

SICOM Limited Vs Anandprasad G. Shrivastava and Others

Court: Bombay High Court

Date of Decision: June 7, 2005

Acts Referred: Bombay Court Fees Act, 1959 " Article 1, 7

Constitution of India, 1950 " Article 12

Limitation Act, 1963 " Article 112, 130, 136, 137, 5

State Financial Corporations Act, 1951 " Section 31, 31(1), 32, 32(4A), 32(6)

Citation: (2005) 4 BC 512 : (2005) 4 BomCR 1 : (2005) 127 CompCas 541

Hon'ble Judges: S.U. Kamdar, J

Bench: Single Bench

Advocate: V.R. Dhond and P. Punjabi, for the Appellant; D.V. Merchant, S.K. Jain, Ranpise Smita and Simon Shaikh, instructed by S.K.Srivastav and Co. for the Respondent Nos. 1 to 3, for the Respondent

Judgement

S.U. Kamdar, J.

The present petition is filed u.s. 31(1)(aa) of the State Financial Corporation Act, 1951 against the Guarantors. The

company known as Consolidated Containers (India) Limited was incorporated inter alia for carrying on business in the containers.

2. The said company applied for a term loan of Rs. 85,00,000/- and Rs. 32,00,000/- during the period November 1988 to January 1995. Thus,

the total term loan lent and advanced by the petitioner to the company was Rs. 1,17,00,000. The said term loan was sanctioned on 25.11.88 and

12.3.91. In respect of the aforesaid sanction of the loan amount, the loan agreement dt.1.12.89 and 22.10.92 was executed by and between the

said company and the petitioner herein. Under the terms and conditions of the said loan agreement it was provided that the said amount has to be

repaid in instalments along with interest costs, charges and expenses. The aforesaid loan amount was secured by a mortgage executed between the

said company in respect of the assets being land bearing Survey No. 51, Hissa Nos. 2 & 3 at Village Kambivili, in the Registration Sub-District of

Khalapur at Raigad The charge was created also in respect of plant and machinery, other movable assets. An equitable mortgage was also created

by deposit of title deeds in respect of immovable properties. The respondents herein were the promoters and directors of the said company and

executed a personal guarantee in favour of the petitioner. Under the said guarantee respondents herein have promised to pay the amount if the said

borrower company commits default in repayment thereto. The said deed of guarantee is executed on 1.12.89 by respondent No. 1. Respondent

No. 2 has executed a deed of guarantee on 27.2.90. Respondent No. 3 has also executed deed of guarantee on 27.2.90. Respondent No. 4 and

5 have executed joint guarantee on 21.5.90 and the respondent No. 6 has executed guarantee on 21.8.90 under the terms to repay the amount in

an event of default on behalf of the said borrower company. In respect of the additional term loan of Rs. 32,00,000/- further guarantees were

executed. Respondent Nos. 1 to 3 executed guarantee in favour of the petitioner on 22.10.92. Respondent Nos. 4 and 5 also executed a

guarantee in favour of the petitioner on 7.12.92 and Respondent No. 6 executed the said guarantee on 14.12.92. Under the terms and conditions

of the guarantees it is provided that the same are absolute and unconditional and without any demur

3. The borrower company failed to make payment of the instalment amount on stipulated dates. The demand notice was issued on 10.2.95 calling

upon the borrower company to repay the overdue amount of Rs. 85,15,490/-with interest thereon. However, borrower company did not make

payment and thus entire outstanding amount of loan lent and advanced was recalled. On 18.4.97 the recalled notice was given to the borrower and

threatened that the company's assets which are mortgaged with the petitioner will be taken over. However, borrower company approached BIFR

under the provisions of Sick Industrial Companies (Special Provisions) Act, 1985 and registered the case being case No. 50 of 1997. In the

aforesaid circumstances, the petitioner issued notice to the guarantors on and the respondents will make payment on the petitioner calling upon

them to do so on default being committed by the borrowers. 3.11.00 and invoked the said guarantee and called upon the respondents herein to

make payment of outstanding aggregated amount of Rs. 4,22,63,333/- comprising of principal amount of Rs. 1,15,11,804/- and an interest

amount of Rs. 3,07,51,529/- payable by the respondents to the petitioners. By a letter dt.28.11.00 the respondents informed the petitioner that in

view of the proceedings pending in the BIFR

BIFR has come to an end and borrower company being wound up an Official Liquidator has been appointed in respect of the assets of the said

company in company petition No. 686 of 1996. The aforesaid Official Liquidator attached to this court has been appointed and he has taken

possession of the borrowers company's assets including mortgaged assets with the petitioner herein. In view of non payment of the demanded

amount by the respondents herein petitioners have filed the present petition u.s. 31(1)(aa) of the SFCs Act, 1951. As on the date of the petition

the petitioners have claimed an amount of Rs. 6,91,99,911/- with interest accrued thereon as due and payable by the respondents.

