

**(2007) 10 KAR CK 0040**  
**In the Karnataka High Court**  
**Case No : Writ Appeal No. 223 of 2006**

Mrs. Sunita Nambiar

APPELLANT

Vs

Karnataka State Financial Corporation

RESPONDENT

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**Date of Decision :** 11-10-2007

**Acts Referred:**

State Financial Corporations Act, 1951 — Section 29, 31, 31 (1), 32

**Citation :** (2008) ILR (Kar) 2057 : (2008) 4 KarLJ 408

**Hon'ble Judges :** Manjula Chellur, J;A.N. Venugopala Gowda, J

**Bench :** Division Bench

**Advocate :** Aditya Sondhi, for the Appellant; B. Rudragowda, for the Respondent

**Final Decision :** Dismissed

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## Judgement

Manjula Chellur and A.N. Venugopala Gowda, JJ.—The appellant being aggrieved by the order of the learned Single Judge dated 24.1.2006 passed in W.P.455/2006 has preferred the present appeal challenging the same.

2. The Writ Petition was filed seeking quashing of the further proceedings in Misc. petition 13/2003 against the appellant on the file of District Judge, Mysore.

3. The facts which are brought on record, in brief, are stated as under:

Mysore Panels and Boards Pvt. Ltd availed loans from the respondent-Corporation for establishing an industry for processing and manufacture of plywood panel and boards and also for running the industry. At some point of time, the management came to be transferred to the 3rd party Mr. S.G. Sundar and others. Thereafter, from 22.11.2000 the appellant ceased to be the Director of the company. The liabilities of the company were guaranteed by the Directors of the new management by executing fresh loan papers.

Even the new management was not able to perform its obligations by discharging the loans borrowed from the respondent-Corporation. Meanwhile, the Corporation took over the factory including the assets of the company on

31.10.2001 in exercise of its power u/s 29 of the State Financial Corporation Act (for short "the Act").

Respondent filed Misc. Petition 13/2003 under Sections 31(1) & 32 of the Act which is still pending before the District Court, Mysore.

According to the appellant, the respondent-Corporation did not take any steps to sell the assets seized by it for about 4 years though market value of the unit would not be less than Rs. 2.5 crores. To her surprise on 18.12.2005 she came across public notice in the Deccan Herald and other papers notifying sale of the assets of the company by the respondent in exercise of its power u/s 29 of the Act. Taking possession of the assets of the company by the Corporation was not disclosed in the Misc. Petition filed u/s 31 of the Act pending before the District Court, Mysore.

The appellants contends, the respondent-Corporation is precluded from pursuing two remedies simultaneously, i.e. one u/s 29 of the Act and the other u/s 31(1) and 32 of the Act as the same would be in contravention of the law laid down by the Supreme Court in Andhra Pradesh State Financial Corporation Vs. M/s. GAR Re-Rolling Mills and another, which was followed in Mysore Chest Care and Pain Therapy Centre (Private) Limited, Mysore and another Vs. State of Karnataka and another,

The respondent contends without abandoning or withdrawing the proceedings u/s 29 of the Act, the Corporation cannot proceed u/s 31(1) of the Act before the District Court, Mysore. Accordingly the appellant filed the above Writ Petition challenging the proceedings in the Misc. Petition as illegal and without jurisdiction.

The learned Single Judge dismissed the said writ petition by placing reliance on the Division Bench judgment of this Court in WA. No. 3548/2001 pertaining to KSIIDC. Aggrieved by the same the present appeal is filed contending that the judgment in KSIIDC is opposed to law and it is per incuriam ignoring the binding principles laid down by the Apex Court in Gar Re-rolling Mills" case, (supra). The opinion of the Division Bench that Supreme Court had no occasion to consider the amendment Act 43 of 1995 is erroneous as the said amendment came, into force in 1985 and not 1995. The Division Bench was also wrong in placing reliance on ILR 2000 Kar 1452 and Maharashtra State Financial Corporation Vs. Jaycee Drugs and Pharmaceuticals Pvt. Ltd. and Others, as they pertain to different issues.

So far as the Judgment of the learned Single Judge, according to the appellant, the learned Judge ought to have quashed the proceedings pending before the District Court Mysore, in Misc. petition as the same would tantamount to pursuing two parallel remedies which is otherwise forbidden in law as the doctrine of Election comes in the way. With there averments she has sought for setting aside the order of the Learned Single Judge seeking quashing of the proceedings in Misc. petition filed by the Corporation u/s 31 of the Act.

4. As against this the Corporation contends the appeal is not at all maintainable as the learned Counsel appearing for the appellant conceded that the law laid down by the Division Bench in W.A. 3548/2001 applies to the facts of the present case. He further contends that even otherwise, the said judgment of the Division Bench is pronounced with reference to law laid down by the Supreme Court in M/s. GAR Re-Rolling Mills. According to the respondent the appellant has completely misunderstood the law laid down by the Apex Court in the said Judgment. It is further contended that the apex Court in the said case has allowed and recognised the rights of the Corporation and held that 1. State Financial Corporation could proceed u/s 29 of the Act though it has proceeded earlier u/s 31 of the Act.

