

**IN THE COURT OF THE DISTRICT JUDGE, KHURDA  
AT BHUBANESWAR.**

Present :

**Dr. D.P. Choudhury,**  
District Judge, Khurda  
at Bhubaneswar.

*Dated, Bhubaneswar the 19<sup>th</sup> Dec. '14.*

**C.M. Appl. No.143 of 2006.**

Industrial Promotion and Investment Corporation of Orissa Limited (IPICOL), A Govt. of Orissa Undertaking having its Registered Office at IPICOL House, Janpath, Bhubaneswar-22, District - Khurda, represented through its Deputy Manager as authorised person Sri Akhila Kumar Sahoo, aged about 52 years, Son of late Lingaraj Sahoo, IPICOL House, Janpath, Bhubaneswar.

... **Petitioner.**

***-V e r s u s-***

1. Sri Bidhan Chandra Patnaik, aged about 57 years, Son of late Gopal Chandra Pattnaik of Aurobindo House, Kalpana Square, Bhubaneswar - 751 016, Orissa.
2. Sri Ram Saran Luthra, aged about 77 years, Son of Late K.C. Luthra, Business by occupation, resident of C/78, Ananda Niketan, New Delhi-21. (Case against him is abated vide order dated 14.10.2011).
3. Sri Mukesh Luthra, aged about 50 years, Son of Ram Saran Luthra, Business by occupation, resident of C/78, Ananda Niketan, New Delhi-21 (Set ex parte vide order dated 22.11.2013).

... **Opposite Parties.**

**Counsel :**

For Petitioner      --      Shri P.K. Das & Associates.  
For O.P. No.1      --      Shri P.K. Mohanty & Associates.  
For O.P. Nos.2 & 3--      None.

Date of Arguments : 20.11.2014.

Date of Order : 19.12.2014.

**No.121, Dated 19.12.2014.**

**O R D E R**

This is an application under section 31 of the State Financial Corporations Act, 1951 (hereinafter called “the Act”) for recovery of outstanding dues of Rs.61,81,778.50p. with pendente lite and future interest @ 15% per annum towards term loan, ad interim injunction restraining the opposite parties from transferring or removing the properties mentioned in the schedule in their names and their heirs / successors-in-interest, or in the alternative, in the failure to recover dues, for an attachment order before passing of the judgment by attaching the properties of guarantors, their heirs and successors-in-interest.

2.            Backdrop of the case of the petitioner is that the petitioner is a State Government Undertaking to carry on business of investment company for providing financial assistance to industrial enterprises in the State of Orissa. By virtue of powers conferred by sub-section (1) of section 46 of the Act read with the Central Government Notification dated

11.12.1986, provisions of sections 27, 29, 31, 32, 32A, 32-G, 41, 41A, 42 & 44 of the Act are directed to apply to the petitioner-Company. Opposite party Nos.1 to 3 being promoters and Directors of the Company in the name and style M/s. Orissa Woolen Mills Pvt. Ltd. (in short, "OWM (P) Ltd.") obtained loan from the petitioner-Company being guarantors of the said OWM (P) Ltd. to repay its outstanding dues. Opposite party No.1 being promoter of OWM (P) Ltd. was looking after the said Company in carrying on its business on manufacturing of woolen blankets, yarns, shoddy, blankets. The OWM (P) Ltd. had availed financial assistance of Rs.30,00,000/- from the petitioner although project cost was Rs.1.14 crores. The rest of money was arranged by promoters otherwise.

3. On the application made by OWM (P) Ltd., the petitioner sanctioned a term loan of Rs.30,00,000/- on 30.11.1983 on mortgage / hypothecation of the fixed assets of the said Company in favour of the petitioner as security towards the term loan. Accordingly, documents were executed and submitted on 13.08.1984. Opposite party Nos.1 to 3 also executed deed of guarantee on 13.08.1984. The said deed of guarantee is irrevocable and continuing in nature till full repayment of the loan with interest. After availing loan, OWM (P) Ltd. did not repay the dues of the petitioner as per

repayment schedule. Thereafter, notice was issued. On 30.11.1993, the outstanding became Rs.68,07,211.50p. Then, the petitioner-Company issued notice under section 29 of the Act to take possession of the property of OWM (P) Ltd. In fact, on 14.10.1993, the petitioner took into their possession the property of the borrowing Company i.e. OWM (P) Ltd., as no reply was filed. Thereafter, the mortgaged properties were sold to M/s. Shakti Pack Pvt. Ltd. on 30.11.1993 on payment of a consideration amount of Rs.48,00,000/-. After deducting such amount, still remained a sum of Rs.20,91,251.50p. as on 30.11.1993 on OWM (P) Ltd.. On 13.11.2001, notice was issued by the Advocate for the petitioner to the opposite parties, but the same did not receive any response. Then, on 19.06.2002, notice was issued to the opposite parties for one-time-settlement, but there was no response to the same for which on 17.04.2006, this application was filed for realization of Rs.61,81,778.50, including principal of Rs.20,91,251.50p. and interest accrued thereon, and other reliefs as aforesaid.

