
AIR 1988 Bom 45 : (1988) 2 BomCR 59

Bombay High Court

Case No: Appeal No. 44 of 1981 in Suit No. 540 of 1970

M. Ramnarain Pvt. Ltd.
and Another

APPELLANT

Vs

The State Trading
Corporation of India
Limited

RESPONDENT

Date of Decision: Sept. 9, 1987

Acts Referred:

Bills of Exchange Act, 1882 " Section 55, 57#Constitution of India, 1950 " Article
133#Contract Act, 1872 " Section 141#Negotiable Instruments Act, 1881 (NI) " Section
117, 30, 32, 80#Transfer of Property Act, 1882 " Section 130, 134, 76

Citation: AIR 1988 Bom 45 : (1988) 2 BomCR 59

Hon'ble Judges: Shah, J; Pendse, J

Bench: Division Bench

Advocate: F.S. Nariman, R.A. Dada, Virag V. Tulzapurkar and instructed by Shrikant Shah,
Nanavati Tijoriwala and Co, for the Appellant; K.S. Cooper and R.A. Kapadia, instructed by
Bhaishankar Kanga and Girdharlal, for the Respondent

Judgement

Pendse, J.

The State Trading Corporation of India Limited the respondent, original plaintiff
(hereinafter referred to as the Corporation") is

constituted for the purpose of effecting and encouraging exports of goods of Indian origin
to foreign countries. The appellant No. 1-original

defendant No. 1 is a Private Limited Company registered under the Companies Act, 1956
and carries on business of exporting textile goods, while

appellant No. 2-origina defendant No. 2 is a Director of defendant No. 1. The Corporation
instituted suit on the Original Side of this Court on

July 15, 1970 for recovery of Rs. 23,88,998.91 with interest on Rs. 18,18,451.39 paise at the rate of 9% per annum from the date of institution of

the suit till judgment and thereafter at the rate of 6% per annum till payment or realisation. The claim made by the Corporation in the plaint was that

by letter dated June 4, June 6 and June 26, 1967 defendant No. 1 represented to the plaintiff-Corporation that defendant No. 1 had concluded

sale of 2500 bales of heavy cess green to Indonesia for shipment during end June or early July 1967. The sale was concluded in favour of M/s. N.

V. Leader Weaving Dyeing and Furnishing Mills (hereinafter referred to as ""leader""). The Corporation claimed that defendant No. 1 stated in the

letters that the total value of the shipment would be about Rs. 30,00,000/- C and F. and defendant No. 1 would require financial accommodation

of Rs. 5,50,000/- during last week of June 1967 for payment of export duty, Port Commission and other charges at the time of export. Defendant

No. 1 promised to guarantee the party to whom the goods were to be sold as well as the realisation of the foreign proceeds and undertook to

indemnify the Corporation for any loss. The Corporation pleaded that in accordance with the request and the assurances, on July 1, 1967 the

Corporation lent and advanced to defendant No. 1 a sum of Rs. 5,11,000/- at interest at the rate of one per cent above the State Bank rate.

Defendant No. 1 agreed to endorse the shipping documents in favour of the Corporation with a view to enable the Corporation to negotiate the

same and further agreed to draw bills of exchange on M/s. Nichol Industrial Development Co. of Hongkong (hereinafter referred to as ""Nichol"")

payable at 90 days" sight in respect of the goods shipped. The Corporation further lent and advanced to defendant No. 1 a sum of Rs. 8,43,950/-

on July 13, 1967 on interest at the aforesaid rate. An agreement between the Corporation and defendant No. 1 was recorded in the letter dated

July 18, 1967 and the letter reads as under :

18th July 1967.

The State Trading Corporation of India Ltd., 13, Lindsay Street, Calcutta-16.

Dear Sirs,

2400 bales HEAVY CESS GREEN shipment to INDONESIA.

In consideration of your advancing us funds towards the full C and F Value of Rs. 27,09,900/- (Rupees twenty seven lakhs nine thousand nine

hundred) only against the value of the goods of the above shipment being effected by us, we guarantee for the repayment of the entire sum

advanced by you with interest at 9% (nine per cent) until the foreign proceeds are realised. Further, we agree to INDEMNIFY you for any

consequences thereof.

Yours faithfully,

for M. RAMNARAIN PVT. LTD.

SD/-

(R.C.V. Ram)

Mr. Madanmohan Ruia"s personal guarantee will be submitted to you today or tomorrow as soon as received.

Sd/- R.C.V. Ram

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In accordance with an endorsement made at the foot of this letter, defendant No. 2 forwarded the deed of guarantee to the Corporation and under

this deed defendant No. 2 guaranteed to the Corporation due payment of sum of Rs. 27,09,900/- which the Corporation agreed to advance to

defendant No. 1 with interest thereon at the bank rate plus one per cent per annum with quarterly rests. The Corporation pleaded that on the

strength of the agreement recorded in the letter dated July 18, 1967 and on the strength of the guarantee, the Corporation paid a further sum of Rs.

13,54,950/- to defendant No. 1 on July 19, 1967. On July 20, 1967 defendant No. 1 delivered to the Corporation the bills of lading in respect of

the goods shipped as also the three bills of exchange, all of them dated July 15, 1967, for United States \$ 1,50,550/- , U.S. \$ 1,50,550/- and

U.S. \$ 60,220/- and corresponding invoices as and by way of security with the request to negotiate the said documents and to arrange to have them discounted by the State Bank of India.

2. The Corporation further claimed in the plaint that on July 25, 1967 defendant No. 1 paid to the Corporation a sum of Rs. 33,455.60 and this

amount was repaid as there was difference between the loan of Rs. 27,09,900/- and the value of the goods shipped. On August 3, 1967 the three

bills of exchange handed over to the Corporation were accepted by the drawee Nichol and thereupon the bills of lading and other shipping

documents were delivered to Nichol against such acceptance. The three bills of exchange were subsequently presented on maturity but were

dishonoured and were got protested on November 4, 1967, and the Corporation served notice of dishonour on defendant No. 1. Subsequently

the full amount of one of the bills, that is for United States \$ 60,220/- was received on April 2, 1968. (wrongly stated in the plaint as ""May 23,

1968""). The plaint further recites that defendant No. 1 made part payment towards the amount due and sought time for repayment of the balance,

but as the payment did not come forth, the Corporation instituted the suit for recovery of the balance amount with interest at the rate of 9% per

annum till the date of judgment and thereafter at the rate of 6% on the principal amount of Rs. 18,18,451.39 from judgment till realisation. The

particulars of the claim made by the Corporation are set out at Exhibit "D" annexed to the plaint, and the perusal of the same would indicate that

the amount received under one of the bills of exchange out of the there on April 2, 1968 has been shown inaccurately and also on an erroneous

date of May 23, 1968. This mistake has resulted into calculation of interest also.

