

(1988) 10 PAT CK 0001

In the Patna High Court

Case No : Civil Writ Jurisdiction Case No. 599 of 1987

Menospak Engineering (P) Ltd. and Another

APPELLANT

Vs

Bihar State Financial Corporation and Others

RESPONDENT

Date of Decision : 11-10-1988

Acts Referred:

COMPANIES ACT, 1956 — Section 3

Constitution of India, 1950 — Article 226, 227, 299

State Financial Corporations Act, 1951 — Section 29, 30, 31

Citation : (1989) 37 BLJR 40 : (1988) PLJR 1140

Hon'ble Judges : Uday Sinha, J; S.N. Jha, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

S.N. Jha, J.—By this application under Articles 226 and 227 of the Constitution of India the petitioners have prayed for quashing of Annexure-1 by which an advertisement u/s 29 of the State Financial Corporation Act (hereinafter referred to as "the Act") was published calling offers for sale of mortgaged property of the petitioner-company and any subsequent action purported thereto. The petitioners have further prayed for restraining the Respondent ("Bihar State Financial Corporation") from selling the properties including the factory, which had been mortgaged with the Corporation.

2. The facts relevant for the disposal of this application, in short, are that petitioner No. 1 is a private limited company (hereinafter referred to as "the Company"), which was incorporated on 1st April, 1982 under the Companies Act, 1956. The object of the Company was to carry on business as manufactures, exporters, importers, buyers and sellers and dealers in all kinds of machineries and factory implements, and, in particular in diesel engines and electric motors etc.

3. The Respondent Corporation was set up u/s 3 of the said Act, which is the instrumentality or a device of the Government of Bihar to provide medium and

long term credit to the industrial concerns for setting up industries in the State.

4. The Company which was originally a partnership concern under the name and style of M/s Menospak Engineering Industries" entered into an agreement with the Corporation on 21st March, 1975 through its partners, namely, Shri P. K. Kurup, Shri M. K. Somnathan, Shri Ramesh Upadhaya and Shri Shankaran Kutti for the grant of loan of Rs. 3,60,000 (Rupees three lac sixty thousand) for the purpose of construction of buildings and purchase of plants and machineries including tools and electric equipment and a mortgage deed was executed between the then partners of the petitioner concern, namely, M/s Menospak Engineering Industries on one hand and the Corporation on the other.

5. It appears that the Corporation had advanced a loan of Rs. 2,48,000 (Rupees two lac forty eight thousand). That loan was paid in instalments between the period 28th April, 1975 to October, 1977. The petitioners were required to pay back the loan alongwith the interest in instalments in terms of the aforesaid agreement entered into between the petitioners and the Corporation,

6. Although the petitioners have paid Rs. 4,77,827.39p (Rupees four lac seventy seven thousand eight hundred twenty seven and paise thirty nine only) yet it is an admitted position that there has been default on part of the petitioners to repay back the loan in terms of the agreement. According to the case of the petitioners the Company suffered a set back as a result of unprecedented flood in the year 1975, which badly damaged the petitioners" buildings, plants and machineries for which a claim was lodged with the said Corporation for rehabilitation loan of Rs. 7.000 (Rupees seven thousand), which was subsequently repaid with interest in full on final settlement It appears that the original partnership firm was converted into a private limited company and after its conversion as Company, the Corporation was duly informed on 19th April, 1982. The company duly supplied every details including the name of the Directors.

7. Since the Company could not make repayment of dues for the years 1985 and 1986, the Corporation published an advertisement on 14th February, 1987 inviting offers for purchase of factory and property of the petitioners mortgaged with the respondent Corporation u/s 29 of the Act by 25th February, 1987 on "as is where is basis", which is under challenge in this application.

