

(2001) 04 CAL CK 0018

In the Calcutta High Court

Case No : G.A. No's. 99 and 100 of 2001 in C.S. No. 83 of 2000

Hindusthan Magcobar Chemicals Ltd.

APPELLANT

Vs

O.P. Rajgarhia

RESPONDENT

Date of Decision : 11-04-2001

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 151, 47

Contract Act, 1872 — Section 146, 147

Sick Industrial Companies (Special Provisions) Act, 1985 — Section 16, 22, 22(1)

Citation : (2002) 110 CompCas 661

Hon'ble Judges : Dilip Kumar Seth, J

Bench : Single Bench

Advocate : Pratap Chatterjee, for the Appellant; S.N. Mukherjee, for the Respondent

Final Decision : Dismissed

Judgement

Dilip Kumar Seth, J.—The moot question that arises in these two applications being G. A. No. 99 of 2001 and G. A. No. 100 of 2001 is as to whether the decree obtained against the defendant-applicant can be enforced or proceeded with or could be treated to be a valid decree, against the defendant-judgment-debtor by the plaintiff, in view of the fact that the claim that was sought to be enforced arises out of a guarantee given by the defendant against recovery of an advance made to a company against which proceedings under Sick Industrial Companies (Special Provisions) Act, 1985 (hereinafter referred to as the SICA) was initiated and referred to the Board for Industrial and Financial Reconstruction (hereinafter referred to as the BIFR). In order to appreciate the question first we may refer to the facts of the case in short, before we note the respective arguments advanced by learned counsel for the respective parties. The plaintiff-decree holder on February 9, 1996, allegedly advanced Rs. 75 lakhs as loan to one VHEL Industries Ltd. (hereinafter referred to as VHEL) by way of an intercorporate deposit. One J. K. Rajgarhia (hereinafter referred to as JKR) executed a deed of guarantee as guarantor for repayment of the said loan by

VHEL. On August 13, 1998, the plaintiff filed a suit at Vadodara for recovering the alleged amount from VHEL and JKR. On September 11, 1998, terms of settlement, between the plaintiff and the two defendants in the Vadodara suit, were agreed. A further security for repayment of the loan was executed through a deed of guarantee by O.P. Rajgarhia (hereinafter referred to as OPR). On the same date three cheques, covering the entire amount, issued by OPR were handed over to the plaintiff, on the alleged understanding that in the event VHEL or JKR fails to pay, the plaintiff would be entitled to encash the cheques. On presentation by reason of non-payment by VHEL and JKR the cheques were dishonoured. Thereafter on September 30, 1998, a consent decree was obtained in the Vadodara suit, wherein the defendant agreed to pay the entire amount in instalments. On October 15, 1999, VHEL was referred to the BIFR under the SICA. On March 13, 2000, the plaintiff filed a suit (C. S. No. 83 of 2000) against OPR being a guarantor for recovery of the loan availed of by VHEL and guaranteed by JKR. The said suit was decreed on June 9, 2000. Admittedly at that time the enquiry under the SICA against VHEL was pending before the BIFR. On September 26, 2000, certain orders were passed in the execution application being G. A. No. 3752 of 2000. On November 8, 2000, further order was passed in the said execution. After having obtained change in favour of the present advocate-on-record on December 12, 2000, it came to the notice of the advocate-on-record that while obtaining the decree the court was not informed of the proceedings against VHEL pending before the BIFR. In the circumstances no suit could be proceeded with against a guarantee covering the loan advanced to VHEL and the decree passed therefore being a nullity, the same could not be proceeded with. Therefore, these two applications have been filed by the judgment debtor. G. A. No. 99 of 2001 was filed seeking recalling and/or setting aside of the decree dated June 9, 2000, passed in C. S. No. 83 of 2000 and also for dismissal of the said C. S. No. 83 of 2000, G. A. No. 100 of 2001 was filed for stay of proceedings of G. A. No. 3752 of 2000 being the execution of the decree passed in C. S. No. 83 of 2000, and for dismissal of the said execution proceedings and recalling of the orders dated September 26, 2000, November 8, 2000, and December 13, 2000, respectively, passed in the said execution proceedings, as well as for stay of operation of the respective orders. Thus, how the present matters have come up before this court.