4. Opposite party No.3 is set ex parte. The case against opposite party No.2 is abated. Opposite party No.1 filed written statement stating that there is no cause of action to file the case, the case is barred by limitation, this Court has no jurisdiction to entertain this case and no schedule of property is

attached to the application. It is also averred, inter alia, that the application filed by the petitioner is bad for non-joinder and mis-joinder of necessary parties. It is the case of this opposite party that he was one of the Directors of OWM (P) Ltd. and stood as guarantor in the capacity of Director of the Company, but not in his personal capacity. At the same time, he denied to have promoted an Industrial Unit in the name and style of M/s. Orissa Woolen Mills Private Ltd. It is also denied by opposite party No.1 that he had applied for a term loan of Rs.30,00,000/- for OWM (P) Ltd.; but, at the same time, he admitted that he stood as guarantor for the loan sanctioned to the said Company. He denied to have received any notice from the lawyer of the petitioner. According to this opposite party, the petitioner has taken over the property of OWM (P) Ltd. and sold the same to the satisfaction of the Agreement and there is nothing outstanding against the Company or its guarantors, including himself. He further averred that all his properties are at Keonjhar for which jurisdiction lies at Keonjhar but not at Bhubaneswar. He also took the plea that he has resigned from the post of Director since 17.02.1990 and the same was accepted on 18.02.1990. It is, therefore, prayed to reject the petition with cost.

5. After going through the pleadings of both parties,

the following points emerge for consideration :

- (i) Whether the case is maintainable ?
- (ii) Whether the case is barred by law of limitation ?
- (iii) Whether there is cause of action to file the case ?
- (iv) Whether the opposite parties are jointly and severally liable to pay the outstanding dues of Rs.61,81,778.50p. to the petitioner ?
- (v) To what other reliefs, the petitioner is entitled ?

**Point No.(iv) :**

6. This issue being decisive to other issues is taken up at the first instance for discussion. The petitioner in order to prove its case has examined one witness whereas opposite party No.1 has examined himself as O.P.W.1. Both parties have adduced documentary evidence. When both parties have adduced documentary evidence, onus of proof loses its importance. Keeping in mind the said principle, let me find out if petitioner or opposite party No.1 have proved their respective pleas.

7. It is revealed from the evidence affidavit of P.W.1, who is none other than the Joint Manager of the petitioner-Company, that the opposite parties had promoted the Industrial Unit, namely, M/s. Orissa Woolen Mills (P) Ltd. at a project cost of Rs.114.00 lakhs and on their approach and application, the petitioner sanctioned term loan of Rs.30,00,000/- on 30.11.1983. In support of this, he has proved the order vide

Ext.15, which shows that on 30.12.1983, Rs.30,00,000/- was sanctioned as term loan to OWM (P) Ltd. pursuant to the application No.308 dated 29.11.1983. He has also proved the letter of hypothecation of the properties of OWM (P) Ltd. vide Ext.13, which shows that Biswajit Das, Managing Director of the Company, has executed the letter of hypothecation by hypothecating plants and machineries of the said Private Company. He has also stated that the opposite parties executed deed of guarantee on 13.08.1994 and proved the said document vide Ext.8, which shows that the three opposite parties became guarantors for OWM (P) Ltd. towards sanction of the loan of Rs.30,00,000/- in favour of the said Private Company. According to P.W.1, the opposite parties did not repay the principal amount with interest for which they issued legal notice on 21.04.1993 under section 29 of the Act and, in fact, on 14.10.1993, the petitioner took possession of the assets of the opposite party-Company and sold the same to M/s. Shakti Pack Pvt. Ltd. on 30.11.1993 on a consideration of Rs.48,00,000/-. The said amount was distributed between Orissa State Financial Corporation (OSFC) and petitioner-Company on proportionate basis. The said legal notice vide Ext.9 shows that there was outstanding of Rs.64,43,382.50p. Including principal and interest against OWM (P) Ltd.. He has also proved the letter of

the petitioner-Company issued to M/s. Shakti Pack Private Ltd. vide Ext.10, which shows that the sale consideration became Rs.48,00,000/-.