4. An additional affidavit has been filed in the terms of the Judgment of the Central Bank of India Vs. Ravindra and Others, and it has been pointed

out that the claim made in the petition is an accurate amount because

5. The learned counsel for the respondents have contended that the claim in the present petition is barred by the law of limitation. It has been

contended that admittedly the guarantees are invoked on 3.11.00 whereas the petition is filed on 16.6.04 which is beyond the period of 3 years as

prescribed under Article 137 of Schedule to the Limitation Act, 1963. It has been contended that even if the present application is not the suit still

residuary Article 137 will apply and the application ought to have been filed within 3 years from the date of right to apply accrues. It has been

contended that in the present case on invocation of bank guarantee on 3.11.00 the right to apply accrued in favour of the petitioners and therefore

remedy stood barred by law of limitation on 3.11.03. On the other hand, the learned counsel for the respondents have contended that the present

proceedings cannot be initiated as against guarantors also. However, the BIFR by its order dt.3.12.00 directed that the borrower company should

be wound up. Thus, the proceeding under they have not charged any compound interest in respect of the personal interest charged by the

petitioners. Respondents herein have however contested the present petition by raising various defences. petition is not barred by the law of

limitation. It has been contended that the relevant provisions of the Limitation Act which is applicable to the petitioners case is not Article 137 but

Article 136 which inter alia provides for execution of decree or order and the period of limitation prescribed is 12 years and not 3 years. It has also

been alternatively contended that assuming without admitting that the said claim is barred by the law of limitation then in that event this being an

application the provision of s. 5 of the Limitation Act will apply and this court ought to grant condonation of delay. In support of the said

contention, the learned counsel has moved the Misc.Application (L) No. 3 of 2005 and has sought condonation of delay. It has also been

contended that the delay has accrued in the present case because of the impression of the petitioner that the proceeding against guarantor cannot

be proceeded with in view of the provision of s. 22 of the Sick Industrial Companies (Special Provisions) Act, 1985. However, since it has been

subsequently held by this court that the provisions of s. 22 has no application in so far as enforcement of the guarantee of the guarantors are

concerned because the present application is not a suit and thus, the provision of s. 22 cannot attract which gives a limited protection of non filing

of suit for enforcement of guarantees given by the concerned person to the financial institution and therefore, proceedings in the nature of

Miscellaneous Petition is maintainable.

6. I have considered the aforesaid submission at length. Before I deal with the various Judgments which are relevant for the purpose of present

issue, it is necessary that the relevant articles 136 and 137 of the Limitation Act 1963 be reproduced hereunder:

Description of Period of Time from which period application limitation begins to run

136. For the execution of any Decree or order (other than a decree or order granting of where the

decree or any mandatory injunction) subsequent order directs or order of any civil court. or the delivery of any property to

be made at a certain date or at recurring periods, when default in making the payment or delivery in respect of which execution is sought, takes

place.

Provided that an application for the enforcement or execution of a decree granting a perpetual injunction shall not be subject to any period of

limitation.

137. Any other application When the right to apply

for which no period years accrues.

of limitation is

provided elsewhere in

this division.

7. If the present application is in execution of decree or order then in that event the said application will fall under article 136 and period of

Limitation prescribed is 12 years. If it is not so then there being no other period of limitation provided under the said schedule it must necessarily fall

under residuary Article 137 of the Limitation Act wherein the period of limitation prescribed is 3 years from the date when the cause of action

accrues.

8. In the case of Gujarat State Financial Corporation Vs. Natson Manufacturing Co. Pvt. Ltd. and Others, for the first time the nature of

application under provision of S. 31 of the SFC Act, 1951 was considered by the Apex Court. In the said Judgment the issue was whether the

application u.s. 31(1) is a suit and whether the court fee was payable thereon. The court held that it is not a suit and it is an application akin to the

execution of decree and therefore the provisions of Article 1 or Article 7 of the Schedule 1 of Bombay Court Fee Act 1958 were not attracted.