3. The suit was resisted by defendant No. 1 by filing written statement on May 6, 1971. Defendant No. 1 pleaded that in order to effect exports of

various types of articles and goods, the Corporation used to enter into collaboration with firms and companies who had experience in exporting

goods to various countries. Defendant No. 1 claimed that the Corporation had formulated scheme for joint collaboration and the Corporation

demanding that the collaborator would render technical assistance in sampling selection, pricing, supplying, packing and marketing of such goods

and all matters in regard to the export of the goods. Defendant No. 1 claimed that the Corporation had entered into such an agreement on

February 1, 1966, and the agreement covered cotton textiles, including readymade garments, cotton waste, cotton yarn and all manufactures and

fabrics of cotton textiles and such other items as would be agreed upon from time to time. Under the said agreement defendant No. 1 were to act

as technical consultants to the Corporation and to render all possible assistance and information in respect of the export of the goods. The

agreement further provided that the contracts with foreign buyers in the countries specified in the First Schedule to the agreement might be entered

into either by defendant No. 1 or the Corporation directly, but all such contracts which were entered by defendant No. 1 were invariably to be

entered into in the name of the Corporation or in the name of defendant No. 1 for and on behalf of the Corporation. The invoice, bills of lading and

other related documents were to be prepared in the name of the Corporation or in the name of defendant No. 1 for and on behalf of the

Corporation. The agreement further provided that whenever necessary delegation or representatives of defendant No. 1 and the Corporation

would proceed to abroad to negotiate and settle details in regard to the contracts in connection with the business or promotion of business and the

expenses incurred in respect thereof were to be shared by the parties. Clause 13 of the agreement prescribes that defendant No. 1 were to pay to

the Corporation a share of profit at the rate of 1% on the contract value of the orders secured for export of readymade garments, irrespective of

the country to which they were exported. The share of profit on cotton textiles and other specified items was to be 1% of the contract value in the

case of export to East European countries including Soviet Russia and at the rate of 1/4% on the contract value so far as in the case of all other

countries. Clause 16 of the agreement provided that nothing in the agreement would be deemed to constitute a partnership between the parties

thereto and the agreement shall be treated as an agreement of joint collaboration for export of goods outside India. The agreement was

subsequently varied and the variation is noted in the memorandum dated February 10 and 11, 1966. Under the said variation the words ""share of

profit"" in the agreement were to be substituted by the words ""service charges"". It was further agreed that defendant No. 1 be given exclusive

representation of the Corporation for export of jute goods to Indonesia and certain other countries, and the service charges of the Corporation in

respect of exports to Indonesia would be 1/2% and in respect of other countries 1/4%. Defendant No. 1 pleaded that the transaction with Leader

was in pursuance of this joint venture agreement as varied. Defendant No. 1 pleaded that in view of the joint venture agreement, which may be

constituted as a partnership, the Corporation was not entitled to sue for the amount claimed on the basis of the loan advanced.

Defendant No. 1 further pleaded that the Corporation had failed and neglected to take any proceedings against either Nichol or Leader, Nichol

being the acceptors of the bill of exchange and Leader being the consignee of the goods. Defendant No. 1 claimed that by reason of default

committed by the Corporation, the claim against Nichol had become irrevocable and loss and damage to the extent of the amount of the bills of

exchange with the statutory interest thereon had been suffered by the defendants. It was submitted that by reason of the loss of the security due to

the negligence or inaction of the Corporation, the Corporation is not entitled to recover any amount from defendant No. 1. It was further pleaded

that by reason of the defaults of the Corporation, defendant No. 1 had lost the right to recover the amount from the acceptors. Defendant No. 1

claimed legal set-off in respect of the amount of two bills of exchange and the statutory interest thereon and also made a counter-claim for the sum

of Rs. 4,05,165.11 which was paid to the Corporation in respect of the transactions from time to time.

Defendant No. 2 filed written statement on June 10, 1971 and reiterated the pleas raised by defendant No. 1.

4. The Corporation filed reply to the counter-claim made by the defendants asserting that there was no obligation on the Corporation to take any

steps to recover from Nichol or Leader the amount of the bills of exchange. The Corporation also claimed that it is open for the Corporation to

retain the bills and institute the suit in respect of the moneys lent and advanced to defendant No. 1 as per the agreement contained in letter dated

July 18, 1967. The Corporation claimed that defendant No. 1 ought to have recovered the amount of the two bills of exchange or the price of the

goods supplied by them by adopting appropriate legal proceedings and having failed to do so are guilty of contributory negligence and are

therefore not entitled to debit the said amount to the Corporation as claimed in the written statement.

5. On these pleadings, the learned single Judge raised necessary issues and the Corporation examined two witnesses, while the defendants led no

oral evidence. The parties by consent produced the documents and the correspondence on record. The learned single Judge by the impugned

judgment dated December 16, 1980 held that the amounts were advanced by the Corporation to defendant No. 1 as loans. The learned Judge

further held that on the date of institution of the suit the claim on the two bills of exchange was not barred by limitation and therefore it is not open

for the defendants to claim that the amount covered by the two bills should be credited to the defendants because the Corporation retained the bills

but did not enforce them. The learned Judge felt that on July 15, 1970 when the suit was filed, the remedy to enforce payment in respect of two

outstanding bills was not time barred, as according to law prevalent in Hongkong the period to institute suit on dishonoured bills was six years from

the date of dishonour. According to the learned judge, the relevant point of time to ascertain whether the securities were rendered infructuous is the

date on which the suit is instituted and not the date on which the decree is passed. On the strength of these findings the learned trial Judge held that

the suit to enforce the right under the agreement and the deed of guarantee was perfectly maintainable and decreed the claim and dismissed the

counterclaim and the set-off. The defendants thereupon applied for payment of the decretal amount by instalments, and the learned Judge ordered

that the decretal amount should be paid by monthly instalments of Rs. 3,50,000/, the first of such instalment to be paid on or before March 7.

1981 and the subsequent instalments on or before 7th day of each succeeding month. It was also provided that in the event of any one default in

payment of the instalments, the Corporation would be at liberty to execute the decree for the whole of the decretal amount then due.

