

***IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **OMP No.126/2001**

% **Date of decision: 30.07.2009**

M/S POYSHA OXYGEN PVT. LTD. Petitioner

Through: Mr. P. Mishra, Sr. Advocate with Mr.
Sandeep Sharma, Advocate.

Versus

SH. ASHWINI SURI & OTHERS ... Respondents

Through: Mr. Sanjeev Anand with Mr. D.
Nishant and Mr. Anuj Bedi,
Advocates for Respondents No.2&3.

AND

OMP No.127/2001

M/S GOYAL MG GASES PVT. LTD. Petitioner

Through: Mr. P. Mishra, Sr. Advocate with Mr.
Sandeep Sharma, Advocate.

Versus

SH. ASHWINI SURI & OTHERS Respondents

Through: Mr. Sanjeev Anand with Mr. D.
Nishant and Mr. Anuj Bedi,
Advocates for Respondents No.2&3.

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

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| 1. | Whether reporters of Local papers may
be allowed to see the judgment? | Yes |
| 2. | To be referred to the reporter or not? | Yes |
| 3. | Whether the judgment should be reported
in the Digest? | Yes |

RAJIV SAHAI ENDLAW, J.

1. Both petitions under Section 34 of the Arbitration Act, 1996
arise out of a common arbitral award dated 31st July, 2000 in the
claims preferred by each of the petitioners against the respondents

OMPs No.126&127/2001

Page 1 of 25

(common in both the cases). The petitioners had before the arbitrator, preferred claims, besides against the respondents, also against M/s Ganga Automobiles Ltd. (which is not a party hereto). Identical questions being involved in the two petitions, they are taken up together for consideration.

2. To appreciate the challenge to the arbitral awards, it is deemed expedient to set out certain facts.

3. On 14th February, 1997 the following documents were executed in each case:-

(a). An Inter Corporate Deposit Agreement between M/s Ganga Automobiles Ltd. and the petitioner in each case. In the said agreements, identical in language, M/s Ganga Automobiles Ltd. is described as the borrower and the petitioner in each case as the lender. The language of the said agreements is inter-alia as under:

“Whereas the borrower is at present in need of financial assistance for the usual business operations of the company and had approached the lender for the same by way of Inter Corporate Deposits.

And whereas lender has agreed to grant to the borrower the required Inter Corporate Deposit herein after referred to as “ICD” (of Rs.1 crores in favour of petitioner M/s Poysha Oxygen Pvt. Ltd. and Rs.2.70 crores in favour of petitioner M/s Goyal MG Gases Ltd.) on the above representation of the borrower, for a period of 90 days at an interest rate of

In view of the above consideration lender has advanced on this day the sum of (Rs. 1 crores in case of petitioner M/s Poysha Oxygen Pvt. Ltd. and Rs.2.70 crores in case of petitioner M/s Goyal MG Gases Ltd.) to the borrower as ICD for a period of 90 days at an interest rate of 30% per annum payable..... **the receipt of which is hereby expressly and specifically admitted by the borrower as well as by a separate money receipt”**

(b). Deeds of personal guarantee were executed separately by the respondent No.1 Sh. Ashwini Suri, respondent No.2 Sh. G. Sagar Suri in favour of each of the petitioners and for amounts aforesaid

with respect to each of the petitioners. The terms of the said deeds, which are also identical and in so far as relevant for the present purposes are as under:-

“Whereas the lender has considered to grant to M/s Ganga Automobiles Ltd..... an Inter Corporate Deposit of Rs..... **vide ICD agreement dated 14th February, 1997** for the usual business operation of the borrower company and in consideration of the representations made by the guarantor to the lender, the lender has agreed to provide the deposit mentioned herein above.

In consideration of the premise, the guarantor hereby unconditionally, absolutely and irrevocably guarantees to and agrees with the lender as follows.....

In the event of any default on the part of the borrower in payment/repayment of any of the monies referred to above or in the event of any default on the part of the borrower to comply with or perform any of the terms conditions and covenants contained in the ICD Agreement the guarantor shall, upon demand, forthwith pay to the lender without demur all the amounts payable by the borrower under the ICD Agreement”.

