

**IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELANGANA AND THE STATE OF
ANDHRA PRADESH**

W.P.No.11630 of 2018

Between:

1. M/s.Taruni Diary Products Pvt. Ltd. rep. by its Managing
Director & Anr.

.... Petitioners

and

1. A.P. State Financial Corporation, Hyderabad & Anr.

.... Respondents

DATE OF JUDGMENT PRONOUNCED: 11.10.2018.

SUBMITTED FOR APPROVAL:

**HON'BLE SRI JUSTICE RAMESH RANGANATHAN
AND
HON'BLE SMT JUSTICE KONGARA VIJAYA LAKSHMI**

1. Whether Reporters of Local newspapers may
be allowed to see the Judgments? --
2. Whether the copies of judgment may be marked
to Law Reports/Journals - Yes -
3. Whether Their Ladyship/Lordship wish to see the
fair copy of the Judgment? - Yes -

RAMESH RANGANATHAN, J

*** HON'BLE SRI JUSTICE RAMESH RANGANATHAN
AND
* HON'BLE SMT JUSTICE KONGARA VIJAYA LAKSHMI**

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.... Respondents

! Counsel for Petitioners: Sri Bankatlal Mandhani, Learned
Counsel.

^ Counsel for 1st respondent: Sri Y.N.Lohita, Learned Standing
Counsel

^ Counsel for 2nd respondent : Smt. Ch.Vedavani, Learned
Counsel.

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> HEAD NOTE:

? Citations:

- 1) (2002) 3 SCC 496
- 2) (2005) 4 SCC 456
- 3) (1996) 5 SCC 65 = JT 1996 (6) 37
- 4) (1969) 2 SCC 262
- 5) 1977 AC 1014 = (1976) 3 All ER 665
- 6) (1947) 2 All ER 680 = (1948) 1 KB 223 (CA)
- 7) (1995) 2 SCC 754
- 8) (2004) 7 SCC 166
- 9) (2004) 7 SCC 151
- 10) (1993) 2 SCC 279
- 11) (1995) 4 SCC 595
- 12) (1977) 3 SCC 247
- 13) (2016) 8 LAWS (SC) 159
- 14) (2010) 1 SCC 297
- 15) (1992) 1 SCC 489
- 16) (1999) 7 SCC 298
- 17) (2004) 4 SCC 714
- 18) (1985) 3 SCC 169
- 19) 1989 Supp (2) SCC 364
- 20) (2003) 7 SCC 546
- 21) (1995) 6 SCC 749
- 22) (1994) 4 SCC 448
- 23) 1995 Supp (2) SCC 731
- 24) (1993) 2 SCC 299
- 25) (2014) 12 SCC 368
- 26) (2008) 5 SCC 176
- 27) 2017(5) ALD 4 (SC)
- 28) (2014) 5 SCC 651 = AIR 2014 SC 1710

**HON'BLE SRI JUSTICE RAMESH RANGANATHAN
AND
HON'BLE SMT JUSTICE KONGARA VIJAYA LAKSHMI**

WRIT PETITION NO.11630 of 2018

ORDER: {Per Hon'ble Sri Justice Ramesh Ranganathan}

The relief sought for in this writ petition is for a mandamus to declare the auction notice dated 04.02.2016, issued by the A.P. State Financial Corporation ("APSFC" for short) extending, by almost 2 years, the time for payment of the balance sale consideration of Rs.4.30 crores as against the bid amount of Rs.4.60 crores, and in refusing to accept the proposal of Rs.6.00 crores offered by the petitioners as against the sale price of Rs.4.60 crores accepted by the APSFC from the bidder who has not paid the balance sale price for almost 2 years from the date of the auction; and the inaction on the part of the APSFC in not forfeiting Rs.30.00 lakhs, and in continuing to extend time beyond all reasonable limits, as illegal, arbitrary, against principles of natural justice and in violation of Article 300-A of the Constitution of India.

It is the petitioners case, as stated by them in the affidavit filed in support of the writ petition, that the 1st petitioner had borrowed Rs.5.00 crores in the year 2011 towards additional working capital requirements to make timely payment for the milk procured from farmers; the 2nd petitioner had approached the APSFC for sanction of a term loan of Rs.3.48 crores to set up two separate plants for processing milk and milk products; in compliance with the terms and conditions of the sanction letter, primary security for the said term loan was furnished by way of equitable mortgage of land admeasuring Acs.3.00 in Survey No.1847/1 of B.Kothakota Village, Chittoor District together with the building constructed thereon, and hypothecation of plant and

machinery etc; the APSFC had sanctioned credit facilities; the assets, acquired under the term loan, were hypothecated to the APSFC as security for repayment of the term loan; the sanction letter did not stipulate any collateral security; the 1st petitioner had purchased land, of an extent of 1936 square yards in Survey No.92 of Mallampet Village, Quthbullapur Mandal, Ranga Reddy District under registered sale deed dated 30.05.2011; they had also purchased land, admeasuring 4477 square yards, in Survey No.91 of Mallampet Village, Quthbullapur Mandal, Ranga Reddy District under registered sale deed dated 27.05.2011; the 2nd petitioner had purchased land, admeasuring 4719 square yards, in Survey No.92 of Mallampet Village, Quthbullapur Mandal, Ranga Reddy District vide registered sale deed dated 10.02.2010; these properties were offered as collateral security for the credit facility sanctioned to the petitioners and its sister concerns; for reasons beyond their control, the petitioners had suffered huge losses, and could not pay the instalments in accordance with the terms and conditions of the sanctioned term loan; the APSFC initiated proceedings under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short "the SARFAESI Act") for recovery of dues; a demand notice dated 21.12.2012 was issued, and thereafter a symbolic possession notice dated 09.05.2013 was also sent; thereafter a notice, under Rule 9(1) of the Secured Interest Enforcement Rules, 2002 (for short the "Rules"), was issued to put the subject secured properties to sale; however, the sale was not successful for want of bidders; the petitioners had, by their letter dated 10.03.2018, requested the APSFC to extend to them a One Time Settlement,

and had remitted Rs.15.00 lakhs and Rs.7.50 lakhs through demand drafts as down payment for extension of the One Time Settlement facility; they had also requested the respondents to stop all further proceedings, including sale of the primary and collateral securities, as they intended to pay the amounts due under the One Time Settlement scheme; the petitioners came to know, after submission of the One Time Settlement proposal, that the APSFC had, in the exercise of its powers under Section 29 of the State Financial Corporations Act, 1951 (for short “the Act”), issued a notice for sale of the collateral securities belonging to the petitioners; the 1st petitioner had, vide letter dated 14.03.2018, requested the Managing Director of the APSFC to furnish certain documents; these documents were furnished by the APSFC without any covering letter; on a perusal of the said documents, the petitioners came to know that the APSFC had approved the offer of the 2nd respondent on 12.04.2016 for a consideration of Rs.4.60 crores; Clause (1) of the letter dated 13.04.2016 stipulated that the entire sale consideration of Rs.4.60 crores should be paid within 30 days from the date of the letter i.e on or before 12.05.2016; as per Clause (3), in case payments were not received, the EMD and other payments should be forfeited without any further reference to the bidder; APSFC informed the bidder, vide letter dated 18.06.2016, that they had only paid Rs.25.00 lakhs in addition to the EMD of Rs.5.00 lakhs; they had requested three months time to pay the balance sale consideration of Rs.4.30 crores; the APSFC had considered the said request, and had extended time for payment of the balance amount due till 10.08.2016, subject to payment of interest at 16.50% per annum

from 12.05.2016 together with asset carrying costs incurred if any; the bidder was informed that, in case the full amount was not received as per the above schedule by 10.08.2016, the entire amount of Rs.30.00 lakhs would be forfeited; the bidder did not pay the said amount even by then, and yet further time was granted till 09.11.2016 by the APSFC vide its letter dated 21.10.2016; and the valuable property of the petitioners was sought to be knocked away behind their back.

The petitioners further contended that they had a prospective buyer who was willing to purchase the property for Rs.6.00 crores which was a much higher price than what the APSFC had sold in a collusive sale on 04.02.2016; the sale effected in favour of the 2nd respondent was being subjected to challenge in the writ petition in view of the defects in the sale notice; the petitioners have a right of redemption under Section 61 of the Transfer of Property Act; without the petitioners consent, the APSFC could not have extended the period for payment of the sale consideration, by the 2nd respondent, for more than two years; Section 29 of the Act cannot be invoked against the collateral security furnished by the petitioners; and, having invoked the provisions of the SARFAESI Act, it is not open to the APSFC to invoke its powers under Section 29 of the Act.