5. In the present case, the Corporation has proceeded against the primary assets u/s 29 of the Act and later filed misc. petition u/s 31(1)(aa) of the Act for recovery of the amount from the guarantors as no action could be taken against the guarantors u/s 29 of the Act Therefore, respondent contends, there is no impediment for the SFC to proceed against the assets of the borrower and the same cannot be a ground for the guarantor to seek quashing of the proceedings initiated against them u/s 31 of the Act. With these averments they have sought for dismissal of the appeal.

6. The points that would arise for court's consideration are:

i) Whether the appeal is not maintainable in view of the appellant conceding before the learned Single Judge that Corporation could proceed simultaneously u/s 29 & also Section 31 of the Act?

ii) Alternatively, whether the order of the learned Single Judge warrants any interference?

7. The appellant contends that for 4 years even after taking over the assets of the appellant-company, respondent/corporation did not take any steps to sell the assets seized by them though the unit is worth more than Rs. 2.5 crores. Factual situation is otherwise. The objections filled in the appeal by the respondent indicate that on several occasions, the primary assets seized by the Corporation were brought for sale by notification from time to time which are detailed at under:

Date of publication

Name of the paper

06.04.2002

Indian Express

19.07.2002

Vijaya Karnataka

08.11.2002

Times of India

30.01.2003

Times of India

09.06.2003

Vijaya Karnataka & Deccan Herald

03.09.2003

Vijaya Karnataka & Indian Express

14.08.2004

Andolana

03.03.2005

Vijaya Karnataka and Vijay Times

13.12.2005

Deccan Herald

8. As per Annexure "F" now produced by the appellant, on 4.1.2006, the Corporation addressed a letter to the appellant and others intimating that after negotiation, the highest offer received was at Rs. 78.25 lakhs and the appellant could also bring a better offer within the stipulated time so that the Corporation could conclude the same favour of the highest offeror. From the records of this Writ Appeal, it is noticed though appellant sought for stay of the proceedings, no such stay came to be granted. Neither of the parties have brought to the notice of the Court whether sale of primary assets of the appellant-company was finalized or not in pursuance of the sale notification in December 2005. As of now, no amount seem to have been paid either by the appellant or the company to the respondent-corporation. Thus the respondent-corporation is not able to enjoy the fruits of the action taken by them u/s 29 of the Act after taking over the assets of the company.

9. It is apparent initially the respondents initiated action u/s 29 of the Act to recover its dues. It is not even the case of the appellant that she was able to secure better offer for the sale of primary assets of the company. It is also not disputed that the proceeding u/s 31(1)(a)(a) of the Act was initiated against the Company and its directors including the present appellant who guaranteed the repayment of the loan borrowed by the Company. Out of 9 respondents, only the present appellant has approached this Court seeking quashing of the proceedings u/s 31(1) of the Act.

10. Apparently, the proceedings in the misc. petition are at the stage of evidence of the respondents i.e. the present appellant and others. Subsequent to 13.12.2005 the stage of proceedings before the District Court is not spelt out by

either of the parties. The fact remains the proceedings in the Misc. Petition before the District Judge. Mysore are not concluded into any final order or decree on merits.

11. Our endeavour is to see if appellant could maintain this appeal challenging the orders of the learned Single Judge, having conceded with the Division Bench Judgment of this Court in W.A. 3554/2001 dated 2.4.2004 in the case of KSIIDC v. Mysore Chest Care which in turn relied upon the Apex Court judgment in *Gar Re-rolling Mills*" (supra).

12. This persuades us to look into the circumstances under which the Division Bench of this Court considered similar situation in the Writ Appeal No. 3548/2001. Copy of the orders of the Division Bench is perused. In the said case, the borrower took a loan of Rs. 47 lakhs from the corporation in the year 1993, but was unable to repay the loan in terms of the schedule of repayment. Then, Corporation filed an application in Misc. 599/97 u/s 31(1)(a) of the Act in the Court of City Civil Judge, Bangalore. When the said application was pending before the Civil Court, the Financial Corporation realising that there was no possibility of recovering the loan amount from the guarantor, initiated action u/s 29 of the Act. Before any order on merits could be passed on the application u/s 31 of the Act, the borrower approached the High Court under Article 226 of the Constitution questioning the action taken by the Corporation u/s 29 of the Act. The learned Single Judge allowed the writ petition placing reliance on the judgment of the Apex Court in *M/s GAR Re-rolling Mills* and another.

13. Questioning the said order of the learned Single Judge an appeal came to be filed by the Financial Corporation. The argument of the learned Counsel for the Corporation was the learned Single Judge did not properly analyse the ratio of the judgment of the Apex court in *GAR Re-rolling Mills* case (supra). The said contentions are at paragraph 4 of the judgment of the Division Bench. At paragraph 5, their Lordships of the Division Bench reiterated the ratio of the Judgment in *GAR Re-rolling Mills*" case (supra) at paragraph 16 of the Judgment i.e. to say "While the corporation cannot simultaneously pursue the two remedies, it is under no disability to take recourse to the rights and remedy available to it u/s 29 of the Act even after an order u/s 31 has been obtained but without executing it....