(c). Deed of corporate guarantee with respect to amount of ICD agreement with each petitioner was also executed by the respondent No.3 M/s. Delhi Auto & General Finance Pvt. Ltd. (Delhi Auto). The terms thereof relevant for the present purposes were as under:-

“Whereas the lender has considered to grant to the borrower an Inter Corporate Deposit of Rs..... **vide ICD Agreement dated 14th February, 1997** for the usual business operations of the borrower company and in consideration of the representations made by the guarantor to the lender, the lender has agreed to provide the deposit mentioned herein below:-

And whereas in case of default by the borrower in repayment of the facilities given to them as mentioned herein above and on the request of the lender this deed of guarantee and indemnity is being executed in favour of the lender and shall remain in existence till all the monies, liabilities, damages and other obligations to the lender is met out by the borrower to the entire satisfaction of the lender.

The guarantor hereby agrees and undertakes to make without delay, demur or protest on first demand the payment of any or all of the obligations that may become payable at any point of time even if the borrower in any

way refuses, defaults, denies, disputes or fails to pay or reimburse the due amounts to the guarantor or to lender or otherwise.”

4. Needless to mention that all the aforesaid documents contained an arbitration clause.

5. Disputes and differences having arisen between the parties, an arbitrator was appointed and the petitioner in each of the cases claiming default of M/s Ganga Automobiles Ltd. and the respondents herein as guarantors preferred claims against them.

6. The respondents herein as well as M/s Ganga Automobiles Ltd. filed a joint reply to the claims of each of the petitioner. It was inter-alia their case that a fortnight before 14th February, 1997 the representatives of the petitioners had a meeting with Sh. Ashwini Suri and Sh. G. Sagar Suri i.e respondents No.1&2 herein and had promised to provide them a temporary loan of Rs.2.70 crores and Rs.1 crore respectively provided corporate guarantee was given for that purpose by the respondent No.3 Delhi Auto and also personal guarantees are given by the respondents No.1&2 Sh. Ashwini Suri & Sh. G. Sagar Suri; negotiations in that respect continued for ten days and ultimately on 14th February, 1997 each of the petitioners got executed an agreement titled as Inter Corporate Deposit Agreement from M/s Ganga Automobiles Ltd. stating therein that each of the petitioners had agreed to grant to the said M/s Ganga Automobiles Ltd. Inter Corporate Deposit of Rs.2.70 crores and Rs.1 crores respectively. It was further the defence of the respondents and M/s Ganga Automobiles Ltd. that on the basis of the promise of the petitioners to advance the temporary loans of Rs.2.70 crores and Rs.1 crore the respondents executed the guarantee papers aforesaid

which were to be valid and operative only if the petitioner had paid the said sum of Rs.2.70 crores and Rs.1 crore respectively and not otherwise; that the said monies were never advanced by the petitioners and thus the consideration for the documents executed on 14th February, 1997 did not materialize and therefore the said documents became inoperative and void ab initio.

7. The petitioners filed replications in which it was inter-alia the case of the petitioners that they had prior to 14th February, 1997 lent monies to M/s First Maruti Leasing Co. Inc. a unit of M/s W.E. Indian Adventures Pvt. Ltd. and M/s Ganga Automobiles Ltd. was the guarantor for repayment of the said monies; that upon default by the aforesaid M/s First Maruti Leasing Co. Inc., the petitioners had threatened action/legal proceedings and the loan was restructured and M/s Ganga Automobiles Ltd. became the principal borrower for the monies already due and executed Inter Corporate Deposit Agreement aforesaid and the respondents became the guarantors. It was thus the case of the petitioners that there was consideration for the documents executed on 14th February, 1997 in the form of past transaction and the documents executed on that date were not without consideration.

8. From the arbitral record, it appears that witnesses were examined and cross examined before the arbitrator. However, it appears that during the pendency of the arbitration proceedings M/s Ganga Automobiles Ltd. was ordered to be wound up and the counsel for the official liquidator was appearing for M/s Ganga Automobiles Ltd. and the counsel earlier appearing for the respondents herein

and M/s Ganga Automobiles Ltd. continued to appear for the respondents.

9. The arbitrator has in the award held that the Inter Corporate Deposit Agreement executed by M/s Ganga Automobiles Ltd. in favour of the petitioners was for consideration. The arbitrator for holding M/s Ganga Automobiles Ltd. liable to both the petitioners has held that it is an admitted fact that as on 14th February, 1997 the said M/s Ganga Automobiles Ltd. owed Rs.2.70 crores and Rs.1 crore respectively to the petitioners on the basis of previous agreements and further that in terms of the previous agreements, M/s Ganga Automobiles Ltd. was a guarantor and in the transaction on 14th February, 1997 it became the principal borrower. The arbitrator has further found that the respondent No.1 herein Sh. Ashwini Suri being the Managing Director of M/s Ganga Automobiles Ltd. was aware of the transaction in question and of the existing liability of M/s Ganga Automobiles Ltd. and further found that in case fresh documents were not to be executed, the petitioners would have immediately taken legal steps for recovery of admitted liabilities. The arbitrator held “forbearance to enforce legal right is good consideration”.