6. On January 20, 1981 the defendants filed Appeal No. 36 of 1981 before the Division Bench of this Court and what was challenged in the

appeal was the directions of the learned Judge directing payment of decretal amount by monthly instalment of Rs. 3,50,000/-. The appeal was

placed for admission before Chief Justice, Deshpande and Justice Rege on January 21, 1981, and the appeal was allowed to be withdrawn. On

January 29, 1981 the defendants preferred Appeal No. 44 of 1981 challenging the entire decree and the appeal was admitted by the same Bench

on February 3, 1981, but the Division Bench declined to stay execution of the decree pending hearing and disposal of the appeal. Against the

order passed by the Division Bench declining to stay execution, the defendants moved the Supreme Court, but it is not necessary to refer to those

proceedings, save and except that the appeal itself was directed to be heard by the Supreme Court on or before April 1. 1981. Accordingly, the

appeal was taken up for hearing by Division Bench consisting of Chief Justice Madon and Justice Kurdukar, and the appeal was dismissed by

judgment dated June 19, 1981 on the ground that the appeal was not maintainable. The Division Bench felt that as the earlier appeal being Appeal

No. 36 of 1981 was withdrawn by the defendants the subsequent appeal was barred by res judicata or principles analogous to res judicata. The

Division Bench granted leave under Clause (I) of Article 133 of the Constitution to file an appeal before the Supreme Court, and accordingly Civil

Appeal No. 2905 of 1981 was filed by the defendants. The appeal was allowed by the Supreme Court by judgment dated May 5, 1983 and the

proceedings are remitted back for disposal on merits. The Supreme Court held that the appeal before the Division Bench was not barred by

principles of res judicata. In pursuance of the order of the Supreme Court, the appeal is posted before us for hearing.

7. Before we advert to the challenge to the decree passed by the learned single Judge, it is necessary to refer to certain events which have

transpired either before the institution of the suit by the Corporation or after the institution and the decree passed by the trial Court. As set out

hereinabove Nichol, the acceptor of the two bills, failed to honour the bills and make payment on the date of maturity. Leader seems to have

defaulted due to large variation in the exchange rate, the payment was to be made in United States Dollars and the exchange rate suddenly jumped

up from Indonesian Rs. 121/- per United States Dollar to Indonesian Rs. 285/-per United States Dollar. Efforts were made by defendant No. 1 to

ensure payment in respect of the two dishonoured bills, and the Corporation advised their bankers, State Bank of India, not to debit the account of

the Corporation for some time; Leader was managed by one Mr. Wang and defendant No. 1 secured a writing from Mr. Wang undertaking to

make payment within a short duration and also furnishing guarantees by securing Immovable properties. As the defendants realised that the

payment from the buyers and the acceptors was not coming forth and the Corporation was insisting upon recovering the amount from the

defendants under the agreement contained in the letter dated July 18, 1967, the defendants addressed letters suggesting to the Corporation that suit

should be instituted, both against Leader and against Nichol, for realisation of the amount under the security. The first letter is dated August 20,

1969 and recites that in the personal meetings all the measures taken by the defendants were explained to the officers of the Corporation, including

the advice given by Minister of External Affairs to Ambassador in Indonesia. The letter recites that the legal advisers of the Defendants have

suggested that the action should be taken before the bills became time barred and therefore the Corporation was requested to join the defendants

as a party to the suit as the amounts of the bills are recoverable only by the Corporation. On November 6, 1969 the defendants again addressed

to the Chairman of the Corporation and pointed out that unless pressure is brought by filing the suit the matter will unnecessarily be further delayed.

On November 28, 1969 the Corporation was again informed that suit should be filed both against Nichol and the Leader after ascertaining what is

the period of limitation for filing such suit in Indonesian Court. Two more letters on December 2, 1969 and March 3, 1970 were sent reiterating

the demands for filing the suit. The Corporation informed the defendants on March 4, 1970 that after discussion the Corporation has come to the

conclusion to join as party to the civil suit to be filed in Indonesia. It was stated that such decision was taken to strengthen the case of the

defendants and improve chances of recovery of debt, but it was made clear that this decision would not mean that the Corporation is not entitled to

enforce the personal guarantee given by defendant No. 2. On receipt of this letter, the defendants forwarded two draft complaints to the Corporation

on March 31, 1970 for filing suit against Leader and against Nichol. The Corporation informed the defendants on May 5, 1970 that the

Corporation is not willing to join as co-plaintiff in the suit to be instituted against Leader. The letter makes no reference as to the suit to be filed

against the acceptor Nichol. Same position was reiterated by subsequent letter dated May 18, 1970. In view of the attitude taken by the

Corporation, no suit was instituted against acceptor Nichol in Indonesian Court for realisation of the amount covered by the two bills of exchange.

8. The defendants filed Application No. 396 of 1970 on May 11, 1970 before the Indonesian Court for attachment of the properties of Leader,

and accordingly an order of attachment was passed on May 11, 1970 and was confirmed on June 2, 1970. The procedure in Indonesian Court

permits filing of such application even before institution of the suit. The defendants filed suit against the consignee Leader on September 8, 1971

and the trial Court passed a decree on April 28, 1973 for principal sum covered by the two bills and the interest. The amount of the decree in

Indian rupees comes to about rupees fifty four lakhs. Leader filed appeal and the appellate Court, Jakarta while confirming the decree for the

principal amount reduced the amount of interest by judgment dated January 18, 1979. The total amount of decree awarded by the Appellate Court

comes to about Rupees thirty seven lakhs and eight thousand. Leader then filed an appeal before the Supreme Court of Indonesia, being Appeal

No. 1732/K/SIP/79. The Supreme Court dismissed the appeal on July 28, 1981, and after dismissal the defendants commenced execution

proceedings and the properties of Leader were put to auction sale. As expected the auction sale became infructuous as the legal representatives of

Mr. Wang, who had died in the meanwhile, raised all possible objections to the execution of the decree. After the objections were overruled, a

fresh auction was held on June 16, 1983. The same was cancelled by the Court at the instance of the objections raised by some other parties. The

defendants realising that it was not possible to realise the decretal amount assigned the decretal rights by accepting the principal amount of the two

bills of exchange. The amount of the two bills in Indian currency on the date of assignment was to the tune of Rs. 29,90,069.51. The defendants

received this amount in Indian rupee in India after securing requisite permission from the Reserve Bank. With this background we will examine the

arguments advanced at the bar in support of the respective claims.

