enforcing the liability of such surety as contemplated by Clause (aa) of the said Section. On such an application being made notice shall be issued to the surety as contemplated by Sub-section (1-A) of Section 32. This may, in view of Sub-section (3), be done after examining the officer making the application. If no cause is shown in pursuance of the notice served on him by the surety Sub-section (4-A) of Section 32 contemplates passing of an order forthwith for the enforcement of the liability of surety. If, on the other hand, cause is shown then the claim of the Financial Corporation shall be determined as contemplated by Sub-section (6) of Section 32 and thereafter a direction as contemplated by Clause (da) of Sub-section (7) shall be issued for the enforcement of the liability of the surety or rejecting the claim made in this behalf.

Though there is no provision corresponding to Sub-section (8) of Section 32 for the enforcement of the liability of a surety who has given only personal

guarantee but it is not very significant. The purpose of inserting Sub-section (8) in Section 32 is that it was not intended to apply the provisions of execution of a decree for attachment or sale of property as contained in the Code in its entirety and to achieve this purpose the words "as far as practicable" were used in that sub-section. Hence in view of Section 46-B of the Act the entire provision contained in this behalf in the CPC shall be applicable. That the Code is applicable to an industrial concern also is not in dispute and cannot be doubted.

However, even if Section 46-B of the Act was not there the provisions of CPC for the execution of a decree against a surety who had given only personal guarantee would, in the absence of any provision to the contrary in the Act, be applicable. Since the term used in Section 31(1) is "District Judge", the District Judge is not a person a designata but a Court of ordinary Civil jurisdiction while exercising jurisdiction under Sections 31 and 32 and therefore, the ordinary rules of procedure, orders and decrees under CPC will apply to such Court.

Sub-section (2) of Section 31 enjoins upon the Financial Corporation to state the "extent of the liability of the industrial concern," in the application to be made under Sub-section (1) thereof. Since the liability of the surety is coextensive the same shall, in the absence of anything contrary in the surety bond, be the liability of the surety also. In a case where there is any provision confining the liability of the surety, the extent of the liability to be shown in the application shall be such as is in conformity with the surety bond. The extent of the liability referred to above will necessarily have to be in the very nature of things in terms of monetary value even though it may not be possible to call it a decree *stricto sensu* as defined in Section 2(2) of the Code for recovery of money.

Though the Supreme Court has in the case of Gujarat State Financial Corporation taken the view that Sections 31 and 32 do not contemplate the passing of a money decree and the principle laid down in that case has been relied on in two later decisions, the said principle would not come in the way of enforcing the liability under Sections 31 and 32 even against the surety who has given only a personal guarantee.

It would be of some relevance to note here itself that in the instant case, the learned District Judge has made a determination of the liability of the surety as contemplated by Sub-section (6) of Section 32 and has passed an order as contemplated by Section 32(7)(da) to enforce the liability so determined against the surety.

15. In the case of Karnataka Bank Limited v. G.S. Kulkarni (Supra) the Division Bench of this Court speaking through Sri M.N. Venkatachalaiah, J., (as he then was) has held as under:

Held, the sureties could not appeal to the provisions of Section 141 which in the facts and circumstances of the case was not attracted. A mere passive inactivity or passive negligence on the part of the creditor by failing to realize the debt from the collateral security is not sufficient, in itself, to discharge the surety for

the reason that the surety can himself avoid consequences of such passivity by himself paying the debt and becoming subrogated to the rights of the creditor. In the absence of a contract to the contrary, the creditor is under no obligation of active diligence for the protection of the surety, so long as (he surety himself remains inactive. Thus tested, the inaction on the part of the creditor-bank would not of itself mitigate sureties liability.

16. Therefore the appellant - surety is not released assuming that there is a failure on the part of the 1st respondent - Corporation to enforce the mortgage or other lien which it has taken to secure the payment of the loan advanced to the principal borrower. Also there was no such agreement or understanding between the 1st respondent - Corporation and the appellant with reference to the enforcement of the security and the 1st respondent Corporation is bound to active diligence, and if by his negligence the property held as collateral is lost or destroyed or surrendered, the surety will be exonerated to the extent of the loss, for the reason that the understanding or agreement to look after the security and see that the property given as security shall be applied to the debt destroys the duty of the surety to be vigilant and produces a false confidence, but for which he may take security for his own indemnification. Hence what emerges from the above is that a mere passive inactivity or passive negligence on the part of the 1st respondent - Corporation by failing to realise the debt from the collateral security is not sufficient, in itself, to discharge the appellant-surety for the reason that the surety can himself avoid consequences of such passivity by himself paying the debt and becoming subrogated to the rights of the creditor. In the absence of a contract to the contrary, the 1st respondent-Corporation is under no obligation of active diligence if a for the protection of the appellant-surety, so long as the surety himself remains inactive. Therefore the inaction, if any on the part of the 1st respondent - Corporation will not, of itself, mitigate the liability of the appellant-surety. But however in this case, we find that there is no such inaction on the part of the 1st respondent - Corporation. This is because immediately after the 1st respondent - Corporation took over the property of the principal borrower in accordance with Section-29 of the Act, it took all effective steps to realise its dues. But unfortunately the 1st respondent-Corporation could not recover all its dues in view of the fact that there were the dues of the customs authorities in relation to the seized property to the tune of Rs. 289 lakhs. This has been clearly spoken to by the witness for the 1st respondent - Corporation viz., PW. 1., the Manager of the 1st respondent Corporation at its Head Office in Bangalore. Further, we have been informed by the Learned Counsel for the 1st respondent - Corporation that inspite of all such hurdles, the 1st respondent - Corporation did take effective steps in the matter and has sold the seized properties and it has been able to realise an amount to the extent of only Rs. 26,45,000/- which has been duly adjusted towards the loan of the principal borrower and consequently to that extent, the liability of the appellant also stands reduced.