2. Mr. S.N. Mukherjee, learned counsel appearing on behalf of OPR being the defendant-judgment-debtor herein contends that C. S. No. 83 of 2000, in effect, is an attempt to enforce a guarantee in respect of loan advanced to VHEL since referred to the BIFR. According to him in view of sections 16, 17 and 22 of the SICA such a suit does not lie and cannot be proceeded with and as such the decree passed therein is a nullity and cannot be enforced. Therefore, not only the decree but also all the orders passed therein, be recalled. According to Mr. Mukherjee Section 22, Sub-section (1), specifically bars a suit, for recovery of money or for enforcement of any security against the industrial company or of any guarantee in respect of any loans, or advance granted to the industrial

company, shall lie or be proceeded with further, except with the consent of the Board or, as the case may be, the appellate authority, where an enquiry u/s 16 is pending or a revival/scheme u/s 17 is being framed or is under implementation or an appeal u/s 25 relating thereto is pending. In support of this contention he has referred to the decision in the case of M/S Patheja Bros. Forgings and Stamping and Another Vs. I.C.I.C.I. Ltd. and Others, , Gramophone Company of India Ltd. v. Mahaboob Productions Pvt. Ltd. [1993] 1 CLJ 335, Testeels Ltd. v. Radhaben Ranchhodlal Charitable Trust, and Asian Bearings and Tools Corporation v. Coastal Chemicals Ltd. [1996] 86 Comp Cas 590 (AP). According to him by reason of Section 22, Sub-section (1) of the SICA there was inherent lack of jurisdiction on the part of this court in proceeding with the suit and decreeing the same during the pendency of the reference before the BIFR. He further contends that the plaintiffs objection that the decree was passed in the presence of the learned advocate of OPR, therefore the applications are not maintainable and barred by the principle of res judicata, cannot be sustained in view of the fact that the decree was a nullity and was obtained without informing the court about the pendency of the reference cutting at the root of the jurisdiction of this court. In support of his contention he had relied upon the decision in the case of Mt. Surji Vs. Manki Ram,. He further contends that the principle that the executing court cannot go behind the decree has certain exceptions. The nullity of a decree for want of jurisdiction is one such exception since the decree ceases to be executable. In support of his contention he relies on the decision in the case of Purusottam Padhee Vs. Mst. Panchali Bewa, . Relying on the decision in the case of Official Trustee, West Bengal and Others Vs. Sachindra Nath Chatterjee and Another, and Urban Improvement Trust, Jodhpur Vs. Gokul Narain and another, he contends that when a decree is a nullity the same can be assailed at any stage including at the stage of execution or in collateral proceedings since it hits at the very root of the jurisdiction and authority of the court. In order to contend that the court had no jurisdiction in view of Section 22(1) of the SICA he points out that the suit was founded on the deed of guarantee dated September 22, 1988. This guarantee was in respect of a loan or advance given to VHEL. The deed of guarantee recited that OPR stood guarantee for payment of the amount advanced to VHEL in the event VHEL or JKR fails to pay. OPR had given a guarantee for repayment of the loan advanced by the plaintiff to VHEL and that both OPR and JKR became co-sureties. It cannot be contended that OPR was a surety for JKR in view of the provisions contained in Sections 146 and 147 of the Indian Contract Act. From the pleading it is apparent that the entire claim of the plaintiff is based on a guarantee in respect of a loan or advance made by the plaintiff to the industrial company. The guarantee given by OPR being without consideration, cannot be enforced.

3. Mr. Pratap Chatterjee appearing on behalf of the plaintiff decree holder on the other hand contends that this application is not maintainable in view of the fact that the decree in the suit was passed after due service of writ of summons for final judgment and in the presence of the advocate for the defendant. As such