The said provision inter alia provided the payment of court fee on ad valorem basis on any plaint or application in the nature of plaint instituted for

recovery of mortgaged amount. The provision of s. 31(1) as it stood in 1978 did not include a provision for enforcement of guarantees given by the

surety because sub-clause (aa) of s. 31(1) providing for enforcing the liability of any surety was introduced by Amending Act 14 of 1985

w.e.f.21/8/1985. The Apex court was thereafter required to consider similar contention in the case of Everest Industrial Corporation and Others

Vs. Gujarat State Financial Corporation, wherein the contention was whether the provision of s. 34 and/ or Order 34 Rules 6 and 11 which

provides for payment of interest in respect of mortgage suit whether would be applicable also under the provision of s. 31 and 32 of the SFC Act,

1951. While reiterating the view of the court in the case of Natson Manufacturing Co. (Supra) the Supreme Court once again held that the

proceeding u.s. 31 of the Act is not in the nature of the Suit and/ or mortgage suit. It was once again held that the said application is something akin

to the relief that could be granted to the application for attachment of property for execution of decree at a stage posterior to the passing of a

decree. While considering the view of Natson Manufacturing Co. (supra), the court further held that though in that Judgment the issue arose in the

context of payment of court fee still the nature of the application u.s. 31 was considered and decided that it is in the nature of execution of decree.

The view of the Apex Court in the case of Everest (Supra) also did not take into consideration the amended provisions because the appeal arises

from the Judgment of Gujarat High Court which was decided in LPA No. 94 of 1984 on 2.6.83 was prior to the introduction of amendment of

1985. Thereafter once again the Apex Court has considered the nature of the provisions u.s. 31 in the case of Maganlal v. Jaiswal Industries,

Neemach and Ors. reported in (1989) 4 SCC 344 and while considering the provisions of s. 31 and 32 in detail the court once again held that the

financial institutions is in a position of a decree holder and in fact the application is in the nature of execution of decree. After considering the

Judgment in the case of Natson Manufacturing as well as Everest Industrial Corporation (Supra) the court held in para 24 and 25 as under:

24. The purpose of enacting Sections 31 and 32 of the Act was apparently to provide for a speedy remedy for recovery of the dues of the

Financial Corporation. Thus purpose however was, in cases covered by clause (a) of sub-section (1) of Section 31 confined to the stage of

obtaining an order akin to a decree in a suit, in execution whereof the property pledged, mortgaged, hypothecated or assigned to the Financial

Corporation as security for the loan or advance"" could be sold. Sections 31 and 32 of the Act cut across and dispense with the provisions of the

Code from the stage of filing a suit to the stage of obtaining a decree in execution whereof such properties as are referred to in clause (a) of sub-

section (1) of Section 31 could be sold. After this stage was reached sale in execution of an order u/s 32 of the Act was for purposes of execution

put at par with the sale in execution of a decree obtained in a suit, by enacting sub-section (8) of Section 32 of the Act. This sub-section as noted

earlier provides that an order of attachment or sale of property under this section shall be carried into effect as far as practicable in the manner

provided in the Code of Civil Procedure, 1908 for the attachment or sale of property in execution of a decree as if the Financial Corporation were

the decree holder.

25. Expressions ""as far as practicable"" and in execution of a decree as if the Financial Corporation were the decree holder"" are the only

expressions which qualify the ""manner provided"" for sale of property in execution of a decree"", as contained not only in some specific provision of

the Code e.g. Order XXI thereof but ""in the Code of Civil Procedure, 1908 namely, all the provisions in the Code in this regard wherever they

may be.

9. In the case of Maharashtra State Financial Corporation v. Jaycee Drugs and Pharmaceuticals P.Ltd. and Ors reported in JT 1991 (1) SC 524

the Apex court was considering the nature of proceedings u.s. 31 in the context of enforcement of liability by guarantor and the Apex Court while

considering the same has held that the proceeding is in the nature of execution and the financial institution is in position of decree holder and are

entitled to enforce the liability even against the surety under the said provisions of s. 31(1) of the State Financial Corporation Act, 1951. The

relevant portion of the judgment reads as under:

In the background of the rules of interpretation of statutes adverted to earlier and the specific provisions with regard to enforcement of the liability

of a surety introduced in sections 31 and 32 of the Act by Act 43 of 1985, we find it difficult to agree with the submission made by learned

counsel for the respondents. It is true, as has been indicated above, that this court has in the case of Gujarat State Financial Corporation (1979) 49

Comp Cas 187, taken the view that sections 31 and 32 of the Act do not contemplate the passing of a money decree and the principle laid down

in that case has been relied on in two later decisions referred to above. The said principle would, in our opinion, not come in the way of enforcing

the liability under sections 31 and 32 of the Act even against the surety who has given only a personal guarantee. As indicated earlier, those were

not given only a personal guarantee. As indicated earlier, those were not cases dealing with the question of enforcement of the liability of such a

surety and, naturally, therefore, the provisions in this behalf specifically introduced in sections 31 and 32 of the Act by Act 43 of 1985 were not

considered in those cases. However, in this connection, what is of significance is that clause (aa) inserted in sub-section (1) of section 31 of the Act

by Act 43 of 1985 uses the words "any surety".