17. A reference may also be made to another Division Bench decision of this

Court in the case of Hukumchand Insurance Co. v. Bank of Baroda (Supra) wherein it is held as under:

C) The question as to the liability of the surety, its extent and the manner of its enforcement have to be decided on first principles as to the nature and incidents of surety ship. The liability of a principal debtor and the liability of a surety which is co-extensive with that of the former are really separate liabilities, although arising out of the same transaction. Notwithstanding the fact that they may stem from the same transaction, the two liabilities are distinct. The liability of the surety does not also, in all cases, arise simultaneously.

18. Further in the case of N. Narashimhaiah and Ors. v. KSFC and Ors. (Supra) the Division Bench of this Court speaking through Sri R.V. Raveendran J., (as he then was) has held as under:

C) It is not necessary for a creditor, before proceedings against the surety to demand payment from the principal-Debtor unless it is expressly stipulated for. The surety may be proceeded against without first proceeding against the Principal Debtor.

18-A. What emanates from the above decision is that in terms of Section 128 of the Contract Act, the liability of the appellant - surety is coextensive with the liability of the principal debtor and hence it is not necessary for the 1st respondent - Corporation, before proceeding against the surety to demand payment from the principal borrower or sue the principal borrower. Nor it was incumbent upon the 1st respondent - Corporation to have impleaded the principal borrower as a party respondent to the present proceedings initiated against the appellant and the other respondents for enforcing the liability of the surety u/s 31(1)(aa) of the Act. It is now well settled that the liability of the surety is coextensive with that of the principal borrower. The liability of the surety is immediate and the same is not deferred until the Corporation exhausts its remedies against the principal borrower. It is equally well settled that the guarantor alone could be sued without suing the principal borrower so long as the creditor satisfies the Court that the principal debtor or the principal borrower is in default. Section 128 of the Indian Contract Act provides that the liability of the sureties is coextensive with the liability of the principal-debtor unless it is otherwise provided by the contract. It is not necessary for a creditor, before proceeding against the surety to demand payment from the principal-debtor or sue the principal-debtor, unless it is expressly stipulated for. The surety may be proceeded against, without first proceeding against the principal debtor. The guarantor alone could be sued without suing the principal debtor so long as the creditor satisfies the Court that the principal debtor is in default. Therefore we find no force in the submission of the learned Counsel for the appellant that the principal borrower being not made party respondent to the proceedings, the same is fatal to the proceedings initiated u/s 31(1)(aa).

18-B. In view of above discussion, there could be no legal impediment on the

part of the 1st respondent-Corporation to seek to enforce the liability of surety without making the principal borrower as party to the proceedings. Be it noted that the liability of surety of nonpayment of loan, is co-extensive with the Principal borrower or Principal Debtor and that further even according to the clauses contained in the surety bond executed by the appellant by way of personal guarantee to the first respondent - Corporation towards the repayment of loan of the Principal borrower, the deed of guarantee is a continuing one. In the fact situation, the appellant cannot escape his liability to pay the dues. In other words, the first respondent - Corporation can certainly enforce the claim against surety under the deed of guarantee executed by the appellant.

