

Before G. R. Majithia, J.

AJAY KAPOOR AND OTHERS,—*Petitioners.*

versus

THE J. & K. STATE FINANCIAL CORPORATION, JAMMU AND
OTHERS,—*Respondents.*

Civil Revision No. 1467 of 1988.

23rd July, 1990.

State Financial Corporation Act, 1951—S. 31—Liability of a surety—Can such liability be enforced under the Act—Order passed against surety—Validity of such order—Amendment of the Act—Applicability of—Prospective only.

Held, that the action against the surety under S. 31(1) could only be taken after the amendment had been brought in the statute. The amended provision was to operate prospectively and not retrospectively unless it specifically provided otherwise. The order under S. 31 of the Act, insofar as it related to the petitioners/guarantors, is obviously without jurisdiction. A decree passed by a Court without jurisdiction is a nullity, and that its validity could be set up whenever and wherever it is sought to be enforced or relied upon, even at the stage of execution and even in collateral proceedings. (Para 8)

Petition under Article 227 of the Constitution of India, praying that the petition be accepted records of the case sent for and the order, Annexure P-5, be quashed and it be declared that the Court at Pathankot had no jurisdiction to execute the decree.

N. K. Sodhi, Sr. Advocate with S. K. Hiraji Advocate, for the
Petitioner.

L. M. Suri, Sr. Advocate with Arun Kumar Advocate, for Res-
pondent No. 1.

Munishwar Puri, Advocate, for *Respondent No. 2.*

JUDGMENT

G. R. Majithia, J.

(1) The petitioners have impugned the order dated November 9, 1987 passed by the Subordinate Judge 1st Class, Pathankot in this petition under Article 227 of the Constitution of India.

(2) Reference to a few relevant facts is necessary to appreciate the point raised by the learned counsel for the petitioners.

(3) Respondent No. 1 moved a petition under Section 31 of the State Financial Corporation Act, 1951 (for short, the Act) against the petitioners and respondent No. 2 in the Court of the District Judge, Bhaderwah in the district of Doda in the State of Jammu and Kashmir. By an order dated November 10, 1972, petition was allowed by the learned District Judge ordering recovery of Rs. 2,65,964.72 against the petitioners and respondent No. 2. The order was executable as a decree. The loan was advanced by respondent No. 1 to respondent No. 2 and the petitioners were the guarantors. The learned District Judge who, was seized of the matter, passed the order not only against the principal debtor but also against the guarantors. The principal debtor did not discharge the liability. Respondent No. 1 took out execution in the Court of the District Judge, Bhaderwah, who issued a precept under Section 46 of the Code of Civil Procedure for attaching properties of the guarantors mentioned therein. The period mentioned in the precept was extended, but the decree was not transferred to the Subordinate Judge Ist Class, Pathankot. The Subordinate Judge not only attached the properties but also auctioned the same, necessitating the filing of objections under Order 21, rule 58, Civil Procedure Code by the guarantors. The objections failed and the guarantors have moved this Court under Article 227 of the Constitution of India.

(4) At the hearing of the petition, learned counsel for respondent No. 1 stated that the execution application which was pending in the Court of Subordinate Judge, Pathankot has already been withdrawn and the same has been dismissed as such.

(5) Learned counsel for the petitioners, Shri N. K. Sodhi, Senior Advocate, in view of the statement of the learned counsel for respondent No. 1, did not urge any other point except that the order under Section 31 of the Act against the principal debtor and the guarantors, insofar as it is passed against the guarantors, is bad at law. The learned counsel submits that no order can be passed under Section 31 against the guarantors.

(6) In order to appreciate the submission made by the learned counsel for the petitioners, it will be useful to refer to Section 31 of the Act:—

“31. *Special Provisions for Enforcement of Claims by Financial Corporation.*—(1) Where an industrial concern, in breach of any agreement makes any default in repayment of any

Ajay Kapoor and others v. The J & K State Financial Corporation,
Jammu and others (G. R. Majithia, J.)

loan or advance or any instalment thereof or otherwise fails to comply with the terms of its agreement with the Financial Corporation or where the Financial Corporation requires an industrial concern to make immediate payment of any loan or advance under Section 30 and the industrial concern fails to make such repayment then without prejudice to the provisions of Section 29 of this Act and of Section 69 of the Transfer of Property Act, 1882, any officer of the Financial Corporation, generally or specially authorised by the Board in this behalf, may apply to the District Judge within the limits of whose jurisdiction the industrial concern carries on the whole or substantial part of its business for one or more of the following reliefs, namely :—

- (a) for an order for sale of the property pledged, mortgaged, hypothecated or assigned to the Financial Corporation as security for the loan or advance; or
- (b) for transferring the management of the industrial concern to the Financial Corporation; or
- (c) for an *ad interim* injunction restraining the industrial concern from transferring or removing its machinery or plant or equipment from the premises of the industrial concern without the permission of the Board where such removal is apprehended.”