On its plain grammatical meaning, there can be no doubt that the term "any surety" will include not only a surety who has given some security but

also one who has given only a personal guarantee. If the submission made by learned counsel for the respondents is accepted, the words "who has

given property by way of security" will have to be added after the words "any surety". Such a course not only militates against the normal rule of

interpretation but also tends to defeat the very purpose of the amendment introduced by Act 43 of 1985 enabling the Financial Corporation to

make an application u/s 31(1) of the Act "for enforcing the liability of any surety", inasmuch as it would have the effect of restricting or qualifying

the amplitude of the term "any surety" which the Legislature has, in its wisdom, thought it fit to use in its widest sense. The procedure, in our opinion,

for enforcing the liability of a surety who has given only a personal guarantee would, after the amendment introduced by Act 43 of 1985, be that an

application u/s 31(1) shall lie for enforcing the liability of such surety as contemplated by clause (aa) of the said section. On such an application

being made, notice shall be issued to the surety as contemplated by sub-section (1A) of section 32. This may, in view of sub-section (3), be done

after examining the officer making the application. If no cause is shown in pursuance of the notice served on him by the surety, sub-section (4A) of

section 32 contemplated passing of an order forthwith for the enforcement of the liability of surety. If, on the other hand, cause is shown the claim

of the Financial Corporation shall be determined as contemplated by sub-section (6) of section 32 and, thereafter, a direction as contemplated by

clause (da) of sub-section (7) shall be issued for the enforcement of the liability of the surety or for rejecting the claim made in this behalf. In the

case of Maganlal Vs. Jaiswal Industries, Neemach and Others, which related to the relief contemplated by clause (a) of section 31(1) of the Act, it

was pointed out that the purpose of enacting sections 31 and 32 of the Act was apparently to provide for a speedy remedy for recovery of the

dues of the Financial Corporation and that these sections had the effect of recurring across and dispensing with the provisions of the Code of Civil

Procedure, 1908 (hereinafter referred to as "the Code"), from the stage of filing a suit to the stage of obtaining a decree in execution whereof such

properties as are referred to in clause (a) of subsection (1) of section 31 could be sold. In our opinion, on the same principle, even in a case where

the relief claimed in the application u/s 31(1) of the Act is for enforcing the liability of a surety who has given only a personal guarantee, sub-section

(4A) of section 32 where no cause is shown and clause (da) of sub-section 7, where no cause is shown contemplate cutting across and dispensing

with the provisions of the Code from the stage of filing a suit to the stage of obtaining a decree against the surety, the passing of an order which can

straightaway be executed as it were a decree against the surety may be passed in the event of a suit being filed. As seen above, sub-section (2) of

section 31 enjoins upon the financial corporation to state the extent of the liability of the "industrial concern" in the application to be made under

sub-section (10) thereof. Since the liability of the surety is co-extensive, the same shall, in the absence of anything contrary in the surety bond, be

the liability of the surety also. In a case where there is any provision confining the liability of the surety, the extent of the liability to be shown in the

application shall be such as is in conformity with the surety bond. When no cause is shown by the surety on being served with the show-cause

notice, the order which will be passed under sub-section (4A) of section 32 would be for the enforcement against the surety of that liability which is

stated in the application. Where, however, cause has been shown by the surety, the extent of his liability shall be determined as contemplated in

sub-section (6) of section 32 and it is the liability so determined which shall be enforced under clause (da) of sub-section (7) of section 32. It does

not require any elucidation that the extent of the liability referred to above will necessarily have to be in the very nature of things in terms of

monetary value even though it may not be possible to call it a decree strict sensu as defined in section 0(2) of the Code for recovery of money.