19. We are unable to accept the contention of the learned Counsel for the appellant that he is discharged of his liability as soon as he ceases to be a Director of the borrower company for more than one reasons. Firstly, because the deed of guarantee executed by the appellant in favour of the first respondent - Corporation is a personal guarantee and the same has nothing to do with the fact, whether he is or he is not a Director of the borrower company. Secondly, even according to his own materials Exhibits P. 8, P. 9 and P. 10, he did not cease to be a Director of the company. The appellant cannot be permitted to blow hot and cold. When once it is found that the appellant had executed a personal bond in favour of the first respondent-Corporation towards the due discharge of the loan borrowed by the principal borrower, the first respondent - Corporation is certainly entitled under law to enforce the liability of surety of the appellant in accordance with the provisions contained in Section 31(1)(aa) of the Act. It may be stated even at the cost of repetition that under Sub-section (1A) of Section 32, on an application being made u/s 31(1) for relief mentioned in Clause (aa), notice will be issued calling upon the surety to show cause as to why his liability should not be enforced. Regarding liability of the surety, it is very clear from the provisions contained u/s 128 of the Contract Act that the liability of the surety is co-extensive with that of the principal debtor. Thus, the liability of the appellant surety however is co-extensive with that of the principal borrower. The surety becomes liable to pay the entire amount and his liability is immediate. Before payment, the surety has no right to dictate terms to the creditor and ask him to pursue his remedies against the principal borrower in the first instance. It is needless to point out that the surety is a guarantee and it is his business to see whether the principal pays, and not that of creditor. In the absence of some special equity, which we do not find in this case, the surety has no right to restrain an action against him by the creditor on the ground that the creditor can exhaust his remedies against the principal debtor in the first instance. On principle, a guarantor could be sued without even suing the principal debtor. In that event, even if the first respondent - Corporation did not take any effective steps u/s 29 of the Act, that by itself will not disentitle the first respondent - Corporation from proceeding against the appellant guarantor. Even in a case, where the principal debtor has gone into liquidation also would not have any effect on the liability of the guarantor. u/s 128 of the Indian Contract Act, the

liability of the surety is co-extensive with that of the principal debtor, unless of course it is otherwise provided by the contract. Admittedly, in this case, there is nothing contrary provided under the contract. It is not the case of the appellant - guarantor that the principal borrower has discharged the entire amount. That being not the case and the liability of the appellant guarantor being co-extensive with that of the principal borrower, the first respondent is entitled to enforce the liability of surety. There is no controversy that once the liability of the surety arises, it is co-extensive with that of principal debtor. The surety thus becomes liable to pay the entire amount. His liability is immediate. It is not deferred until the creditor exhausts the remedies against the principal debtor. The law is also well settled that the creditor can sue both the debtor and surety together or he could sue the surety alone, likewise, where he has sued both and obtained a decree, he can, in execution proceed against the surety in the first instance. If the creditor had the option of suing the surety or any one of them without impleading the principal debtor in the said suit, it cannot be said that the mere non-action on the part of the first respondent against the seized properties of the principal borrower u/s 29 of the Act, would automatically discharge the liability of the surety for the agreed amount in question. It would be of some relevance to note here itself that the creditor would be entitled to adjust from the payment of a sum by a debtor, towards the time barred debt. It is also equally settled law that the creditor when he is in possession of an adequate security, the debt due could be adjusted from the security in his possession and custody. In the instant case, it appears that the first respondent - Corporation is however not totally passive and on the other hand, it took effective steps to put the property to sale and realized the amount from sale of such property and thereby, it has been able to adjust certain amount towards the dues of the principal borrower. Sub-section (6) of Section 32 provides that the District Judge shall proceed with the investigation of claim of Financial Corporation according to the provisions of CPC. A conjunctive reading of the provisions of Section 31 and Sub-section (6) of Section 32 of the Act would suggest that the scope of investigation within the contemplation of Sub-section (6) of Section 32 is very narrow and limited. This sub-section does not contemplate the investigation of each and every plea that might be raised before the District Judge by either party. The scope of the investigation is restricted to the claim of the Financial Corporation which has to be established in order to entitle it for any of the reliefs as mentioned in Sub-section (1) of Section 31. u/s 31 of the Act, the Financial Corporation can approach the District Judge for the reliefs mentioned in Sub-clauses (a), (aa), (b) and (c) of Sub-section (1) of that Section. Any of such reliefs can be granted to the Financial Corporation on its showing that the industrial concern in breach of any agreement has made any installment thereof, or that the industrial concern has otherwise failed to comply with the terms of its agreement with the Financial Corporation or that the Financial Corporation had required the industrial concern to make immediate repayment of the loan or advance u/s 30 of the Act and the industrial concern has filed to make such repayment. The investigation within the contemplation of Sub-section (6) of Section 32 is, therefore, restricted to such