9. Shri Nariman, learned counsel appearing on behalf of the appellants, submitted that on the undisputed facts set out hereinabove, the suit filed by

the Corporation is required to be dismissed. The learned counsel urged that the Corporation had secured bills of exchange from the defendants

and it was the duty of the Corporation to do every act necessary for the protection and preservation of the said security. It was contended that

apart from the contractual obligation undertaken by the Corporation by agreement contained in the letter dated July 18, 1967 to realise the foreign

proceeds from the bills, it was the duty of the Corporation as a security holder to ensure that the security is not impaired and rendered useless. The

learned counsel urged that the Corporation did not chose to file action against the defendants on the basis of the bills of exchange, but the suit was

filed to enforce the agreement which was independent of the bills. The Corporation did not give up the claim on the bills and declined to endorse

and hand it over to the defendants and at the same time failed to institute proceedings against the acceptor Nichol. It was submitted that as the

securities were rendered useless by inaction or negligence of the Corporation, the defendants stand discharged from the liability, not only under the

bills but in respect of the debt under the agreement. Shri Nariman submitted that the entire amount of the two bills along with the accrued interest

should be considered as actually paid to the Corporation and therefore the debt of the Corporation stands satisfied and any amount paid by the

defendants in respect of that debt should be returned. Shri Cooper, learned counsel appearing on behalf of the Corporation, controverted the

submission by urging that there was no contractual obligation on the Corporation to proceed against acceptor Nichol and realise the amount of the

two bills. The learned counsel further argued that the Corporation was entitled to proceed against the drawer of the bills, that is defendant No. 1,

apart from the fact that the Corporation could enforce the agreement to recover back the amount of loan advanced to the defendants. It was urged

that the bills were presented to the acceptors and after dishonour protest was noted and notice of dishonour was given to the defendants. The

learned counsel urged that it is not necessary for the Corporation to spend the amount for filing suit against the acceptors and it was open for

defendant No. 1 as a drawer to institute suit against the acceptors on the bills of exchange. In any event, says the learned counsel, the defendants

could have made the entire payment to the Corporation and could have secured the endorsed bills for filing action against acceptors. It was also

urged that the remedy to file suit for realisation of the amount under the bills was available on the date of institution of the suit and the bills became

time barred and valueless only because the hearing of the suit was delayed and for which the defendants were solely responsible as they had raised

false and unsustainable defence. In view of these rival contentions, the sole question which falls for determination in this appeal is whether the failure

of the Corporation to proceed to enforce the right under the bills, which was given as a security by the defendants, would discharge the defendants

from the liability to make payment due under the agreement.

10. The liability of acceptor of a bill is set out in Section 32 of the Negotiable Instruments Act, 1881. The acceptor of a bill of exchange by

accepting it engages that he will pay it according to the tenor of his acceptance, and the effect of such acceptance is to make the acceptor primarily

liable to pay the bill and to render the drawer and the indorsers liable as sureties in case of his default. Since the acceptance assumes an obligation

to pay the bill, it involves also everything essential to the existence of such liability, that is, that the drawer has the authority to draw, that he has

funds of the drawer in his hands and that the payee is a person capable of endorsing, for by acceptance he agrees to pay to his order. The general

rule is that the acceptor of a bill is the primary debtor and the drawer only a surety. The three bills of exchange were handed over by defendant

No. 1 to the Corporation, who was payee, and Nichol accepted it with the result that Nichol became the principal debtor, while defendant No. 1,

who was a drawer, becomes surety. The three bills were dishonoured by Nichol, but payment was subsequently made in respect of one of the

bills. It is not in dispute that limitation for filing suit in respect of dishonoured bills is six years from the date of dishonour in accordance with

Indonesian law. The Corporation, who was the holder of the bills did not institute any proceedings for realisation of the amount under the bills from

Nichol, the principal debtor, and it is necessary to ascertain what is the effect of failure to do so.

It was contended on behalf of the defendants that the Corporation had undertaken a contractual obligation to institute proceedings and realise the

proceeds under the two bills and the Corporation failed to discharge that obligation. As mentioned hereinabove on July 18, 1967 defendant No. 1

had guaranteed repayment of Rs. 27,09,900/-which was advanced by the Corporation towards the full C & F value along with interest at 9% per

annum until the foreign proceeds are realised. Relying on the expression ""until foreign proceeds are realised"" it was urged that the Corporation had

agreed to recover the foreign proceeds from the acceptor and that being a contractual obligation, the Corporation was duty bound to institute

action against the acceptor on the bills being dishonoured. It was also urged that taking into consideration the surrounding circumstances, which led

to writing of this letter dated July 18, 1967 and especially the earlier agreement dated February 1, 1966, of joint venture between the parties, it is

possible to spell out an obligation to realise the foreign proceeds. The fact that the amount was advanced by the Corporation in Indian rupee while

the amount under the bills was to be recovered in United States currency was highlighted to submit that the Corporation was anxious to recover

foreign exchange and was not interested in enforcing the guarantee given by the defendants to repay in Indian currency. It was not disputed on

behalf of the plaintiffs that the defendants had undertaken the liability to repay the amount with interest and that liability is independent of the liability

arising under the bills, but it was urged that the liability arising under the agreement stands discharged because of the failure of the Corporation to

take steps to realise the proceedings of the two bills. It was also urged that defendant No. 1 had agreed to indemnify the Corporation for any

consequences and that indicates that the parties desired that the Corporation would first proceed to realise the amount covered by the two bills

and any expenses required would be borne by defendant No. 1. Reference was made to a passage from paragraph 1491 of Chitty on Contracts,

24th Edition page 702, wherein it is observed that the court will readily imply a term in any contract that the parties shall cooperate to ensure the

performance of their bargain and the degree of co-operation is to be determined not by what is reasonable, but by the obligations imposed --

whether expressly or impliedly -- upon each party by the agreement itself. Shri Cooperon the other hand submitted that it is impossible to spell out

any such contractual obligation from the letter dated July 18, 1967. It was contended that the parties never thought that any such obligation was

undertaken by the Corporation, and therefore, there is no reference to such obligation either in the correspondence or the pleadings of the

defendants. In our judgment, though there is considerable merit in the submission urged on behalf of the appellants on this aspect, we do not wish

to rest our decision solely on the fact that there was a contractual obligation on the Corporation to realise the proceeds of the bills before making

claim against the defendants on the basis of the guarantee given by letter dated July 18, 1967.

11. Shri Nariman submitted that apart from the contractual obligation, in law, there is always an obligation on the lender to preserve the securities

secured for the purpose of repayment of the loan. It was not disputed that the lender is not bound to look in only to the security for repayment of

the debt because of borrower's personal obligation remains unaffected by the security. It is always open for the lender either to disregard the

security and sue the borrower on the loan or realise the security and if it is proved insufficient sue for the balance. It was contended that if the

lender chooses to sue on the loan he is under an obligation, on payment of the debt, to hand over the security, and if he is unable to do so he

cannot have judgment for the debt. It was, therefore, urged that the security must be available on the date when the judgment is secured for

repayment of the loan without reference to the security. In the present case, the trial Judge delivered the judgment on December 16, 1980 and on

that date the two bills had become valueless as the limitation for filing suits in respect of those two dishonoured bills had expired on November 3,

1973. Shri Nariman submitted that the learned single Judge was therefore clearly in error in holding that the relevant date to ascertain whether the

security was infructuous was the date on which the suit was instituted. In support of the submission reference was made to a passage in paragraph

3195 of Chitty on Contract, 24th Edition, page 454 and to the decision reported in 1925 AC 489, *Trustee of the Property of Ellis and Co. v.*

Dixon Johnson. Viscount Cave L.C. in his speech observed :

I have always understood the rule in equity to be that, if a creditor holding security sues for his debt, he is under an obligation on payment of the

debt to hand over the security; and if, having improperly made away with the security, he is unable to return it to his debtor, he cannot have

judgment for the debt.