the decree having not been passed ex parte the said application cannot be maintained. The questions now raised can be raised only in an appeal and not otherwise. This question of maintainability ought to have been taken before the decree was passed. Since it was not taken therefore, the same is barred by the principles of constructive res judicata or principle analogous thereto. The defendant cannot go into the merits of the case nor can it raise any argument as to the effectiveness or the extent of the guarantee. In the facts and circumstances of the case Order 9, Rule 13, of the Civil Procedure Code, has no manner of application. The guarantee in effect consists of two guarantees contained in one document. In one part OPR guaranteed payment receivable by the plaintiff in the event of default by (1)VHEL or (2) by JKR. Thus, there are two distinct defaults. One by VHEL and the other by JKR. The suit is confined only with regard to default by JKR. Therefore, it is not an enforcement of a guarantee either against VHEL or against any loan or advance made to VHEL. Section 22, Sub-section (1) is attracted to a suit for enforcement of guarantee in respect of any loan or advance granted to a sick industrial company. Whereas in the present case the suit is against OPR when it seeks to enforce the guarantee with regard to the guarantee of JKR who is an individual and not the industrial company. Section 22, Sub-section (1) contemplates a guarantee given for default by a company. It does not cover a guarantor of a guarantor. In case the contention of Mr. Mukherjee is accepted in that event it would be distortion of statutory provision as was held in the case of Prem Narayan Barchhiha Vs. Hakimuddin Saifi, . Relying on the decision in the case of Deputy Commercial Tax Officer and Others Vs. Corromandal Pharmaceuticals and Others, he contends that the provisions of the SICA cannot be permitted to be misutilised as has been sought to be done in the present case for defeating the claim of the plaintiff by a private individual guaranteeing payment by another private individual. Relying on the decision in the case of State Bank of India Vs. Messrs. Indexport Registered and others, he contended that the object of the SICA is to protect the assets of the sick company not those of any private individual. Therefore, the mischief of Section 22, Sub-section (1) cannot be attracted when the plaintiff seeks to enforce the liability of OPR in the event of default of JKR both private individuals and not the sick industrial company. This proposition can be supported by the principle that the plaintiff can sue the guarantor only without suing the principal debtor. Alternatively he contends that the guarantee given by OPR was a counter guarantee for payment by JKR which has nothing to do with the principal debtor. In order to counter the contention of Mr. Mukherjee that the guarantee, being without consideration as such, cannot be enforced, Mr. Chatterjee contended that the said question cannot be gone into in view of the decision in the case of Gulam Hussain Khan v. M. Faiaz Ali Khan ILR 15 Luc 656 and Jogindra Nath Roy v. Chandra Nath Poddar ILR 31 Cal 242 (DB).

4. I have heard both the learned counsel for the respective parties at length.

5. Having regard to the facts and circumstances of the case it appears that there are certain admitted facts. We may first refer to such admitted facts, The

guarantee by JKR was given in respect of a loan or advance made to VHEL by the plaintiff. In the suit at Vadodara filed by the plaintiff a consent decree was obtained in which the present defendant had given a guarantee by executing a deed of guarantee that in the event of default by VHEL or JKR he guaranteed payment to the plaintiff in respect of the loan and advance given to VHEL. Three cheques were issued on condition that the same would be encashed if VHEL or JKR defaulted. On presentation the cheques were dishonoured. Before C. S. No. 83 of 2000 was filed by the plaintiff, enquiry u/s 16 of the SICA was initiated and a reference was made to the BIFR in respect of the industrial undertaking of VHEL. The decree was passed in the presence of the defendant without informing the court that a reference to the BIFR against VHEL is pending. Now the decree has been sought to be executed. At this stage after change of advocates-on-record the present application has been filed. The guarantee given by OPR was in respect of default by VHEL or JKR in payment of the loan or advance made to VHEL.

6. In this background now it is to be examined as to (i) whether in a suit filed by the plaintiff against the defendant OPR excluding JKR and VHEL the mischief of Section 22(1) could be attracted ; (ii) if attracted could that question be raised by the defendant after the decree was passed in his presence or in other words whether the question is hit by constructive res judicata, thereby making these applications non-maintainable ; (iii) whether the guarantee sought to be enforced against OPR without making JKR and VHEL parties to the suit is an enforcement of a guarantee against a private individual without affecting the loan or advance made to VHEL or in other words whether the mischief of Section 22(1) could be extended in the case of a guarantor of a guarantor ; (iv) whether all these questions could be gone into in execution proceedings where the court cannot go behind the decree or whether it is one of the exceptions to the rule.

7. Though many other questions have been raised by Mr Mukherjee and countered by Mr. Chatterjee and as well as those raised by Mr. Chatterjee and countered by Mr. Mukherjee in reply, but in my view those questions need not be gone into in the facts and circumstances of the case, since those, in effect, touch the merits of the guarantee itself with which we are not now concerned.