claim of the Financial Corporation. The investigation of such claim of the Financial Corporation would, therefore, involve an enquiry with respect to the terms and conditions on which the loan is advanced by the Financial Corporation to the industrial concern and whether there has been any breach of any such terms by the industrial concern. The investigation may also relate to the fact whether the Financial Corporation had in accordance with the provisions of Section 30 called upon the industrial concern and that the industrial concern had failed to comply with such repayment. Only such pleas of the industrial concern could call for investigation. Sub-section (7) of Section 32 prescribes that reliefs can be given after investigation under Sub-section (6) is made, and it clearly gives a clue to the nature of contest under Sub-section (6), Sub-section (8) of Section 32 only prescribes the mode and method for executing the order of attachment or sale of property as provided in CPC, Sub-sections (6), (7) and (8) of Section 32 read together would give an opportunity to the industrial concern to appear and satisfy the District Judge that the situation envisaged by Section 31(1) has not arisen and the relief should not be granted. The same is the procedure applicable in the matter of enforcing the liability of surety. The only difference would be that the guarantor or the surety should be given an opportunity to show cause and when once cause is shown, the investigation must be restricted only with regard to the liability of the principal borrower vis-a-vis the guarantor under the deed of guarantee executed in favour of the Corporation. The provision contained in Sub-section (6) does not expand the contest in the application made u/s 31(1) as to render the application to be a suit between the parties. One has to look at the whole conspectus of the provisions contained in Section 32 coupled with the nature of the relief sought under Section-31(1) and it becomes clear that special provisions is made for certain types of reliefs that can be obtained by a Corporation by an application u/s 31(1) which could not be styled as substantive relief for payment of mortgage money by sale mortgaged property. Nor can it be said to be a proceeding to obtain substantive relief capable of being valued in terms of monetary gain or prevention of monetary loss. The form of the application, the nature of the relief, the compulsion to make interim order, the limited enquiry contemplated by Sub-section (6) of Section 32 and the manner of execution clearly show that the application u/s 31(1) is neither a plaint as contemplated by Article 1 of Schedule I nor an application in the nature of a plaint as contemplated by Article 7 of Schedule 1 of Court Fees Act See Gujarat State Financial Corporation Vs. Natson Manufacturing Co. Pvt. Ltd. and Others, . In view of Sub-section (6) of Section 32, it is contended that the District Judge is bound to investigate the defense set up by the appellant because in absence of any investigation about it, it could not be said that the claim of the Corporation has been investigated. Therefore, according to the Learned Counsel for the appellant, there being no investigation whatsoever by the Learned District Judge, the order is illegal and deserves to be set aside. We are unable to accept this contention. Sub-section (6) of Section 32 of the Act has to be read in the context in which it is placed. The claim of the Corporation is not monetary claim to be investigated though it may become necessary to specify the figure for the

purpose of determining how much of the security should be sold. But the investigation of the claim does not involve all the contentions that can be raised in a suit. The claim of the Corporation is that there is a breach of agreement or default in making repayment of loan or advance or installment thereof and, therefore, the claim against surety will have to be enforced. It is to be noted that the claim is not a money claim at all. Sub-section (7) of Section 32 prescribes the relief, which can be granted after investigation under Sub-section (6) is made and it gives a clue to the nature of the contest between the parties. Sub-section (8) of Section 32 prescribes the mode and method for executing the order of attachment or sale of property as provided in CPC. Indeed, when Sub-section (6), (7) and (8) of Section 32 are read together in the context of the provisions of Section 31(1) of the Act, in the ultimate analysis, the result may be that the property will be sold for repayment of loan or advance taken by the industrial concern for the Corporation, but even then it cannot be said that it is a substantive monetary relief claimed by the Corporation, which can be valued in terms of money in proceedings u/s 31. The substantive relief u/s 31(1) is something in the nature of an application for attachment of property in execution of a decree before the judgment. We repeat that the scope of investigation under Clause (6) of Section 32 is restricted to the claim of the Corporation, which has to be established in order to entitle it to any of the reliefs mentioned in Section 31(1). The investigation u/s 32(6) is to find out the terms and conditions on which the loan was given by the Corporation to the industrial concern and whether the Corporation is entitled to the reliefs u/s 31(1) of the Act on account of breach of the terms of the agreement. When Sub-sections (6), (7) and (8) of Section 32 are read together in the context of the provisions of Section 31(1) of the Act, in the ultimate analysis, the result may be that the property will be sold for repayment of the loan or advance taken by the industrial concern from the Corporation, but even then, it cannot be said that it is a substantive monetary relief claimed by the Corporation. We are therefore of the view that there is no merit in this contention.

20. As regards the periods of limitation, though it is baldly stated in the counter that the petition is barred by limitation and the date of the first notice be taken as the starting point of limitation, there is no clear details given as to how such a contention would stand. It needs to be mentioned that under the first notice, the first respondent-Corporation had only recalled the entire loan payable by the principal borrower and at the same time, had alerted the guarantors to see that something is done to save the company. Under the first notice admittedly, the first respondent - Corporation did not invoke the liability of the surety under the guarantee bond. It is only in the second notice, the first respondent - Corporation invoked the liability of the surety and if the period of limitation is to be computed from the date of the second notice, the petition filed by the first respondent - Corporation u/s 31(1)(aa) for enforcing the liability of surety, it is well within time even if it is to be assumed that the residuary Article 137 is applicable to such petitions.

21. With the above back ground, we shall now proceed to consider the question, whether the impugned order made by the Learned District Judge suffers from any such infirmity so as to call for interference in the appeal by this Court.