10. The single Judge of this court has in the case of Abdul Mobin Ansari and others Vs. The Maharashtra State Financial Corporation, has also

taken a similar view by relying upon earlier Judgment in the case of Natson Manufacturing. It has been held in para 4 thereof

11. The issue in the present case about applicability of Article 136 and 137 has also directly came up for consideration before various high Courts.

Some of the High Courts which has taken the view that the application u.s. 31 of the SFC's Act 1951 is an application for execution of decree and

therefore, Article 136 applies and not Article 137 and the period of limitation prescribed is of 12 years. The Orissa High Court has in the case of

Orissa State Financial Corporation Vs. Desari Adinarayana, has that the provision of s. 31 of the SFC Act are special provision for enforcement

of claim by Financial Corporations and is in the nature of execution of decree. held by relying upon the aforesaid Judgment of the Apex Court that

the provision of Article 137 applies and not Article 136 the learned single Judge of the Orissa High Court has in para 5 and 6 considered the

aforesaid aspect and has held as under:

5. Section 32 deals with procedure in respect of an application u/s 31. The purpose of enacting Sections 31 and 32 of the Act is apparently to

provide for a speedy remedy for recovery of the dues of the Corporation and these sections have the effect of cutting across and dispensing with

the provisions of the Code from the stage of filing a suit to the stage of obtaining a decree in execution whereof such properties as are referred to in

Clause (a) of Sub-section (2) of Section 31 could be sold. As observed in Maganlal's case (supra) an application u/s 31(1) of the Act cannot be

put on par to a suit for enforcement of a mortgage nor the order passed thereon u/s 32 of the Act be put on par as if it was an order in a suit

between a mortgagee and the mortgagor for sale of mortgaged property. On the other hand the substantive relief in an application u/s 31(1) is

something akin to an application for attachment of property in execution of decree at a stage posterior to the passing of the decree. The view in

Maganlal's case (supra) was reiterated by apex Court in The Maharashtra State Financial Corporation v. Jaycee Drugs and Pharmaceuticals

Pvt.Ltd. and Ors. GT 1991 (1) SCC 524.

6. In view of aforesaid position in law, conclusion is inevitable that the period prescribed under Article 130 of the Limitation Act and not Article

137 thereof is applicable to an application u/s 31(1) of the Act. The order passed by the learned District Judge is set aside. The application is

allowed. No costs.

12. The division bench of Orissa High Court has also in the case of Orissa State Financial Corporation Vs. Shri Sailendra Narayan Patnaik and

Another, has taken a similar view that the provision of Article 137 are applicable. The Division Bench of Orissa High Court has followed the

Judgment of Rajasthan High court and Madras High Court and the Division Bench has taken the view as under:

5. In course of hearing of the said appeal, a preliminary question cropped up i.e. as to whether the application u/s 31(1)(aa) of the Act is barred

by limitation? This Court in paragraph 7 of the judgment observed as follows:

An application u/s 31 of the Act lies to the District Judge which is no doubt, a Court. Supreme Court in Maharashtra State Financial Corporation

v. Jaycee Drugs and Pharmaceuticals P.Ltd and Ors. JT 1991 91 SC 524 has already held that District Judge exercising jurisdiction Under

Sections 31 and 32 of the Act functions as a Court of Ordinary Civil Jurisdiction. Thus, although no period of limitation has been prescribed for an

application. u/s 31 of the Act, the same will be governed by Article 137 of the Limitation Act. It is not settled that Article 137 of the Limitation Act

is applicable to all applications before a court (Vide The Kerala State Electricity Board, Trivandrum Vs. T.P. Kunhaliumma,), Mr. Mohanty

appearing for the Corporation does not dispute that Article 137 of the Limitation Act is applicable.

On the basis of the submissions made on behalf of the parties, this Court dismissed the Misc.Appeal solely on the ground that the Corporation's

application u/s 31(1)(aa) of the Act was grossly barred by limitation because of operation of Article 137 of the Act. However, in the concluding

paragraph, it has been observed as follows:

In view of the aforesaid findings that the application u/s 31(1)(aa) of the Act was barred by limitation and accordingly not maintainable it is not

necessary to consider the other questions raised on behalf of the appellant. However, it is kept on record that Mr. Mohanty, learned counsel for

the appellant has raised substantial and important points about the correctness of the impugned judgment. The points raised by Mr. Mohanty are

left open for being considered in an appropriate case and dismissal of this appeal should not be construed as affirmance of the reasons recorded

and observations made in the judgment of the Court below.