Elaborate submissions were made both by Sri Bankatlal Mandhani, Learned Counsel for the petitioner and Sri Y.N. Vivekananda, Learned Counsel for the respondent-corporation. As the validity of the action of the respondent-corporation, under Section 29 of the Act, is subjected to challenge in these proceedings it is useful to take note of the relevant statutory

provisions, and the scope of judicial review of the action taken by the financial corporation under Section 29 of the Act.

Section 29 of the Act relates to the rights of the Financial Corporation in case of default. Section 29(1) stipulates that 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 installment thereof, 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 realize the property pledged, mortgaged, hypothecated or assigned to the Financial Corporation. Section 29(2) stipulates that any transfer of property made by the Financial Corporation, in the exercise of its powers under Section 29(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. Section 29(4) stipulates that, where any action has been taken against an industrial concern under the provisions of Section 29(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 the payment of such costs, charges and expenses and, secondly, in the 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.

In matters where the State Financial Corporation has exercised its powers under Section 29 of the Act, the scope of

judicial review is limited. Interference is permissible only in cases where (a) there is a statutory violation on the part of State Financial Corporation, or (b) the State Financial Corporation acts unfairly i.e. unreasonably. While exercising its jurisdiction under Article 226 of the Constitution of India, the High Court does not sit as an appellate authority over the acts and deeds of the Corporation. (**Haryana Financial Corpn. v. Jagdamba Oil Mills**¹; **Karnataka State Industrial Investment & Development Corpn. Ltd. v. Cavalet India Ltd.**,²; **Karnataka State Financial Corpn. v. Micro Cast Rubber & Allied Products (P) Ltd.**³).

The fairness required of State Financial Corporations cannot be so extended as to disable them from recovering what is due to them. (**Haryana Financial Corpn.**¹). The State Financial Corporation is an independent autonomous statutory body with its own constitution and rules, and has various statutory functions and obligations to discharge. In the discharge of these functions, it is free to form its views, and take decisions on the basis of information in its possession, and the advice it receives. Unless its action is mala fide, even an erroneous decision is not open to challenge, for it is not for the Court or a third party to substitute its decision, however, more prudent or commercial, the alternative may appear to be. (**Haryana Financial Corpn.**¹).

The State Financial Corporation cannot be shackled hand and foot in the name of fairness, as fairness is not a one-way street. Corporations borrow money from the Government or other Financial Corporations, and are required to pay interest thereon.

¹ (2002) 3 SCC 496

² (2005) 4 SCC 456

³ (1996) 5 SCC 65 = JT 1996 (6) 37)

Where the borrower has no genuine intention to repay, and adopts pretexts and ploys to avoid payment, he cannot complain that the Corporation was not acting fairly, even though the requisite procedures have been followed. (**Haryana Financial Corpn.**¹). Without insisting that the borrower honour the commitments undertaken by him, the Financial Corporation alone cannot be shackled in the name of fairness. (**Karnataka State Industrial Investment & Development Corpn. Ltd.**²).

The obligation placed on administrative authorities to act fairly is to ensure the rule of law and to prevent failure of justice. This doctrine is complementary to the principles of natural justice which quasi-judicial authorities are bound to observe. (**Haryana Financial Corpn.**¹). As the High Court cannot sit as an appellate authority over decisions and orders of quasi-judicial authorities, it follows equally that it cannot do so in the case of administrative authorities. In taking an administrative decision, more than one choice is available to the administrator, and a certain amount of discretion is available to them. They have *“a right to choose between more than one possible course of action on which there is room for reasonable people to hold differing opinions as to which choice is to be preferred”*. The Court would not substitute its judgment for the judgment of the administrative authorities in such cases. Only when the action of the administrative authority is so unfair or unreasonable that no reasonable person would have taken that decision, can the Court intervene. (**Haryana Financial Corpn.**¹; **A.K. Kraipak v. Union of India**⁴; **Secy. of State for Education and Science v.**

⁴ (1969) 2 SCC 262

Metropolitan Borough Council of Tameside⁵; Associated Provincial Picture Houses Ltd. v. Wednesbury Corpn.⁶. The doctrine of fairness cannot be so extended as to convert writ courts into appellate authorities over administrative bodies. (**Karnataka State Industrial Investment & Development Corpn. Ltd.²**). In commercial matters, Courts would not substitute their judgment for the judgment of bodies to whom that task is assigned. (**Haryana Financial Corpn.¹; U.P. Financial Corpn. v. Naini Oxygen & Acetylene Gas Ltd.⁷**).

Reasonableness is to be tested against the dominant consideration to secure the best price. (**Karnataka State Industrial Investment & Development Corpn. Ltd.²**). Unless the action of the Financial Corporation is mala fide, even a wrong decision taken by it is not open to challenge. It is not for the Courts or a third party to substitute its decision for that of the Corporation. (**Karnataka State Industrial Investment & Development Corpn. Ltd.²**). The question whether exercise of its rights by a Financial Corporation, under Section 29 of the Act, is fair and reasonable, and whether it is bonafide or not would depend on the facts and circumstances of each case. (**Karnataka State Industrial Investment & Development Corpn. Ltd.²**).

Bearing these aspects in mind let us now examine the rival submissions, made by Learned Counsel on either side, under different heads.

I. **HAS THE APSFC FAILED TO CALL UPON THE PETITIONERS TO MAKE A MATCHING OFFER?**

⁵ 1977 AC 1014 = (1976) 3 All ER 665

⁶ (1947) 2 All ER 680 = (1948) 1 KB 223 (CA)

⁷ (1995) 2 SCC 754

Sri Bankatlal Mandani, Learned Counsel for the petitioner, would submit that the APSFC could not have proceeded with the sale without calling upon the petitioners to submit a matching offer, in the light of the law declared by the Supreme Court, in **S.J.S. Business Enterprises (P) Ltd. v. State of Bihar**⁸; and **Gajraj Jain v. State of Bihar**⁹.

Sri Y.N. Vivekananda, Learned Standing Counsel for the respondent-APSFC would submit that a recall-cum-sale notice was issued on 10.02.2015 and 13.02.2015; an advertisement for sale was issued on 10.03.2015, 30.09.2015 and 04.02.2016; it is pursuant to the sale notice issued on 04.02.2016, that the APSFC had received an offer from the 2nd respondent for Rs.4.60 crores; this fact was intimated to the petitioners, vide letter dated 21.03.2016, calling upon them to match the said offer; the law declared by the Supreme Court in **Gajraj Jain**⁹, requiring a matching offer to be made to the borrower, has been complied with by the APSFC in the present case; the law declared in **S.J.S. Business Enterprises (P) Ltd.**⁸ was followed in **Gajraj Jain**⁹; and since the mandate of the Supreme Court in **Gajraj Jain**⁹ has been complied with by the APSFC, their action in putting the properties to sale cannot be faulted.

In **S.J.S. Business Enterprises (P) Ltd.**⁸, on which reliance is placed on behalf of the petitioners, the appellant was sanctioned Rs 70 lakhs by the Bihar State Industrial Credit and Investment Corporation Ltd. (hereinafter referred to as “BICICO”) in April 1992 for financing the construction of a hotel; according to the

⁸ (2004) 7 SCC 166

⁹ (2004) 7 SCC 151

appellant, BICICO only disbursed Rs 44.56 lakhs in instalments, as a result of which the appellant could not complete the project without a huge cost overrun; from time to time, upto 2001-02, the appellant repaid about Rs 14.23 lakhs to BICICO; however the outstanding amount due from the appellant, according to BICICO, as on March, 2002 was Rs 191.3 lakhs including interest; proceedings were therefore commenced by BICICO under Section 29 of the Act for sale of the hotel which had been mortgaged by the appellant to BICICO by way of security for the loan; the hotel was valued on 3-7-2001 by BICICO, through its valuer, for Rs 2.16 crores; a publication was made on 31-1-2002 offering the hotel for sale on an "as-is-where-is basis"; offers were required to be made by 28-2-2002; respondent No.6 offered to purchase the hotel for Rs 41 lakhs; the offer was rejected by BICICO because the bid was too low; the property was again revalued on 24-1-2002 by BICICO by way of an "in-house assessment"; the value of the hotel was estimated therein at Rs 1.58 crores; when a third valuation was again made, at the instance of BICICO in February 2002, the total value of the property, including the building and land, was assessed merely at Rs 94.81 lakhs; on 26.03.2002, a second sale notice was published by BICICO in respect of the hotel on an "as-is-where-is basis"; under this notice, offers were to be given by way of a sealed cover by 29-3-2002 i.e. within three days; of these three days, 28-3-2002 was "Holi" and 29-3-2002 was "Good Friday"; it appeared from the record that, on the same day, the second sale notice was published, Respondent 6 made an offer to purchase the hotel for Rs 95.50 lakhs, and in fact paid Rs 95.50 lakhs to BICICO; on 30-3-2002, which was a Saturday, the offer of