22. The learned District Judge has observed in the course of the impugned order that there is no serious dispute about the execution of the suit documents although there has been a total denial in the objections statement and consequently he has recorded a finding that the execution of the suit documents including the deed of guarantee Ex.P4 is proved. The relevant discussion in this regard is found in paragraph-7 of the impugned order. There appears to be no such infirmity in the said finding arrived at by the learned District Judge which is supported by the material evidence placed on record. The learned District Judge has further observed in the course of the impugned order that the disbursement of the loan stands probalised not only from the evidence of PW. 1 but also from the circumstance regarding the execution of the mortgage deed as well as the deed of guarantee and moreover the account extracts maintained by the 1st respondent - Corporation relating to the transaction in question which has been proved through the evidence of PW.2 clearly establishes the disbursement of the loan to the principal borrower. The relevant discussion in this regard is found at pages 8 and 9 of the impugned order. The learned District Judge has also found that the evidence of RW. 1 is not at all reliable inasmuch as he went to the extent of denying each and every averment made in the petition, but in his evidence he admits about the execution of deed of guarantee etc. It is the finding of the learned District Judge that RW. 1 is not all a reliable witness and he has also noted the demeanour of the said witness. While placing reliance upon the decision of this Court in AIR 1977 Karnataka 14, the learned District Judge has stated that the mere inaction of the creditor to realise the debt from the collateral security does not mitigate the liability of the surety. The learned District Judge has also found that the petition filed by the 1st respondent - Corporation is not bad for non-joinder of the principal debtor to the proceedings. In support of the said view, he has relied upon a decision of this Court in AIR 1977 KAR.204. In this way, the learned District Judge has found that all the contentions raised by the appellant are not all acceptable in law and on the other hand he found that there is clear evidence on the side of the 1st respondent - Corporation to substantiate its contentions about the sanctioning of the loan, executing the mortgage deed, the deed of guarantee and about the non-payment of the amount inspite of the issue of notice. The learned District Judge has also recorded a finding that it is not the contention of the appellant that in fact the amount was paid after the issue of such notice. Thus on consideration of the evidence adduced on both sides, the learned District Judge has found that the contention of the 1st respondent - Corporation is more probable and consequently the same has been accepted. Regarding the contention of the appellant that the petition is barred by limitation, the learned District Judge has found that the said contention advanced on behalf of the appellant is not sustainable in law. The learned District Judge has observed that the notice to the

appellant demanding the amount was issued on 14.5.1993 and the petition was filed on 22.11.1993, well within the period of 3 years from that date, and hence it is not barred by time. The learned District Judge has also observed that the guarantee deed executed by the appellant is a continuing guarantee and hence no question of limitation for a continuing guarantee would arise and in support of such finding, he has relied upon a decision of this Court reported in AIR 1987 Kar. 2 wherein it is held that in a suit against the surety based on a surety bond of a continuing guarantee, the question of limitation does not arise as against the said surety. In this view of the matter, the Learned District Judge found that the petition filed by the 1st respondent - Corporation is not barred by the period of limitation. The learned District Judge has however found that the 1st respondent-Corporation is not entitled to interest at 16.5% per annum and on the other hand it is entitled to interest at 12% per annum and accordingly, he has awarded the interest to the 1st respondent-Corporation at 12% per annum from the date of filing of the petition, until actual payment. Now it is to be seen whether the said finding recorded by the learned District Judge suffers from any such infirmity so as to call for interference in the appeal by this Court?

23. PW. 1, the 1st witness examined on behalf of the 1st respondent - Corporation has stated that the Corporation has sanctioned a term loan of Rs. 30,00,000/- on 28.9.1983 and the same had been communicated to the Company on 21.10.1983. The borrower - Company having accepted the terms of the sanctioned loan, had executed a mortgage deed dated 7.2.1984. The appellant and the other respondents (respondents 1 to 4 in the Court below) had executed the deed of guarantee for the consideration of the loan advanced in a sum of Rs. 30,00,000/- to the Company. The deed of guarantee executed by the appellant and others had been produced in the Court below. He has further stated that neither the Company nor the guarantors have discharged the said loan. They have failed to pay the agreed installments. Thereupon the 1st respondent - Corporation had issued a notice to the borrower - Company on 18.1.1989 to pay the amount. The borrower - Company did not pay the amount demanded by the 1st respondent - Corporation. That is to say, the borrower - Company failed to pay the loan amount which was recalled by the 1st respondent - Corporation. The notice that was issued to the borrower - Company was produced at Ex. P 1. Thereafter the 1st respondent - Corporation had issued a notice to the guarantors including the appellant and that they failed to respond to the said notice. Ex.P2 is the office copy of the notice that was issued to the guarantors. He has also stated that the assets of the Company are in the custody of the 1st respondent and there are dues to the extent of Rs. 289 lakhs towards customs duty and hence the 1st respondent - Corporation has not been able to realise the amount by selling the machinaries. He has further stated in paragraph-2 of his deposition as under:

2. Respondent No. 1 to 4 are the Guarantors. The respondent 1 to 4 have executed Guarantee Deed in favour of petitioner Corporation. Respondent No. 1 is a Power of Attorney holder of respondent No. 5, so he executed a deed of

guarantee in the capacity of Guarantor and P. A. holder of R-5. Today I produced 4 documents in the form of list. Now I see sanction letter dated 21.10.1993 in favour of the Vioryl India Private Limited, and it is marked as Ex.PS. The deed of Guarantee executed by Respondent No. 1 to 4 is marked as Ex.P4. Respondent No. 1 has also executed a deed of guarantee is marked as Ex. P5, as power of attorney holder of R-5. I have also produced statement of account maintained in our Corporation and it is marked as Ex.P6. After issue of notice, R-1, 2, 3, 4 & 5 did not appear. Since the notice is taken on R-1, 2, 3, 4 & 5 could not be served, therefore, steps taken against all the respondents through paper publication viz., Indian Express dated 25.8.1996, Bangalore Edition. And it is marked as Ex.P7. Inspite of notices and court notice issued to respondent failed to repay the amount borrowed. Therefore, I pray to direct the respondents 1 to 5 to pay the said amount jointly and severally as prayed for in the petition.

24. There is nothing substantial brought out in the cross-examination of PW. 1 so as to discredit the evidence given by him in Court.

25. The next witness PW.2 examined on behalf of the 1st respondent - Corporation has stated that he has prepared the statement of accounts as per Ex.P6 and that the same is true and correct. He has further stated that as on 20.9.1993 the amount due to the Corporation was a sum of Rs. 1,11,91,338/-. Under the cross-examination, he has denied the suggestion that he cannot say whether the entries made in the ledger extract after 18.1.1999 are correct or wrong. An attempt was made in the cross-examination to show that the entries made in the ledger exact are not true and correct, but the said attempt made by the appellant in the cross-examination was not successful. PW. 2 withstood the cross-examination and his evidence has not been shaken in any manner with regard to the entries made in the ledger extract Ex P6.

26. From the oral and documentary evidence adduced on behalf of the 1st respondent - Corporation, it could safely be inferred that the borrower - Company has failed to repay the loan which was recalled by the 1st respondent - Corporation on account of the default committed by the borrower - Company. Thus there was a failure to pay the loan amount borrowed by the Company from the 1st respondent Corporation. The statement of accounts of the Corporation produced by the witness PW. 2 would show the liability of the Company to the Corporation. It is needless to point out that the copies of the entries made in the statement of accounts of the 1st respondent - Corporation are entitled to a presumption under law with regard to their correctness and the same has not been rebutted by the appellant. Section 44 of the SFC Act prescribes that the Financial Corporation shall be deemed to be a bank for the purposes of the Bankers Books Evidence Act, 1891. It is thus obvious that apart from the entries in the books of accounts, there was ample evidence on record to corroborate the said entries. PWs. 1 and 2 in their detailed depositions have corroborated the entries in the books of accounts. Section 4 of the Bankers' Books Evidence Act gives a special privilege to the Corporation in terms of Section 44 and allows

certified copies of their accounts to be produced by them and those certified copies become prima facie evidence of the existence of the original entries in the accounts and are admitted as evidence of matters, transactions and accounts therein. Such admission is to the same extent as the original entry itself and the same would be admissible by law. In the instant case as we have already indicated, apart from the copies of the statement of accounts, the 1st respondent - Corporation had also adduced the evidence of PWs. 1 and 2 in support of the entries to show that the money was advanced as indicated therein. That being so, the claim of the 1st respondent - Corporation stands established against the principal borrower. No attempt was made on behalf of the appellant to show that no such amount was advanced to the borrower - Company. It is to be seen therefore that the 1st respondent-Corporation has been able to establish its claim against the principal borrower and it has also been able to establish that the appellant had stood surety for the repayment of the said loan and had executed a deed of guarantee which is in the nature of a continuing guarantee within the meaning of Section 128 of the Indian Contract Act. The evidence of PWs. 1 and 2 coupled with the statement of account produced by the 1st respondent - Corporation would establish its claim against the borrower-Company. Their evidence has not been shaken in any manner by the appellant in their cross-examination. Thus there was sufficient evidence to establish the claim of the Corporation against the Company. Their evidence would further show that the appellant had executed a deed of guarantee in favour of the 1st respondent - Corporation and when the borrower-Company has failed to repay the loan recalled by the Corporation under Ex.P1, the Corporation had issued a notice as per Ex. P 2 to the guarantors invoking the liability of the sureties under the deed of guarantee. The 1st respondent - Corporation has thus established not only its claim against the borrower-Company but also the execution of the deed of guarantee by the appellant in its favour and invoking the liability of the surety under the deed of guarantee when the Company failed to repay the loan to the Corporation.