8. Let us take the last question as referred to in the paragraph preceding the paragraph above namely whether this court can go into the questions raised in this execution proceedings or in other words whether the question raised falls within the exceptions to the rule that the executing court cannot go behind the decree.

9. It is a settled principle of law that the executing court cannot go behind the decree. In the present case there is a decree. These decrees have been put to execution. G. A. No. 99 of 2001 and G. A. No. 100 of 2001 have since been made in the execution proceeding. This court, while dealing with this question raised, is exercising its jurisdiction in the course of a proceeding for execution. Admittedly the executing court cannot go behind the decree. But at the same time the

executing court can examine the executability of the decree. A decree can be executed only when it is executable. Unless a decree is executable the court cannot proceed to execute the decree. In other words the court cannot assume jurisdiction to execute the decree which is otherwise inexecutable. There are certain exceptions to the principle that the executing court cannot go behind the decree. One such exception is that the decree sought to be executed is a nullity. If the decree is a nullity then the same is inexecutable. As soon as the decree is a nullity in the eye of law the decree is non est. As such, such a decree cannot be enforced. Therefore, there is lack of initial jurisdiction of the executing court to execute such an inexecutable decree which is a nullity. Every court is responsible before assuming jurisdiction to find out as to whether it has jurisdiction to deal with the matter. If the question hits at the root of jurisdiction the court cannot assume jurisdiction. In other words the court being without jurisdiction cannot proceed with the same. Even if an inexecutable decree is executed in the absence of jurisdiction, such execution would be without jurisdiction. Execution of a decree which is a nullity is an exercise in void and as such the execution itself is also a nullity. The court cannot exercise its jurisdiction when there is void. In other words the court cannot exercise its jurisdiction in void. Therefore, it is the responsibility of the court to examine whether it has jurisdiction to execute the decree by examining the executability of the decree. In other words to examine as to whether the decree is a nullity and the court would be exercising its jurisdiction in futility or is exercising its jurisdiction in void. In support of the above proposition reference may be made to a series or catena of decisions on this question. We may not multiply the references. We may simply refer to the decision in the case of *Official Trustee, West Bengal and Others Vs. Sachindra Nath Chatterjee and Another*, and *Urban Improvement Trust, Jodhpur Vs. Gokul Narain and another*, .

10. Now let us examine whether the decree is a nullity or whether this court could have proceeded with the suit and decreed the same in the facts and circumstances of the case in view of Section 22(1) of the SICA. Section 22 in Sub-section (1) provides that "... no suit... for the enforcement... of any guarantee in respect of any loans or advance granted to the industrial company shall lie or be proceeded with further, except with the consent of the Board or, as the case may be, the appellate authority" when in respect of the industrial company an enquiry u/s 16 is pending. In the present case a reference was made under the SICA in respect of VHEL on October 15, 1999, and an enquiry was registered u/s 16 on a reference to the BIFR whereas C. S. No. 83 of 2000 was filed on March 13, 2000. Thus apparently the mischief of Section 22(1) is attracted in the present case. By reason thereof the court lacks inherent jurisdiction to proceed with the suit. As such a decree, passed in such a suit during the pendency of the reference u/s 16 of the SICA without the consent of the Board, is without jurisdiction. Admittedly, no consent of the Board was obtained either before or during the pendency of the suit or this proceeding.

11. Now let us examine whether the distinction sought to be made by Mr.

Chatterjee is of substance or that the sweeping contention made by Mr. Mukherjee is substantial. In order to attract the mischief of Section 22 Sub-section (1) of the SICA certain conditions are to be fulfilled, (i) That an enquiry u/s 16 of the SICA is pending against the industrial company and (ii) that the suit is for enforcement of a guarantee in respect of any loan or advance granted to the industrial company. In the present case, Mr. Mukherjee contended that though the industrial company and its guarantor JKR are not parties to the suit yet the suit seeks to enforce the guarantee given by OPR for payment in default of payment either by VHEL or by JKR in respect of a loan or advance made to VHEL. Admittedly, VHEL is the industrial company within the meaning of Section 22(1), which is not in dispute. It is also not in dispute that OPR had guaranteed payment in default of VHEL or JKR to pay in respect of loan or advance made to VHEL. Therefore, on this score also the mischief of Section 22(1) apparently applies.