At para 6, they reproduce paragraph 20 of the Supreme Court Judgment as under:

Therefore, when the Corporation, in the facts and circumstances of the case, took recourse to the provisions of Section 29 of the Act to recover to outstanding dues by abandoning the proceedings u/s 31 of the Act, it could not be faulted with and the final order/decreed made u/s 31 which had remained unsatisfied, could not debar the Corporation to invoke the provisions of Section 29 of the Act, by giving up further proceedings u/s 31/32 of the Act. The Judgment under appeal has laid down the proposition too broadly and not given effect to the

expression "without prejudice to the provisions of Section 29 of the Act" occurring in Section 31 and by laying down that if recourse is had to the provisions of Section 31 of the Act, the Corporation must pursue that remedy alone and it cannot abandon or withdraw from those proceedings "at any stage". The interpretation placed by the High Court chokes the benefit of recovery proceedings and cannot therefore be sustained and accepting the appeal, we set aside the impugned judgment.

14. After referring to another judgment of Coordinate Bench of this Court in *Naseer Ahamed v. Branch Manager, Karnataka State Financial Corporation* wherein the said Division Bench referring to *Maharashtra State Financial Corporation v. Jaycee Drugs and Pharmaceuticals and Ors.*, held that the Corporation having not executed the orders obtained u/s 31 of the Act, there could not be any legal impediment for the Corporation to take action u/s 29 of the Act in terms of the judgment of the Supreme Court in *GAR Re-rolling mills*" case.

15. The Division Bench in *W.A.3548/2001* in the light of settled law that surety cannot object the action of the Corporation against the surety on the ground that it should exhaust all the remedies first against the borrower, allowed the appeal setting aside the orders of the learned Single Judge. In other words, the Division Bench in the above appeal held, the Corporation having not executed the order or decree to realise the dues u/s 31(1) of the Act, could proceed u/s 29 of the Act in view of the law laid down in *Gar re-rolling Mills* by the apex court.

16. The present appellant being the guarantor, could she question the action of the corporation contending they should first exhaust the remedy u/s 29 of the Act against the main borrower ? Incidentally this Court also has to see what would be the actual position with reference to the facts of the present case in the light of the law laid down by the apex court in *GAR Re-rolling mills*" and also other cases which would be referred to hereinafter.

17. It would be appropriate to reproduce the important provisions of the Act hereunder:

Section 29: Rights of Financial Corporation in case of default:

1) Where any industrial concern, which is under a liability to the Financial Corporation under an agreement, makes any default in repayment of any loan or advance or any instalment thereof (or in mating to 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

powers under Sub-section (1) shall vest in the transferee all rights in or to the property transferred 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 (XXX) shall, in the absence of any contract to the contrary 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 owner of the concern.

### 31. Special provisions for enforcement of claims by Financial Corporation:

1) Where an industrial concern, in breach of any agreement, makes any default in repayment of any loan or advance or any installment 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 or where the Financial Corporation requires an 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 provisions of Section 29 of this Act and of Section 69 of the Transfer of Property Act, 1882, any Officer of the Financial Corporation, generally or specially authorized by the Board in this behalf, may apply to the District Judge within the limits of whose jurisdiction the industrial concern carries on the whole or a substantial part of its business for one or more of the following reliefs, namely:

a) for an order for the sale of the property pledged, mortgaged, hypothecated or assigned to the Financial Corporation as security for the loan or advance; or

(aa) for enforcing the liability of any surety; or

(b) for transferring the management of the industrial concern to the Financial Corporation; or

(c) for an ad interim injunction restraining the industrial concern from transferring or removing its machinery or plant or equipment from the premises of the industrial concern without the permission of the Board, where such

removal is apprehended.

2) Ant application under Sub-section (1) shall state the nature and extent of the liability of the industrial concern to the Financial Corporation, the ground on which it is made and such other particulars as may be prescribed.

32. Procedure of District Judge in respect of applications u/s 31:

Under this section, the procedure and the powers vested with the District Judge while dealing with the application u/s 31 of the Act is enumerated. There are 12 clauses, however, Section 32 not being the provision concerned with the present appeal, it need not be adverted to.

18. Apparently, the appellant who is one of the sureties, is before us questioning the action of the Financial Corporation u/s 31(1) of the Act. It is also not in dispute that the primary assets belonging to the borrower-Company are under the control and possession of the corporation. By virtue of Section 31(1)(aa) of the Act, the proceedings before the District Judge are against the sureties or guarantors. It is also well settled that the principal borrower need not be a party to the proceedings u/s 31(1) of the Act.