27. The appellant who gave evidence as RW-1 has stated that through paper publication seen by his friend, he came to know about the present proceedings. He has stated that he is not liable to pay any claim made by the 1st respondent - Corporation firstly because he has resigned from the Directorship of the Company in the year 1984; secondly, because most of the disbursements by the Corporation were made after he has left the said Company; thirdly he never received any communication from the 1st respondent - Corporation that he is due to pay any amount to the Corporation; fourthly the Corporation did not seize the assets of the Company which had been offered as security, though it could have seized the same; fifthly the Corporation has not filed any suit against the Company to recover the amount and sixthly the Corporation has not taken any action against the foreign Company (5th respondent in the Court below) though it has 60% share in the Company. These are the grounds on which the appellant sought to disown his liability. He has further stated that immediately after his

resignation, he had asked the Corporation not to disburse money stating that the collaboration agreement itself is not implemented as envisaged in the agreement and on account of said fact, the guarantee given by him cannot be valid. He has also stated that the proceedings initiated by the Corporation is barred by time. Under the cross-examination done on behalf of the Corporation, he has stated that he was residing at No.21, Rajmahalvilas Extension, Bangalore and he is now residing at Rajmahalvilas 2nd Stage. He did not inform the change of address to the Corporation. On being confronted with letter dated 8.4.1984 - Ex. P8 and letter dated 22.5.1984 - Ex. P9, he admits that they have been written by him. He did not deny the contents thereof. He accepts that the said two letters Ex.P8 and P9 have been written by him.

28. Except the bald statement made by RW-1 in his chief-examination that the proceedings initiated by the Corporation is barred by time, he has not stated as to how and why the proceedings initiated by the Corporation are barred by time. He did not give any details regarding the proceedings initiated by the 1st respondent - Corporation against him being barred by time. It is to be seen therefore that the evidence of RW-1 does not disclose as to how the proceedings initiated by the 1st respondent Corporation against the appellant u/s 31(1)(aa) of the Act is barred by time. Further as we have already stated, the appellant who gave evidence as RW-1 in the Court below has clearly accepted the two letters Ex.P8 and V9 having been written by him. The contents of these two letters would falsify the plea of the appellant that he had ceased to be the Director of the Company from 16.2.1984. In the letters that were so written by the appellant, he would assert that he had not resigned as a Director of the Company. The said letters were written on 8.4.1984 and 22.5.1984. Thus the plea of the appellant that he had ceased to be a Director of the Company from 16.2.1984 stands falsified from the contents of the his own letters Ex.P8 and P9. These two letters apart from falsifying the plea taken by he appellant would show that the appellant is not a reliable witness. In this connection, a reference may be made to a decision of the Hon''ble Supreme Court in the case of Orissa State Financial Corporation v. Hotel Jogendra (Supra) wherein it is observed as under:

In this case the respondent loanee was only interested in delaying the repayment of the dues and has abused the process of the court taking indulgence of the court''s direction. Under these circumstances, no indulgence would be shown to such a recalcitrant defaulter in repayment of the loan. Public money is meant to be recycled to all the needy entrepreneurs. The dilatory tactics defeat the public policy and the court process becomes an instrument of abuse. Court would protect only honest and sincere litigants. The Corporation is at liberty to take action against the respondent as required u/s 29 of the Act, irrespective of the orders passed by any Court. The appeal is accordingly allowed with exemplary costs of Rs. 10,000.

29. The evidence of RW-1 does not in any way dispel the evidence adduced on behalf of the first respondent - Corporation. On the other hand, the admissions

made by the appellant (RW-1) in his evidence would further confirm the evidence adduced on behalf of the first respondent-Corporation.

30. Therefore, from the investigation made by the learned District Judge, it was found that the first respondent-Corporation has established its claim against the company (the principal borrower) and has also established the fact that the appellant, who had executed the deed of guarantee and stood surety for the company (principal borrower) for due discharge of the loan, failed to perform his obligation under the deed of guarantee and hence, the first respondent-Corporation invoked the liability of the surety under the deed of guarantee Exhibit P. 2. In the fact situation, it cannot be said that the first respondent-Corporation was not entitled to the relief u/s 31(1)(aa) of the State Financial Corporation Act. We are therefore of the clear view that the first respondent - Corporation was justified in seeking the relief u/s 31(1)(aa) of the Act against the appellant and the other sureties. Now coming to the question of limitation in so far as the appellant is concerned, the proceedings initiated against the appellant for enforcing the liability of surety u/s 31(1)(aa) of the Act cannot be said to be barred by limitation, even assuming that Article 136 of the Limitation Act is applicable to such proceeding. This is because, the Corporation invoked the liability of surety under the legal notice Exhibit P.2 dated 14.5.1993 and not under Exhibit P. 1. Therefore, the period of limitation would start not from the date of Exhibit P. 1, but from the date of Exhibit P. 2 the legal notice dated 14.5.1993. In so far as the appellant surety is concerned if the period of limitation is commuted from the date of issue of legal notice Exhibit P.2 dated 14.5.1993, the proceedings initiated by the first respondent - Corporation seeking to enforce liability of surety u/s 31(1)(aa) of the Act is well within the period of limitation. It may be noted that in so far as surety is concerned, the only notice that is contemplated under the statute is u/s 32(1-A) of the Act, whereunder the surety will be called upon to show cause why his liability should not be enforced. The said notice could be issued only after the proceeding is initiated u/s 31(1)(aa) of the Act. The notice at Exhibit P. 1 dated 18.1.1989 was admittedly issued to the Company (principal borrower) whereby, the first respondent-Corporation had recalled the entire loan and at the same time cautioned the guarantor that the principal borrower had defaulted in payment of the loan amount. To be more specific, under this notice Exhibit P. 1 issued to the principal borrower, it has been specifically informed that the total amount due towards the full discharge was Rs. 52,51,436-00 as on 20.12.1988, as per the particulars given in the statement of account and he has been called upon to pay the aforesaid amount with interest thereon at the rate of 16% p.a. on quarterly rests basis with effect from 20.12.1988 within seven days from the date of the receipt of the notice, failing which the Corporation will proceed to recover the same at his risk and costs. Copy of this notice had been sent to the guarantors for their information and necessary action to enable them to avoid the invocation of their personal guarantee given under the deeds of guarantee. It is thus clear from the notice Exhibit P. 1 that the first respondent-Corporation had only sent a

