

IN THE HIGH COURT OF ORISSA AT CUTTACK

M.A. NO.271 OF 1993

From the Judgment/Order dated 05.05.1993 passed by the learned District Judge, Cuttack in Misc. Case No.2/87.

Sri Purusottam Sahu

::::

Appellant

-:: VERSUS ::-

**Orissa State Financial
Corporation & Ors.**

::::

Respondents

Appeared in this case by Video Conferencing Mode / Hybrid

Mode.

For Appellant

**:::: Mr. N.P. Parija, Advocate
(for Appellant)**

For Respondent

**:::: Mr. A. Routray, Advocate
(for Respondent-Corporation)**

PRESENT :

THE HON'BLE MR. JUSTICE B.P.SATAPATHY

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Date of Hearing- 08.07.2022:: Date of Judgment- 14.07.2022
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B.P.Satapathy, J.** This matter is taken up through Hybrid
Arrangement (Virtual/Physical) Mode.

2. Heard Mr. N.P. Parija, learned counsel for the Appellant and Mr. A. Routray, learned counsel appearing on behalf of Respondent-Corporation.

3. This appeal has been filed by the Appellant challenging the order dtd.05.05.1993 passed in Misc. Case No.2/87 by the learned District Judge, Cuttack in an application filed by the Odisha State Food Corporation Act (in short 'Act') under Sec. 31 of the State Financial Corporation Act, 1981 (in short 'Act').

4. Mr. Parija, learned counsel for the Appellant submitted that learned court below without proper appreciation of the materials placed before it and without considering the specific stand taken by the Appellant, who is admittedly the guarantor in respect of the loan sanctioned by the Corporation in favour of original Respondent No. 2 , held the Appellant liable to the extent of Rs.45,686.29p/- (Rs. Forty five thousand six hundred eighty six and 29 paisa) along with pendente lite and future interest @ 6% per annum.

5. Mr. Parija, learned counsel for the Appellant further submitted that there is no dispute that the present Appellant stood at the guarantor in respect of the loan sanctioned by the Corporation in favour of Respondent No. 2 for purchase of a truck.

6. Since loan so sanctioned in favour of Respondent No. 2 was not cleared, the aforesaid proceeding was initiated by the Corporation in Misc. Case No.2/87 under Sec. 31 of the Act.

7. Mr. Parija submitted that initially the Corporation seized the truck in question in exercise of its power under Sec. 29 of the Act and put the same into auction. It is further submitted that after realising the sale price in such auction the present Appellant was issued with a notice to pay the residue loan outstanding. It is also submitted that prior to putting the truck into auction, the present Appellant was never noticed and only after taking such action to realise the residue loan amount the present Appellant was issued with the notice.

8. Mr. Parija accordingly submitted that since prior to putting the truck into auction the present Appellant was never noticed, the Appellant cannot be held liable for the balance loan amount. Accordingly, Mr. Parija prayed that learned Court below without appreciating the stand so taken by the Appellant held the Appellant liable vide the impugned order dtd.05.05.1993.

9. Mr. Routray, learned counsel appearing for the Respondent-Corporation on the other hand submitted that all the materials placed before the learned court below were duly considered and the Appellant being the guarantor, he is jointly and severally liable to pay the residue loan amount and no illegality has been committed by the learned court below in directing the Appellant to pay the amount in question.

10. Mr. Routray further submitted that there is no provision in the Act to issue prior notice to the Appellant/Guarantor while exercising power under Sec. 29 of the Act. Mr. Routray further submitted that after taking possession of the truck in question and

putting it into auction, the Appellant was duly noticed to pay the residue loan amount prior to initiation of the proceeding under Sec. 31 of the Act. Accordingly, Mr. Routray submitted that learned court below has not committed any illegality in passing the impugned order.

11. Heard learned counsel for the Parties. Perused the materials available on record. There is no dispute that the Appellant is the guarantor in respect of the loan availed by Respondent-2. But the stand taken by the Appellant that the Appellant was due to be noticed by the Corporation prior to initiation of action under Sec.29 of the Act as per the considered view of this Court was required to be followed by the Corporation. But the same having not been followed in the present case, the Appellant cannot be held liable for the residue loan amount.

12. Had the Appellant being noticed prior to putting the truck into auction, the Appellant could have taken steps to liquidate the loan amount or take over the possession of the truck by participating in the auction.

13. Mr. Parija in support of his stand relied on a decision of this Court reported in *AIR (1995) Orissa Page-1*. In the said reported decision, this Court in a similar issue held that the guarantor is entitled to prior notice on the ground of principle of natural justice when the Corporation takes any action under Sec. 29 of the Act. This Court further held that on failure to give such notice to the borrower the Corporation cannot put to auction the property

mortgaged by the guarantor for realising the short fall. Para 6 & 7 of the said Judgment is reproduced hereunder:-

“ 6. Having considered the contentions raised by the parties, we are of the opinion that the petition deserves to be allowed and the notice dated 29-7-1993 (Annexure-1) is liable to be quashed. There can be no dispute to the proposition that the liability of a guarantor is co-extensive with that of the borrower. It cannot also be disputed that though S. 29 of the Act does not provide for issuance of any notice, the principles of natural justice and fair play are not excluded. In view of this, the two contentions which are more in the nature of preliminary objections deserve to be overruled. Indeed, this is now the settled position in view of the pronouncement of the Apex Court in the case of *M/s. Kharavela Industries (Pvt.) Ltd. V. Orissa State Financial Corporation*, reported in AIR 1985 Ori 153, Therefore, the opposite parties were duty bound to issue a notice regarding their intended auction under S. 29 of the Act.