19. When it comes to Section 29 of the Act, definitely no sub-section of this Section empowers the Corporation to proceed against the sureties. It is meant only for initiating action against the industrial concern i.e. "defaulter" and not its sureties. For this, we rely upon the following decisions:

1) Maharashtra State Financial Corporation Vs. Jaycee Drugs and Pharmaceuticals Pvt. Ltd. and Others, :

Paragraph-45: Having regard to the features referred to above, it appears to be more in consonance with the scheme of the Act and the object underlying Sections 31 and 32 that by introducing the amendments in Sections 31 and 32 of the Act, Parliament intended to place the surety on the same footing as the principal debtor in the matter of enforcement of the claims of the Financial Corporation so as to enable the Financial Corporation to obtain relief against the properties of the principal debtor as well as the surety. If considered in this perspective, the expression "enforcing the liability of any surety" in Clause (aa) of Section 31(1) would mean enforcing the liability of a surety in the same manner as the liability of principal debtor is enforced, i.e., by attachment and sale of property keeping in view that the proceedings under Sections 31 and 32 of the Act are akin to an application for attachment of property in execution of a decree at a stage posterior to the passing of the decree. This construction would obviate the need for procedure for carrying into effect of the order passed under Clause (da) of Sub-section (7) of Section 32 of the Act because such an order would be an order of attachment and sale of the property of the surety and it can be carried into effect in accordance with Sub-section (8) of Section 32 which prescribes the procedure for carrying into effect an order for attachment and sale of property. This construction will also preserve the special nature of the

proceedings u/s 31 and would not result in bringing about a fundamental alteration in the law laid down by this Court with regard to the nature of these proceedings as well as the general law where under a surety is to be treated on par with the principal debtor.

2) ILR 2000 KAR 1452 (Nazzer Ahmed v. Branch Manager, KSFC):

Paragraph-8: Further, Section 3 of the Act has made specific provision for enforcing the outstanding liability of the borrower against any of the sureties but it does not provide that before proceeding against the surety it should be shown to the satisfaction of the District Judge that all other remedies available against the principal borrower has been exhausted.

3) N. Narasimahaiah and Others Vs. Karnataka State Financial Corporation and Others,

Paragraph 5:

Section 29 of SFC Act spells out the rights of State Financial Corporations to realize its dues without the intervention of Courts, when the borrower industrial concern commits default or breach. The intention is to save public money from unscrupulous or recalcitrant entrepreneurs/industrial concerns. There is no reference to the surety, anywhere in Section 29. The rights conferred on SFC's u/s 29 are:

to take over the management or possession or both of the industrial concern as well as to transfer by way of lease or sale and realise the property pledged, mortgaged, hypothecated or assigned to the financial corporations.

Section 29 clearly states that the financial corporation shall have the right to take over the management or possession or both of the industrial concern. It does not refer to taking over of management or possession of the property belonging to the surety, which has been secured in favour of Financial Corporation. The Legislature has been careful in conferring such power, only against the industrial concern and not against the surety. In the absence of an express statutory provision, the power to take over the property of another, without intervention of Court, cannot be a matter of inference. Any attempt by a SFC to take possession of a surety's property even if mortgaged, in the absence of a specific authority by law will fall foul of Article 300A of the Constitution of India.

Paragraph 6:

The next question is whether Section 29 can be read as also conferring power in regard to the property of the surety. If the language and words of the statute are plain and unambiguous, full effect must be given to them as they stand. The words of a statute should be understood in their natural, ordinary or popular sense and phrases should be construed according to their grammatical meaning, unless that leads to absurdity or unless there is something in the context, or in the objects of the statute, to suggest to the contrary (vide GLAXO Laboratories

(India) Limited v. Presiding Officer, Labour Court). It is impermissible to add or subtract words from any provision of the statute in the garb of finding out the intention of the legislature. A statutory provision should be construed in a manner which will sub-serve and advance the purpose of the enactment and does not defeat the purpose, nor in a manner so as to render any part of its surplus or otiose (vide Maharashtra State Financial Corporation v. Jaycee Drugs and Pharmaceuticals Pvt. Ltd.

Paragraph 12:

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. In *Hukumchand Insurance Co. v. Bank of Baroda*, a Division Bench of this Court held as follows:

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 suretyship. The liability of a principal debtor and the liability of a surety which is coextensive 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.

Paragraph 19:

Section 29 as noticed above, deals with the rights of Financial Corporation, in case of default by the industrial concern/borrower. Sub-section (4) deals with the consequences of action taken under Sub-section (1) that is recovery of all costs, charges and expenses incurred by the Financial Corporation for such action. Sub-section (4) very significantly uses the words "where an action has been taken against an industrial concern under the provisions of Sub-section (1)" and does not refer to any action taken against a surety under Sub-section (1). This gives a clear indication that the action that can be taken by the Financial Corporation u/s 29(1) is only against the industrial concern and not its sureties.

4) ILR 2007 Karnataka Page 44 Gulhari and Anr. v. Karnataka State Financial Corporation and Ors.