6. Mr. Mohanty, learned counsel appearing on behalf of the appellant-Corporation assails the impugned judgment of the Single Bench and

submitted that the finding that Article 137 of the Limitation Act governs a petition filed u/s 31 of the Act and that the prescribed period is 3 years, is

contrary to law. It is further submitted that a proceeding u/s 31(1)(aa) of the Act being akin to an execution proceeding. Article 136 of the

Limitation Act is applicable and the Corporation had a right to file an application u/s 31(1)(aa) of the Act within a period of 12 years and not 3

years, as wrongly held by the Single Bench.

7. Perusal of the judgment reveals that Article 137 of the limitation Act is applicable. Thus, the judgment passed by the learned Single Judge is

based on a concession of the Advocate. In normal course, we would not have entertained a contrary submission by the Corporation who had

conceded a point-before the Single Bench. However, we feel that the impugned decision has a far reaching consequence, inasmuch as, whether

Article 136 or 137 of the Limitation Act applies to the petition filed Under Sections 31(1)(aa) and 32 of the Act would affect several transactions

throughout the country. In that view of the matter, we are persuaded to examine the point of law raised by the appellant i.e. whether Article 136 of

137 of the Limitation Act applies to the proceedings initiated by the Corporation u/s 31(1) of the Act. Sec. 31 of the Act vests a special power

upon the financial corporation to apply to the District Judge for enforcement of its claim against a defaulting debtor for repayment of any loan or

advance granted to it. The occasion for invoking the provisions of Section 31 of the Act arise only when there is breach of agreement. The State

Financial Corporation Act is a special statute conferring right upon the Corporation to take over the management or possession or both of the

industrial concern and also vests a right upon the Corporation to transfer the assets pledged, mortgaged, hypothecated or assigned to the Financial

Corporation by way of lease or sale and realise the outstanding dues. On the basis of the discussions made above, only 2 points are to be

answered in the present appeal:

(1) Whether the concession of the lawyer, in a pure question of law binds the parties;

(2) Whether the claim made by the Corporation u/s 31(1)(aa) is governed under Article 136 or 137 of the Limitation Act.

13. Rajasthan High Court had an opportunity to consider the aforesaid Judgment and in the case of Rajasthan Financial Corporation Vs. Banwari

Lal and Others, has considered once again the earlier Judgment of the Apex Court and in para 4 and 5 and 8 of the said Judgment has held has

under:

4. In Abdul Mobin Ansari and others Vs. The Maharashtra State Financial Corporation, , it has been held that Section 32 of the Act is nothing

but an execution proceedings.

5. Full Bench of the Himachal Pradesh High Court headed by Hon"ble N.M.Kasliwal, C.J. (as he then was) in H.P.F.C. v. Tourist Hotel 1989 (2)

CLR 1999 :A IR 1990 HP 27 has observed that the substantive relief sought in an application u/s 3(1) of the Act is something akin to an

application for attachment of property in execution of decree at a stage posterior to the passing of the decree.

8. The observation of the court below that the application was barred by the limitation in view of the Article 137 of the Limitation Act, is also

perverse and bad in law. The court below has not appreciated Section 31 and 32 of the Act in right perspective. As already stated the application

u/s 31(1) of the Act cannot be treated as plaint. The substantive relief sought in the application is alike the relief sought in the execution

application.

14. Madras High Court has also taken similar view in the case of Tamil Nadu Industrial Investment Corporation Ltd. v. Trinity Music Recorders

reported in O.P. No. 644 of 1997 decided on 23.11.99 and has held that the application u.s. 31(1)(b) is governed by Article 136 and not 137. In

para 10 and 11 of the said Judgment the learned single Judge of Madras High Court has held as under;

10. Learned counsel for the 3rd respondent next contended that the petition claim is barred by time. The loan was foreclosed in the year 1992 and

the property was brought to auction in the year 1994 and from the date of August, 94, the petition has been filed within a period of three years.

Learned counsel further contended that when the loan was foreclosed in 1992 the petition ought to have been filed within a period of three years

and as such, according to Article 137 of the Limitation Act, the claim is barred by time, I am unable to agree with this contention of the learned

counsel for the 3rd respondent. The deed of guarantee is a continuing one and respondent 2 and 3 are jointly and severally liable to pay the

amount. Article 137 of the Limitation Act is not applicable to the case on hand.