respondent No.6 was negotiated, and the consideration was finalised at Rs 1 crore; the difference between Rs 94.50 lakhs and Rs 1 crore had already been paid to BICICO by respondent No.6 on 07.03.2002 itself; by 26.03.2002, even before the last date for receipt of offers expired and the tenders were opened, respondent No.6 had deposited the entire consideration of Rs.1 crore; nevertheless a letter, accepting respondent No.6's offer, was issued by BICICO on 31-3-2002 (which was a Sunday) asking respondent No.6 to pay the amount of Rs 1 crore by 31-3-2002, failing which its offer would stand rejected; respondent No.6 received the letter on the same day from BICICO, and also replied on that day stating that the amount of Rs 1 crore had already been paid; after this, a letter was written again on the same day by BICICO, to the appellant and its two Directors, asking them to match the offer of respondent No.6 within 10 days from the date of the issue of the letter, failing which the sale would be concluded in favour of respondent No.6; when the special leave petition was initially entertained by the Supreme Court, notice was directed to be issued subject to the appellant depositing Rs.1 crore by way of bank draft with the Registry of the Supreme Court; the willingness of the appellant to recompense respondent No.6, to the extent of any loss incurred by way of interest on the amount paid by it, was also recorded; the demand draft of Rs 1 crore was deposited with the Registry of the Supreme Court by the appellant, and the amount was invested in a nationalised bank in a short-term fixed deposit.

It is in this context that the Supreme Court observed that the sale effected in favour of respondent No.6 could not be sustained; it was axiomatic that the statutory powers, vested in

State Financial Corporation, under the State Financial Corporations Act, must be exercised bona-fide; the presumption that public officials discharge their duties honestly, and in accordance with law, may be rebutted by establishing circumstances which reasonably probabalise the abuse of that power; in such an event, it was for the officer concerned to explain the circumstances which were set up against him; if there was no credible explanation forthcoming, the Court could assume that the impugned action was improper; some of the restrictions placed on State financial corporations, exercising their powers under Section 29 of the State Financial Corporations Act, as prescribed in **Mahesh Chandra v. Regional Manager, U.P. Financial Corpn.**¹⁰ were no longer in place in view of the subsequent decision in **Haryana Financial Corpn.**¹; however, in overruling the decision in **Mahesh Chandra**¹⁰, the Supreme Court had affirmed the view taken in **Chairman and Managing Director, SIPCOT v. Contromix (P) Ltd.**¹¹, and had held that, in the matter of sale under Section 29, the State financial corporations must act in accordance with the statute, and must not act unfairly i.e. unreasonably; if they do, their action could be called in question under Article 226; reasonableness was to be tested against the dominant consideration to secure the best price for the property to be sold; this could be achieved only when there was maximum public participation in the process of sale, and everybody had an opportunity of making an offer; and public auction, after adequate publicity, ensured participation of every person who was interested in purchasing the property, and generally secured the best price.

¹⁰ (1993) 2 SCC 279

¹¹ (1995) 4 SCC 595

In **Gajraj Jain**⁹, tenders were invited, under the public notice dated 22-2-2002, whereby bids were to be submitted by 21-3-2002, and were to be opened on 22-3-2002. The assets of the borrower were taken over on 18.03.2002. On 19-3-2002, the Corporation handed over the assets to the fourth respondent against down payment of Rs 28.85 lakhs plus a promise to the Corporation that the purchaser undertook to pay the dues of Central Bank of India. A part of Rs 28.85 lakhs was paid by demand drafts dated 09.03.2002. The Supreme Court held that these circumstances indicated collusion between the respondent-Corporation, and respondents 3 and 4; the takeover of assets was ordered on 18.03.2002 and, on 19.03.2002, the assets were handed over to the 4th respondent against a down payment of Rs 28.85 lakhs in demand drafts dated 9-3-2002; under Section 29(1) of the Act, the Corporation is entitled to sell or lease the assets, in order to realise the pledged/ hypothecated or mortgaged property; it was not known as to under what colour of title the assets were handed over to respondent No.4 on 19-3-2002, whether under sale, lease or repayment of loan; there was no explanation as to how respondent No.4 could have drawn demand drafts in favour of the Corporation on 09.03.2002, when their offer to purchase was made only on 17.03.2002; the allegation that respondent No.4 was given the assets with the specific understanding that the property should be returned, if a higher offer was received in the auction, was not supported by the recitals in the minutes of the Tender Committee, nor in the recitals in the impugned agreement dated 26-4-2002; there was no resolution/minutes of the Board of Directors of the Corporation in that regard; in the agreement dated

26-4-2002, it had been recited that Rs 90 lakhs were advanced as a loan in 1988 by the Corporation to the Company against equitable mortgage of land and assets; under Section 60 of the Transfer of Property Act, equity of redemption existed in favour of the Company; a mere agreement, for sale of the assets, could not extinguish the equity of redemption; it was only on execution of the conveyance that the mortgagor's right of redemption would be extinguished; till date there was no conveyance and, therefore, on 21-3-2002 when the appellant paid Rs 28.85 lakhs to the Corporation representing its full dues, there was complete liquidation of the dues of the Corporation, and yet the Corporation did not return the assets to the Company; it had arbitrarily, and for extraneous reasons, adjusted the said amount to the account of M/s Aditya Flour Mills; the reason was because the Corporation intended to sell the assets only to respondent No.4 for a paltry sum of Rs 28.85 lakhs; even if respondent No.4 was right in its submission that the assets in question were not worth Rs 10 crores as alleged by the appellant, even then, in terms of the offer of respondent No.4, the property was worth Rs 198 lakhs; the Corporation had, however, handed over the assets, and had agreed to sell them against down payment of Rs 28.85 lakhs; no reasons were given by the Corporation as to why it did not insist on the full payment of Rs 198.85 lakhs; the appellant had cleared the dues of the Corporation on 21-3-2002, before opening of the tenders on 22-3-2002, and yet the Corporation did not return the assets to the Company; even the tender money deposited by the appellant was returned without any demand from them, so that it could be argued by the Corporation that the appellant had withdrawn from

the auction, and therefore the offer of respondent No.4 was accepted; the documents showed that the appellant had refused to collect the earnest money and, therefore, the amount was kept by the Corporation in a separate account; as held in **Narandas Karsondas v. S.A. Kamtam**¹², putting the property to auction does not extinguish the right of redemption; therefore, on 21-3-2002, the Company had a right to redeem the assets; there was no merit in the argument that the appellant intended to buy the assets in his own name; the record showed that the appellant, as the Director of the Company, had offered to clear the dues of the Corporation for which he insisted on the return of the title deeds of M/s Katihar Flour Mills; the Corporation was required to act in accordance with Section 29 of the Act, and not unreasonably; under the public notice inviting tenders, the Corporation was obliged to call for matching offers from the directors/promoters/guarantors; the Corporation did not call for such offers, as its object was to keep out all counter-offers; the impugned agreement dated 26-4-2002 was entered into without any consideration in favour of Central Bank of India; and the respondent-Corporation had misused its authority and power in breach of the law, taking into account extraneous matters, and ignoring relevant matters, which had rendered its action ultra vires.

In both **S.J.S. Business Enterprises (P) Ltd.**⁸ and in **Gajraj Jain**⁹, on which the petitioners place reliance, the Supreme Court held that the respondent-corporation had misused its authority and power, in breach of the law, taking into account extraneous matters ignoring relevant matters; the presumption that public

¹² (1977) 3 SCC 247

officials discharge their duties honestly, and in accordance with law, may be rebutted by establishing circumstances which reasonably probabilise the abuse of that power; in that event, it is for the officer concerned to explain the circumstances set up against him; and, if there is no credible explanation forthcoming, the Court may assume that the impugned action is improper. In both **S.J.S. Business Enterprises (P) Ltd.**⁸ and **Gajraj Jain**⁹, the action of the State financial corporation was held not to be a bonafide exercise of power, and to be in abuse of the powers vested in it under the Act.