7. In support of their contention that a notice under registered post was issued on 8-2-1990, a Xerox copy of the notice has been filed as Annexure-A. A mere perusal of this document shows that it was sent by registered post with A.D. to “Sri Banshidhar Samantaray.” The endorsement in the notice shows that a copy was, amongst others, also marked to Smt. Hiranyaprava Samantray, the petitioner herein. As there was a dispute between the parties regarding issuance of this notice by registered post, we called upon the opposite parties to produce the Despatch Register. The entry 5488 in the Despatch Register shows that a notice under Registered A.D. post was sent to Bansidhar Samantray and a postal receipt has been affixed in the despatch Register against the said entry. The subsequent entry

does show that copies were sent to the R.T.O., Regional Manager, O.S.F.C. and Smt. Hiranyaprava Samantray, the petitioner but no postal receipt is affixed against this entry nor is there any entry regarding the cost incurred by way of postage or otherwise,. Indeed, in the column, where the cost of postage is to be incurred, something written there has been scored off. Thus, the contention of the learned counsel for the opposite parties in Para 8 of the counter-affidavit “that before the sale of the vehicle the guarantor was requested vide our registered letter bearing No. 5488 dated 8-2-1990 to appear for settlement of the loan dues and for release of the vehicle....”, does not appear to be correct. Had the notice been issued under registered post as alleged, the postal receipt would have been affixed against the entry like in the case of the borrower and, also the cost incurred towards postage charges would have found place in the appropriate column in the Dispatch Register. In view of the above, we are of the view that registered notice as alleged, was not sent to the petitioner by the opposite parties. The contention of the petitioner, therefore, that action under S. 29 of the Act was taken without any notice to her deserves to be upheld. The question, therefore, is what would be the effect of this omission on the proposed action of the opposite parties against the petitioner/guarantor in terms of Annexure-1 is somewhat similar facts in the case of *Balaram Das v. Orissa State Financial Corporation*, OJC No. 3013 of 1992, decided on 8-7-1993, a Division Bench of this Court consisting of Hon’ble Mr. Justice R.K. Patro have held as under:

“Sine in law, the liability of the loanee and the guarantor stands on the same footing, the legal protections available to the loanee are also available to the guarantor. Since admittedly the petitioner had no notice of the taking over of the press to a third party, which is by now a *fait accompli*, there is no doubt that the

interest of the petitioner has been grossly affected by the action of the opposite parties taken behind his back. That being so, the further action taken under S. 29 of the Act to take over the property of the petitioner cannot be sustained in law nor can the demand be raised against him for recovery of the short-fall, though (sic) we must add that since the provisions of the Act were complied with so far as the loanee is concerned, the remedy against the loanee remains unaffected.”

Under the circumstances, the proposed action contemplated against the petitioner by Annexure-1 cannot be sustained and Annexure-1 is thus liable to be quashed.”

14. Mr. Parija also relied on another decision of this Court reported in ***AIR (1990) Orissa P-42***. While dealing with the similar question, this Court held that while taking action under Sec. 29 of the Act, principle of natural justice has to be followed and if the Corporation has taken such action without following the principle of natural justice, then the same is liable to be set aside. Para 10 of the said Judgment is reproduced hereunder:-

“10. This is the appropriate stage for considering the factual aspect whether at all the Corporation had given due notice to the petitioners of the proposed action under S. 29 of the Act. The Petitioners in paras 4, 5, 8, 10(f) and 10(g) of the writ petition have repeatedly asserted that the Corporation had not given a notice, nor an opportunity of hearing, to the petitioners before their Industrial Concern under S. 29 of the Act. In the counter affidavit filed by the Corporation on 7-4-1979, the allegation, that the petitioners were neither given a notice nor an opportunity of being heard before their Industrial Concern was taken over by the Corporation, was not denied by it. On the other hand, the

Corporation had taken the plea in its counter that the question of intimating the petitioners regarding the action proposed to be taken under Sec. 29 of the Act does not arise for consideration in the facts and circumstances of the case, for the reason that if any such intimation were to be given, the important machineries and other items might have been removed by the petitioners. From the material placed on record, it is seen that there is no basis for the apprehension of the Corporation that on receipt of the intimation regarding the proposed action under S. 29, the petitioners would have removed the machineries etc. from the plant. Even otherwise also, the Corporation could have very easily taken the appropriate steps to see that nothing of value was removed from the premises of the Industrial Concern after the issuance of the notice to the petitioners. Considering the facts and circumstances of the case, we find that there is no justification for the Corporation to take over the Industrial Concern under S. 29 of the Act without prior notice to the petitioners.”

15. Heard learned counsel for the Parties. In view of the specific stand taken by Mr. Parija regarding non-issuance of any notice prior to taking action under Sec. 29 of the Act and the decisions relied on by Mr. Parija as cited (*supra*), this Court held that since the Appellant at no point of time has been issued with a notice prior to taking action under Sec.29 of the Act, the Appellant cannot be held liable to pay the short-fall loan dues.

16. Perusal of the orders also indicates that the Appellant was never noticed by the Corporation prior to taking auction under Sec. 29 of the Act. It is only after the property in question was put to auction and sold, the Appellant was noticed to pay the residue amount. Therefore, the stand taken by the Appellant that he is not

liable to pay the residue amount is squarely covered as per the decision cited supra. Accordingly, this Court has got no hesitation in quashing the order dtd.05.05.1993 passed in Misc. Case No. 2/87 by the learned District Judge and the said order is hereby quashed.

17. Accordingly, the appeal is allowed. There shall be no order as to cost.

(Biraja Prasanna Satapathy)
Judge

Orissa High Court, Cuttack
The 14th July, 2022/Sneha