11. Learned counsel for the petitioner also relied on M/s. Easwari Industries, Shencottai and Ors. v. Tamil Nadu Indl. Investment Corporation

Ltd. by its Branch Manager, Tirunelveli 1998(1) MLJ 1 wherein it is observed that the order passed u/s 31 of the State Financial Corporation Act

is not a decree under the Code and procedure of making, the calculation held, was a process of execution of a decree already passed under the

Act, Learned counsel for the petitioner also relied upon Maganlal Vs. Jaiswal Industries, Neemach and Others, , and also Rajasthan Financial

Corporation Vs. Banwari Lal and Others, . It is stated that where an application is filed by State Financial Corporation u/s 31(1) for enforcing the

liabilities of the sureties which are co-extensive with the principal debtor who did not make the repayment of loan, the substantive relief sought in

the application is like the relief sought in an execution proceedings. Hence, it cannot be treated as a plaint and it would not be barred by limitation

provided under Article 137 of Limitation Act. These decisions are applicable to the case on hand.

15. However, my attention is drawn to the full bench Judgment of the Karnataka High Court in the case of Karnataka State Financial Corporation

and Ors. v. Smt. Jaya Menon and Ors. reported in AIR 2004 Kar 370 wherein the Hon"ble Karnataka High Court has taken the contrary view

and held that the application filed u/s 31 of the Act is governed by the provisions of Article 137 of the Limitation Act and not by Article 136. The

view is taken on the basis that the application u.s. 31 cannot be said to be in execution of any decree because there is no decree and therefore

residuary Article 137 would apply. The Full bench of the Karnataka High Court has relied upon the Judgment of Apex Court in the case of The

Kerala State Electricity Board, Trivandrum Vs. T.P. Kunhaliumma, in which while considering the provision of Article 137 it has been held that it

applies to all applications the limitation period for which is not specifically provided for under the Schedule. It has been further held in the said

Judgment particularly in para 22 thereof that all applications whether they are under Civil Law or under any special enactment it will be governed

by Article 137 unless such special law or special enactment prescribes the period of limitation therein. It was thus, held by the full bench of

Karnataka High court that in view of the fact that SFC's Act 1951 does not prescribe for any period of limitation the application must be governed

by Article 137 and the period of limitation prescribed is period of 3 years from the date of Accruing the cause of action. In so far as earlier

Judgments of Apex Court are concerned which are set out hereinabove, the court was of the view that the said Judgments are not applicable

because it does not arise in context of limitation . The full bench Judgment of Karanataka High Court has held as under:

Similarly, the provisions of Article 136 prescribing the period of limitation for filing application for execution of any decree or order of any Civil

Court is also not applicable to an application filed u/s 31 of the SFC Act as the said application so filed cannot be said to be in execution of any

decree. Having regard to the nature and scope of the provisions of Sections 31 and 32 of the Act explained by the Supreme Court in Maharashtra

State Finance Corporation case referred to above. Therefore, the only article that would be applicable to the application filed u/s 31 of the Act

would be 137 of the Limitation Act which prescribes limitation of three years from the date when the right to apply accrues.

16. The learned counsel for respondent has also relied upon the Judgment of the learned single judge of this court in the case of Kiril Fine Art and

Others Vs. The Maharashtra State Financial Corporation, in which the learned single Judge has held that on combine reading of s. 31 and 32 of

the Act it is clear that the District Judge can only grant relief as enumerated therein and the court has no power to pass any order in the nature of

decree for payment of any amount. It has been contended by the learned counsel for the respondent by relying on the aforesaid Judgment that if

there can be no decree passed then how there can be an execution of the decree in proceeding u.s. 31.

17. After considering all the aforesaid Judgments of the Apex Court and various Judgement of the High Courts, I am of the opinion that it is plainly

clear that the provision u.s. 31(1) r/w s. 32 of the SFC's Act, 1951 is a proceeding in the nature of execution of decree by mortgagee. It is no

doubt true that there can be no decree passed in the said proceedings because proceedings are at the stage posterior to the passing of a decree.

The Apex Court has in the aforesaid four judgments referred to above has considered the nature of the proceeding u.s. 31(1) and 32 of the SFC"s

Act and has unequivocally held that the proceedings under the aforesaid provision is in the nature of execution of decree. In am of the opinion that

in the light of the Judgment of the Apex Court it is no doubt clear that the present proceeding being in execution of decree the provision of Article

136 prescribing period of 12 years would be applicable and not provisions of residuary Article 137. It is time and again held by the apex court that

where there is a special provision provided for then by necessary implication the general provision or residuary provision must be excluded. In

view of the fact that Article 136 directly applies to the present case because the present proceedings are in nature of execution proceedings and

the financial corporation are decree holder. Thus, in my opinion, the provisions of Article 136 would clearly apply and provisions of Article 137

will not be applicable to the present case which is residuary in nature. I am in complete agreement with the view expressed by various high courts. I

however, do not agree with the opinion of the full bench of Karnataka High Court. In my opinion the view taken by full bench of Karnataka High

Court is not in consonance with the view taken by the Apex Court in the aforesaid four Judgments namely, Gujarat State Financial Corporation V.