8. A supplementary affidavit has been filed on behalf of the petitioners in which it has been seated that originally the petitioners" firm was sanctioned a sum of Rs. 3,60,000 (Rupees three lac sixty thousand only) @13.25% interest with rebate of 2% in case of timely payment but there was no penal interest in the deed of agreement between the parties. It has also been mentioned that out of the aforesaid sanctioned amount, a sum of Rs. 2,04,500 (Rupees two lac four thousand and five hundred only) was disbursed to the petitioners" firm and subsequent to that a sum of Rs. 43,500 (Rupees forty three thousand and five hundred only) was disbursed by supplementary agreement @ 14.25% interest

with 2% rebate in case of timely payment. It has also been stated that no proper accounting has been done by the Corporation. It has further been stated that when the petitioners came to know about the aforesaid advertisement (Annexure-1) they wrote a letter to Respondent No. 2, the Managing Director of the Respondent Corporation with a request to reconsider the request of the petitioners already made to the Corporation on 22nd December, 1986, a copy of which was also enclosed with the letter dated 17th February, 1987 sent by Special Messenger under the signature of petitioner No. 2, which was duly received by the Corporation on the same day as per the receipt of the Company's peon book. A copy of the letter dated 17th February, 1987 is Annexure-5 appended to the Supplementary Affidavit.

9. A counter affidavit has been filed on behalf of Respondents No. 1 and 2, wherein it has been stated that the Company was sanctioned a term loan of Rs. 3,60,000 (Rupees three lac sixty thousand) and a flood loan of Rs. 9,000 (Rupees nine thousand) on 28th November, 1974 and 19th September, 1975 respectively but the Company could only avail a sum of Rs. 2,48,000 (Rupees two lac forty eight thousand only) out of the aforesaid sanctioned amount. It has further been stated that the scheme of the Company was fully implemented and it went into production. It, however, defaulted heavily in the payment of Corporation's dues. Several reminders were sent to the Company for liquidating the dues of the Corporation. Various officers of the Corporation also contacted the Company, but the dues of the Corporation were not liquidated. As such the affairs of the Company were reviewed by "the Advisory Committee (Legal and Default Cases) of the Corporation in its meeting held on 18th August, 1980 and the Company was asked to repay the dues of the Corporation in monthly instalments" of Rs. 20,000 (Rupees twenty thousand) starting from September 1980 and ending in August 1981. The Company did not pay the instalment in accordance with the decision/direction of the Advisory Committee. As such its affairs were again reviewed by the Advisory Committee at its meeting held on 2nd December, 1981. At this meeting it was decided to recall the loan advanced to the Company and to go for legal action against it and accordingly legal notice recalling the loan was issued to the Company and its proprietors/guarantors of the said loan. In paragraph No. 9 of the counter affidavit it has been stated that in the meantime the Company requested for one more opportunity to clear off the Corporation's dues in instalment and without doubting the intention of the Company, the Corporation allowed this request. However, even this commitment of the Company was not kept and the Corporation had to recall the loan by serving a fresh notice under Sections 29 and 30 of the Act. A photostat copy of the notice dated 21st February, 1983 has been annexed as Annexure-A to the counter affidavit. The Company did not pay off even after the said notice and then it was gathered that the promoters of the Company diverted the surplus fund and promoted a trading concern in the name and style of "M/s Ospak, Exhibition Road, Patna." It was further stated that from a perusal of the books of accounts of the Company it was gathered that though its financial position was

good yet it had not paid off the dues and its promoters had withdrawn substantial amount of money from the firm.

10. It has further been stated in the counter affidavit that the petitioner concern has changed its constitution from a partnership firm to a private limited company without seeking permission of the Corporation though it was obligatory on its part to do so in terms of the deed executed at the time of availing the loan from the Corporation. The Corporation as much issued a show-cause notice to the Company for the breach of agreement vide letter dated 4-3-1983.

11. However, the affairs of the Company was again reviewed by the Advisory Committee at its meeting held on 21-7-1983. One of the promoters Shri Somnathan appeared before the Advisory Committee and promised to pay the entire interest, overdues and other charges by 31-12-1983 together with the instalment of interest falling due on 30-9-1983. It was further agreed between the said Shri Somnathan and the Advisory Committee that in case he promise taken is not kept, then the sale action will follow. The Company again failed to keep up its promise. Thereafter it appears that the Company issued cheques which bounced and inspite of repeated reminders the petitioner company did not take care to liquidate the dues of the Corporation. On 11-1-1985 the Board of Directors of the Corporation at its meeting decided to take over and advertise for sale the mortgaged assets of the Company for recovery of the dues. The Company once again approached the Corporation with small payment and a proposal for repayment and pleaded for last opportunity to pay the entire dues. This was again considered sympathetically by the Corporation and last opportunity was given to the Company to liquidate the entire dues but the Company again failed to keep its promise and did not pay the dues.