copy of the notice communicated to the principal borrower to see that they take action to enable them to avoid the invocation of their personal guarantee given under the deeds of guarantee. Admittedly, when the principal borrower namely, the Company did not repay the loan inspite of the issue of such notice and did not comply with the terms of the notice, the first respondent-Corporation invoked the liability of the sureties under the guarantee bonds executed by them. This was by issue of the second notice at Exhibit P. 2 dated 14.5.1993. Under Exhibit P. 2, notice dated 14.5.1993 issued to the guarantors including the appellant, the first respondent-Corporation made it very clear that it invokes the deed of guarantee executed by them on 7.2.1984 undertaking to pay the amount in case the borrower Company has failed to pay the amount to the Corporation and inspite of this, if they failed to pay the amount within 15 days from the date of the notice, the Corporation will be constrained to take legal proceedings to recover the amount from them. It is by this notice Exhibit P. 2 the first respondent - Corporation invoked the deed of guarantee executed by the appellant. Obviously, when the appellant and other guarantors did not pay the amount and did not comply with the terms of the notice Exhibit P. 2, a right to sue accrued in favour of the 2nd respondent - Corporation to initiate proceedings against the appellant and other guarantors u/s 31(1)(aa) of the State Financial Corporation Act. The period of limitation under Article 137 of the Limitation Act is 3 years which commences from the date when the right to apply accrues. The question when such right to apply accrues will depend on the facts and circumstances of each case. In the instant case, the Corporation for the first time sought to enforce the claim against the surety by issue of a notice dated 14.5.1993. The appellant and others failed to respond to the notice issued by the Corporation, hi the fact situation, the period of limitation for the petition u/s 31(1)(aa) would commence when the appellant refused to comply with the terms of the notice dated 14.5.1993 and as such the petition is within the period of limitation. The right to enforce liability against the surety accrues on the date of serving of the notice invoking the liability of the surety under the deed of guarantee. The starting point of limitation is the date when the right to apply accrues and that in the instant case, it had accrued to the Corporation when the appellant failed to comply with the terms of the notice dated 14.5.1993. The expression, "right to apply accrues" has to be liberally understood so that such right is correlated to the date when the remedy becomes available to the party. In the fact situation, we are therefore unable to understand as to how the proceedings initiated against the sureties for enforcing their liability under the deeds of guarantee executed by them u/s 31(1)(aa) could be said to be barred by law of limitation. Under these circumstances, we are of the view that there is absolutely no merit in the contention urged by the counsel for the appellant. The Corporation is entitled to enforce the guarantee, as the guarantee is a continuing one and the petition has also been filed on 22.11.1993, within three years from the date of 14.5.1993. in view of the foregoing discussion, the Corporation is entitled to claim the amount with the rate of interest mentioned above, as the claim cannot be said to be barred by limitation.

31. To sum up, therefore, that the first respondent - Corporation was able to establish its claim against the company (principal borrower) and was also able to establish that the appellant, who had executed the deed of guarantee towards the due discharge of the loan borrowed by the Company failed to discharge the obligation under taken by him under the deed of guarantee. Hence, the first respondent - Corporation was entitled to seek the relief u/s 31(1)(aa) of the State Financial Corporation Act against the appellant. The proceedings which were so initiated by the Corporation besides being legal and proper, was not barred by law of limitation.

32. Therefore, having given our anxious consideration to the entire matter in issue, we find that there is no merit in any of the contentions urged by the learned Counsel for the appellant. We have carefully perused the decisions relied upon by the learned Counsel for the appellant and we find that they have absolutely no application to the facts and circumstances of the case at hand and hence there is no need for us to make reference to each of those decisions individually. We have perused the impugned judgment of the learned District Judge and we are of the opinion that the impugned Judgment does not suffer from any illegality as to warrant interference in the appeal. Hence, we find no merit in this appeal filed by the appellant.

33. In the result, this Miscellaneous First Appeal filed by the appellant stands dismissed. But, in the circumstances of the case, there is however no order as to costs.