By its letter dated 21.03.2016, the respondent corporation informed the petitioners that they had defaulted in honouring commitments to the Corporation; the Corporation had advertised for sale of 4799 square yards in Sy. No.92, 4477 square yards in Sy. No.91, and 1936 square yards in Sy. No.92 which were offered as collateral security by the borrower; the Sale notice was published in Economic Times (English daily) and Eenadu (Telugu daily) on 04.02.2016; in response, the Corporation had received an offer for Rs.4.60 crores; the highest bidder had offered to pay the sale consideration, on 100% down payment basis, within 30 days from the date of communication; the Corporation was of the opinion that the offer was reasonable; the Corporation had displayed the highest offer of Rs.4.60 crores in the notice board inviting improved offers; with a view to give the petitioner an opportunity, the Corporation was offering the above properties for the price offered by the highest tenderer; and, if the petitioners were willing to match the offer, they should give their acceptance for the same. The petitioners were also informed that, in case the

Corporation did not hear anything from them about the proposal within ten days, the sale of the above properties would be finalised in favour of the highest bidder.

Despite receipt of the said letter dated 21.03.2016, the petitioners did not choose either to make a similar offer as that of the 2nd respondent or even to respond to the said letter of the respondent-corporation. It is two years after receipt of the said letter dated 21.03.2016, that the petitioners have filed the present Writ Petition, before this Court, on 06.04.2018. In the present case, the petitioners were given the opportunity to match the offer of the highest bidder which they failed to avail. The contention that the respondent-corporation had not called upon the petitioner to make a matching offer is, evidently, false.

A bare reading of the affidavit, filed by the petitioners in support of their writ petition, would show that they have suppressed the fact that the APSFC, in its letter dated 21.03.2016, had intimated them of the offer received for Rs.4.60 crores; the APSFC was offering them the said properties, for the sale price offered by the highest tenderer, to give the petitioners an opportunity to match the offer; and, if the petitioners were willing, they should convey their acceptance for the same. While this letter dated 21.03.2016 required the petitioners to submit their matching offer, not only have they failed to refer to this letter in their writ affidavit, they have also not furnished any explanation as to why, despite receipt of this letter, they have chosen not to submit any reply thereto; or to invoke the jurisdiction of this Court for a period of two years till they filed the present writ petition on 06.04.2018.

Reliance placed by the petitioners on **S.J.S. Business Enterprises (P) Ltd.**⁸ and in **Gajraj Jain**⁹ is, therefore, misplaced.

As noted hereinabove, in the present case, bids were invited pursuant to a sale notice being published in Economic Times (English daily) and Eenadu (Telugu daily). The highest offer received of Rs.4.60 crores from the 2nd respondent was put up on its notice board by the SFC inviting others to match the offer. A letter dated 21.03.2016 was also addressed to the petitioners asking them to match the offer, despite which the petitioners failed to avail such an opportunity. They have, in the present writ petition, also suppressed the fact that the APSFC had informed them, by letter dated 21.03.2016, that the highest bid received was for Rs.4.60 crores, and it was open to them to match the said offer. This contention, therefore, does not merit acceptance.

II. CAN INTEREST BE CHARGED FOR BELATED REPAYMENT AFTER THE CORPORATION DECIDES TO SELL THE PROPERTY?

Sri Bankatlal Mandhani, learned counsel for the petitioners, would question the sale, effected by the APSFC in favour of the 2nd respondent for Rs.4.60 crores, on the ground that, as the first sale notice was issued by the APSFC under the SARFAESI Act on 23.12.2013, the APSFC cannot, in the light of the law declared by the Supreme Court in **Baldev Singh v. State of Punjab**¹³, charge interest, for belated repayment, thereafter.

Sri Y.N. Vivekananda, learned counsel for the 1st respondent, would submit, placing reliance on the judgment of the Supreme Court in **Punjab Financial Corporation v. Surya Auto**

¹³ (2016) 8 LAWS (SC) 159

Industries¹⁴, that the APSFC has the power, even after taking possession of the property, to continue to charge interest and penal interest till the debt is actually realised; this judgment in **Surya Auto Industries**¹⁴ was not brought to the notice of the Supreme Court in **Baldev Singh**¹³; the directions in **Baldev Singh**¹³ to the Punjab Financial Corporation, to charge interest only till the date on which the Corporation took a decision to sell the property, was in the light of the peculiar facts of the said case, and is not a declaration of law applicable to the facts of the present case; and the Supreme Court, in **Haryana Financial Corporation**¹ and **Karnataka State Industrial Investment & Development Corporation Limited**², has laid down the parameters of judicial review regarding sale of property by the APSFC under Section 29 of the Act.

As the respondent-corporation is a creature of the statute (i.e., the SFC Act) and must act in accordance therewith, it is useful, in the first instance, to refer to the relevant statutory provisions. The SFC Act is an Act to provide for the establishment of State Financial Corporations. Section 3(1) enables the State Government, by notification in the Official Gazette, to establish a Financial Corporation for the State under such name as may be specified in the notification. Under Section 3(2), the Financial Corporation shall be a body corporate, by the name notified under sub-section (1), having perpetual succession and a common seal, with power, subject to the provisions of the Act, to acquire, hold and dispose of property and shall, by the said name, sue and be sued. Section 9(1) stipulates that the general superintendence,

¹⁴ (2010) 1 SCC 297

direction and management of the affairs and business of the Financial Corporation, shall vest in the Board of Directors which may exercise all powers, and do all such acts and things, as may be exercised or done by the Financial Corporation and are not, by the SFC Act, expressly directed or required to be done by the Financial Corporation in its general meeting. Section 9(2) enables the Board to direct that any power, exercisable by it under the SFC Act, shall be exercisable in such cases and subject to such conditions, if any, as may be specified by it, by the Chairman, Managing Director or the Whole-Time Director.

Chapter-III of the Act relates to the powers and duties of the Board. Section 24 relates to the general duty of the Board and, thereunder, the Board, in discharging its functions under the Act, shall act on business principles due regard being had by it to the interests of the industry, commerce and the general public. Since the Board is required to act on business/commercial principles, the Court, while exercising its powers of judicial review in such matters, must examine whether the action of the financial corporation is in accordance with reasonable commercial principles and practices.

Section 25 of the Act relates to the business which a Financial Corporation may transact and, under sub-section (1) thereof, the Financial Corporation may, subject to the provisions of the SFC Act, carry on and transact any of the business mentioned in clauses (a) to (v) thereunder. Section 25(2) enables the Corporation to receive, in consideration of any of the services mentioned in sub-section (1), such commission, brokerage, interest, remuneration or fee as may be agreed upon. The

Corporation is, thus, statutorily empowered, by Section 25(2) of the Act, to charge such interest as is agreed upon between the Corporation and the borrower for the loans extended by the former to the latter.

In **Baldev Singh**¹³, on which reliance is placed on behalf of the petitioners, the Punjab State Financial Corporation filed an affidavit before the Supreme Court stating that possession of the property was taken in the year 2002 in part, and the entire premises was taken over finally on 15.09.2005; the matter was processed for approval of the concerned authorities for sale of the property; approval was granted on 15.06.2009, a sale notice was issued, and the property was sold on 07.12.2011 after giving an opportunity to pay the amount due. It is in this context that the Supreme Court observed that, notwithstanding the fact that possession of the property was taken over by the Corporation in the year 2002, the material on record disclosed that such possession was only in part; that apart, the articles and other items, belonging to the appellant, was lying in the premises; in such circumstances, the sale could not have been effected by the Corporation under Section 29 of the Act; possession was finally taken over on 15.09.2005; mere taking over of possession by the Corporation did not dis-entitle the appellant from discharging his liabilities by tendering the amount due; no such payment, or offer of payment, was made by the appellant; there was no merit in the contention advanced by the appellant; and there was no infirmity in the order of the High Court.

The Supreme Court, thereafter, observed that, since the Corporation had decided to proceed with the sale of the property, it

could legitimately charge interest only upto the said date i.e. 15.06.2009, and not for the period thereafter upto the date of sale of the property i.e. 07.12.2011. The order of the High Court was modified and the Corporation was directed to take further action in the matter on the basis of the liability of the appellant to pay interest upto 15.06.2009, and not upto 07.12.2011.