8. It is further stated by P.W.1 that the petitioner gave another opportunity to the guarantors to repay the outstanding dues to their Company by issuing lawyer's notice to the guarantors dated 13.11.2001 with proposal for one-time-settlement of the rest of the dues; but the opposite parties did not respond to the same. Again, they gave another notice on 01.11.2002, but no response came. In support of his statement, he has proved the letter dated 13.11.2001 of Advocate for the petitioner vide Ext.6, which shows that after selling of the assets of OWM (P) Ltd. on 30.11.1993, there still remained outstanding of Rs.46.73 lakhs as on 31.08.2000. He has further stated that in February, 2006, the principal with interest became altogether Rs.61,81,778.50p., which was outstanding; but, on the date of deposition i.e. March, 2014, the amount became Rs.88,60,409.50p.. In support of this, he has proved the loan ledger report of OWM (P) Ltd. maintained by the petitioner vide Ext.2. In cross-examination, he has admitted that loan was advanced to OWM (P) Ltd.. In para-24 of his cross-examination, he has admitted that IPICOL took possession of the opposite parties' factory in 1993 under section 29 of the Act

and three guarantors executed the deed of guarantee in the capacity of Directors. Regarding resignation of opposite party No.1, he has stated that they have not received any intimation from the Board of Directors. In para-26 of cross-examination, he has stated that the factory was seized under section 29 of the Act and was sold. The Company started its production in 1984 and supplied blankets and it was sold for Rs.48,00,000/- to M/s. Shakti Pack Pvt. Ltd.. He has further stated that opposite party No.1 had given equitable mortgage and in the letter of hypothecation, personal property of opposite party No.1 was mortgaged vide Ext.10. But, said Ext.10 cannot be counted since it was actually furnished by the Managing Director of the Company. In para-28 of cross-examination, P.W.1 has clarified that after adjustment of the sale-proceeds falling to the share of the petitioner, petitioner came to know on 30.11.1993 that around Rs. 20,91,251.50p. was still outstanding against the opposite parties. So, in cross-examination, it is very clear that after properties were sold on 30.11.1993 and after apportionment of the loan amount between OSFC and petitioner, there still remained outstanding of Rs.20,91,251.50p. as on 30.11.1993. Apart from this, Ext.8 shows that the opposite parties executed the deed of guarantee as a supplementary to the equitable mortgage deed for a loan of

Rs.30,00,000/- sanctioned in favour of OWM (P) Ltd.. Nothing is found from the guarantee deed that they stood as guarantors being Directors of the Company, although the statement of P.W.1 shows that they became guarantors as the Directors of the Company. The documents will be preferred to the oral testimony of P.W.1. On the other hand, the evidence of P.W.1 read with Ext.8 shows that opposite party Nos.1 to 3 gave personal guarantee for the loan amount of Rs.30,00,000/- sanctioned in favour of OWM (P) Ltd., although they are Directors of the said Company. Not only this, but also the statement of P.W.1 coupled with the documents disclose that as on 30.11.1993 there was outstanding of Rs.61,81,778.50p. with pendente lite and future interest against the opposite parties, who are jointly and severally liable to pay the same on that date after adjustment of the sale-proceeds of the mortgaged property i.e. factory OWM (P) Ltd. Further, the evidence of P.W.1 coupled with the documents show that in spite of notice, the opposite parties did not repay the loan which became Rs.61,81,778.50p. as on the date of filing of the case.

9. Opposite party No.1 has examined himself as O.P.W.1. It is revealed from his evidence that OWM (P) Ltd. took term loan of Rs.30,00,000/- from the petitioner and he being one of the Directors stood as guarantor and executed the

letter of guarantee as personal guarantor. He further revealed that on 17.02.1990, he resigned and the same was accepted on 18.02.1990. He has admitted that on 30.11.1993, after sale of the factory to M/s. Shakti Pack Pvt. Ltd., there remained outstanding amount of Rs.23,29,752.52p. against OWM (P) Ltd. He has proved the true copy of the minutes of the Board of Directors held on 17.02.1990 showing his resignation vide Ext.B. But, in cross-examination, he has admitted that Ext.B is not the original document. On going through Ext.B, it appears that it is a xerox copy of the extract of the meeting of Board of Directors. It has not been certified by any Authority, but attested to be true copy by one Notary. There is nothing available from the evidence of O.P.W.1 as to why this true copy has been produced instead of the original. On the other hand, the provision of section 65 of the Indian Evidence Act has not been complied with by O.P.W.1 to prove the extract of the minutes of Board of Directors vide Ext.B. Unless the preconditions to adduce secondary evidence are complied with, secondary evidence cannot be allowed to be led. Apart from this, the extract as a copy of the original and true copy of that extract is not permissible in law to be proved. Hence, Ext.B cannot be taken as a proof to show the resignation of O.P.W.1 as Director of OWM (P) Ltd. He has admitted in cross-

examination that he has given personal guarantee as the Director, but there is nothing to show on record that being the Director he has furnished the guarantee. Thus, it is clear from the evidence of O.P.W.1 that he has stood as a guarantor for OWM (P) Ltd. and has given personal guarantee for the loan of Rs.30,00,000/- sanctioned to the said Company and he has not resigned so far as per the evidence adduced by him.