12. From the statements made in the counter affidavit, it appears that on 24-11-1986 a fresh notice was given to the Company to liquidate the entire overdues within twenty days from the date of issue of the letter, failing which action for taking over/sale of the mortgaged assets was to be taken up but the Company failed to appreciate the sympathetic attitude taken by the Corporation and on the contrary kept on diverting the fund to some other industrial activity keeping the Corporation starved of its legitimate dues. It has also been stated in paragraph No. 19 of the counter affidavit that the Company was reported to be promoting another industrial unit in Alleppey, Kerala, under the name and style of "M/s. Ospak Engineering Co." and have already been disbursed a sum of Rs. 8,73,000 (Rupees eight lac seventy three thousand only) out of the sanctioned loan of Rs. 11,50,000 (Rupees eleven lac fifty thousand only) sanctioned by the Kerala Financial Corporation. A photostat copy of the letter dated December 24, 1986 of the Kerala Financial Corporation is Annexure-D appended to the counter affidavit. It has also been stated that the pro-motors of the Company had advertised in the newspaper "AAZ" dated 21-4-1986 for the sale of its concern without giving any intimation to the Corporation, which is impermissible and in contravention of the terms and conditions of the agreement entered into with the

Corporation. The Corporation has also learnt that petitioners are interested in winding up their business at Patna and they are migrating to Kerala. These activities of the petitioners raised doubt in the mind of the Corporation about the intention and integrity of the promoters of the Company and the Corporation was left with no option but to go for sale of the mortgaged assets for recovery of its legitimate dues.

13. The sale advertisement inviting tenders by 25-2-1987 was published in the leading newspapers of Bihar, Uttar Pradesh and West Bengal and in pursuance of "the aforesaid advertisement four offers/tenders were received and after negotiations, the tender of Respondent No. 4, Ashok Kumar Jaiswal, was found highest i. e. Rs. 7,61,000 (Rupees seven lac sixty one thousand only) against the outstanding dues of the Corporation amounting to Rs. 3,60,000 (Rupees three lac sixty thousand) approximately. The Board of Directors of the Corporation accepted and approved the sale at its meeting held on 27-2-1987 and the orders for taking over of the unit was also passed by the Managing Director.

14. The writ application was filed on 27-2-1987 and it was placed before the Bench on the same day for admission. One of the points raised on behalf of the Company was that by Annexure-2 time was granted to them for depositing the amount mentioned therein and in that view of the matter steps under Sections 29 and 30 of the Act could not have been completed before that date. It was said that tenders from willing purchasers were called for and have been received and a decision thereon was proposed to be taken in course of the day. The case was adjourned to 2nd March, 1987 for admission and the court directed the Authorities not to accept any of the tenders and not to finalise the matter before the 3rd of March, 1987, if not already done so. On 3rd March, 1987 both sides filed further affidavits. It was stated on behalf of the Corporation that the property in question has already been sold. Mr. Basudeva Prasad, learned senior advocate appearing on behalf of the Corporation also stated that there was serious apprehension of removal of parts of the plants etc. by the Company and the Corporation may, therefore, be allowed to take possession of the property on the undertaking that the Corporation shall not deliver the same to the purchaser or to any body else and shall guard and protect it properly. The Court after hearing the parties on the matter of stay and after having considered all the facts and circumstances of the case did not pass any order of stay, but, the Court directed that the Corporation shall not deliver the property to the purchaser or any body else undertaken by it till 9th March, 1987. On 9th March, 1987 this application was admitted for final hearing and the possession of the disputed property remained with the Corporation on the condition mentioned above.

15. The learned counsel appearing on behalf of the company has submitted that on the facts and circumstances of this case, any action taken by the Corporation under Sections 29 and 30 of the Act and any subsequent proceeding thereto was illegal, void and inoperative and not binding on the petitioners. It was also contended that the action was arbitrary, mala fide and in violation of the

principles of natural justice. According to the learned counsel the sale and any action purported thereto was void because demand to pay the dues was by 28-2-1987 but it was sold on 25-2-1987 itself. In this connection it was also pointed out that no decision ever was taken by the Board of Directors for sale, there was no notice before advertisement for sale and no valuation was ever determined as required under the law and everything was done in hot haste, so far as the auction sale was concerned. In nutshell the argument was that the Corporation under the circumstances of the case had no authority in law to take step for the sale of the mortgaged assets of the Company and according to the petitioners even the procedure adopted for the sale lacked bona fide and good faith vitiating the full transaction.