Head Note: (A) STATE FINANCIAL CORPORATION ACT, 1951 SECTION 31(1)(A) (A -PETITION UNDER-SCOPE OF SECTION 31 AND 32-Purpose and intent of Section 29-Rights of the corporation under-Deed of guarantee executed by the appellant and other respondents-Failure to pay the amount-Direction sought by the 1st respondent corporation for enforcement of its claim-Order passed by the Learned District Judge u/s 32(7) (da)-Appealed against-HELD, u/s 31(1)(a)(a) 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 of the rights available to the corporation u/s 69 of the T.P. Act. FURTHER HELD, The scope of enquiry u/s 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-Application u/s 31 cannot be treated as a plaint and it would not be barred by limitation provided under Article 137 of the Limitation Act. 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 relief's as mentioned in Sub-section () of Section 3.

Head Note B: STATE FINANCIAL CORPORATION ACT, 1951-SECTION 32(6)-INVESTIGATION UNDER-SCOPE OF-HELD, 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) of the Act on account of breach of the terms of the agreement-ON FACTS, HELD, 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 for due discharge of the loan, failed to perform his obligation under the deed of guarantee Exhibit P.2- Hence, the first respondent Corporation is entitled to the relief u/s 31(1)(a)(a) of the Act.

Head Note: C: CONTRACT ACT, 1872-SECTION 128-LIABILITY OF THIS SURETY UNDER-HELD, The liability of the surety to co-extensive with that of the principal borrower-The guarantor alone could be sued without suing the principal borrower to long as the creditor satisfies the Court that the principal debtor or the principal borrower to in default-FURTHER HELD, it to not necessary for a creditor, before proceeding against the surety to demand payment from the principal-debtor or sue the principal-debtor, unless it to expressly stipulated for-Even, the corporation need not make principal borrower as a party to the proceedings u/s 31(1)(a)(a) of the Act.

20. The gist of the above cases would definitely indicate that the liability of the surety u/s 128 of the General Contract Act being co-extensive with that of the principal borrower, the creditor has the option to proceed against the guarantor without initiating any action for recovery of the money against the principal borrower as long as the creditor is able to establish that the principal borrower is in fact a defaulter. Therefore, it is not open to the sureties to dictate terms to the creditor that first the creditor should proceed against the principal borrower and then proceed against the guarantor if creditor's effort results in failure to realise the dues or recovered amounts are insufficient to satisfy the total dues. The above mentioned two procedures though aim at recovering the dues of the creditor, they are entirely different from each other. In case principal borrower

offers his personal guarantee or secures Ms individual property guaranteeing the repayment of the loan, then also u/s 29 of the Act the Financial Corporation has disability to proceed against the Principal borrower.

21. In light of above discussion, we have to see how these two remedies would avail to the benefit of the Financial Corporation. On this aspect, we rely on paragraphs 13 to 21 of the judgment reported in Andhra Pradesh State Financial Corporation Vs. M/s. GAR Re-Rolling Mills and another, WITH (Andhra Pradesh State Financial Corporation v. Kota Subba Reddy and Ors.).

Paragraphs 13 to 21: On a conjoint reading of Section 29 and 31 of the Act, it appears to us that in case of default in repayment of loan or any instalment 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. The expression "without prejudice to the provisions of Section 29 of this Act" as appearing in Section 31 of the Act clearly demonstrates that the Legislature did not intend to confine the Corporation to take recourse to only a particular remedy against the defaulting industrial concern for recovery of the amount due to it. It left the choice to the Corporation to act in the first instance u/s 31 of the Act and save its rights and remedies u/s 29 of the Act to be availed at later stage, with the sole object of enabling the Corporation to recover its dues. It is not, however, obligatory on the part of the Financial Corporation to invoke the special provisions of Section 31 of the Act, it can even without taking recourse to the provisions of the said Section invoke the procedure prescribed u/s 29 of the Act for realisation of its dues. Where the Corporation takes recourse to the provisions of Section 31 of the Act and obtains an order from the Court, it shall ordinarily and invariably seek its enforcement in the manner provided by Section 32 of the Act, which provisions are aimed to act in aid of the orders obtained u/s 31 of the Act and it cannot simultaneously initiate and take recourse to the remedy available to it u/s 29 of the Act unless it gives up, abandons or withdraws the proceedings u/s 31 of the Act, at whatever stage those proceedings may be. The Corporation cannot simultaneously pursue two remedies at the same time. The reach and scope of the two remedies is essentially different even if somewhat similar result flows by taking recourse to either of the two provisions in certain respects.

14. While dealing with the provisions of Sections 31 and 32 of the Act, this Court in Gujarat State Financial Corporation Vs. Natson Manufacturing Co. Pvt. Ltd. and Others, after noticing the scope of Section 31 of the Act by observing:

...Section 31(1) prescribes a special procedure for enforcement of claims by the Financial Corporation. The Corporation is to make an application for the reliefs set out in Section 31(1). The reliefs that a Court can grant u/s 31(1) are the sale of the property mortgaged, etc to a Financial Corporation as security for the loan

or advance; transfer of the management of the industrial concern to the Financial Corporation or restraining the industrial concern from transferring or removing its machinery or plant or equipment from the premises of the industrial concern without the permission of the Board of the Financial Corporation. An application for such a relief is certainly not a plaint in a suit for recovery of mortgage money by sale of mortgaged property. On a breach of an agreement by an industrial concern the Corporation can seek one or more of the three reliefs set out in Section 31(1)....