10. From the aforesaid marathon discussions, it is manifestly clear that the petitioner has succeeded to prove that due to non-payment of outstanding dues, notice was sent to OWM (P) Ltd. under section 29 of the Act and as no response was received, the concerned industry was sold to M/s. Shakti Pack Pvt. Ltd. on 30.11.1993 for a consideration of Rs.48,00,000/- and on that day there was outstanding of Rs.20,91,251.50p. after adjusting term loan and interest. As such, as on 21.04.1993, there was outstanding of Rs.68,07,211.50 i.e. principal of Rs.29,02,049/- and interest of Rs.39,05,162/- against the opposite parties, who are the guarantors. Opposite party No.1 has failed to prove that he did not stand as a guarantor in his personal capacity, but being the Director of the Company. He has also failed to prove that he has resigned from the Board of Directors of OWM (P) Ltd. on 17.02.1990.

11. Since opposite party No.1 has given personal guarantee, he is liable to pay the amount accrued against OWM (P) Ltd. In this connection, I rely upon the decision in the case of *Sita Ram Gupta Vs. Punjab National Bank & Ors.* reported in **2008 (1) CLR (SC) - 751**, where Their Lordships have been pleased to observe that :

“Section 130 of the Indian Contract Act, 1872, which reads as under :

Revocation of continuing guarantee - A continuing guarantee may at any time be revoked by the surety, as to future transactions, by notice to the creditor”.

12. With due respect to the above decision, I find that a continuing guarantee may, at any time, be revoked by the surety and after further analysis Their Lordships have been pleased to observe that liability of guarantor to pay the decretal amount exists even after revocation of the guarantee. In the case at hand, no proof of revocation by opposite party No.1 as surety is found. Hence, in such situation, opposite party No.1 is still liable to pay the outstanding dues accrued against OWM (P) Ltd. on the date of filing of the case and after sale of the property on 30.11.1993, there still remained outstanding dues, as discussed above. Point No.(iv) is answered accordingly.

**Point No.(ii) :**

13. It is the case of the petitioner that by 30.11.1993, there was outstanding dues of Rs.68,07,211.50p. against the opposite parties and after adjustment of sale proceeds of the mortgaged property of OWM (P) Ltd, there still remained Rs.20,91,251.50p. and the same became principal again and interest accrued thereon for which such amount became Rs.61,81,778.50p. on the date of filing of the case. On the other hand, opposite party No.1 took the plea that the case is barred by limitation as it is filed beyond three years when Rs.20,91,251.50p. became outstanding on 30.11.1993 against OWM (P) Ltd. and, consequently, upon the guarantors. Before going into evidence, let me find out the norms on this aspect. It is reported in the case of ***Deepak Bhandari Vs. H.P. State Indust. Dev. Corp. Ltd. & Ors.*** [2014 SAR (Civil) 385], where Their Lordships have been pleased to observe at paragraphs 22 & 23 as under :

“22. It is thus clear that merely because the Corporation acted under Section 29 of the State Financial Corporation Act did not mean that the contract of indemnity came to an end. Section 29 merely enabled the Corporation to take possession and sell the assets for recovery of the dues under the main contract. It may be that only the Corporation taking action under Section 29 and on their taking possession they became deemed owners. The mortgage may have come to an end, but the contract of indemnity, which was an independent contract, did not. The right to claim for the balance, arose, under the contract of indemnity, only when the sale proceeds

were found to be insufficient. The right to sue on the contract of indemnity arose after the assets were sold. The present case would fall under Article 55 of the Limitation Act, 1963 which corresponds to old Articles 115 and 116 of the old Limitation Act, 1908. The right to sue on a contract of indemnity / guarantee would arise when the contract is broken.

23. Therefore, the period of limitation is to be counted from the date when the assets of the Company were sold and not when the recall notice was given”.