The decision of the House of Lords does indicate that the relevant date to ascertain whether the security is available for being returned to the

debtor is the date on which judgment is sought for the debt and not the date on which the action is instituted for realisation of the debt without

reference to the security,

12. In support of the submission that the liability of the defendants on the original debt stands discharged and the guarantee given by defendant No.

1 cannot be enforced for failure to keep the security alive, Shri Nariman relied upon a couple of decisions, both of English Courts and Indian

Courts, The first decision is reported in (1863) 143 ER 630, Peacock v. Pursell. In this case one Perry drew a bill of exchange payable two

months after the date to the defendants and was accepted by one Angerstein. The defendants endorsed the bill to the plaintiffs as a security for the

loan received from the plaintiffs. In an action instituted for realisation of the moneys lent and advanced, a defence was raised that the debt cannot

be realised due to the failure of the plaintiffs to present the bill and give notice of dishonour. A unanimous judgment was recorded by four Judges

constituting the Court holding that the failure of the holder of the bill to present it and give notice of dishonour would result into the bill becoming

money in the hands of the holder, and that being so, the debt is satisfied. It was observed that if the creditor is guilty of laches whereby the security

becomes deteriorated or valueless, it becomes equivalent to actual payment. It was further observed that if the holder of the bill obtains a security

for the debt, there was a duty to present the bill and failure to do so discharges the defendants. Reference was also made to three of the decisions

Williams v. Price (1824) 1 Sim & St 581, Mayer v. Murray (1878) 8 Ch D 424 and Yglesias v. Mercantile Bank of the River Plate. (1878) 3

CPD 330 where the same principle was applied.

Reliance was then placed on the decision of the Division Bench of this Court reported in Ganpatrao Balkrishna Bhide Vs. H.H. The Maharaja

Madhavrao Sinde, , where the plaintiff appointed the defendant as an agent to supervise the estate and the defendant deposited a certain sum as

security with a First Class Sardar of Gwalior. the plaintiff being the Maharaja of Gwalior. After the defendant was dismissed from service and the

account was furnished certain amounts were found due from the defendant and the defendant gave authorisation to recover that amount from the

deposit with the Sardar. Without recourse to the amount of deposit. the plaintiff filed suit to recover the amount that would be found due on taking

accounts. The trial Judge decreed the suit holding that the security was not given at the plaintiff's desire or with his cognizance or knowledge. In

appeal, this Court held that as money was held by the Sardar as a stake-holder and was validly assigned by the defendant to the plaintiff in

satisfaction of the balance due on the agency account and as the plaintiff having been able to recover the amount so assigned and neglected to do

so, he was chargeable with the amount. The Division Bench after referring to the English decision mentioned in the paragraph hereinabove,

observed that it is a well recognised principle, that where a creditor has the control of a security he is chargeable with what he might have received

from it but his wilful default.

Reference was also made to the decision of the Privy Council reported in (1904) 6 Bom LR 754, Musummat Sham Kumari v. Raja Rameshwar

Singh. In the case before the Privy Council the suit was brought by the plaintiff to enforce two mortgage bonds and the defendants were

mortgagees and prior mortgagee of the property charged. The plaintiff alleged that the prior mortgage was without consideration and invalid. The

plaintiff also referred to a debt assigned to the plaintiff by the mortgagor. The mortgagor did not resist the suit, but the prior mortgagee filed a written

statement, in which the validity of the plaintiff's mortgage was attacked while maintaining the validity of the prior mortgage. It was also specifically

claimed that the account filed with the plaintiff was wrong in not giving credit for the amount of the assigned debt referred to in the plaintiff's statement. One of the

questions which arose before the Privy Council related to the "assigned debt" as while taking accounts the trial Court had debited the plaintiff with

the amount of that debt. The plaintiff claimed that the amount could have been debited only if and when actually received. The Privy Council

observed that it lay upon the plaintiff to use reasonable diligence to recover the assigned debt from the debtor and no serious attempt seems to

have been made to recover any portion of it, and therefore, debiting the amount of that debt while taking accounts was proper. The case was cited

to contend that the amount of the security under the two bills, if not realised by the Corporation due to its default, should be debited and the

Corporation is not entitled to recover it in the suit against the defendants.

The next decision is reported in ILR (1915) Mad 297 : AIR 1915 Mad 1031 . Muthukrishna Aiyar v. Veeraraghava Iyer), where the plaintiffs

sued to recover the amount due on a mortgage bond by which a house, a promissory note and two simple mortgage bonds executed in favour of

the defendants by the third parties were hypothecated. There was no assignment of the promissory note by way of endorsement. The defendants

pleaded that the plaintiff being the assignee of the promissory note by virtue of the mortgage was not only entitled but was also bound to sue on the

note before it became time barred and that not having been done was liable to be debited while taking accounts with the amount of the promissory

note. The trial Judge upheld the plea and debited the plaintiffs with the amount of the promissory note. The appeal was heard by a Full Bench and

it was held that by virtue of Sections 130 and 134 of the Transferor Property Act (IV of 1882) a mortgage in writing of a promissory note

executed in favour of the mortgagor by a third party for a debt creates an assignment of the promissory note in favour of the mortgagee even

without an endorsement, and as the right of the promisee to sue on the note becomes vested in the mortgagee, the mortgagee alone is entitled to

sue on the note and in taking accounts of the mortgage, the mortgagee is liable to be debited with the amount of the note if he without any

justification allows the recovery of the debt barred by limitation.

The Supreme Court considered the question of the right of pledgee to maintain a suit for recovery of debt while retaining the pledged property in

the decision reported in Lallan Prasad Vs. Rahmat Ali and Another, . A loan was advanced to the defendant against a promissory note and the

receipt. The defendant also executed an agreement to pledge as security for the debt quantity of aeroplanes purchased from military authorities

and to keep the goods in the custody of the plaintiffs. The suit was instituted by the plaintiffs for recovery of the debt and the defendant admitted

the loan but claimed that the plaintiff would not be entitled to obtain a decree unless the goods pledged were delivered back. The trial Judge

rejected the defence by holding that there was no completed contract of pledge as the defendant failed to deliver the goods. The High Court

disagreed with the finding and set aside the decree. The Supreme Court upheld the High Court's finding and then in paragraph 16 of the judgment

considered the question as to whether the plaintiff was entitled to recover the balance of the loan in view of failure to offer to redeliver the goods.