16. In order to appreciate the points raised on behalf of the petitioners it is necessary to go through the provisions of Sections 29 and 30 of the Act. Sections 29 and 30 read as under :

29. Rights of Financial Corporation in case of default.-(I) Where any industrial concern, which is under a liability to the Financial Corporation under an agreement, makes any default in payment of any loan or advance or any instalment thereof or in meeting its obligations in relation to any guarantee given by the corporation or otherwise fails to comply with the terms of its agreement with the Financial Corporation, the Financial Corporation shall have the right to take over the management or possession or both of the industrial concern, as well as the right to transfer by way of lease or sale and realise the property-pledged, mortgaged, hypothecated or assigned to the Financial Corporation.

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

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

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

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

against the concern, and shall sue and be sued in the name of the concern.

Section 30 of the Act vests power to call for repayment before agreed period. Section reads as follows;

30. Power to call for repayment before agreed period.-Notwithstanding anything in any agreement to the contrary, the Financial Corporation may, by notice in writing require any industrial concern to which it has granted any loan or advance to discharge forthwith in full its liabilities to the Financial Corporation :

(a) if it appears to the Board that false or misleading information in any material particular was given by the industrial concern in its application for the loan or advance; or

(b) if the industrial concern has failed to comply with the terms of its contract with the Financial Corporation in the matter of loan or advance; or

(c) if there is reasonable apprehension that the industrial concern is unable to pay its debts or that proceedings for liquidation may be commenced in respect thereof; or

(d) if the property pledged, mortgaged, hypothecated or assigned to "the Financial Corporation as security for the loan or advance is not insured and kept insured by the industrial concern to the satisfaction of the Financial Corporation or depreciates in value to such an extent that, in the opinion of the Board, further security to the satisfaction of the Board should be given and such security is not given; or

(e) if, without the permission of the Board any machinery, plant or other equipment, whether forming part of the security or other-wise, is removed from the premises of the industrial concern without being replaced; or

(f) if for any reason it is necessary to protect the interests of the Financial Corporation.

17. The object of Sections 29 and 30 of the Act is clear. Section 29 defines the right of the Corporation to take over the management of the industrial concern for realising its loan or get the mortgaged property by way of lease or sale. The power conferred upon the Corporation u/s 29 of the Act to take possession of the debtor's property without any adjudication by any judicial authority is not arbitrary. Such wide powers are conferred on the Corporation to save public money from unscrupulous or inefficient entrepreneurs and Section 30 also gives power to the Corporation to call for repayment before the agreed period if it appears to the Board that the industrial concern has failed to comply with the terms of its contract with the Corporation in the matter of loan and if it appears that there is reasonable apprehension that the industrial concern is unable to pay its debts and any machinery, plant or other equipment whether forming part of the security or otherwise are being removed from the premises of the industrial concern without any information to the Corporation. In either circumstance or for

any other reason if the Board thinks it necessary to protect the interests of the Corporation, may at once call for repayment. On a plain reading of the aforesaid provisions it is apparent that this Act has made specific provision for realisation of the dues by the Corporation apart from the right such Corporation may have under the provisions of any other Act, namely, the Transfer of Property Act or the Civil Procedure Code, Even in this Act two procedures have been prescribed. u/s 29 the Corporation has a right to take over the management of the Company or to transfer by way of lease and sell the property which has been pledged or mortgaged. It is clear that once there has been a default in the payment of the loan, or any instalment thereof, it is for the Corporation to decide as to whether it shall immediately proceed with Section 29 for the sale of the property mortgaged or it shall take any recourse in accordance with Section 31 of the Act. According to Mr. Basudeva Prasad, learned counsel appearing on behalf of the Corporation, the power u/s 29 of the Act has an overriding effect and it even extinguishes the right a mortgagor may have under the provisions of the Transfer of Property. Act or any other law for the time being in force.