10. The arbitrator further held that though in the documents executed on 14th February, 1997 there was no reference to existing liability being taken over by M/s Ganga Automobiles Ltd. as principal borrower but the issuance of cheques and letter by M/s Ganga Automobiles Ltd. made it evident that the consideration for the new agreements was past existing liability. The arbitrator thus held the

Inter Corporate Deposit Agreement executed by M/s Ganga Automobiles Ltd. to be for valid consideration.

11. Having held so, the arbitrator proceeded to determine the liability of respondents as guarantors. It was observed that the deeds of guarantee themselves did not at all indicate that the petitioners were not to advance Rs.2.70 crores and Rs.1 crore to M/s Ganga Automobiles Ltd. and also did not indicate that the consideration for the agreements was past existing liability. The arbitrator further held that the respondent No.2 Sh. G. Sagar Suri and respondent No.3 Delhi Auto cannot be presumed to be aware that the transaction of 14th February, 1997 was based on past existing liability of M/s Ganga Automobiles Ltd. The arbitrator then referred to illustration (c) of Section 127 of the Contract Act and held "Thus a past consideration is not a sufficient consideration of a contract of guarantee". Reference is also made in the award to Sections 142 & 143 of the Contract Act laying down that any guarantee obtained by means of misrepresentation is invalid. The award also refers to the resolution of the board of directors of the respondent No.3 Delhi Auto (though not found by me on arbitral record) permitting the company to become guarantor for loan to be taken by M/s Ganga Automobiles Ltd. from the petitioners. The arbitrator observed that the said resolution did not permit the respondent No.3 Delhi Auto to become guarantor for any past liability of M/s Ganga Automobiles Ltd. The arbitrator thus held the deed of guarantees executed by respondent No.2 Sh. G. Sagar Suri and No.3 Delhi Auto & General Finance Pvt. Ltd. to be void.

12. As far as the respondent No.1 Sh. Ashwini Suri is concerned the arbitrator held him liable to petitioner M/s Goyal MG Gases Pvt. Ltd. for Rs.2.70 crores but held deed of personal guarantee executed by him in favour of petitioner M/s Poysha Oxygen Pvt. Ltd. also to be void for the same reasons as applicable to the other respondents.

13. The senior counsel for the petitioners has made a short submission. He has contended that the award is contrary to public policy because the claims have been allowed against M/s Ganga Automobiles Ltd. from which nothing can be recovered, having been ordered to be wound up and have been declined against the respondents from whom alone the monies could be recovered. It is argued that the arbitrator has thus left the petitioners with a paper decree; umbilical cord of the documents executed by all the respondents was stated to be the monies which the arbitrator also has found to have been advanced by the petitioners to the respondents. Contradiction is also pointed out in the award, in at one place holding forbearance to be a good consideration and at another place holding otherwise. It is further argued that once the monetary award had been made against the principal borrower, the award is unfair in holding the guarantees to be bad. It is further contended that there are inconsistencies and contradictions in allowing the claim against respondent Sh. Ashwini Suri in one case and disallowing it in the other, and it is further contended that what is good against Sh. Ashwini Suri in the case in which he has been held liable is good against him in the other case, as well as against the other guarantors in both cases. Reference is also made to a letter dated 14th February, 1997 of the petitioner M/s Goyal MG Gases Pvt. Ltd. to M/s Ganga Automobiles Ltd. in reference to the

discussions with the respondent Sh. G. Sagar Suri. It is argued that the intent of the parties was to provide security and which has been defeated in the award. The senior counsel though admitting bad drafting of the documents urged that the same cannot be permitted to be used as fig leaf of defence. He thus argued that the corporate veil should be pierced and the award dismissing the claims against respondents Sh. G. Sagar Suri and M/s Delhi Auto and Sh. Ashwini Suri (in once case) be set aside.

14. Per contra, the counsel for the petitioner has contended that the arbitrator has decided in terms of the documents between the parties and no error can be found with the award. He has reiterated illustration (c) to Section 127 and has stated that the respondent Sh. Ashwini Suri had been held liable to the petitioner M/s Goyal MG Gases Pvt. Ltd. because of the peculiarity of that transaction and which is not so in the transaction with petitioner M/s Poysha Oxygen Pvt. Ltd.