The Supreme Court held that the plaintiff cannot obtain a decree in view of the failure to redeliver the goods. It was held that if by the default the

pawnee is unable to return the security against the payment of the debt, then the pawner has a good defence to the action. It was further observed :

This being the position under the common law, it was observed in *Trustees of the Property of Ellis and Co. v. Dixon Johnson* 1925 AC 489, that

if a creditor holding security sues for the debt, he is under an obligation on payment of the debt to hand over the security, and that if, having

improperly made away with the security he is unable to return it to the debtor he cannot have judgment for the debt.

Relying on these authorities it was contended that the Corporation did not take any steps to realise the proceeds of the two bills of exchange and

permitted the security to lapse, as it was not possible to enforce the securities after period of six years and therefore the liability of the defendants is

discharged in respect of the original debt. The submission urged on behalf of the appellants deserves acceptance.

13. Shri Cooper submitted that the cases referred to by the appellants have no application as in all these cases the defendants had parted with the

property in favour of the plaintiffs while creating security and the right to recover the amount covered by the security was irrevocably lost. It was

urged that the defendants by handing over the bills of exchange to the Corporation had not parted with the property as the bills were merely an

actionable claim. It was also contended that the right to recover the amount under the bills was lost because of failure of defendant No. 1 to pay

the amount to the plaintiffs and get the bills endorsed in favour of defendant No. 1. It is not possible to brush aside the decisions cited on behalf of

the appellants on the ground suggested by the learned counsel. It is futile to suggest that by handing over the bills of exchange drawn in favour of

the Corporation defendant No. 1 did not part with any property. The bills were valuable security and on acceptance of the same by Nichol the

Corporation got a valuable right to receive payment under the bills. It was open for the Corporation to assign the bills by making endorsement and

receive the payment without taking any proceedings against the acceptor. Indeed on acceptance Nichol agreed that the funds of defendant No. 1

were in their hands and agreed to pay the same to the Corporation or their order Once bills of exchange were accepted, then the acceptor accepts

the position that the funds of the drawer are in the hands of the acceptor, and therefore, it is not correct to suggest that by drawing the bills and by

acceptance by Nichol the property was not parted with by the drawer. It was then contended on behalf of the Corporation that though the

Corporation had a duty to preserve the security, it was not obligatory to institute suits in a foreign court against Nichol and it was enough when the

bills were protested and notice of dishonour was given to the drawer. Shri Cooper submitted that it would be unjust to suggest that the

Corporation should have instituted suit against Nichol for realisation of the proceeds under the bills of exchange by spending a huge amount in a

foreign court. The learned counsel also wondered whether Nichol was a solvent party and whether even after obtaining a decree the Corporation

could have recovered the amount. The apprehensions sounded by the learned counsel are ill founded. In the first instance it is not enough to merely

note protest and give notice of dishonour to the drawer. The notice of dishonour was given with a view to make the drawer-the defendant No. 1

liable for payment of the amount covered by the bills, but such notice would not discharge the liability of the acceptor. The liability to pay the

amount covered by the bills is principally of the acceptor and it was necessary for the Corporation to adopt proceedings to realise the proceeds of

the bills. The contention that the Corporation was not sure whether Nichol was a sound party is without any merit. The Corporation accepted the

bills as security only because the solvency of Nichol was not in doubt. Defendant No. 2 had made confidential inquiry through the bank in

Hongkong about the credit worthiness of Nichol and secured a report from the bank which sets out that the financial position of Nichol was

satisfactory. The report was forwarded to the Corporation by letter dated July 15, 1967. It is, therefore, obvious that before securing the bills as a

security, the Corporation was satisfied that Nichol was a sound party. In fact the Corporation never pleaded in the present proceedings that Nichol

was a worthless party and therefore the bills had become valueless. In case the Corporation felt that the bills were valueless then the Corporation

could have very well endorsed the bills in favour of defendant No. 1, but the Corporation was desirous of retaining the security and to keep the

option open to proceed on the bills, both against the acceptor as well as the drawer while enforcing the liability undertaken by defendant No. 1 as

guarantor. The correspondence transpired between the parties indicate that defendant No. 1 was repeatedly requesting the Corporation to file suit

against the acceptor, but the Corporation did not think it wise. Suggestion of Shri Cooper that the Corporation did not want to spend large amount

in a foreign court for institution of suit is not of much substance because defendant No. 1 by letter dated July 18, 1967 had agreed to indemnify the

Corporation for any consequences which would attract while realising the proceeds under the bills. The Corporation thought that the amount could be easily recovered by filing action against defendants Nos. 1 and 2 under the agreement and the deed of guarantee, and therefore, the remedy available against Nichol was not resorted to.

Shri Cooper then submitted that the Corporation was entitled to file suit against defendants Nos. 1 and 2 on the strength of agreement and the

deed of guarantee, and that liability is independent of the liability flowing from the bills of exchange. There cannot be any dispute as regards the

correctness of this submission. Shri Cooper further submitted that the suit filed by the plaintiffs against the defendants is not only to enforce the

liability arising under the agreement and the deed of guarantee for realisation of the original debt, but also for enforcing the liability of defendant No.

1 as drawer of the bills of exchange. It is not possible to accept the submission of the learned counsel. The perusal of the plaint leaves no manner

of doubt that the suit was instituted for realisation of the loan amount advanced by the Corporation and reference was made to the bills of

exchange only in paragraph 5 of the plaint by claiming that the bills were handed over to the Corporation as and by way of security. Though the

reference is made to the fact of bills being dishonoured, the suit claim is based not on the liability of defendant No. 1 arising as a drawer of the

dishonoured bills. Shri Nariman very rightly pointed out that the said fact is made very clear by the defendants by what was stated by the

Corporation in paragraph 4(u) of the reply to the counter claim. After denying that there was any obligation on the Corporation to take any steps

to recover from Nichol the amount of the bills and asserting that the Corporation can retain the bills, it was pleaded ""the plaintiff says that the

plaintiff's claim is made in respect of moneys lent and advanced to the 1st defendant as per the agreement more particularly mentioned in the

plaint."" The second circumstance which clearly goes against the claim made by Shri Cooper is the fact that after institution of the suit under Order

XXXVII of the Code of Civil Procedure, 1908, the plaintiffs took out Summons for judgment on November 25, 1970 and the said summons

establishes that the amount claimed in the suit was one which was lent and advanced by the Corporation to defendant No. 1 from time to time.