18. The learned counsel appearing on behalf of the Corporation has controverted the facts raised on behalf of the petitioners that no decision by the Board of Directors for sale was taken or no notice before the advertisement for sale was given to the Company. It was vehemently argued on behalf of the Corporation that nothing was done in hot haste, so far as the sale is concerned. It may be pointed out that several reminder were sent to the Company for liquidating the dues of the Corporation, various officials of the Corporation also contacted but the dues were not liquidated. As far -back as 18-8-1980 the Advisory Committee (Legal and Default Cases) of the Corporation reviewed its affairs and wrote to the Company to pay off the dues but as it was not done the Corporation had to recall the loan by serving fresh notice under Sections 29 and 30 of the Act on 21-2-1983. Thereafter one of the promoters of the Company, Shri Somanathan, appeared before the Committee and promised to pay the entire interest, dues, overdues and other charges by 31-12-1983 together with the instalment of interest. But that was also not materialised. Therefore, it is wrong to say that everything was done in hot haste and without any notice to the Company. Even in 1986 in " the larger interest of the industries in the State of Bihar and to safeguard them, the Corporation was considerate enough to give a fresh notice to the Company to liquidate the entire overdues within twenty days from the date of issue of the letter, failing which action for taking over/sale of the mortgaged assets was to be taken up, but the Company failed to pay the same.

19. A supplementary affidavit has been filed on behalf of the petitioners where it has been stated that no proper accounting has been done by the Corporation and the Corporation and the entire amount was asked to be paid by the Company through letter No. I/D/REC/3218/88-87 dated 24/26-11-1987 issued under the signature of Respondent No. 2.

20. In reply to the above supplementary affidavit a supplementary counter

affidavit has also been filed on behalf of the Corporation, where it has been stated that the statement made in paragraph Nos. 3 to 7 of the supplementary affidavit filed on behalf of the petitioners are erroneous and misplaced. The interest charged on the petitioner has been in accordance with the agreement entered into between the Company and the Corporation. It has also been stated that proper accounting was done by the Corporation and it was only when the Company repeatedly failed to keep up their promise and attempted to defraud the Corporation, the Corporation was constrained to issue notice dated 26-11-1986 to safeguard the public money. According to the Corporation the Company by their own conduct in the past years had totally disintegrated themselves from any further indulgence. It was also pointed out that the Company had also diverted some fund and promoted another company without furnishing any information to the Corporation. The Company also advertised in the newspaper "AAZ" for the sale of its concern, and wanted to wind up their business at Patna without giving any intimation to the Corporation, which was in contravention of the terms and conditions of the agreement. In such circumstances there was no option left to the Corporation but to take action under Sections 29 and 30 of the Act since the Company was in self default and they had always accepted their liabilities to pay off the dues but, failed every time.

21. In reply to the statement made in paragraph No. 13 of the counter affidavit filed on behalf of the Corporation, it has been stated on behalf of the Company that the above statement is misleading and irrelevant. Any such payment of loan in which the cheques of the company were dishonoured were paid by bank drafts soon after and this fact of repayment by bank draft has been deliberately suppressed. So far as the publication for the sale of the Company without giving any information to the Corporation in "AAZ" is concerned, it has been stated that the Corporation had knowledge of each and every detail of the activities of the Company and there was nothing secret, therefore, the allegation of suppression is wrong. It was due to the fact that there was undue pressure for repayment of its dues and frequent threat of sale, the Company thought it wise and prudent to sell the unit and pay off the dues but the idea of sale was put off because expected offer was not received. Mr. P. K. Kurup on behalf of the Company has also stated on oath that the promoters have their own residential house at Patna, therefore, there was no question of any winding up of the business and the migration to Kerala does not arise. It was also submitted that there was no reason or occasion for forthwith payment, as sought for by the Corporation vide letter No. I/D/REC/3218/ 86-87 dated 24/26.11.1987.

22. It was contended by Mr. Prasad that at any rate the question of accounting cannot be raised by way of a writ proceeding. The Corporation have got the proper accounting done and the Company was sold only thereafter. It was vehemently argued on behalf of the Corporation and it has also been stated on oath in the supplementary counter affidavit that throughout, the Company had been kept informed about the action of the Corporation which would be evident

from Annexure-F appended to the main counter affidavit, which shows that even a copy for publication of the sale notice was sent to the Company. Thus it is manifest that before exercising the power under Sections 29 and 30 of the Act the Corporation had given more than adequate opportunity and sufficient time to the Company to repay their dues.