15. The senior counsel for the petitioner has in rejoinder urged for setting aside of the award on the grounds of morality.

16. Since the arbitrator has in declining the claims against the respondents relied only on illustration (c) to Section 127 of the Contract Act, even though neither any law in that respect is mentioned in the award nor has any been cited, it was felt necessary to check the same.

- i. Reference may first be made to the judgment of the Division Bench of Karnataka High Court in **Jayakunvar Manilal Shah Vs. Syndicate Bank**

MANU/KA/0365/1991. It was held that the words “anything done..... for the benefit of the principal debtor” in Section 127 are wide enough to cover the past transaction also; it is not necessary that conferment of a benefit upon the principal debtor by the creditor must be contemporaneous with the execution of surety bond, in order to provide consideration for the agreement of guarantee. Reference was made to ***Halsbury's Laws of England*** 4th Edition at Para-117 inter-alia to the effect that the consideration for a promise of guarantee need not be contemporaneous with the agreement of guarantee and need not appear in writing. Reference was also made to ***Jagadindranath Roy v. Chandranath*** (1904) 31 Calcutta 242 where the surety bond was executed two years after the deed and it was held that the demand for fresh surety was made and the surety became a fresh surety in order to save the principal debtor from the results of failure to comply with the demand of the creditor and as such the execution of the surety resulted in advantage to the debtor and therefore was sufficient consideration for execution of the surety bond. With reference to illustration (c) to Section 127 (Supra) it was held, that the same cannot cut down the amplitude of Section 127 and though an illustration to a section could not be readily assumed to be repugnant thereto, reliance was placed on ***Shambhu Nath Mehra Vs. The State of Ajmer*** MANU/SC/0023/1956 holding that an illustration does not exhaust the full content of

the section which it illustrates but equally it can neither curtail nor expand its ambit.

- ii. Illustration (c) to Section 127 also came up for consideration before the Division Bench of the Gujarat High Court in ***State Bank of India Vs. Smt. Kusum Vallabhdas Thakkar*** MANU/GJ/0303/1991. It was held that this kind of illustration would apply to a total stranger and volunteer who for no consideration whatsoever, agrees to pay in default of payment by the principal debtor. It was held that only in those cases the agreement would be void for being without consideration. In the facts of the case, it was held that anything done for the benefit of principal debtor is a sufficient consideration to the surety and owing to the relationship of the principal debtor and the creditor in that case, it was held that there was consideration and illustration (c) of Section 127 could not come in the way. Reference was also made to Chitty on Contracts-General Principles, 25th Edition, paras 176 and 177 where the promise not to enforce a valid claim against the debtor or a third person was held to be a sufficient consideration for a counter-promise by the debtor or a third person i.e to give security for the debt or to do some other act.
- iii. Reference may next be made to the judgment of the Division Bench of the Bombay High Court in ***Union Bank of India Vs. Avinash P. Bhonsle*** MANU/MH/0923/1991. A reference in this judgment was

made to ***Aniruddha Mitra Vs. The Administrator General of Bengal*** [MANU/PR/0013/1949](#) holding that the purpose of illustration is to illustrate the section, such illustrations should not be read as extending the meaning or restricting operation of the section, especially so, when the effect would be to curtail a right which the plain words of the section would confer; the Division Bench thus held that the language of Section 127 was clear and unambiguous and the sweep of its text could not be curtailed by using Illustration (c) to impose limitation on the expression "anything done or any promise made for the benefit of the principal debtor" that it should be done at the time of giving the guarantee. It was held that the language is wide enough to include anything that was done or a promise made before giving the guarantee.

- iv. The question also came before the Division Bench of Andhra Pradesh High Court in ***Y. Venkatachalapathi Reddy Vs. Bank of India*** MANU/AP/0481/2002. Reference in this regard was made to the definition of consideration in Section 2 (d) of the Contract Act as "when at the desire of the promisor, the promisee or any other person has done or abstained from doing or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise." It was similarly held that there being no ambiguity in the language of

Section 127, illustration 'c' could not be read as abridging or explaining the same.