12. But the question remains as to whether it would be attracted even where VHEL and JKR are not parties to the proceedings. In other words whether the direction provided in Section 22(1) of the SICA could be available to a guarantor of a guarantor. Mr. Chatterjee had sought to point out that OPR is the guarantor of JKR. It has nothing to do with the principal debtor. OPR had guaranteed payment in default of JKR. He had tried to distinguish the said question on various grounds. But the endeavour of Mr. Chatterjee was an attempt or exercise in futility, in view of the terms of guarantee given by OPR. Even if we describe the same as counter guarantee or even if we described OPR as a guarantor of JKR, a guarantor, still then the question remains to be examined having regard to the terms of guarantee executed by OPR read with the provisions of Section 22, Sub-section (1). The guarantee specifically mentions that OPR agreed to guarantee payment and was liable to pay in default of payment by VHEL or JKR in respect of loan advanced by the plaintiff to VHEL. In order to ascertain the situation we may refer to the guarantee given by OPR being annexure A to G. A. No. 100 of 2001. The said guarantee contains the following terms :

"This deed of guarantee made in Calcutta this 22nd day of September, 1998, by Shri OPR son of late R. N. Rajgarhia, aged about 62 years, and residing at 5, Hungerford Street, Calcutta-700 017 hereinafter referred to as the "guarantor", in favour of Hindustan Magcobar Chemicals Ltd., an existing company within the meaning of the Companies Act, 1956, and having its registered office at 208/1, GIDC Industrial Area, Panoli (via Ankleshwar)-394 116 (Gujarat) hereinafter called as "HMCL".

13. Whereas :

(i) At the request of VHEL Industries Ltd., a company incorporated under the Companies Act, 1956, and having its office and principal place of business at 3, Hungerford Street, Calcutta- 700 017 (hereinafter referred to as "the borrower"), HMCL had advanced short term loan of Rs. 75 lakhs to the borrower on, inter alia, agreed terms and conditions as to payment of interest and/or repayment

thereof. Out of which, a sum of Rs. 10 lakhs has been repaid.

(ii) VHEL Industries Ltd., are taking steps to liquidate the dues arising out of short-term loan as aforesaid of HMCL.

(iii) At the request of HMCL the guarantor herein has agreed to execute the guarantee in favour of HMCL.

14. Now this deed witnesseth as follows :

1. The guarantor do hereby irrevocably guarantee the due payment of all dues of HMCL and in case of default by the borrower and Shri JKR in making payment of the said dues, the guarantor agrees and undertakes to pay to HMCL, the entire dues payable by the borrower to HMCL without any reference or recourse to the borrower and Shri JKR and notwithstanding any dispute that may be raised by the borrower and Shri JKR.

2. Additionally, the guarantor herein in consideration as above mentioned has agreed to forward post-dated cheques drawn in favour of HMCL and in accordance with such agreement, the post-dated cheques covering the entire dues of HMCL have been forwarded and handed over to HMCL details whereof are included in Schedule A hereto.

3. HMCL shall be entitled to present the aforesaid cheques for encashment in the event of failure by the borrower and Shri JKR to honour its obligation and in payment of the dues of HMCL. It is further irrevocably agreed by the guarantor that the guarantor shall not stop payment of the said cheques or countermand payment under any circumstances.

4. This guarantee shall be continuing and shall continue until the dues payable to HMCL by the borrower and Shri JKR are paid in full satisfaction of HMCL.

5. This guarantee shall not be revoked until full payment by the borrower and Shri JKR to HMCL.

6. This guarantee will not stand discharged by reason of any settlement between HMCL and the borrower and Shri JKR or by any act or omission of HMCL, the legal consequence of which is the discharge of the borrower and Shri JKR or when HMCL compounds with gives time to or agrees not to sue the borrower Shri JKR or otherwise due to extension of time to the borrower and Shri JKR for payment or forbearance to sue on the part of HMCL, the borrower and Shri JKR or otherwise enforce any other remedy against the borrower and Shri JKR.