This Court went on to consider the question as to whether an application u/s 31(1) of the Act, the Corporation can pray for a decree for its outstanding dues and opined in the negative. In the words of the Court:

...At any rate, in an application u/s 31(1) the Corporation does not and cannot pray for a decree for its outstanding dues. It can make an application for one of three reliefs, none of which, if granted, results in a money decree, or decree for recovery of outstanding loan or advance. Section 31(1) of the Act, in the circumstances therein set out, permits the Corporation to seek one or more of the three reliefs therein stated....

The Court then considering the conspectus of the provisions of Sections 31 and 32 of the Act, went on to say that on in application u/s 31(1) being made it is obligatory upon the Court to make an interim order attaching the security with or without interim injunction restraining the industrial concern from transferring or removing its plant, machinery or equipment without the permission of the Board of the Corporation. If the relief claimed in the application u/s 31 is transfer of the management of the industrial concern to the Corporation the District Judge is also obliged to grant an ad interim injunction and at the same time issue a notice calling upon the defaulting industrial concern to show cause why the interim injunction should not be made absolute. The claim of the Corporation in an application u/s 31 is not the monetary claim of its due to be investigated, though it may become necessary to specify the amount for the purpose of determining how much of security should be attached or sold but the investigation of the claim does not involve the raising of all such contentions as are permissible in a money suit. 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 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 the Code of Civil Procedure. Indeed 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 which can be valued in terms of money in proceedings u/s 31 of the Act. 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.

15. The Doctrine of Election clearly suggests that when two remedies are available for the same relief, the party to whom the said remedies are available has the option to elect either of them but that doctrine would not apply to cases where the ambit and scope of the two remedies is essentially different. To hold otherwise may lead to injustice and inconsistent results. Since, the Corporation must be held entitled and given full protection by the Court to recover its dues it cannot be bound down to adopt only one of the two remedies provided under the Act. In our opinion, the Corporation can initially take recourse to Section 31 of the Act but withdraw or abandon it at any stage and take recourse to provisions of Section 29 of the Act, which Section deals with not only the rights but also provides a self contained remedy to the Corporation for recovery of its dues. If the Corporation chooses to take recourse to the remedy available u/s 31 of the Act and pursues the same to the logical conclusion and obtains an order or decree, it may thereafter execute the order or decree, in the manner provided by Section 32(7) and (8) of the Act. The explanation, however, may withdraw or (sic) Act. A "decree" u/s 31 of the Act not being a money decree or a decree for realisation of the dues of the Corporation, as held in Gujarat State Financial Corporation Vs. Natson Manufacturing Co. Pvt. Ltd. and Others, *supra*, recourse to it cannot debar the Corporation from taking recourse to the provisions of Section 29 of the Act by not pursuing the decree or order u/s 31 of the Act, in which event the order made u/s 31 of the Act would serve in aid of the relief available u/s 29 of the Act.

16. The doctrine of election, as commonly understood, would thus not be attracted under the Act in view of the express phraseology used in Section 31 of the Act, viz. "without prejudice to the provisions of Section 29 of this Act". While the Corporation cannot simultaneously pursue the two remedies, it is under no disability to take recourse to the rights and remedy available to it u/s 29 of the act even after an order u/s 31 has been obtained but without executing it and withdrawing from those proceedings at any stage the use of the expression "without prejudice to the provisions of Section 29 of the Act" in Section 31 cannot be read to mean that the Corporation after obtaining a final order u/s 31 of the Act from a court of competent jurisdiction is denuded of its rights u/s 29 of the Act. To hold so would render the above quoted expression as redundant in Section 31 of the Act and the Courts do not lean in favour of rendering words used by the legislature in the statutory provisions redundant. The Corporation which has the right to make the choice may make the choice initially whether to proceed u/s 29 of the Act or Section 31 of the Act, but its rights u/s 29 of the Act are not extinguished, if it decides to take recourse to the provisions of Section 31 of the Act. It can abandon the proceedings u/s 31 of the Act at any stage, including the stage of execution if it finds it more practical and may initiate proceedings u/s 29 of the Act.