In **Baldev Singh**¹⁵, as the Supreme Court had, in the exercise of its powers under Article 142 of the Constitution of India, directed the Corporation not to levy interest after the date on which it took a decision to proceed with the sale of the property. The Constitution has, by Article 142, empowered the Supreme Court to make such orders as may be necessary “for doing complete justice in any case or matter pending before it”, which authority the High Court does not enjoy. The jurisdiction of the High Court, in writ proceedings, is circumscribed by limitations which cannot be transgressed on the whim or subjective sense of justice varying from Judge to Judge. (**State of Punjab v. Surinder Kumar**¹⁵). The power which is available to the Supreme Court under Article 142 is not available to the High Courts. (**Chairman, Grid Corpn. of Orissa Ltd (Gridco) v. Sukamani Das**¹⁶). The power conferred on the High Court, under Article 226 of the Constitution of India, is not on par with the constitutional jurisdiction conferred upon the Supreme Court under Article 142 of the Constitution of India. (**State of U.P. v. Johri Mal**¹⁷; **State of H.P. v. A parent of a Student of Medical College**¹⁸ and **Asif**

¹⁵ (1992) 1 SCC 489

¹⁶ (1999) 7 SCC 298

¹⁷ (2004) 4 SCC 714

¹⁸ (1985) 3 SCC 169

Hameed v. State of J&K¹⁹). Although the High Court may pass an order for doing complete justice to the parties, they do not have the power akin to Article 142 of the Constitution of India. (**Johri Mal**¹⁷; **Guruvayoor Devaswom Managing Committee v. C.K. Rajan**²⁰; **B.C. Chaturvedi v. Union of India**²¹). Exercise of the extraordinary jurisdiction, constitutionally conferred on the Supreme Court under Article 142(1) of the Constitution, can be of no guidance on the scope of Article 226. (**State of Haryana v. Naresh Kumar Bali**²²; **State of H.P. v. Mahendra Pal**²³). The petitioners cannot, therefore, seek a similar direction before the High Court in proceedings under Article 226 of the Constitution of India.

On the power of the respondent-corporation to charge interest, on belated payment of interest, it is useful to note that, in **Surya Auto Industries**¹⁴, the Punjab & Haryana High Court had declared that the Corporation was entitled to charge only simple interest at 10%, after the expiry of six months from the date of taking over of the Unit. In the appeal preferred against the said order, the question which arose for consideration before the Supreme Court, was:-

“Whether, after invoking the power under Section 29 of the SFC Act, the Punjab Financial Corporation had absolute power of retaining the property without taking any steps, and to continue to charge the interest and penal interest, without any limit?”

The Supreme Court held that the respondent had not challenged the terms of the loan agreement; therefore, the High Court could not have, suo motu, altered the terms of the

¹⁹ 1989 Supp (2) SCC 364

²⁰ (2003) 7 SCC 546

²¹ (1995) 6 SCC 749

²² (1994) 4 SCC 448

²³ 1995 Supp (2) SCC 731

agreement to direct the Corporation to make fresh calculation of the outstanding dues, or to allow the respondent to pay the amount as per the fresh demand by selling the mortgaged property; this approach of the High Court was, ex facie, contrary to the law laid down by the Supreme Court in **U.P. Financial Corpn. v. Gem Cap (India) (P) Ltd**²⁴ and **Haryana Financial Corpn.**¹ the High Court was not called upon to examine the legality or otherwise of the terms of the agreement entered into between the Corporation and the respondent, under which the latter was obliged to pay interest at a particular rate with periodical rests; and, moreover, the stipulations incorporated in the contract, entered into and binding on the parties, shall govern their substantive rights and obligations in the matter of recovery and payment of interest.

We, therefore, see no merit in the submission, urged on behalf of the petitioners, that the Corporation should not be permitted to charge interest till the date of sale of the property, notwithstanding an agreement between the parties to the contrary.

III. **CAN THE APSFC PUT THE COLLATERAL SECURITY OF THE BORROWER-INDUSTRIAL CONCERN TO SALE?**

Sri Bankatlal Mandani, Learned Counsel for the petitioner, would submit that, in view of the judgment of the Supreme Court in **Subhransu Sekhar Padhi v. Gunamani Swain**²⁵, the APSFC was not entitled to proceed against the collateral security offered by the petitioners for availing the term loan, and could only have proceeded against the primary security offered by them.

²⁴ (1993) 2 SCC 299

²⁵ (2014) 12 SCC 368

Sri Y.N. Vivekananda, Learned Standing Counsel for the APSFC, would submit that the APSFC had sanctioned a medium term loan of Rs.5.00 crores on 27.07.2011 to the 1st petitioner, of which they had availed Rs.469.43 lakhs; while no primary security was offered as security for the said term loan, the 1st petitioner had offered certain lands, belonging to it, as collateral security; the APSFC had sanctioned a term loan of Rs.3.48 crores to the 2nd petitioner on 04.04.2010; this term loan was secured by the primary security of lands and buildings at B. Kothakota Village and Mandal, and hypothecation of plant and machinery besides collateral security by way of equitable mortgage of land admeasuring 4719 square yards in Survey No.92 of Mallampet Village, Qutbullapur Mandal; these properties were offered as security also for the loans extended to the sister concerns of the petitioners herein viz, M/s. Nandita Dairy Products Pvt. Ltd, Nitya Dairy Products Pvt. Ltd. and Kisan Food Products Pvt. Ltd; the collateral security offered by the petitioners is land admeasuring 4477 square yards in Survey No.91 of Mallampet Village, Qutbullapur Mandal, Ranga Reddy District, 1936 square yards in Survey No.92 of Mallampet Village and Mandal, Ranga Reddy District belonging to the 1st petitioner, and land admeasuring 4719 square yards in Survey No.92 of Mallampet Village, Qutbullapur Mandal, Ranga Reddy District belonging to the 2nd petitioner i.e. a total extent of 11,133 square yards (approximately 2½ acres); in **Subhransu Sekhar Padhi**²⁵, the Supreme Court followed its earlier judgment in **Karnataka State Financial Corporation v. N. Narasimhaiah**²⁶ to hold that the collateral security offered by

²⁶ (2008) 5 SCC 176

parties, other than the defaulting borrower, cannot be proceeded against under Section 29 of the Act; in the present case the collateral security which has been put to sale, in the exercise of the powers conferred under Section 29 of the Act, belongs to the petitioners and not to third parties; and the APSFC is, therefore, entitled to proceed against the said property, under Section 29 of the Act, to realise its dues.

Section 31 of the Act contains special provisions for enforcement of claims by Financial Corporation and, under subsection (1) thereof, where an industrial concern, in breach of any agreement, make any default in repayment of any loan or advance or any installment thereof or otherwise fails to comply with the terms of its agreement with the Financial Corporation then, without prejudice to the provisions of Section 29 of the 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.

The heading of Section 29 of the Act is **“Rights of financial corporation in case of default”**. The default contemplated thereby is of the industrial concern. Such default would create a liability on the industrial concern. Such a liability would arise when the industrial concern makes default in repayment of any loan or

advance or any instalment thereof under the agreement. It may also arise when it fails to meet its obligation(s) in relation to any guarantee given by the corporation. If it otherwise fails to comply with the terms of the agreement with the financial corporation, the same provisions would apply. In the eventualities, contemplated under Section 29 of the Act, the corporation has the right to take over the management or possession or both of the industrial concern. By use of the words “*as well as*”, Section 29 confers a right on the Corporation to transfer by way of lease or sale, and to realise its dues on the sale of the property pledged, mortgaged, hypothecated or assigned to the Corporation. (N. Narasimahaiah²⁶).

The default in payment of any loan is by the industrial concern which is under a liability to the Financial Corporation under an agreement. Likewise, default in meeting obligations in relation to any guarantee given by the Corporation, or failure to comply with the terms of the agreement with the Financial Corporation, is also by the industrial concern. It is on the default of the industrial concern, in repayment of a loan or in meeting its obligations in relation to a guarantee given by the Corporation, that Section 29(1) confers a right on the Financial Corporation to take possession of the industrial concern as well as the right to transfer, by way of sale, the property pledged, mortgaged, hypothecated or assigned to the Financial Corporation by the industrial concern.

It is only the property pledged, mortgaged or hypothecated by the industrial concern which can be realised under Section 29(1) by its sale. Section 29 gives a right to the Financial

Corporation to sell the assets of the industrial concern and realize the property pledged, mortgaged, hypothecated or assigned to it. This right accrues when the industrial concern, which is under a liability to the Financial Corporation under an agreement, defaults in repayment of any loan or advance or any instalment thereof or in meeting its obligations as envisaged in Section 29 of the Act. Section 29(1) gives the Financial Corporation, in the event of default, the right to take over the management or possession or both, and thereafter deal with the property. (**Haryana Financial Corpn.**¹).

In **Subhransu Sekhar Padhi**²⁵, on which reliance is placed on behalf of the petitioners, the Orissa State Financial Corporation had sanctioned a term loan, for purchase of a Tata truck, in favour of the 6th respondent who was the wife of the 7th respondent. The said loan transaction was secured by the mortgage of the land of the father-in-law of the 6th respondent and the father of the 7th respondent. As the 6th respondent-borrower did not make repayment in terms of the agreement, the Financial Corporation proceeded against the mortgaged property. Challenging the seizure, the wife and the children of the mortgagor invoked the jurisdiction of the Orissa High Court. The Orissa High Court, relying on the judgment of the Supreme Court in **N. Narasimhaiah**²⁶, held that the sale of properties of the guarantors was liable to be quashed as it was in violation of Section 31 of the SFC Act. Among the questions, which arose for the consideration of the Supreme Court, was whether the Orissa State Finance Corporation was legally entitled to invoke Section 29 of the Act and bring the properties of the guarantors to sale without resorting to the procedure

contemplated under Section 31 of the Act. This order of the Orissa High Court was affirmed by the Supreme Court holding that there was no merit in the appeal.