7. That this guarantee has been furnished with full knowledge and consent by the surety and even if any of the co-surety does not join in or gets discharged otherwise, this guarantee is valid.

8. HMCL may, at any time, take such action against the borrower and Shri JKR for realisation of their dues and shall also in its sole opinion be entitled to grant any time or indulgence to the borrower and Shri JKR for payment of the dues or

enter into any arrangement and agreements with the borrower and Shri JKR for securing its payment towards dues and this guarantee shall not be released or discharged thereby or by any act or omission on the part of HMCL which, otherwise, in law, may amount to discharge of surety."

15. A plain reading of the said terms shows that this guarantee has been given in respect of loan or advance given to VHEL, the borrower and that it had sought to secure repayment of the dues of the plaintiff. Such dues were secured by the guarantee of JKR. The guarantee given by OPR covered payment in default either by VHEL or by JKR. The guarantee could be invoked without reference to VHEL or JKR and notwithstanding any settlement between the plaintiff and borrower or JKR and it would continue until the borrower or JKR pays the dues fully and shall not be revoked until full payment is made by the borrower on JKR. Thus the guarantee clearly specifies that it was a guarantee in respect of the loan or advance given to VHEL. It appears that by means of this suit the plaintiff has sought to avoid the mischief of Section 22(1) by omitting to make VHEL and JKR parties to the suit. The terms contained in the said deed of guarantee clearly specify that OPR was a co-surety along with JKR in respect of loan advanced to VHEL. As co surety OPR was liable to pay in default of both borrower and JKR. Thus it was not a guarantee independent of the loan or advance made to VHEL. OPR cannot be said to be a guarantor of a guarantor. The guarantee was given to the creditor, the plaintiff, in respect of repayment of loan or advance given to VHEL. Thus he was not a guarantor of a guarantor but a guarantor of a borrower in respect of repayment of loan given to VHEL, the borrower. There is no scope for drawing a distinction and thereby separating the borrower and JKR. The expression used in the deed covers both VHEL and JKR. It does not permit of supporting the liability of OPR only to the extent of JKR. Thus the distinction sought to be drawn by Mr. Chatterjee cannot be sustained.

16. Admittedly the object of the SICA is to protect the assets of the industrial undertaking as was held in State Bank of India Vs. Messrs. Indexport Registered and others, . Mr. Chatterjee contended relying on the said decision that SICA does not protect the assets of the guarantor. But this contention cannot be sustained in the facts and circumstances of the case in view of the decision in M/ S Patheja Bros. Forgings and Stamping and Another Vs. I.C.I.C.I. Ltd. and Others, . When the language of the section is clear and unambiguous and there is no scope for a different interpretation, then the court is not supposed to consider the consequences. But then the law having been declared by the apex court in M/S Patheja Bros. Forgings and Stamping and Another Vs. I.C.I.C.I. Ltd. and Others, , by reason of article 141 of the Constitution little scope is left to the High Court.

17. Whether the guarantee was without consideration or not need not be gone into.

18. Now let us examine how far the guarantee could be protected or is hit by the mischief of Section 22(1). As soon as the guarantee is in respect of a loan or

advance given to the industrial company, it is protected and the mischief of Section 22(1) is attracted, even if such guarantee is sought to be enforced against the guarantor alone without impleading the industrial company or the other guarantor. By reason of sections 146 and 147 of the Contract Act having regard to the terms of the deed of guarantee executed by OPR there is no escape from concluding that OPR and JKR are co-sureties for VHEL namely the industrial company. As such the guarantee given by OPR securing repayment of the loan or advance given to the industrial undertaking cannot be enforced even if the co-surety or the industrial undertaking is not a party to the suit. Thus the mischief of Section 22(1) of the SICA having been attracted in the present case no suit could be proceeded with. If without the information about the pendency of the reference u/s 16 of the SICA, the suit is proceeded with and decree is passed, then such decree is a nullity.