- v. Another Division Bench of the Gujarat High Court in ***State Bank of India Vs. Premco Saw Mill*** AIR 1984 Gujarat 93 held that it is a settled legal position that if the document is stating some wrong consideration, oral evidence can be given to show that real consideration was other than what has been stated in the document. In that case also the guarantee deeds were executed as if the payments were to be made to the principal debtor in future when in fact the loans had already been advanced and they were not to be advanced afresh at the time of or subsequent to the agreement of guarantee. So ex facie the consideration mentioned in the guarantee deed was incorrect. However, the court found that consideration for which the guarantee was given was in the knowledge of the parties and the language of the guarantee bond was held to be immaterial.
- vi. As far as this court is concerned, I find that a single judge in ***Rattanrya Dhari Jain Vs. S. Avtar Singh*** ILR (1971) Delhi 284 held that Section 128 of the Contract Act says that anything done or any promise made can be a sufficient consideration to the surety; this was held to mean the contract with principal debtor already created to be a sufficient consideration for the surety. It was also held that contracts should be interpreted in the light of

the Latin Maxim “Ut res magis quam vel pereat” i.e. in such a way so as to make it valid.

- vii. Recently another single judge of this court in ***Madan Lal Sobti Vs. Rajasthan State Industrial Development and Investment Corporation Limited*** MANU/DE/9636/2006 also had occasion to consider the said provision. In that case also, as in this case, the execution of the documents was not disputed. The plea was that the documents were got executed by misrepresenting and concealing material facts; it was the case that the mortgage in that case was created much after the date of sanction and disbursement of the loan in favour of the borrower, without any further facility being advanced at that stage; the mortgage was thus alleged to be null and void for lack of consideration. It was the plea that the consideration for a contract can be passed only once and thus the additional guarantee cannot be legally claimed and enforced in law unless fresh consideration is given and which was not so given in that case. Reliance was also placed on illustration (c) to Section 127 of the Act. This court found that the mortgage in that case came into being after the issuance of demand letters and failure of the borrower to clear the dues. It was held to be obviously a case of creation of mortgage arising from forbearance to sue and thus it was held that the mortgage could not be said to be without consideration. The court held that the mortgage in that case being to secure forbearance to sue against the borrower, the

mortgagor could not be permitted to defeat the rights of the creditor and the courts ought not to permit the same.

Thus it will be found that this court also laid emphasis on existence of consideration rather than on whether the deed of guarantee was executed contemporaneously or subsequent to the consideration. Thus the view of this court is not different from that of the various other High Courts as discussed above.

17. Unfortunately, the award in the present case save for merely referring to illustration 'c' of Section 127 has not discussed the same at all. However, a discussion of the various dictas, most of which are of a date prior to that of the award would show that the courts have refused to read the illustration (c) to Section 127 literally as done by the arbitrator. In view of the said settled position of law, there is no option but to hold the award to the extent declining the claim of the petitioners against the respondents Sh. G. Sagar Suri and M/s Delhi Auto as well as partly against the respondent Sh. Ashwini Suri as contrary to law. As per the law laid down in **ONGC Ltd. Vs. Saw Pipes Ltd.** AIR 2003 SC 2629, the same would constitute a ground for setting aside of the award to the said extent.

18. However, I would be failing in my duty if I do not refer to judgments taking a contrary view of Section 127 and/or illustration (c) thereto.

19. Reference may first be made to **Ram Narain Vs. Lt. Col. Hari Singh** AIR 1964 Rajasthan 76 where a single judge held on the basis of illustration (c) to Section 127 that anything

done or any promise made for the benefit of the principal debtor must be contemporaneous to the surety's contract of guarantee in order to constitute consideration therefor. It was further held that a contract of guarantee executed afterwards without any consideration is void. Reliance was placed upon **Nanak Ram Vs. Mehin Lal** (1875) ILR 1 All 487 and the judgment of the privy counsel in **Kalicharan Vs. Abdul Rahman** MANU/PR/0083/1919 and another judgment of the Allahabad High Court in **Chakhan Lal Vs. Kanhaiya Lal** AIR 1929 All 72 and yet another judgment of the Oudh High Court in **M. Ghulam Husain Khan Vs. M. Faiyaz Ali Khan** AIR 1940 Oudh 346 (taking the same view as judgments in para 16 above) distinguished.

20. I am however not only unable to accept the reasoning of the single judge of the Rajasthan High Court but may mention that this court also in **Madan Lal Sobti** aforesaid though referring to the **Ram Narain** case, nevertheless held that consideration even though subsequent, once shown was sufficient and the deed of guarantee could not be avoided on such ground.