17. The relief available to the Corporation u/s 29 of the Act to realise its dues in

the manner prescribed therein is wider in scope than the limited relief available to it u/s 31 of the Act and is not controlled by Section 31 of the Act. The Legislature clearly intended to preserve the rights of the Corporation u/s 29 of the Act, by expressed stating in Section 31 of the Act, that its recourse to action under that Section is without prejudice to the provisions of Section 29 of the Act. What alone is not desirable or permitted by the Act is to pursue both the remedies simultaneously by the Corporation and not that it cannot withdraw or abandon the proceedings initiated u/s 31 at "any stage" and then take recourse to the provisions of Section 29 of the Act. Any interpretation which frustrates the right of the Corporation to recover its dues must be eschewed. Similarly, if in a given case, the corporation has taken recourse to the provisions of Section 29 of the Act, there is no bar for it without taking those proceedings to their logical conclusion to abandon them and approach the Court u/s 31 of the Act to seek one or more of the reliefs available to it under that Section. Where, the defaulting party fails to honour the order or decree of the Court made u/s 31 of the Act, it has neither any legal nor even a moral right to object to the Corporation from taking recourse to the provisions of Section 29 of the Act only on the ground that it has obtained a proper relief u/s 31 of the Act which relief it does not wish to pursue any further. Indeed, if the order of the Court issued u/s 31 of the Act has been fully complied and honoured with by the defaulting concern, no occasion would arise for the Corporation to invoke the provisions of Section 29 of the Act. However, to hold that since the Corporation has initially taken action u/s 31 of the Act and obtained an order/decreed from the Court, the Corporation is prohibited from invoking the provisions of Section 29 of the Act, notwithstanding the fact that the defaulting concern has not honoured the court's order or decree made u/s 31 of the Act, would amount to putting premium on the activities of the defaulting concern aimed at frustrating the order/decreed of the court and depriving the Corporation of recovering its legitimate dues and thereby rendering the expression "without prejudice to...." Occurring in Section 31 as otiose. Courts do not favour such a course.

18. There is no equity in favour of a defaulting party which may justify interference by the Courts in exercise of its equitable extraordinary jurisdiction under Article 226 of the Constitution of India to assist it in not repaying its debts. The aim of equity is to promote honesty and not to frustrate the legitimate rights of the Corporation which after advancing the loan takes steps to recover its dues from the defaulting party. Thus, the intention of the legislature in using the expression "without prejudice to the provisions of Section 29 of the Act" clearly appears to be that recourse to the provisions of Section 29 of the Act is not prohibited where an order of decreed u/s 31 of the Act obtained by the corporation has not been complied with or honoured by the defaulting concern or is otherwise insufficient to satisfy the dues of the Corporation and the Corporation withdraws and abandons to pursue further proceedings u/s 31 of the Act. Passing a money decreed for recovery of the outstanding dues, not being within the jurisdiction of the Court u/s 31 of the Act, the Corporation retains its

right to recover its dues by invoking the provisions of Section 29 of the Act in the manner prescribed therein notwithstanding any order, final or interim, obtained by it u/s 31 of the Act by withdrawing from and abandoning those provisions at any stage of the proceedings. A court of equity, when exercising its equitable jurisdiction under Article 226 of the Constitution must so act as to prevent perpetration of a legal fraud and the courts are obliged to do justice by promotion of good faith, as far as it lies within their power. Equity is always known to defend the law from clearly evasions and new subtleties invented to evade law. Since the legislature enacted Sections 29 and 31 with a view to aid the Corporation to recover its legitimate dues etc. from the defaulting party, the saving clause in Section 31 of the Act, preserving the rights u/s 29 of the Act by giving up the pursuit u/s 31 at any stage of the proceedings is available to the Corporation. The two provisions must be so harmonised as to facilitate the Corporation to recover its dues from the defaulting party. The Act was enacted by the Parliament with a view to promote industrialization and offer assistance by giving financial assistance in the shape of loans and advances etc. repayable in easy instalments. The Corporation has to recover the loans and advances, so as to be able to give financial resources assistance to other industries and unless it recovers its dues, the money will not remain in circulation for long. It is with this end in view that the Parliament gave the Corporation the light to proceed u/s 31 of the Act, preserving at the same time its rights and remedy u/s 29 of the Act, so that the Corporations are not choked by the defaulting debtors by adopting frustrating or dilatory tactics in the proceedings in the court initiated u/s 31 of the Act.

19. The right vested in the Corporation u/s 29 of the Act is besides the right already possessed at common law to institute a suit or the right available to it u/s 31 of the Act. Since the Corporation can withdraw from the Court its proceedings u/s 31 of the Act at any stage, it would imply that it has the right to withdraw from further proceedings u/s 31 and 32 of the Act even after obtaining an order in its favour and take recourse to the proceedings u/s 29 of the Act without pursuing the proceedings u/s 31 of the Act any further. The Corporation cannot, indeed, execute the order u/s 31 of the Act and yet simultaneously take recourse to proceedings u/s 29 of the Act for the same relief. The position may also be different if the claim of the Corporation is negatived, on facts by the Court in the proceedings u/s 31 of the Act. In that event depending upon the facts of each case, it may be permissible to hold that fair play and justice demand that the Corporation is not allowed to take recourse to the provisions of Section 29 of the Act. Thus from the above discussion it follows that the answer to the question posed in the opening part of the judgment is in the affirmative.