19. Section 22, Sub-section (1) prescribes that no suit shall lie or be proceeded with further. In the present case the suit having been filed after the reference, the suit did not lie. Even if the suit was filed before the reference the same could not be proceeded with further. Thus there was a total embargo on the jurisdiction of the court. If a suit does not lie, in that event, the court cannot assume jurisdiction to proceed with such suit. Thus there was inherent lack of jurisdiction with regard to the present suit during the pendency of the enquiry u/s 16. In the absence of any jurisdiction the decree, that has been passed, is without jurisdiction and as such a nullity. If a suit did not lie then there was no suit before the court. And as such there could not be any decree. The decree if passed would therefore be non est and a nullity. Since the suit was for enforcement of guarantee in respect of loan or advance granted to the industrial company, as such the same did not lie. Therefore, the same could not be proceeded with, within the meaning of Section 22(1). It is immaterial whether the co-surety or the principal borrower is not made a party. Even without them the suit is a suit for enforcement of a guarantee in respect of loan or advance granted to the industrial company.

20. Thus the jurisdiction of the court being prohibited, the decree being a nullity, it could not be enforced and is accordingly inexecutable. And as such this question can be examined by this court. It is equally settled that if the decree is inexecutable this court cannot proceed to execute the decree and can very well drop the execution proceedings and recall the orders passed in the execution proceedings. At the same time if the court finds that the decree is a nullity in that event it can very well declare the decree to be a nullity and inexecutable. If a decree is a nullity it is not necessary to recall the said decree or dismiss the suit since the suit did not lie at all. The declaration of nullity is sufficient to render the necessary relief to a party since by reason of such declaration the decree cannot be executed. In other words the declaration of nullity has the same effect of dismissing the suit or recalling of the decree. At the same time it can also be said that if the court had no jurisdiction to entertain the suit and to pass the decree, in that event, whenever it is brought to the notice of the court,

even at the stage of execution, the court can examine the same and pass appropriate order.

21. In this respect I am supported by the decisions, as rightly cited by Mr. Mukherjee, in the cases of M/S Patheja Bros. Forgings and Stamping and Another Vs. I.C.I.C.I. Ltd. and Others, , Gramophone Co. of India Ltd. v. Mahaboob Productions Pvt. Ltd. [1993] 1 CLJ 335, Testeels Ltd. v. Radhaben Ranchhodlal Charitable Trust, and Asian Bearings and Tools Corporation v. Coastal Chemicals Ltd. [1996] 86 Comp Cas 590 (AP). In the decision in the case of M/S Patheja Bros. Forgings and Stamping and Another Vs. I.C.I.C.I. Ltd. and Others, , the apex court had observed in paragraph 12 as follows (p. 25) :

"We have analysed the relevant words in Section 22 and found that they are clear and unambiguous and that they provide that no suit for the enforcement of a guarantee in respect of any loan or advance granted to the concerned industrial company will lie or can be proceeded with without the consent of the Board or the appellate authority. When the words of a legislation are clear, the court must give effect to them as they stand and cannot demur on the ground that the Legislature must have intended otherwise."

22. Now let us examine the question of distortion of the statutory provision and misutilisation of Section 22(1) as contended by Mr. Chatterjee. In view of the observation made above by the apex court the question of misutilisation of Section 22(1) of the SICA, in the facts and circumstances of this case, does not arise. As such the decisions in the case of Prem Narayan Barchhiha Vs. Hakimuddin Saifi, does not apply. On the other hand it may be said that it is the plaintiff who had purported to misuse the process of the court in order to avoid the mischief of Section 22(1) by omitting to add VHEL and JKR as parties to the suit and obtain a decree without informing the court, about the pendency of the reference u/s 16. The purpose of omission of these two parties despite the terms of the deed of guarantee appears to be apparent. It is purportedly for the purpose of avoiding the mischief of Section 22(1) VHEL and JKR were so omitted. Therefore, it is the plaintiff itself who appears to have misutilised the process of the court. The decision in Deputy Commercial Tax Officer and Others Vs. Corromandal Pharmaceuticals and Others, does not help us in the facts and circumstances of the case. Therefore, such a question cannot be permitted to be raised by it.