23. I have already mentioned above that it was an admitted fact that there has been default on the part of the Company to repay back the loan in terms of the agreement and ultimately the aforesaid notice u/s 29 of the Act was issued for the sale of the factory and the property mortgaged with the Corporation. During the course of hearing of the present writ application a controversy was raised on behalf of the petitioners that actually the properties mortgaged have not been sold, but it has now been admitted even by the petitioners that the factory and the properties belonging to the Company are in possession of the Corporation since 14th March, 1987. From different orders passed in this case it appears that in past, before a Bench of this Court, an effort was made to settle the dispute between the petitioners and the Corporation but it did not materialised. It was contended on behalf of the Corporation that the factory and other properties were sold to Respondent No. 4 for an amount of Rs. 7,61,000 (Rupees seven lac sixty one thousand only). Respondent No. 4 has also entered appearance. The learned counsel appearing on behalf of the petitioners stated that the petitioners are prepared to pay off the entire dues with interest up to 14th March, 1987 and as such the Corporation should release the property which had been mortgaged with the Corporation by the mortgagor. Mr. Prasad appearing on behalf of the Corporation took a stand that there was no question of payment, of arrears alongwith interest only up to 14th March, 1987. The offer of the petitioners can be considered only if they agree to pay the entire dues alongwith the interest up to date. The Court earlier directed the parties to come to a settlement but ultimately it did not materialise. All these facts show that ample opportunities and indulgences were given to the Company but nothing could happen. I do not find that any step taken under Sections 29 and 30 of the Act and any action purported thereto was illegal and arbitrary and in my opinion nothing was done in hot haste so far as the sale is concerned. Having considered all facts and circumstances of this case, it is very difficult to hold that the Corporation failed in its duty to give a reasonable time and notice to the Company before taking any action u/s 29 of the Act and there has been any violation of the principle of natural justice.

24. It was then submitted on behalf of the Company that even if it is held that the Corporation can exercise its power of selling the mortgaged property in accordance with Section 29 of the Act, it has to be exercised in a bona fide manner. It is true that the mortgagee while selling the property, which had been pledged to it shall not sell it in a manner lacking bona fide or good faith. According to the learned counsel appearing on behalf of the Company only one person was called for auction, when other tenderers were also there. It was also submitted that fictitious offer was made by Respondent No. 4 by issuing cheque

after the filing of the writ petition and neither there was execution of sale deed nor any transfer of property was made in accordance with law. It was also contended that no opportunity was given to the highest bidder. Therefore, the action was arbitrary and not bona fide.

25. According to the learned counsel for the Company four tenders were received, which were opened in the office of the Corporation on 25th February, 1987. The petitioners have learnt that the offer of M/s Menon & Menon (P) Ltd., Kolhapur, Maharashtra, was the highest i.e. Rs. 7,50,000 (Rupees seven lac fifty thousand only) but negotiation was completed with Respondent No. 4, whose offer was only Rs. 3,80,000 (Rupees three lac eighty thousand only). In the counter affidavit it has been stated on oath that sale advertisement inviting tenders by 25th February, 1987 was published in leading daily newspapers of Bihar, Uttar Pradesh and West Bengal and against the aforesaid advertisement four tenders were received and after negotiation, the tender of one Ashok Kumar Jaiswal, Respondent No. 4, was found to be highest i.e. Rs. 7,61,000 (Rupees seven lac sixty one thousand only) against the outstanding dues of the Corporation amounting to Rs. 3,60,000 (Rupees three lac sixty thousand) approximately. This statement has not been factually denied by the petitioners. In such circumstance it is not possible to accept that the offer made by the aforesaid M/s. Menon & Menon was the highest. It has also been stated on behalf of the Corporation in the supplementary counter affidavit that Respondent No. 4, Ashok Kumar Jaiswal, whose tender was the highest, has already deposited Rs. 1,85,000 (Rupees one lac eighty five thousand only) over and above the initial tender deposit of Rs. 5,000 (Rupees five thousand) on 30th March, 1987 vide Cheque No. A/178-917905 drawn on the State Bank of India in accordance with the offer for purchase of the said unit. It has further been stated that Respondent No. 4 has also deposited a cheque of Rs. 7,56,000 (Rupees seven lac fifty six thousand only) with the Corporation and this amount and the initial deposit of Rs. 5,000 (Rupees five thousand) comes to Rs. 7,61,000 (Rupees seven lac sixty one thousand only), which was the total consideration money for sale of the said unit, Respondent No. 4 has also intimated that the Corporation should encash the cheque after settling the terms and conditions in this regard and after giving prior information to him. It was pointed out on behalf of the petitioners that when the Corporation has claimed that Respondent No. 4 had already deposited Rs. 5,000 (Rupees five thousand) as initial amount and Rs. 1,85,000 (Rupees one lac eighty five thousand) over and above that amount on 30th March, 1987, the fact that Respondent No. 4 deposited a cheque of Rs. 7,56,000 (Rupees seven lac fifty six thousand only) cannot be accepted. But this fact has been clarified in the show cause filed on behalf of Respondent No. 4. It has been stated by Respondent No. 4 that he deposited a sum of Rs. 7,61,000 (Rupees seven lac sixty one thousand) through two cheques including Rs. 5,000 (Rupees five thousand) as initial deposit and, therefore, he is entitled to take possession of the unit for running the same.