Section 29 of the Act nowhere states that the Corporation can proceed against the surety even if some properties are mortgaged or hypothecated by it. In terms of Section 29 of the Act, the financial corporation must exercise its rights only against a defaulting party. There cannot be any default, as is envisaged in Section 29, by a surety or a guarantor. The liabilities of a surety or the guarantor to repay the loan of the principal debtor arises only when a default is made by the latter. The words “*as well as*” confer two different rights but such rights are to be enforced against the same person viz. the industrial concern. The second part of Section 29, merely because it does not refer to the “industrial concern”, does not mean that any property pledged, mortgaged, hypothecated or assigned to the Financial Corporation can be sold. Sub-section (1) of Section 29, when it speaks of a guarantee, means such a guarantee to be furnished by the Corporation in favour of a third party for the benefit of the industrial concern. It does not speak about a surety or guarantee given in favour of the Corporation for the benefit of the industrial concern. (**N. Narasimahaiah**²⁶).

The manner in which the sale proceeds should be appropriated, when a property is sold, is provided under Section 29(4) of the Act. Section 29(4), which relates to appropriation of the sale proceeds, only refers to the “industrial concern” and not a “surety” or “guarantor”. (**N. Narasimahaiah**²⁶). It is only the properties of the defaulter which can be proceeded against

under Section 29 of the Act, and not the properties of third parties whether they are guarantors, mortgagors etc. ((**N. Narasimahaiah**²⁶; **Subhransu Sekhar Padhi**²⁵).

While the defaulting industrial concern can be proceeded against under Section 29 of the Act, the State Financial Corporation cannot proceed against the assets of a third party surety under Section 29(1), and its power to put the assets to sale under Section 29(1) is confined only to the assets of the industrial concern. For enforcing the liability of a third party surety, the procedure under Section 31, and not under Section 29, can alone be resorted to by the respondent-Corporation. In the case on hand, it is not in dispute that the collateral security, for the term loan extended to it, was furnished by the industrial concern (defaulting borrower) and not by any third party. The respondent-Corporation is therefore entitled, in law, to sell the assets offered by the petitioners-industrial concern as collateral security for repayment of the loan due by it to the respondent-Corporation. This contention, urged on behalf of the respondent-corporation, also necessitates rejection.

IV. **RIGHT OF REDEMPTION OF THE BORROWER:**

Sri Bankatlal Mandani, Learned Counsel for the petitioner, would rely on **Gajraj Jain**⁹ to submit that the petitioners have a right of redemption; they have now identified a buyer for Rs.7.00 crores; the said buyer is willing to pay Rs.1.00 crore forthwith, and the balance Rs.6.00 crores within two months; they ought to be given an opportunity of redemption; and, as held by the Supreme

Court in **Sanjay v. Anil**²⁷, the mortgaged property cannot be sold at a price lesser than its market value.

Sri Y.N. Vivekananda, Learned Counsel for the APSFC, would submit that the outstanding loan amount as on 31.07.2018 with respect to the 1st petitioner is Rs.15,59,69,933/- and, with respect to the 2nd petitioner, is Rs.5,14,01,532/-; the amounts due from the petitioners sister companies are Rs.3,06,63,011/- from M/s.Nanditha Dairy Products Pvt. Ltd, Rs.3,16,39,199/- from M/s.Nitya Dairy Products Pvt. Ltd, and Rs.5,45,93,648/- from M/s.Kisan Food Products Pvt. Ltd; the total outstanding loan amount, due from all the five companies put together as on 31.07.2018, is Rs.32,42,67,323/-; a sale letter dated 13.04.2016 was issued to the 2nd respondent calling upon them to pay the bid amount by 12.05.2016; the 2nd respondent had, vide letter dated 12.05.2016, sought extension of time; the APSFC had, by its letter dated 18.06.2016, extended time upto 10.08.2016; the 2nd respondent sought further time, vide letter dated 11.08.2016, paying a sum of Rs.2.30 crores by then; time was extended by the 1st respondent, by its letter dated 20.09.2016, till 09.11.2016 by which date the 2nd respondent paid the entire amount by cheques all of which were realised by 21.11.2016; as the sale consideration was belatedly paid by the 2nd respondent-auction purchaser, the APSFC had insisted on payment of interest, for the delayed period, before handing over possession of the collateral security property; the purchaser had, by his letter dated 13.12.2016, raised a dispute regarding the actual extent of land on the ground; negotiations took place and finally, by his letter dated 05.03.2018, the 2nd

²⁷ 2017(5) ALD 4 (SC)

respondent decided to take possession of the property on an “*as is where is*” basis; they also agreed to remit interest of Rs.34.12 lakhs for the delayed payment at 16.5% per annum; while the 2nd respondent had handed over a cheque for Rs.34.12 lakhs, the said cheque had to be returned to them in the light of the interim order passed by this Court; since the subject properties are still in the possession of the APSFC, possession of the subject lands would be delivered to the 2nd respondent only after receipt of the interest amount, for the delayed payment, i.e for Rs.34.12 lakhs; and there are no *bonafides* in the petitioners’ claim to now make payment, when they chose not even to reply to the letter sent to them by the APSFC on 21.03.2016 calling upon them to match the offer of the 2nd respondent at Rs.4.60 crores.

On the petitioners invoking the jurisdiction of this Court by way of the present writ petition on 06.04.2018, an interim order was passed on 09.04.2018 directing the APSFC not to take any further steps. Sri Y.N. Vivekananda, Learned Standing Counsel for the Corporation, would submit that, though the 2nd respondent had handed over a cheque for Rs.34.12 lakhs towards interest at 16.5% p.a. for the delayed payment of Rs.4.60 crores, from May to November, 2016, the said cheque had to be returned to them in view of the interim order passed by this Court; and possession of the subject lands would be delivered to the 2nd respondent only after receipt of interest, for delayed payment, of Rs.31.12 lakhs from the 2nd respondent.

In **S.J.S. Business Enterprises (P) Ltd.**⁸ and in **Gajraj Jain**⁹, the Supreme Court referred to its earlier decisions in **Mahesh Chandra**¹⁰ and **Haryana Financial Corp**¹. In **Haryana**

Financial Corpn.¹ the Supreme Court held that the guidelines, in **Mahesh Chandra**¹⁰, were stated to be necessary to ensure fair play; that decision, as the factual position showed, was rendered in a case where the borrower intended to repay the debt and was anxious to do so; the view, in **Mahesh Chandra**¹⁰, had been too widely expressed without taking note of ground realities, and the intended objects of the statute; if the guidelines therein were to be strictly followed, it would be giving premium to a dishonest borrower; it would not further the interest of the Corporation and, consequently, of the industrial undertakings intending to avail financial assistance; it would only provide an unwarranted opportunity to the defaulter (in most cases chronic and deliberate) to stall recovery proceedings; the guidelines issued, in **Mahesh Chandra**¹⁰, placed unnecessary restrictions on the exercise of power by Financial Corporations conferred on them under Section 29 of the Act, by requiring the defaulting unit-holder to be associated or consulted at every stage in the sale of the property; a person, who has defaulted, is hardly ever likely to cooperate in the sale of his assets; the procedure, indicated in **Mahesh Chandra**¹⁰, would only lead to further delay in realization of the dues by the Corporation by sale of assets; the subsequent decisions of the Supreme Court in **Gem Cap**²⁴, **Naini Oxygen**⁷ and **Micro Cast Rubber**³ ran counter to the view expressed in **Mahesh Chandra**; issuance of the guidelines in **Mahesh Chandra**¹⁰ were contrary to the letter and the intent of Section 29; and the observations in **Mahesh Chandra**¹⁰ did not lay down the correct law; and the said decision was overruled.

In **S.J.S. Business Enterprises (P) Ltd**⁸, the Supreme Court held that, in over-ruling the decision in **Mahesh Chandra**¹⁰, the Supreme Court in **Haryana Financial Corpn.**¹ had affirmed the view taken in **Contromix Pvt. Ltd**¹¹, and had held that, in the matter of sale under Section 29 of the SFC Act, the State Financial Corporation must act in accordance with the Statute, and must not act unfairly i.e. unreasonably; if they do, their action can be called into question under Article 226 of the Constitution of India; reasonableness is to be tested against the dominant consideration to secure the best price for the property to be sold; this can be achieved only when there is maximum public participation in the process of sale, and everybody has an opportunity of making an offer; and public auction, after adequate publicity, ensures participation of every person who is interesting in purchasing the property, and generally secures the best price.

