

* **HIGH COURT OF DELHI : NEW DELHI**

OMP No.277/2004 & OMP No.278/2004 & OMP No.267/2004

% Judgment reserved on : 3rd February, 2009

Judgment pronounced on : 9th April, 2009

OMP No.277/2004

Dr. B.K. Modi ...Petitioner
Through : Mr. L.P. Dhir, Adv. with Mr. Manoj
Yadav, Adv.

Versus
Morgan Securities & Credits Pvt. Ltd. Respondent
Through : Mr. P.S. Bindra, Adv.

OMP No.278/2004

V..K. Modi ...Petitioner
Through : Mr. L.P. Dhir, Adv. with Mr. Manoj
Yadav, Adv.

Versus
Morgan Securities & Credits Pvt. Ltd. Respondent
Through : Mr. P.S. Bindra, Adv.

OMP No.267/2004

Modi Rubber Ltd. ...Petitioner
Through : Mr. L.P. Dhir, Adv. with Mr. Manoj
Yadav, Adv.

Versus
Morgan Securities & Credits Pvt. Ltd. Respondent
Through : Mr. P.S. Bindra, Adv.

Coram:

HON'BLE MR. JUSTICE MANMOHAN SINGH

1. Whether the Reporters of local papers may
be allowed to see the judgment? Yes
2. To be referred to Reporter or not? Yes

3. Whether the judgment should be reported
in the Digest?

Yes

MANMOHAN SINGH, J.

1. The petitioners have filed the aforementioned three petitions/objections under Section 34 of the Arbitration and Conciliation Act, 1996 for setting aside the Award dated 6th May, 2004 made by Respondent No.2. Before considering the above said objections on merit, submissions have been made by learned counsel for the petitioners that the petitioner company i.e. Modi Rubber Ltd was a sick company of which reference was registered in BIFR and since the Scheme of Rehabilitation of the Company has been approved by BIFR these petitions cannot proceed further. Learned counsel for the petitioner has referred to three judgments in the case of **Bijli Cotton Mills (Unit of National Textile Corporation UP Ltd) vs. U.P. Power Corporation Ltd & Ors, JT 2007 (12) SC 645; Arrow Syntex Pvt. Ltd & Ors vs. AAIFR & Ors, MANU/DE/0420/2008 Delhi (DB) and Patheja Brothers Forgings & Stamping & Anr vs. ICICI Ltd. & Ors. (2000) 6 SCC 545** and another un-reported judgment dated 8th June, 2005 of this Court by Division Bench in W.P. (c) No.10284/05 M/s. Modi Rubber Ltd vs. BIFR & Ors in support of his submission.

2. The brief facts are that the petitioners in the above said matters have challenged the award dated 6th May, 2004 passed by Justice J.K. Mehra (Retd.) holding that the respondent No.1 is entitled to a sum of Rs.6,72,63,015/- along with interest @ 21% p.a. from the date of reference i.e. 15th April, 2004 till the date of award and thereafter

from the date of award till the date of payment with simple interest @ 18% p.a. along with costs from the petitioners jointly and severally.

3. It is contended by the respondents that the award is based on agreement between the parties whereby the respondents had given inter-corporate debt of Rs.5 crores to the petitioner in OMP NO.267/04 and in OMP No.278/04 and stood guarantors of the said agreement. Since the amount remained unpaid, the respondent invoked arbitration in which the award has been passed. It is further contended by learned counsel for the respondents that with a view to delay the matters, the petitioners have been taking false and frivolous pleas. The learned counsel submits that under Section 16, an enquiry is pending against the company or if any scheme referred to in Section 17 is in operation during the period of consideration of any Scheme under Section 18 or where any such Scheme is sanctioned, the Board may by order declare with respect to the Sick Industrial Company or any of the contract, assurances of the property, agreement, settlement, award, standing orders or other instruments in force shall remain suspended. According to him, in fact in the Scheme sanctioned by BIFR, the debt of the respondent company is not covered. Lastly he submits that this court has got the power to consider the petition under Section 34 of the Act and in any case if the objection raised by the petitioners, has any merit, the same can only be considered at the time of enforcement of the award and not at this stage. Learned counsel for the respondents has referred the judgment reported as **Morgan Securities & Credit (P) Ltd. vs. Modi Rubber Ltd. 2006(12) SCC 642** and has argued that in view of the said judgment, it

is no more res integra as the same question have been adjudicated upon by the Hon'ble Supreme Court in Civil Appeal No.25762/06 decided on 19th December, 2006 between Morgan Securities Pvt. Ltd. vs. Modi Rubber Ltd. Paras 66 and 67 of the said judgment are reproduced as under:-

“66. Section 5 of the 1996 Act also provides for a non obstante clause. It has, however, a limited application aiming at the extent of judicial intervention. Its application would be attracted only when an order under sub-section (3) of Section 22 is required to be passed. If the said provision is to be given effect to, the Board would not intervene in the matter of the implementation of the award. It would merely suspend the operation of it. It may even pass an order suspending the liabilities or obligations of the industrial company under the award. Even otherwise in the facts of the present case it stands suspended.