(7) Section 31, no doubt, contains a speedy and summary mode of recovery of loan by making an application to the District Judge for any of the reliefs contained in clauses (a), (b) and (c) of subsection (1). Clauses (b) and (c) provide for an action against the borrower. The management of the borrower industrial concern can be taken over by the Financial Corporation or an *ad interim* injunction can be obtained against it restraining it from removing its machinery, plant, equipment etc. Under clause (a) it can ask for sale of property pledged. The question that arises is as to whether under clause (a), the property of a surety can also be put to sale in the summary manner as provided in Section 31. In *Munnalal Gupta v. Uttar Pradesh Financial Corporation and another* (1), a Full Bench

(1) A.I.R. 1975 Allahabad 416.

of the Allahabad High Court had an occasion to deal with this matter and the Bench opined that from the scheme of the Act, it was clear that the speedy remedy contained in Section 31 is available not against the surety but against the borrower only and the Bench held thus :—

“11. The learned Advocate-General then referred to the Statement of Objects and Reasons of the Act and clause (ix) of paragraph 2 thereof, which says :—

‘The Corporation will have special privileges in the matter of enforcement of its claims against borrowers.’

To us it appears that the objects and reasons read with clause (ix) of paragraph 2 really support the view that we have taken. The special privileges granted to the Corporation in respect of enforcement of its claim is limited to the borrowers and the borrowers have to be industrial concerns. It is not possible to accept the contention of the learned Advocate-General that the word ‘borrower’ would include a surety. He says that any person who is a party to the agreement, he should also be deemed to be a borrower. We have perused the agreement. The preamble of the agreement describes the industrial concern as borrower and describes Munna Lal as the ‘mortgagor’ who has mortgaged his property in security of the loan. The distinction between the borrower and the surety has been kept throughout the agreement. The agreement has been signed separately by the borrower as also by Munna Lal as the mortgagor. A borrower is obviously a person who borrows and it cannot include the surety who guarantees or secures the loan. No doubt, in the ultimate paragraph of the agreement it is provided :—

‘Whenever the context so demands *qua* the property mortgaged the term borrower shall include the ‘mortgagor’. But this clause clearly shows that a mortgagor and the borrower are two separate entities and it is only when the context so demands that the word ‘borrower’ may include the mortgagor. This clause does not, however, in any way modify or amend statutory provision contained in Sections 31 and 32 of the Act. Indeed,

Ajay Kapoor and others v. The J & K State Financial Corporation,
Jammu and others (G. R. Majithia, J.)

it would not be open to the parties to enter into a contract contrary to the statutory provisions. We have already shown above that for the purposes of Sections 31 and 32 of the Act the borrower and the surety could not be placed at par. The clause in question refers to the context of the agreement and does not refer to the context of the statutory provisions.' ”

(8) The Central Government amended the Act by Act No. 43 of 1985. The amending Act received the assent of the President of India on August 21, 1985 and was published in the Gazette of India (Extra.), Part II on August 22, 1985 and it came into force with effect from the said date. Section 31 of the Act was amended. The amendment, obviously, was necessitated to overcome the effect of the judicial decisions in which it was held that the surety could not be brought within the ambit of Section 31 of the Act. The amended provisions of Section 31 read thus:—

“Amendment of Section 31.

In Section 31 of the principal Act, in sub-section (1), after clause (a), the following clause shall be inserted, namely:—
‘(aa) for enforcing the liability of any surety; or ’ ”

The action against the surety under Section 31(1) could only be taken after the amendment had been brought in the statute. The amended provision was to operate prospectively and not retrospectively unless it specifically provided otherwise. The order under Section 31 of the Act, insofar as it related to the petitioners/guarantors, is obviously without jurisdiction. A decree passed by a Court without jurisdiction is a nullity, and that its validity could be set up whenever and wherever it is sought to be enforced or relied upon, even at the stage of execution and even in collateral proceedings. Reference can usefully be made to the apex Court's decision in *Kiran Singh and others v. Chaman Paswan and others* (2), wherein it was held thus:—

“The answer to these contentions must depend on what the position in law is when a Court entertains a suit or an appeal over which it has no jurisdiction, and what the

(2) A.I.R. 1954 S.C. 340.

effect of Section 11 of the Suits Valuation Act is on that position. It is a fundamental principle well established that a decree passed by a Court without jurisdiction is a nullity, and that its validity could be set up whenever and wherever it is sought to be enforced or relied upon, even at the stage of execution and even in collateral proceedings. A defect of jurisdiction, whether it is pecuniary or territorial, or whether it is in respect of the subject-matter of the action, strikes at the very authority of the Court to pass any decree, and such a defect cannot be cured even by consent of parties. If the question now under consideration fell to be determined only on the application of general principles governing the matter, there can be no doubt that the District Court of Monghyr was 'coram non iudice' and that its judgment and decree would be nullities. The question is what is the effect of Section 11 of the Suits Valuation Act on this position."

(9) The objection regarding the validity of the decree could be urged in the execution proceedings and the learned counsel for respondent No. 1 could not bring any contrary law to my notice.

(10) Thus, the error being apparent on the face of the record, the order under challenge is set aside in the light of my aforesaid observations and in view of the statement of the learned counsel for respondent No. 1. It is, of course, made clear that respondent No. 1 can proceed against the petitioners/guarantors for enforcing their guarantee under the general law of the land.

(11) The petition is accordingly allowed, but there will be no order as to costs.

S.C.K.

Before G. R. Majithia, J.

BALLU,—Appellant.

versus

PARSA AND OTHERS,—Respondents.

Regular Second Appeal No. 2051 of 1978.

21st November, 1990.

Hindu Adoption and Maintenance Act, 1956—Ss. 4 & 15—Customary adoption—Abrogation of—Overriding effect of act stated—Right of adopted son to challenge alienation.