26. On the pleadings of the parties and on the materials available on the record,

it is not possible to hold that there was any fictitious payment and the acceptance of the offer made by Respondent No. 4 was illegal. It has come on the record that Respondent No. 4 gave highest bid, which fact has not been denied by the petitioners, as I have already indicated above. In the instant case, as the facts stand, it is also not possible to hold that no opportunity was given to the highest bidder, as alleged by the petitioners.

Therefore, the decision in the case of Ram and Shyam Company Vs. State of Haryana and Others, relied upon by the petitioners on the point that no opportunity was given to the highest bidder, does not help them at all.

27. It was then contended that the officers of the Corporation were in collusion with Respondent No. 4, therefore, no bona fide decision was taken by the Corporation in getting the property of the Company auctioned. Even the matter was not on the agenda before the Board before taking such decision. In reply to this contention, Mr. Prasad, learned counsel appearing on behalf of the Corporation, drew our attention to the supplementary affidavit on behalf of the Corporation, where Annexure-G has been annexed. From perusal of Annexure-G, it appears that the matter of sale of the mortgaged assets of the Company was placed before the Board on 27th February, 1987 and the same has been discussed elaborately. It is mentioned in Annexure-G that after opening of the tenders, the Tender Opening Committee found the offer of the aforesaid M/s Menon & Menon(P) Ltd. to be the highest, but at the time of negotiation the authorised representative of this tenderer showed his inability in raising the amount of consideration money, whereas Respondent No. 4 raised his offer to Rs. 7,61,000 (Rupees seven lac sixty one thousand) from Rs. 3,80,000 (Rupees three lac eighty thousand) with cash amount of Rs. 1,85,000 (Rupees one lac eighty five thousand only) which was deposited, as I have already indicated above. From Annexure-G it also appears that from the talk of the representative of M/s Menon & Menon (P) Ltd., it appeared to the Tender Opening Committee that this tender was submitted with a view to shelve the sale auction of the Corporation because Shri K. V. Menon, appearing on behalf of the said M/s. Menon & Menon (P) Ltd., was closely associated with the petitioner concern.

28. Having given my anxious consideration to the materials available on the record, I have no hesitation to hold that the purported action of the Corporation cannot be said to be vitiated and collusive since the authorities did take into consideration all the facts and was considerate enough to give reasonable opportunities to the Company before taking decision for the sale, of the mortgaged property. I am also of the opinion that on the materials produced, it is not possible for me to hold that there was any collusion between the officers of the Corporation and Respondent No. 4 and accordingly the said allegation must be rejected. It has been observed by the Supreme Court in many cases that the allegations of mala fide are very often made than proved and the burden of establishing mala fides is very heavy on the person who alleges it. The seriousness of such allegation demands proof of high order of credibility [see E.P.

Royappa Vs. State of Tamil Nadu and Another,]. Keeping this dictum in view, I am fully satisfied that the petitioners have not been able to prove the so called collusion between the officers of the Corporation and Respondent No. 4.

29. It was next contended that sale was void for non-payment of the consideration money in time. It was also contended that if deposit has not been made as per terms and conditions of the agreement sale is not valid in the eye of law. Reliance has been placed on the decision in the case of Mohanlal Shah and Ors. v. Sardar Sayed Ahmad Sayed Mohammad and Anr. 1954 SCA 646, wherein the Hon"ble Supreme Court has discussed the provisions of Order XXI, Rules 72, 84 and 85 of the CPC (hereinafter referred to as "the Code").