There is not a whisper of claim based on the dishonoured bills and Shri Cooper very fairly stated that the Summons for Judgment does not indicate

that the suit claim was based on the dishonoured bills. The learned counsel submitted that the pleadings should be liberally construed and it should

be held that the Corporation wanted to realise the amount paid on the basis of advancement of loan and on the strength of dishonoured bills. It is

not possible to accede to the submission, because the Corporation had filed the suit on the basis of cause of action of advancement of loan and not

on the basis of dishonoured bills and the reason for doing so is not far to seek. The bills of exchange did not specify any rate of interest and

therefore the interest could have been claimed by the Corporation only at the rate of 6% per annum in accordance with provisions of Section 80 of

the Negotiable Instruments Act. The Corporation obviously desired to claim interest at a higher rate of 9% per annum as guaranteed by defendant

No. 1 by letter dated July 18, 1967 and to secure higher rate of interest the Corporation thought it fit to file the suit on the basis of loan advanced

and therefore did not refer at all to the claim arising out of the fact of dishonour of the bills. It is, therefore, impossible to accede to the submission

that the suit claim was made also on the basis of the liability of the defendant No. 1 in respect of the two dishonoured bills. Indeed it was not

necessary for the Corporation to file the suit against the acceptor for enforcing the liability under the bills in the foreign court and it was open to

institute a suit in Indian Courts, both against defendant No. 1-drawer and Nichol, the acceptor, for realisation of the proceeds under the bills. The

failure of the Corporation to institute the suit for realisation of the security from the acceptor is obvious and excuses put forward for not doing so

are without any merit. It was also urged by Shri Cooper that it was open for defendant No. 1 to pay the suit claim to the Corporation and then the

bills could have been endorsed in favour of defendant No. 1, The fact that the Corporation could have endorsed the bills on receipt of entire

amount does not enable the Corporation to escape its obligation to preserve the security.

14. Shri Cooper then submitted that though it was open for the Corporation to institute action against Nichol after the bills were dishonoured,

nothing prevented the drawer to file a suit against Nichol and it was urged that such suit by the drawer against the acceptor, who has failed to

discharge the obligation to make payment to the payee is maintainable u/s 32 of the Negotiable Instruments Act. Reference was made to Section

30 of the Act which prescribes that the drawer of the bills of exchange is bound, in case of dishonour by the acceptor, to compensate the holder

provided due notice of dishonour has been given, and the fact that defendant No. 1 is liable in respect of dishonoured bills of exchange was never

questioned by the appellants. The contention of Shri Cooper that the drawer can file a suit against the acceptor on the bills being dishonoured u/s

32 of the Act cannot be accepted. Section 32 prescribes that in the absence of a contract to the contrary, the acceptor of the bill is bound to pay

the amount at or after maturity and further provides :

In default of such payment as aforesaid such maker or acceptor is bound to compensate any party to the note or bill for any loss or damage

sustained by him and caused by such default.

Relying on the later part of Section 32 of the Negotiable Instruments Act, it was urged that as soon as the bills were dishonoured it was open for

defendant No. 1 to institute suit against Nichol and recover the amount. The submission is misconceived because defendant No. 1 could have

never instituted proceedings against Nichol as the Corporation was the holder of the bills and was never willing to part with the same unless the

entire amount covered by the bills was realised. The suit which could be instituted by the drawer of the bills against the acceptor is for

compensation and Section 117 of the Act sets out the rules in regard to compensation payable in case of dishonour of a bill of exchange. Section

117(c) provides that an endorser who, being liable, has paid the amount due on the bill is entitled to the amount so paid with interest at 6% and

that clearly indicates that the compensation can be sought only by person who is holder of the bill. The drawer can file a suit for compensation

against the acceptor only after the payment is made by the drawer to the payee and an endorsement is obtained in favour of the drawer. It is

therefore incorrect to suggest that defendant No. 1 could have instituted the suit against Nichol after the bills were dishonoured.

Shri Cooper referred to a decision reported in (1877) 7 Ch D 637 (Re, General South American Company), the head-note of which reads as

under :

The drawer of a bill of exchange in a foreign country accepted in England is entitled, upon the bill being dishonoured and protested, to recover

from the acceptor not only the amount of the bill with interest, but also all such reasonable expenses as may have been caused by the dishonour,

including the expenses of re-exchange.

The judgment does not set out as to how the drawer of a bill could recover from the acceptor amount of the bill and Shri Nariman very rightly

suggested that the right arises provided the bill is endorsed in favour of the drawer. The reference to this decision in Re, General South American

Co. is made in Paragraph 503 of Halsbury"s Laws of England, 4th Edition, page 223. In Paragraph 501 it is set out that in the event of dishonour

damages may be recovered by the several parties to the instrument. The holder may recover from any party liable on the instrument and the drawer

of a bill which he has been compelled to pay may recover from the acceptor. From this passage it is obvious that the drawer of a bill can recover

compensation u/s 32 of the Negotiable Instruments Act from the acceptor, provided the drawer is required to pay the amount and the bills are

endorsed by the payee in favour of the drawer.

Shri Cooper then referred to the decision reported in (1886) 18 QBD 286 (Re, Gillespie) where it was observed that notwithstanding the

provisions of Section 57 of the Bills of Exchange Act, 1882, the drawer of a foreign bill of exchange upon an acceptor in England is entitled, upon

the bill being dishonoured and protested, to recover from the acceptor damages in the nature of re-exchange, which the drawer is by the foreign

law liable to pay to the holder of the bill. The decision instead of supporting the submission runs counter. The drawer is entitled to recover from the

acceptor damages provided the drawer is required to pay to the holder of the bill. Section 55 of Bills of Exchange Act, 1882 provides that the

drawer of a bill by drawing it engages that on due presentment it shall be accepted and paid according to its tenor, and that if it be dishonoured he

will compensate the holder or any indorsor provided that the requisite proceedings on dishonour are duly taken. In fact this section indicates that it

was necessary for the holder of the bill to adopt requisite proceedings and requisite proceedings can be nothing but an action in the Court of law to

recover the proceeds of the bills. In our judgment, the contention that it was open for defendant No. 1 to file action against Nichol in respect of

dishonoured bills is without any merit.