In **Gajraj Jain**⁹ the Supreme Court, while following its earlier judgment in **S.J.S. Business Enterprises (P) Ltd**⁸, held that the question which arose for determination was whether the Financial Corporation had acted reasonably, and in accordance with Section 29 of the SFC Act, in transferring the assets of the industrial concern and in entering into an agreement for sale with the transferee; and the first charge holder was bound to obtain the best possible price for the mortgaged assets, and the best possible price must, in the context, mean the fair market value.

In **Gajraj Jain**⁹ the Supreme Court has, no doubt, held that the equity of redemption, which existed in favour of the industrial concern, cannot be extinguished by a mere agreement of sale of assets; and it is only on execution of a conveyance that the

mortgagor's right of redemption will be extinguished. The fact, however, remains that, in the present case, the conveyance deed could not be executed because of the dispute, regarding the actual extent of land on ground, between the first and the second respondent till it was resolved in March, 2018 with the 2nd respondent agreeing to take possession of the property on an as is where is basis; and because the cheque issued by the 2nd respondent of Rs.34.12 lakhs, for belated payment of six months in paying the sale consideration of Rs.4.60 crores, could not be encashed because of the interim orders passed by this Court on 09.04.2018. While the equity of redemption in favour of the petitioners may not stand extinguished, it is not as if they are ready even now to exercise their right of redemption by repayment of the entire debt due to the respondent-corporation in excess of Rs.32 Crores.

In the sale of public property, the dominant consideration is to secure the best price for the property to be sold and this can be achieved only when there is maximum public participation in the process of sale, and everybody has an opportunity of making an offer. (**Cavalet India Ltd.**,²). The Corporation should try and realize the maximum sale price by sale of the assets following a procedure which is transparent and acceptable, after due publicity. (**Haryana Financial Corpn.**¹). In the sale of public property, the dominant consideration is to secure the best price for the property to be sold. This can be achieved only when there is maximum public participation in the process of sale, and everybody has an opportunity of making an offer. Public auction, after adequate publicity, ensures participation of every person who is interested in

purchasing the property, and generally secures the best price. But many times it may not be possible to secure the best price by public auction. In that event, another suitable mode for selling the property can be by inviting tenders or even by negotiations. In order to ensure that such sale by calling tenders does not escape the attention of an intending participant, it is essential that every endeavour should be made to give wide publicity so as to get the maximum price. These are aspects which the Corporation should keep in view while dealing with disposal of seized units. (**Haryana Financial Corpn.**¹; **Contromix (P) Ltd**¹¹; **Cavalet India Ltd.**,²).

Since their efforts to put the mortgaged property to sale under the SARFAESI Act did not fructify, the respondent-corporation initiated proceedings under Section 29 of the SFC Act. Pursuant to the sale notice published in Economic Times (English daily) and Eenadu (Telugu daily) on 04.02.2016, the 2nd respondent submitted its tender on 25.02.2016. The sale negotiating committee, in its meeting held on 10.03.2016, recommended acceptance thereof; and the Corporation, in its meeting held on 12.04.2016, approved the offer of the 2nd respondent, and called upon them to pay Rs.4.60 crores, including EMD of 5 lakhs already paid by them, within 30 days i.e., on or before 12.05.2016. The 2nd respondent, by its letter dated 12.05.2016, informed the respondent-corporation that, because of the demise of their father who was the Chairman/Managing Director of their Group Companies, bank transactions were held up; during negotiations, the Corporation had expressed its willingness to give three months time for making payment; because of their liquidity status, they were enclosing a postal demand draft

for Rs.25 lakhs; and they be given three months time to pay the entire sale consideration. The APSFC, by its letter dated 18.06.2016, informed the petitioner that the balance sale consideration of Rs.4.30 crores should be paid on or before 10.08.2016, along with further interest at 16.5 % per annum from 12.05.2016 together with asset carrying cost, incurred if any. The petitioner was informed that, in case the balance amount of Rs.4.30 crores was not paid by 10.08.2016, the amount already paid by them of Rs.30 lakhs, including earnest money deposit of Rs.5 lakhs, would be forfeited by cancelling the sale without further reference.

By their letter dated 11.08.2016, the 2nd respondent informed the APSFC that they had already paid Rs.2.30 crores by then; and they be granted three more months time to pay the remaining Rs.2.30 crores, and they were willing to pay interest for the delayed period. The respondent-corporation informed the 2nd respondent, by its letter dated 20.09.2016, that, as a final opportunity, their request for grant of three months time, vide their letter dated 11.08.2016, was being acceded to; and they should pay the balance sale consideration of Rs.2.30 crores on or before 09.11.2016 along with further interest at 16.50% p.a. The 2nd respondent paid the said amount by way of demand draft dated 27.10.2016 and 09.11.2016 for 20 lakhs each, and Rs.1.90 crores by way of three cheques all of them dated 09.11.2016, which were all realised and cleared by 21.11.2016.

As noted hereinabove, though the petitioner was called upon, by the letter of the respondent-corporation dated 21.03.2016, to make a matching offer to the highest bid received of Rs.4.60

crores, they chose not even to respond even before the end of November, 2016, by which time the entire sale consideration of Rs.4.60 crores was paid by the 2nd respondent. In their letter dated 10.03.2018 (nearly one and half years after the entire sale consideration of Rs.4.60 crores was paid to the respondent-corporation by the 2nd respondent), the petitioners, while enclosing a draft of Rs.7.50 lakhs, requested the respondent-corporation to treat the said amount as down payment for the loans, and to stop all proceedings including the sale of primary and collateral security. In their letter dated 14.03.2018, the petitioners merely requested the 1st respondent to provide copies of the sale advertisement, the sale letter, the date of demand receipt along with amount of payment received date-wise. They informed the respondent-corporation that they had already filed an application for a one time settlement. They requested the corporation not to sell any collateral property. Even in this letter dated 14.03.2018, no reference is made by the petitioner to any intending purchaser offering a higher price. By their letter dated 16.03.2018, the petitioners faulted the respondent-corporation for extending the time, granted to the 2nd respondent, for payment of the balance amount; they stated that they had identified a prospective buyer who was ready to buy the properties for more than Rs.6 crores which would be realised by 31.03.2018. They sought permission to sell the property for Rs.6.00 crores, and requested that the sale consideration be treated as part of the OTS package. Even in this letter dated 16.03.2018, no details were furnished of the person who had made the offer to pay Rs.6.00 crores was. It is relevant to note that the petitioners letter dated 16.03.2018, addressed to the

respondent-corporation, was nearly one and half years after the 2nd respondent had paid the entire sale consideration of Rs.4.60 crores by November, 2016.

The only reason, why a conveyance deed was not executed and registered in the 2nd respondent's favour, was because they had raised a dispute regarding the actual extent of land on ground being less than the extent of land reflected in the sale notice, because of which they did not pay interest at 16½ % on the belated payment of Rs.4.60 crores from May, 2016 till November, 2016. It is for the first time, in their affidavit dated 18.08.2018, that the petitioners stated that they had filed a petition along with a third party offer to purchase the properties for a consideration of Rs.7 crores. The third party affidavit dated 12.08.2018 is filed by one Sri Sunkari Krishna stating that they had five demand drafts for Rs.1 crore ready to be paid to the APSFC; and the remaining sale consideration of Rs.6 crores would be paid within 60 days from that date. In their reply affidavit dated 21.08.2018 the petitioners have referred to the earlier intending purchaser as Shah Motilal Foods Limited who, they claim, had offered to purchase the property for Rs.6 crores.

While the 2nd respondent had paid the entire sale consideration of Rs.4.60 crores by November, 2016, an increased offer is now sought to be made nearly two years thereafter by way of a third party affidavit. Even this offer is not to pay the entire sale consideration of Rs.7.00 crores forthwith, but to pay Rs.1 crore upfront, with the balance to be paid within 60 days thereafter. If, as is now contended by the petitioners, the market value of the property is Rs.7 crores, and the bid received from the

2nd respondent was less than the market value, nothing prevented them from matching the said offer on being so intimated by the 1st respondent-corporation in their letter dated 21.03.2016.

The petitioners claim to have found a buyer, who was willing to pay Rs.7.00 Crores, is sought to be supported by a third party affidavit of the intending buyer who, while expressing readiness to pay Rs.1 Crore upfront, has sought two months time to pay the balance Rs.6 Crores. The financial wherewithal of the intending purchaser, to pay the balance Rs.6 Crores, is not disclosed in his affidavit, nor does the third party affidavit refer to the source of funds for payment of the balance Rs.6 Crores.