30. Under Order XXI, Rule 72 of the Code a decree holder cannot purchase property at the court auction without the express permission of the Court and that when he does so without such permission, then the Court has the discretion to set aside the sale upon the application by the judgment debtor or any person whose interest are affected by the sale. The Supreme Court also held this provision to be directory and not mandatory. Under Provision of Order XXI, Rules 84 and 85 of the Code, the auction purchaser requires to deposit 25% of the purchase money immediately to the officer or the person conducting the sale on being declared as a purchaser and the payment of the balance within 15 days of the sale. If such deposits are not made under the aforesaid provisions of the Code, there is no sale at all in the eye of law. In the instant case, as I have already held, the purchaser had deposited initial money of Rs. 5,000 (Rupees five thousand) before participating in the auction and Rs. 1,85,000 (Rupees one lac eighty five thousand) after acceptance of his tender and the balance money within the time as per terms and conditions of the agreement. I do not find any substance in the argument of the learned counsel for the Company that the sale was void on account of non-payment of consideration money or 25% of the auction money in time. Therefore, the decision in the case of Manilal Mohan Lal Shah (supra) is not at all helpful to the petitioners.

31. Relying on the judgment of Ramana Dayaram Shetty Vs. International Airport Authority of India and Others, , it was contended that the action of the Corporation was arbitrary. There cannot be any dispute that agreement entered into between the Corporation and the Company shall not be deemed to be a contract within the meaning of Article 299 of the Constitution, but in view of series of judgment of the Hon"ble Supreme Court, the Corporation which is statutory in nature cannot be held to be just an ordinary Corporation. The Corporation has to act in a just and fair manner. It has been held in R. D. Shetty's case (supra) that the rule inhibiting arbitrary action by the Government would equally apply to such Corporation where it deals with the public whether by way of giving jobs or entering into contracts or otherwise. It cannot act arbitrarily and its action must be in conformity with some principle which meets the test of reason and relevance.

32. In the instant case I have already held that the Corporation has acted fairly

and on the materials available on the record their action cannot be said to be arbitrary. Under the Act the Corporation has power to sell the properties which had been mortgaged with the Corporation under the terms of the agreement when the loanee has defaulted in the payment of the instalment. I have already indicated above that during the course of hearing when an offer was given on behalf of the petitioner to pay the arrears alongwith interest the court adjourned the case and directed the Corporation to consider the offer regarding the payment of dues alongwith interest up to date, but the petitioners failed to come to an amicable settlement. It was vehemently argued on behalf of the Corporation that many unscrupulous industrialists take money from the Corporation and subsequently they do not like to pay the instalment in time and as such because of their action they affect the very functioning of the financial institution.

33. On a plain reading of various provisions of the Act it is apparent that this Act has made specific provision for realisation of dues by the Corporation apart from the right such Corporation may have under the provisions of the Transfer of Property Act or any other Act.

34. An intervention petition was filed on behalf of the State Bank of India to add as one of the respondents, which was allowed. It was submitted on behalf of the State Bank of India that the petitioners have also taken certain loans from the Bank against hypothecation of certain goods of the Company, which has also been sold. Therefore, it was prayed that either the Corporation or the purchaser, Respondent No. 4 shall pay the debt to the bank. This fact has not been controverted on behalf of the Company. In that view of the matter, the Corporation shall pay the amount of debt of the State Bank of India, which is the first charge on the Company.

35. Needless to say that the articles which are not mortgaged shall be returned to the debtor in accordance with Section 29 of the Act and after liquidating all these dues and charges the balance amount will be paid to the Company within two months from the date of judgment.

36. Having examined the question very closely, and having considered the matter in all its ramifications. I am of the opinion that in the instant case every effort was made on behalf of the Corporation before taking steps under Sections 29 and 30 of the Act, and the petitioners can have no legitimate grievance that there has been any breach on the part of the Corporation while exercising the statutory power u/s 29 of the Act.

37. For the reasons stated above, I find no merit in this application and it is accordingly dismissed. However, in the special circumstances of the case there will be no order as to the costs.

Uday Sinha, J.

38. I agree.