21. In view of the judgments of several High Courts mentioned hereinabove and with which I respectfully concur, the interpretation placed in the award on illustration (c) to Section 127 of the Contract Act cannot be accepted. I hold that a past consideration is a sufficient consideration for the contract of guarantee.

22. The arbitrator has while applying illustration (c) of Section 127, also held that the respondents, Sh. G. Sagar Suri and M/s Delhi Auto "cannot be presumed to be aware of the fact the present

transactions were based on past existing liability of M/s Ganga Automobiles Ltd.” The arbitrator has gone to the extent of suggesting that the contracts of guarantee were obtained by the petitioners by misrepresentation. There does not appear to be any basis whatsoever for the arbitrator to reach the said conclusion. The respondents Sh. Ashwini Suri and Sh. G. Sagar Suri and M/s Delhi Auto were before the arbitrator, represented by the same advocate as representing M/s Ganga Automobiles Ltd. till prior to its winding up. They all filed a joint written statement. They all attempted to avoid their liability, as principal debtor as well as guarantors on the plea that while all the documents read as if monies were to be advanced by the petitioners to M/s Ganga Automobiles Ltd. after execution thereof, in fact no monies were so lent/advanced. It was not the case of the respondents Sh. Ashwini Suri and Sh. G. Sagar Suri and M/s. Delhi Auto that they were not aware of the transaction between petitioners and M/s Ganga Automobiles Ltd. Once the arbitrator has negated the said plea qua M/s Ganga Automobiles Ltd., I am unable to appreciate the distinction carved out by the arbitrator between M/s Ganga Automobiles Ltd. and the respondents/guarantors.

23. In fact it was the case of respondents and M/s Ganga Automobiles Ltd. in their reply before the arbitrator that the transaction of the petitioners was with Sh. Ashwini Suri and Sh. G. Sagar Suri. Thus not only from the pleadings of the respondents, the involvement of the respondent Sh. G. Sagar Suri is made out but also of respondent M/S Delhi Auto, in as much as it is the pleading of Delhi Auto also that the petitioners had about 10 days prior to 14th February, 1997 met/approached the respondents Ashwini Suri and

G. Sagar Suri with the offer to lend monies to Ganga Automobiles Ltd. and all the respondents had agreed to stand guarantee for the same. Once the arbitrator reached the conclusion that consideration for execution of documents was not fresh loan but past transactions, the joint case of the respondents could not be split up as done in the award. Once the case set up by the respondents was found to be false to that extent, there was no occasion for the arbitrator to give the benefit given to the respondents. The award also loses sight of the fact that it was not the case of the respondents that they were strangers to the transactions between the petitioners and Ganga Automobiles Ltd. On the contrary their express plea was of all of them along with Ganaga Automobiles, having together transacted with the petitioners. The transactions set up by them have been disbelieved by the arbitrator. Having done so, it is contrary to normal human conduct that the respondents in the transaction actually found in the award, would have acted separately qua the petitioners.

24. There is yet another aspect of the matter. In the Inter Corporate Deposit Agreement, after the recitals inter-alia to the effect that the petitioners had agreed to loan monies to M/s Ganga Automobiles Ltd., there is also a recital whereunder M/s Ganga Automobiles Ltd. has acknowledged receipt of the monies from the petitioners respectively. The deeds of personal guarantee/corporate guarantee executed by the respondents/guarantors also refer to the agreement of Inter Corporate Deposit. Thus the guarantors were aware of acknowledgment of receipt of monies by M/s Ganga Automobiles Ltd. The deeds of guarantee were executed simultaneously to the agreement of Inter Corporate Deposit. The

arbitrator has returned a finding that monies were in fact payable by M/s Ganga Automobiles Ltd. to the petitioners. That finding of the arbitrator has become final and has not been challenged. Once, it is held that there was consideration for the Inter Corporate Deposit Agreement, the guarantees issued for the same consideration, by no stretch of imagination can be said to be without consideration and thus void.

25. This court in ***Saurabh Exports Vs. Blaze Finlease and Credits Pvt. Ltd.*** 129 (2006) DLT 429 has held that a corporate identity cannot be used to defraud the creditors. I find the award to be doing precisely that in the present case.

26. The next question which arises for consideration is that in spite of aforesaid, whether this case falls in the category of cases requiring interference under Section 34 of the Act. It has been my view that mere wrong interpretation or application of law or a contradiction in the award or an inconsistency would not always justify this court interfering with the award. The test to be applied is of perversity and of the judicial conscience being shocked. Whether this case qualifies the said test or not is to be next seen.