15. Shri Cooper referred to a decision reported in ILR (1877) All 392, Basant Ram v. Kolahal and to the decision reported in ILR (1902) Mad

239, Ramaswamy Bhagavatharv. Sundararaja Chetti, but both these decisions, in our judgment, have no bearing to the issue in question. The

Allahabad decision holds that the holder of a bill in the event of dishonour is not bound to sue all the parties liable under it, but may select any party

as he may judge best for the recovery of the money. There is no dispute that the Corporation could have sued either Nichol or defendant No. 1 in

respect of the dishonoured bills, but the Corporation has chosen not to file suit against both of them. The Madras decision indicates that the fact

that the acceptor of a bill is not liable because he was joined as a party to the suit after the limitation had expired does not discharge the drawer

from the liability when the suit has been instituted against the drawer within period of limitation. There cannot be any quarrel about the propositions

laid down by the Madras decision, but we fail to appreciate how it is of any relevance to the facts of the present case. In our judgment, the liability

is very clear that the failure of the creditor to preserve the security leads to the debtor being discharged from the liability, not only under the bills but

also in respect of original debt. In respect of security of Immovable property, Section 76 of Transfer of Property Act demands that the mortgagee

in possession must manage the property as a person of ordinary prudence would manage if it is of his own and return the property back to the

mortgagor after the mortgage amount being satisfied. In the case of surety's liability under the Contract Act, Section 141 of the Indian Contract

Act, 1872 prescribes that a surety is entitled to the benefit of every security which the creditor has against the principal debtor at the time when the

contract of surety ship is entered into, and if the creditor loses or parts with such surety, the surety is discharged to the extent of the value of the

security. In case of bill of exchange after acceptance the primary liability is of the acceptor and the drawer is liable only as a surety. It is necessary

for the creditor to preserve the security, whether it is an actionable claim or whether it is pledge-mortgage or a negotiable instrument. The

advantage of security available to the creditor must be kept alive so as to enable the surety to proceed against such security in case the principal

debtor fails to discharge the liability. The failure to preserve the security would lead to the surety being discharged from the liability. In the present

case the Corporation having failed to preserve the bills of exchange by not instituting any proceedings against Nichol --the acceptor till the expiry

of the period of limitation, the right available to the drawer to proceed against the acceptor was irrevocably lost and consequently the liability of

defendant No. 1 to pay the amount under the letter dated July 18, 1967 also stands discharged. As the liability of defendant No. 1 stands

discharged, it follows that the liability of defendant No. 2, who was the guarantor, would also be discharged and in this connection reliance by

State of Madhya Pradesh Vs. Kaluram, , Amrit Lal Goverdhan Lalan Vs. State Bank of Travancore and Others, , State Bank of Saurashtra Vs.

Chitranjan Rangnath Raja and Another, , is appropriate.

16. The result of this finding is that the plaintiffs suit will have to be dismissed on the basis that the entire amount covered by the two bills along with

the accrued interest stands debited against the Corporation, but we are not inclined to proceed to pass that order. because of events which have

transpired after the decree passed by the learned trial Judge. As mentioned hereinabove after the decree was passed, the defendants have secured

an amount of Rs. 29,90,069/- on June 24, 1983 by assignment of decree secured against Leader. In case the suit filed by the Corporation is

dismissed it would enable the defendants to secure undue advantage. The bills of exchange could not be enforced by the Corporation as the

remedy is barred by limitation, and in case of dismissal of the suit against the defendants the Corporation would not be able to recover back the

loan amount advanced. The contention urged on behalf of the appellants is based on equitable doctrine and therefore it is necessary for the Court

to mould the relief to do justice to both the parties. Merely dismissing the suit would lead to unjust enrichment by the defendants and the genuine

claim of the Corporation to get back the amount advanced would stand defeated. The appellants never denied their liability to return the amount of

Rs. 27,09,900/-advanced by the Corporation and it is not now in dispute that the amount of Rs. 29,90,069.51 was realised by the defendants in

respect of the two dishonoured bills, and in our judgment, there is no rational why the defendants should not return this amount to the Corporation

but retain the same. Shri Nariman very fairly stated that the Court should do justice to the parties because it is well settled that one who demands

equity should also do equity to the others. Shri Nariman submitted that the defendants have no objection to pay the amount of Rs. 29,90,069.51 to

the Corporation but the decree passed by the trial Court requires the defendants to pay a very large amount as the interest is awarded at the rate

of 9% and at the rate of 6% from the date of judgment. The learned counsel pointed out that prior to the suit the defendants have paid an amount

of Rs. 4,05,165.11 to the Corporation against the two dishonoured bills of exchange, the value of which was Rs. 22,23,616.50. The defendants

paid a sum of Rs. 41,00,000/- to the Corporation after the date of the decree, while the total amount of the decree, including interest comes to Rs.

45,73,256.38/-. Shri Nariman submitted that taking all these facts into consideration, the decree of the trial Court should be so modified as not to

pass heavy burden upon the defendants and this is necessary as the defendants are being penalised for no fault of theirs. It was also pointed out

that the defendants were required to spend a large amount of about Rs. 8 lakhs for obtaining a decree against Leader in the Indonesian Court.

Taking all the factors into consideration, in our judgment, the decree of the trial Court is required to be so modified as to make justice between the

parties. In our judgment, it would be appropriate in case the decree of the trial Court is modified by granting the claim which was due on the date

of institution of the suit but by reducing the rate of interest from the date of the suit till realisation. The suit was for enforcement of an agreement to

return the amount with interest at the rate of 9% and this Court has no jurisdiction to reduce rate of interest prior to the date of the suit, but it is

permissible for this Court to determine the rate of interest after the date of the suit and which need not necessarily be the rate agreed to by the

parties under the contract. In our judgment, it would be appropriate in case the Corporation is awarded interest at the rate of 5% per annum on

Rs. 18,18,451.39 which was the principal amount due on the date of institution of the suit and interest is made payable from the date of the suit till

realisation.

It is required to be stated at this juncture that though the plaintiffs demanded a sum of Rs. 23,88,998.91 as being due on the date of the suit and

the particulars of the claim was set out in Exhibit "D" annexed to the plaint, the claim was modified to Rs. 23,12,631.53 as per the modified

particulars tendered before the Division Bench of Chief Justice, Madon and Justice, Kurdukar during the hearing of this appeal on an earlier

occasion. These modified particulars were given after correcting the date of the receipt of the amount in respect of the third bill and also correcting

the figure of exact amount received,

17. Accordingly, decree passed by the learned trial Judge is set aside and the following decree is substituted :

The defendants are ordered and decreed to pay to the plaintiffs a sum of Rs. 23,12,631.53 with interest on Rs. 18,18,451.39 paise at the rate of

5% per annum from the date of filing of the suit till payment or realisation.

Taking into consideration all the circumstances of the case, each party is directed to bear its costs throughout.

Counter claim and set off dismissed with no order as to costs.

The defendants are entitled to calculate the amount due to the Corporation in accordance with this decree, and in case it is found that the

defendants have overpaid the Corporation, then the Corporation shall refund the said amount and such refund shall be made with interest at the

rate of 6% per annum from the date of judgment till payment.

In view of this judgment, Motion No. 1528 of 1987 does not survive, and is dismissed without any order as to costs.

Mr. Kapadia orally applies for certificate to file appeal to Supreme Court. Leave refused.