Natson Manufacturing Co., Everest Industrial Corporation V. Gujarat State Financial Corporation, Maganlal V. Jaiswal Industries, Maharashtra

State Financial Corporation v. Jaycee Drugs & Pharmaceuticals P.Ltd. (Supra). I also do not find any detail discussion in the Judgment of the full

bench of Karnataka High Court discussing the binding opinion of the apex court in the aforesaid judgments. The aforesaid issue of nature of

proceeding and consequent application of Article 136 or 137 of Limitation Act is not considered and therefore, I am unable to accept the view of

the Full Bench of the Karnataka High Court in the aforesaid case. The Karnataka High Court mainly dealt with the arguments of the application of

Article 112 and 137 but did not consider in detail the application of Article 136 of the Limitation Act, 1963. Article 112 undoubtedly has no

application as rightly held by Karnataka High Court because it pertains to any suit by and on behalf of Central Government and State Government.

Neither the financial corporation is a Central Government nor a State Government thus provision of the said Article 112 is not applicable. Merely

because for the purpose of Article 12 of Constitution of India the said financial institutions are treated as a State. In my opinion they would neither

be the Central Government nor the State Government as contemplated under Article 112 of Limitation Act. In the aforesaid circumstances, I am

unable to concur with the view expressed by the Karnataka High Court in the aforesaid judgment. However, I am in full agreement with the view

expressed by Orissa High Court, Rajasthan High Court and Madras High Court wherein it is held that the proceedings are in the nature of execution

of decree and therefore Article 136 applies and not Article 137 of the Limitation Act. In the light of the aforesaid position in law, I reject the

contention of the respondent that the present petition is time barred by the law of limitation. In the light of aforesaid view, I have taken I do not feel

it necessary to go into whether the provision of s. 5 are applicable to the proceeding u.s. 31(1) of the SFC"S Act, 1951 and/or sufficient cause has

been made out by the petitioner or not to condone the delay.

18. The next contention which has been raised is that because of theft committed of the company's assets which were mortgaged with the

petitioner herein, liability of the respondent to the extent of the amount lost by the said theft has to be reduced. It has been contended that on

20.4.99 an Official Liquidator took possession of the mortgaged properties and theft took place on 4.6.00. It is an admitted position that on the

said theft being committed on 4.6.00 necessary complaint has been registered with the police by the Security Guards Agency on 14.6.00. The said

issue of theft is a subject matter of the criminal investigation and the proceedings are separately pending in that behalf. I do not see how the

petitioner is liable for the said theft being committed when it is an admitted position that the petitioners never took possession of the said assets nor

the petitioners were able to sell the same by virtue of the BIFR proceedings pending under the provisions of Sick Industrial Companies Act, 1985.

The Official Liquidator was in possession when the theft took place. Official Liquidator has already taken action of lodging necessary criminal

proceedings. Security Guards are also employed by the Official Liquidator and not by the petitioners. In any event, further investigation is in

progress. In view thereof I am not inclined to accept the contention of the respondents that because of theft committed I should held the petitioners

responsible and to the extent of loss of the assets by virtue of the said theft I must give credit to the petitioner herein. In view thereof I reject the

aforesaid contention. The second contention raised is in respect of the stamp paper on which the guarantees are executed by the respondents. It is

contended that the same are in the name of the company and not in the name of the person who has executed the said guarantees and under the

Stamp Act. In view of the amendment the stamp paper must contain the name of the party who has executed the document. It has been thus,

contended that guarantees executed on such a stamp paper is not a valid guarantee. I am unable to accept the aforesaid contention of the

respondents herein. Firstly,because such a provision was not existing when the said guarantee were executed in 1991. Secondly, it is an admitted

position that the respondents herein are the promoters and directors of the said company which is a borrower company. Stamp papers are in the

name of the borrower company and in view thereof I do not find any substance in the contention advanced by the respondents herein. I

accordingly reject the same and pass the following order:

19. That the respondents to pay jointly and severally to the petitioner Rs. 6,91,99,911/-with further interest " 12% from today till payment and/or

realisation.