27. The Division Bench of this court in ***Gyan Chand Totu Vs. Subhash Chand*** FAO(OS) No.1 of 2004, as quoted in ***NTPC Ltd. Vs. Wig Brothers Builders & Engineers Ltd.*** 160 (2009) DLT 642, has held that the pivotal principle while deciding the scope for interference with award on grounds of public policy is that the award can be set aside if it is patently illegal, but the illegality must go to the root of the matter and if the illegalities are of trivial nature, it

cannot be held that the award is against public policy. It was further held that the award can be set aside if it was so unfair and unreasonable so as to shock the conscience of the court.

28. There is inherent danger in laying down such tests of 'shocking the judicial conscience of the court' for setting aside of the arbitral awards. The same is bound to lead to a lot of subjectivity; the measure/perception of such 'shock' and 'judicial conscience' being inherently different of different courts. I have been unable to find to any judgment defining the same. Rather than attempting to define the same, it is deemed necessary to set out reasons why the conscience of this court is shocked and why the arbitral award in the present case is found to be so unfair and unreasonable so as to be set aside.

29. The petitioners in the present case took care to secure their monies by getting multiple documents signed and by making not only M/s Ganga Automobiles Ltd. liable but making the respondents herein also liable for the same. The respondents also agreed to make themselves liable and admittedly executed documents, on the basis of whereof the petitioners acted. The award changes the said transaction and on a technicality of law which is also not found to be correct. The award sets at naught the commercial transaction between the parties and further deprives the petitioners of the benefit of the documents got executed by them from the respondents and owing to execution whereof the petitioners in 1997 refrained from taking proceedings against M/s Ganga Automobiles Ltd. which till then had not been ordered to be wound up and from which the said monies would have then been recovered. In view of the order of

winding up of M/s. Ganga Automobiles Ltd., the award though in favour of the petitioners would not let the petitioners see the colour of money. The illegality forming basis of such an award can thus by no stretch of the imagination be said to be trivial. The award by dismissing the claims against the respondents protects them, to the detriment and prejudice of the petitioner, from the claims for which they are found by this court to be liable in law. It is not a case of mere difference in amounts awarded or difference of assessment of claims but allows the respondents, from whom monies can be recovered, to go scot free. It is this which shocks the conscience of this court in as much as it sends a message to the public at large, of law not coming to the aid of the petitioners to whom monies are admittedly due and protecting the respondents who had executed deeds of guarantee for repayment of the said monies. Such awards if allowed to stand would bring the entire machinery of administration and dispensation of justice to disrepute.

30. Time has come to change the perception of, 'the law' as Mr. Bumble (in Oliver Twist) said "is an ass - an idiot". Justice cannot be frustrated by legalistics. It is the duty of every court to prevent its machinery from being made a sham, thereby running down the rule of law itself as an object of public ridicule. It will and must prove any stratagem self defeating if a party indulges in making the law a laughing stock, for the court will call him to order. Justice Krishna Iyer in ***Bushing Schmitz Private Limited Vs. P.T. Menghani*** AIR 1977 SC 1569 quoted with approval Lord Erskine "there is no branch of the jurisdiction of this Court more delicate than that, which goes to restrain the exercise of a legal right". He further held

“But the principle of unconscionability clothes the court with the power to prevent its process being rendered a parody”.

31. I also find an inherent inconsistency in the award in so far as denying the claims of the petitioner, M/s. Poysha Oxygen Pvt. Ltd. against the respondent Sh. Ashwini Suri while allowing the claim of the petitioner, Goyal MG Gases Pvt. Ltd. against him. No rationale is found in making the said distinction when the transactions in the two cases were identical.

32. I thus set aside the award in so far as disallowing the claims of the petitioners against respondents G. Sagar Suri and M/S Delhi Auto and in so far as disallowing the claim of petitioner M/S Poysha Oxygen Pvt. Ltd. against respondent Ashwini Suri. The next question which arises is as to whether the parties are to be referred back to arbitration.

33. Section [34](#) of the 1996 Act, literally read, empowers the court only to set aside the award. Section [34\(4\)](#) provides for the court giving an opportunity to the arbitral tribunal to resume the arbitral proceedings. One option in the aforesaid state of law is to require the arbitrator to now go into the claims of the petitioner which were earlier disallowed. Such method was adopted in ***Kirpal Singh Khurana Vs. Union of India*** [MANU/DE/0449/1997](#) and in ***B.P.L. Ltd. Vs. State of A.P.*** JT 2001 (1) Supp 599.