While the petitioners had, in their writ affidavit dated 06.04.2018, vaguely stated that they had found a buyer for Rs.6 Crores without furnishing particulars of such a buyer or his financial capacity to pay the said sum of Rs.6 Crores, it is only in the affidavit dated 18.08.2018 that they claimed to have found an intending purchaser for Rs.7 Crores. As noted hereinabove, the sale was conducted pursuant to a sale notice published in the "Economic Times" (English daily) and "Eenadu" (a leading Telugu daily), on 04.02.2016. If really the intending purchasers were ready and willing to pay the said amount, nothing prevented them from submitting their tender pursuant to the said sale notice. Further, on being called upon to match the offer of the highest bidder of Rs.4.60 Crores by the APSFC in its letter dated 21.03.2016, nothing prevented the petitioners from informing APSFC that they had a buyer ready and willing to pay the said sum. As the auction purchaser had paid the entire sale consideration of Rs.4.60 Crores by November, 2016, and their

dispute with the APSFC, regarding the variation in the extent of land as reflected in the sale notice and on ground, resulted in their not paying interest of around Rs.32 Lakhs till March, 2018, for belated payment of the sale consideration of around six months, the petitioners claim, that the subject property was sold below the market value, needs only to be noted to be rejected.

In **Haryana Financial Corpn.**¹ the Supreme Court held that the view expressed, in **Gem Cap**²⁴, appeared to be more in line with the legislative intent; indulgence shown to chronic defaulters would amount to flogging a dead horse without any conceivable result being expected; failure of the borrower, to repay even a minimal portion of the principal amount, is a factor which should not be lost sight of by Courts; it is one thing to assist a borrower who has the intention to repay, but is prevented by insurmountable difficulties in meeting its commitments; and that has to be established by adducing material. In the present case the total sum due from the petitioners is in excess of Rs.32 crores. It is not even their case that they are ready and willing to repay the debt in its entirety. Their claim to have now found a buyer for 7 crores nearly two years after the 2nd respondent paid the entire sale consideration of Rs.4.60 crores by November, 2016 is evidently made only to avoid execution of a conveyance deed in favour of the 2nd respondent.

In **Sanjay**²⁷, on which reliance is placed on behalf of the petitioners, the Supreme Court, following its earlier judgment in **J. Rajiv Subrahmanian v. Pandiyas**²⁸, held that proceedings are initiated under the SARFAESI Act, 2002 against the borrowers only

²⁸ (2014) 5 SCC 651 = AIR 2014 SC 1710

when the borrower is in dire-straits; the provisions of the SARFAESI Act, and the 2002 Rules, have been enacted to ensure that the secured asset is not sold for a song; all banks and financial institutions, which resort to the extreme measures under the SARFAESI Act, 2002, for the sale of the secured assets, should ensure that such sale of the asset provides the maximum benefit to the borrower by the sale of such an asset; the secured creditors are, therefore, expected to take bonafide measures to ensure that there is maximum yield from such secured assets for the borrowers; the amount under the decree which was payable was not much, and was even less than Rs.4 Lakhs as on the date of the sale; that became an added reason to set aside the sale of the property, the value of which was much higher; as the appellant was ready to refund the amount paid by respondent No.1, they were of the opinion that equities would be balanced by directing the appellant to refund the said amount, along with interest at 12% from the date of payment as also the cost of litigation to respondent No.1 which was quantified at Rs.1 lakh; and the sale being setting aside was subject to the condition that the aforesaid amount was paid by the appellant to respondent No.1 within a period of three months.

If, as is now contended before us, the bid for Rs.4.60 cores is less than the market value, nothing prevented the petitioner-borrower from either matching the offer or in securing a higher bid from a third party and in informing the respondent corporation accordingly. The petitioners remained silent for more than two years after receipt of the letter of the respondent-corporation dated 21.03.2016, and around one and half years after the 2nd

respondent paid the entire sale consideration of Rs.4.60 crores in November, 2016, before filing this writ petition on 06.04.2018. Except for a vague averment of another person willing to pay Rs.6.00 crores, no details were furnished in the affidavit filed in support of the writ petition. It is only during the hearing of the writ petition in August, 2018 that the petitioner has filed an affidavit, along with a third party affidavit, that one Sri Sunkari Krishna is willing to purchase the property for Rs.7.00 crores paying Rs.1.00 crore upfront and the balance Rs.6.00 crores in 60 days. No details are furnished of the source of funds of Sri. Sunkari Krishna to pay this sum of Rs.6.00 crores. It would be wholly inappropriate for this Court to now direct the respondent corporation to reject the bid of the 2nd respondent who paid the sale consideration of Rs.4.60 crores two years ago in November, 2016, and to direct them instead to sell the property to Sri Sunkari Krishna, for nothing prevented either Sri Sunkari Krishna or the petitioners to make such an offer after receipt of the respondent corporation's letter dated 21.03.2016.

The respondent-corporation has caused wide publicity, and has thereby ensured maximum public participation in the process of sale, by causing publication of the sale notice in two leading dailies viz., Economic Times (English) and Eenadu (Telugu) on 04.02.2016. Thereby, all those interested in purchasing the subject land, were invited to submit their tender. The borrower, who had mortgaged the assets, was also permitted to match the highest bid of Rs.4.60 crores. Having chosen not to respond to the letter of the respondent-corporation dated 21.03.2016, calling upon them to match the offer, the petitioner cannot, nearly one

and half years thereafter, be heard to contend, in March, 2018, that the subject property was sold for a price below its market value or that the respondent-corporation should hand over the subject property to the person, who the petitioners claim, is now willing to offer a higher price. We are satisfied that the petitioners belated claim to have identified a prospective buyer, whose financial credentials are unknown and who has offered only to pay Rs.1 crore upfront, and seeks sixty days further time to pay the balance Rs.6 crores, is only to drag on proceedings and avoid physical possession of the property being delivered to the 2nd respondent who has already paid the entire sale consideration of Rs.4.60 crores nearly two years ago, in November, 2016.

While the 2nd respondent was, no doubt, required to pay the entire sale consideration by 12.05.2016, the respondent-corporation has safeguarded its interests directing them to pay interest at 16.5% per annum, i.e., for a sum of Rs.34.12 lakhs, for the delay of six months in making payment of Rs.4.60 crores (i.e., from May to November, 2016). Having chosen not to respond to the letter of the APSFC dated 21.03.2016 calling upon them to match the offer of the 2nd respondent to pay Rs.4.60 crores, the petitioners contention, made for the first time by their affidavit dated 18.08.2016 nearly two years after the 2nd respondent had paid the entire sale consideration of Rs.4.60 crores, that they have received an offer for Rs.7 crores, lacks bonafides. The petitioners request, to now be permitted to pay a higher amount than what was paid by the 2nd respondent in November, 2016, does not therefore merit acceptance.

V. PROVISIONS OF SECTION 29 OF SFC ACT CAN BE INVOKED EVEN AFTER PROCEEDINGS ARE INSTITUTED UNDER THE SARFAESI ACT:

Sri Bankatlal Mandani, Learned Counsel for the petitioner, would submit that, since the APSFC had earlier invoked the provisions of the SARFAESI Act, they cannot now invoke the provisions of the SFC Act.

On the other hand Sri Y.N. Vivekananda, learned counsel for the APSFC, would submit that the lands furnished as security were initially sought to be put to sale under the SARFAESI Act; since SARFAESI proceedings did not fructify, the APSFC had initiated proceedings under Section 29 of the Act; and they had intimated the same to the petitioners vide letter dated 07.02.2015.

Section 37 of the SARFAESI Act stipulates that application of other laws are not barred and, thereunder, the provisions of the SARFAESI Act or the Rules made thereunder shall be in addition to, and not in derogation of, among others, any other law for the time being in force. Since the remedy available under the SARFAESI Act is in addition to, and not in derogation of, the SFC Act (which is also a law for time being in force), the contention that the respondent-Corporation, having initiated proceedings under the SARFAESI Act, cannot resort to the provisions of Section 29(1) of the SFC Act, is only to be noted to be rejected.

VI. CONCLUSION:

Viewed from any angle, the petitioners have failed to make out a case for interference by this Court in the exercise of its extraordinary jurisdiction under Article 226 of the Constitution of India. The Writ Petition fails, and is accordingly dismissed. However, in

the circumstances, without costs. The miscellaneous petitions, if any pending, shall also stand dismissed.

RAMESH RANGANATHAN, J

KONGARA VIJAYA LAKSHMI, J

Date:11.10.2018

Note: L.R. copy to be marked.

B/o
MRKR/CS