23. Now let us examine as to whether in view of all these materials this court can declare the decree a nullity in this proceeding. Admittedly the suit was decreed in the presence of the defendant judgment-debtor applicant and not ex parte. Therefore, Order 9, Rule 13 of the CPC has no manner of application, as rightly contended by Mr. Chatterjee. But still whether such an application could be maintained without Order 9, Rule 13 of the CPC requires to be examined. When the question is that of a nullity whenever it is brought to the knowledge and notice of the court, the court is supposed to examine as to whether it had jurisdiction to pass the decree or whether the decree is a nullity even at the

stage of execution. It is immaterial as to how the said question is brought to the notice of the court. It is well within the scope of Section 47 of the CPC to oppose the execution of a decree and raise the question of executability of the decree in such an application. The nomenclature of an application is only a procedural aspect of the matter. Procedures are hand-maids of justice. It cannot stand in the way of dispensing justice. If the court had no jurisdiction and had lacked inherent jurisdiction and the decree is a nullity, it can look into it, even at the stage of execution and decline execution, if on examination the court finds it so. The court cannot sit idle with its eyes closed, nor can it avoid its responsibility by reason of technicalities. When it comes to its notice that the court had been led to assume jurisdiction when it had none and to pass a decree with inherent lack of jurisdiction, it is the duty of the court to correct itself. The court is bound to activate itself and remedy the mischief. No matter from what source and in what manner such information comes before it. Whenever there is a failure on the part of the court to act in accordance with law, the court had every right to correct itself and set things right. It cannot be oblivious of the situation and permit an illegality or a nullity to continue and perpetuate. The court having been led to do something which it had no jurisdiction to do, when it is brought to its notice it cannot allow its stamp of sanctity to continue leaving the same as it is, on grounds of technicality. It cannot perpetuate a nullity nor can it permit perpetuation of inherent lack of jurisdiction. The court lacks inherent jurisdiction in executing a decree which was passed by it despite inherent lack of jurisdiction. In other words it is bound to correct itself when the decree appears to be a nullity and declare it so and refuse to execute the same on account of inherent lack of jurisdiction. If the suit does not lie then the same cannot be proceeded with, nor could a decree be passed thereon and despite all these if the decree is passed the said embargo continues, then the court cannot execute such a decree which is a nullity. All exercise to this end is an exercise in futility and void. As such this application even if there might be some technicalities standing in the way, the court has to activate itself and rise to the occasion. If the technicalities are adhered to, it would be justice which will suffer and become the first casualty or victim.

24. Justice is above all. Justice is the only object for which the court survives. It is justice which is to be dispensed. Whenever, the conscience of the court feels that justice is to be done, it cannot feel restricted or deterred by reason of any technicalities. Even if it is not permissible under the procedures laid down still the court has its own inherent jurisdiction to correct itself if justice demands so. Section 151 of the CPC recognises such inherent jurisdiction and power of the court. In any event the application can be treated as one u/s 47 read with Section 151 of the CPC and this court treats the same as such. Admittedly in a proceeding u/s 47 of the CPC the question of executability of the decree or the validity thereof, in other words, the question of nullity of the decree, can be gone into by the executing court. Therefore the technical point raised by Mr. Chatterjee cannot be sustained.

25. The question of res judicata as raised by Mr. Chatterjee also cannot be sustained. Inasmuch as if the court lacked inherent jurisdiction its decision being a nullity there is no decision in the eye of law and as such it cannot operate as res judicata. Section 11 of the CPC provides principles of res judicata where an issue is decided, the court can decide an issue provided it has jurisdiction to decide such issue. If an issue is decided when the court lacked inherent jurisdiction, then such decision being a nullity is non est and there is no decision in the eye of law. If there is no decision in the eye of law, there is no question of decision on an issue attracting the principle of res judicata. If the principle of res judicata cannot be attracted there is no scope for constructive res judicata. Inasmuch as in the absence of lack of inherent jurisdiction the question even though not raised cannot be deemed to have been raised and decided, attracting the principle of constructive res judicata.

26. For the reasons foregoing, I am unable to persuade myself to agree with the contentions of Mr. Chatterjee. In the circumstances G. A. No. 99 of 2001, upon being treated as an application u/s 47 read with Section 151 of the CPC succeeds. It is declared that the suit being C. S. No. 83 of 2000 was not maintainable and the court had lacked inherent jurisdiction to entertain and proceed with the same in view of Section 22(1) of the SICA as discussed above and consequently the decree, though passed in the presence of the defendant, is void and a nullity and as such inexecutable. In view of the above G. A. No. 100 of 2001 also succeeds. The execution proceedings are rejected and all orders passed in the execution are hereby recalled.