34. Section [34](#) of 1996 Act uses the expression ‘set aside’ only in contradistinction to the myriad options given to the court under the 1940 Act. The reason is not far to fathom. The 1996 Act limits the courts' jurisdiction to interfere with the award. The grounds
OMPs No.126&127/2001

provided for interference were such which if found could only lead to setting aside of the award. The legislature therefore did not feel the need to expressly provide for the power in the court to 'modify' the award, in as much as, if the grounds provided for were to be perused, there would be no occasion for modification and only result would be setting aside of the award. The Apex Court in ***Mcdermott International Inc Vs. Burn Standard Co Ltd.*** 2006(5) SLT 345 thus held that power of court under Section [34](#) was only to set aside the award.

35. However, the Apex Court in ***Numaligarh Refinery Ltd. Vs. Daelim Industrial Company Ltd.*** [MANU/SC/3629/2007](#) has not disapproved the modification of the award done by the District Court and the High Court in appeal in that case and itself also modified the award in terms of its findings. In fact in ***Mcdermott International Inc*** also, the Apex Court after laying in para 55 that under Section [34](#) the court is only empowered to set aside, in the last para modified the award. Similarly, the interest rate awarded by arbitrator has been modified in ***Krishna Bhagya Jala Nigam Ltd. v. G. Harischandra Reddy*** [MANU/SC/0705/2007](#).

36. In my opinion, the power given to the court to set aside the award, necessarily includes a power to modify the award, notwithstanding absence of express power to modify the award, as under the 1940 Act. Just as ***ONGC Ltd. Vs. SAW Pipes Ltd.*** [MANU/SC/0314/2003](#) interpreted the ground of award being against the public policy to include contrary to substantive provisions of law or against the terms of contract ***SBP & Co Vs. Patel Engineering Ltd.*** 2005 8 SCC 618, interpreted the powers under Section [11\(6\)](#) to

be inclusive of judicial powers. The speedy disposal of lis is the underlying thought in the radical changes made in the Arbitration Law. If the powers of the court under Section [34](#) are restricted to not include power to modify, even where the court without any elaborate enquiry and on the material already before the arbitrator finds that the lis should be finally settled with such modification and if the courts are compelled to only set aside the award and to relegate the parties to second round of arbitration or to pursue other civil remedies, we would be not serving the purpose of expeditious / speedy disposal of lis and would be making arbitration as a form of alternative dispute resolution more cumbersome than the traditional judicial process. With great respect, I find myself unable to hold so. The Constitution Bench of Apex Court in ***SBP & Co*** reversed the judgment of earlier Constitution Bench inter alia holding that when a statute confers a power or imposes a duty on judicial authority, that authority unless shown otherwise is to act judicially. The Constitution Bench adopted the procedure laid therein in the context of the Act and to best serve the purpose sought to be achieved by the Act of expediting the process of arbitration without too many approaches to the court at various stages.

37. Such modification of the award would however have to be within the confines of interference with arbitral awards, as held under the 1940 Act and would not permit the courts to substitute their opinion for that of the arbitrator. Such modification of award will be a species of "setting aside" only and would be "setting aside to a limited extent". However, if the courts were to find that they cannot within the confines of interference permissible or on the material before the arbitrator are unable to modify and if the same

would include further fact finding or adjudication of intricate questions of law, the parties ought to be left to the forum of their choice i.e. to be relegated under Section 34(4) of the Act to further arbitration or other civil remedies.

38. In the present case, as already noticed above, the disputes pertain to a transaction of the year 1997. The petitions have been pending in this Court for the last eight years. Claims were made against respondents as guarantors. The claims against principal debtor had already been allowed. Upon setting aside of the award in so far as holding the respondents not liable, the liability of the respondents is the same as that of the principal debtor M/s Ganga Automobiles Ltd., as already determined in the award. It is clarified accordingly. The petitioners shall be entitled to execute the award for the amounts awarded against M/s Ganga Automobiles Ltd., against the respondents Sh. Ashwini Suri, Sh. G. Sagar Suri and M/s. Delhi Auto & General Finance Pvt. Ltd. also.

39. Resultantly the petitions are allowed with the modifications/clarifications aforesaid in the arbitral award. Petitioners shall also be entitled to costs from the respondents of Rs. 50,000 in each petition for the proceedings before this court.

**RAJIV SAHAI ENDLAW
(JUDGE)**

**July 30, 2009
PP**