14. With due respect to the said decision, I find that the period of limitation is to be counted from the date when the assets of the Company were sold, but not when the recall notice was given. In the instant case, it is revealed from the averments made in the application and the evidence of P.W.1 that after sale of plants and machineries, which were mortgaged under Ext.10 with the petitioner, to M/s. Shakti Pack Pvt. Ltd. on 30.11.1993 on a consideration of Rs.48,00,000/- due to non-payment of the outstanding loan by OWM (P) Ltd., a sum of Rs.20,91,251.50 became due as principal. Thereafter, in February, 2006, interest of Rs.40,90,527/- accrued on the said principal and the total amount of Rs.61,81,778.50p. was due against OWM (P) Ltd. and the guarantors as on the date of filing of the case. It is revealed from Ext.3 that the petitioner has sent notice on 19.06.2002 to pay Rs.48,42,461.50p. and as on that date term loan was shown as Rs.20,91,251.50p. Similarly, Ext.5 shows that on 13.11.2001, notice was given to

opposite party No.1 for enforcement of the personal guarantee under section 31 of the Act in a similar way. It is further found from the evidence of P.W.1 that opposite party No.1 has never responded to such notices. On the other hand, opposite party No.1 took the plea that he has resigned in 1990, but the same is not successfully proved. He does not admit that after sale of the mortgaged plants and machineries, there is fresh Agreement between OWM (P) Ltd. and the petitioner. Thus, three years as per Article 55 of the Limitation Act, 1963 will start from 30.11.1993. The case is filed on 17.04.2006. As such, this case is barred by law of limitation to recover the dues of Rs.61,81,778.50p. from the opposite parties, including opposite party No.1. Hence, the present application is not maintainable being barred by limitation.

**Point No.(iii) :**

15. In point No.(iv), it has already been held that there is outstanding of Rs.20,91,251.50p. with interest accrued thereon against OWM (P) Ltd. and that has become Rs.61,81,778.50p. on the date of filing of the case. But, in point No.(ii), it is found that the case is barred by limitation. When the claim of Rs.61,81,778.50p. outstanding on the date of filing of the application is barred by limitation, there appears to be no cause of action to realise the said amount even if the amount of

Rs.20,91,251.50p. as on 30.11.1993 became outstanding against the opposite parties, including opposite party No.1. So, there is no cause of action to file the application. Point No.(iii) is answered accordingly.

**Point No.(i) :**

16. It has already been held that there is no cause of action to file the application and the same is also barred by limitation. Nothing is buttressed that the case is otherwise maintainable. Thus, the case is not maintainable.

**Point No.(v) :**

17. It is observed that although there is outstanding dues against the opposite parties, as discussed in the foregoing paragraphs, the same is barred by limitation and there is no cause of action to file the case. As such, no relief can be granted to the petitioner. Hence ordered :

**O R D E R**

The claim made by the petitioner against the opposite parties is hereby rejected without cost. The C.M. Application under section 31 of the Act is disposed of accordingly.

**District Judge, Khurda  
at Bhubaneswar.  
19.12.2014.**

Dictated, corrected by me and pronounced in the open Court this day the 19<sup>th</sup> December, 2014.

**District Judge, Khurda**  
**at Bhubaneswar.**  
19.12.2014.

**List of witnesses examined for petitioner.**

P.W.1                --     Jagannath Patra.

**List of witnesses examined for O.P.No.1.**

O.P.W.1     --     Bidhan Chandra Pattnaik.

**List of documents admitted in evidence for petitioner.**

Ext.1            --     Authorization letter,  
Ext.2            --     Extract of loan ledger,  
Ext.3            --     Letter dated 19.06.2002,  
Ext.4            --     Notice dated 02.11.2002,  
Ext.5            --     Advocate Notice,  
Ext.6            --     Advocate Notice,  
Ext.7            --     Advocate Notice,  
Ext.8            --     Deed of Guarantee,  
Exts.8/a to 8/c    --     Signatures of opposite parties in Ext.8,  
Ext.9            --     Notice dated 21.04.1993,  
Ext.10           --     Sale Notice dated 22.11.1993,  
Exts.11, 11/a & 11/b --     Notices dated 09.12.1994,  
Ext.12           --     Notice dated 20.11.2013,  
Ext.13           --     Letter of Hypothecation,  
Ext.14           --     Letter dated 24.03.2006 &  
Ext.15           --     Loan sanction letter.

**List of documents admitted in evidence for O.P.No.1.**

Ext.A            --     Certified copy of report of the Board of  
Directors along with Balance-sheet &  
Ext.B -           --     True copy of extract of the minutes of the  
meeting of Board of Directors.

**District Judge, Khurda**

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**at Bhubaneswar.**

19.12.2014.