20. In Civil Appeal No. 3689/87, the Corporation took recourse to the provisions of Section 31 of the Act and obtained an order u/s 31(1) of the Act but its effort to enforce the liability either against the defaulting concern or the surety was frustrated by the defaulting party by shifting the concern without leaving scope for tracing it. This action of the defaulting concern could not lead to the

consequence that the remedy of the Corporation u/s 29 to recover its outstanding dues together with interest was lost because undoubtedly the Corporation did not proceed further with the proceedings u/s 31 of the Act which it abandoned by withdrawing from those proceedings impliedly. Therefore, when the Corporation, in the facts and circumstances of the case, took recourse to the provisions of Section 29 of the Act to recover its outstanding dues by abandoning the proceedings u/s 31 of the Act, it could not be faulted with and the final order/decree made u/s 31 which had remained unsatisfied, could not debar the corporation "to invoke the provisions of Section 29 of the Act, by giving up further proceedings u/s 31/32 of the Act. The judgment under appeal has laid down the proposition too broadly and not given effect to the expression "without prejudice to the provisions of Section 29 of the Act" occurring in Section 31 and by laying down that if recourse is had to the provisions of Section 31 of the Act, the Corporation must pursue that remedy alone and it cannot abandon or withdraw from those proceedings "at any stage". The interpretation placed by the High Court chocks the benefit of recovery proceedings and cannot therefore, be sustained and accepting the appeal, we set aside the impugned judgment."

21. In Civil Appeal No. 3216/88, the facts as noticed in the earlier part of this judgment which are rather eloquent show that the respondents did not have any intention of repaying any part of the debt. Even in this Court their attitude was no different. They have been merely adopting delaying tactics and putting forward one or the other ploy to keep the Corporation diverted of its legitimate dues. The learned single Judge was perfectly justified to dismiss the writ petition, thereby upholding the action u/s 29 of the Act since the Corporation did not further pursue its remedy u/s 31 of the Act. The Division Bench fell in error in setting aside the judgment of the single Judge by following the full judgment, (which has been set aside by us while allowing C.A.3689/87) without considering the peculiar facts of the case and the attitude of the respondent - the defaulting party. Consequently, C.A. 3216/88 is also allowed and the impugned judgment under appeal is set aside.

22. In the light of the above judgment, the Financial Corporation having failed to enjoy the fruits of its action u/s 29 of the Act, it is not barred from taking recourse to provisions of Section 31 of the Act. The defaulting party apparently has failed to honour the contract by repaying the loan as scheduled. Even on the basis of equity, the Courts are not expected to lean in favour of a party who is a defaulter by exercising extra-ordinary Jurisdiction under Article 226 of the Constitution. It would only mean a defaulting party would be taking the assistance of the Court not to pay legal dues.

23. The Financial Corporation in a given case may be able to recover its entire dues by taking recourse to provisions of Section 29 of the Act. At times, it may be successful in recovering part of the dues. Then, the defaulting party should not be allowed to knock at the doors of the Court to come to its aid against the interest of the Financial Corporation. Therefore, the legislature has left the choice

to the Corporation to act accordingly under the circumstances prevailing in a given case. In case the entire dues are not recovered from the principal borrower u/s 29 of the Act, balance of the dues could be recovered by proceeding against the surety to the extent agreed by the terms of the contract by taking recourse to Section 31 of the Act. Therefore, the appellant cannot contend there is no doctrine of election in favour of financial Corporation. It is the choice of the Financial Corporation whether it would proceed u/s 29 of the Act first or u/s 31 of the Act. What is prohibited is simultaneous action under both the provisions of the Act i.e. against the principal borrower and the surety etc as provided u/s 31 of the Act.

24. In the present case, apparently, the Financial Corporation is not able to realise the fruits of its action u/s 29 of the Act. Therefore, it has intended to proceed against the sureties by taking recourse u/s 31 of the Act. Meanwhile, if the Corporation is able to realise its dues in pursuance of its action u/s 29 of the Act, it may even abandon the proceedings u/s 31 of the Act. The proceedings u/s 31 of the Act has not yet culminated into any decree or order capable of being executed by the Corporation. It is at the stage of evidence of the respondents at could be gathered from the records. What is prohibited to simultaneous action under both the provisions. Therefore, in the present case, no such situation has arisen where one could term it as simultaneous action.

25. In this view of the matter, the learned Single Judge was justified in placing reliance on the Division Bench judgment of this Court in W.A.3548/2001. The learned Counsel appearing for the appellant having conceded before the learned Single Judge about the applicability of the division bench judgment to the facts of the present case, could not have challenged the same. However, his contention is the Division Bench in W.A.3548/2001 did not properly adopt the principle laid down by the Apex court in GAR Re-rolling Mills" case. Factually, this is incorrect. After referring to the ratio of the decision in GAR Re-rolling Mills" case, the Division Bench applied the said law to the facts of the case pending before the Bench. In the present case also, as discussed above, the parties are not faced with a situation where one could term it as a simultaneous action. Even after obtaining the decree u/s 31 of the Act, the financial corporation need not execute the same. It can abandon the said order or decree at any stage. Likewise, it can abandon the recourse u/s 29 of the Act at any stage. It should not take recourse to both simultaneously. The Financial Corporation is not precluded from choosing one as other modes of recoveries as the Doctrine of Election as commonly understood would not apply to the provision of the Act.

26. Accordingly, we find no merits in the present appeal. Hence, appeal is dismissed. No order as to costs.