67. The Board, however, has not passed an order under sub-section (3) of Section 22 of SICA. The court, therefore, must proceed with the objection filed by the respondent under Section 34 of the 1996 Act. However, if the objection filed by the respondent is rejected, the question of its enforceability would come into being. Once the arbitral award having the force of a decree is put into execution, sub-section (1) of Section 22 of SICA would come in its way from being enforced. The contention raised by Mr Sundaram that having regard to the provisions of Section 5 of the 1996 Act, the Board would have no jurisdiction, therefore, does not seem to have any force.”

4. In view of this judgment the Hon'ble Apex Court has held that since no order under Section 22(3) of SICA was passed, the court must proceed with the objections under Section 34 of the Arbitration and Conciliation Act. Section 22 of SICA is reproduced herein below :

“Section 22. Suspension of legal proceedings, contracts, etc.

22. Suspension of legal proceedings, contracts, etc.—(1)

Where in respect of an industrial company, an inquiry

under Section 16 is pending or any scheme referred to under Section 17 is under preparation or consideration or a sanctioned scheme is under implementation or where an appeal under Section 25 relating to an industrial company is pending, then, notwithstanding anything contained in the Companies Act, 1956 (1 of 1956), or any other law or the memorandum and articles of association of the industrial company or any other instrument having effect under the said Act or other law, no proceedings for the winding up of the industrial company or for execution, distress or the like against any of the properties of the industrial company or for the appointment of a receiver in respect thereof [and no suit for the recovery of money or for the enforcement of any security against the industrial company or of any guarantee in respect of any loans or advance granted to the industrial company] shall lie or be proceeded with further, except with the consent of the Board or, as the case may be, the Appellate Authority.

- (2) Where the management of the sick industrial company is taken over or changed [in pursuance of any scheme sanctioned under Section 18] notwithstanding anything contained in the Companies Act, 1956 (1 of 1956), or any other law or in the memorandum and articles of association of such company or any instrument having effect under the said Act or other law—
 - (a) it shall not be lawful for the shareholders of such company or any other person to nominate or appoint any person to be a director of the company;
 - (b) no resolution passed at any meeting of the shareholders of such company shall be given effect to unless approved by the Board.
- (3) [Where an inquiry under Section 16 is pending or any scheme referred to in Section 17 is under preparation or during the period] of consideration of any scheme under Section 18 or where any such scheme is sanctioned thereunder, for due implementation of the scheme, the Board may by order declare with respect to the sick industrial company concerned that the operation of all or any of the contracts, assurances of property, agreements, settlements, awards, standing orders or other instruments in force, to which such sick industrial company is a party or which may be applicable to such sick industrial company immediately before the date of such order, shall remain suspended or that all or any of the rights, privileges, obligations and liabilities accruing or arising

thereunder before the said date, shall remain suspended or shall be enforceable with such adaptations and in such manner as may be specified by the Board:

Provided that such declaration shall not be made for a period exceeding two years which may be extended by one year at a time so, however, that the total period shall not exceed seven years in the aggregate.

- (4) Any declaration made under sub-section (3) with respect to a sick industrial company shall have effect notwithstanding anything contained in the Companies Act, 1956 (1 of 1956), or any other law, the memorandum and articles of association of the company or any instrument having effect under the said Act or other law or any agreement or any decree or order of a court, tribunal, officer or other authority or of any submission, settlement or standing order and accordingly,—
- (a) any remedy for the enforcement of any right, privilege, obligation and liability suspended or modified by such declaration, and all proceedings relating thereto pending before any court, tribunal, officer or other authority shall remain stayed or be continued subject to such declaration; and
 - (b) on the declaration ceasing to have effect—
 - (i) any right, privilege, obligation or liability so remaining suspended or modified, shall become revived and enforceable as if the declaration had never been made; and
 - (ii) any proceeding so remaining stayed shall be proceeded with subject to the provisions of any law which may then be in force, from the stage which had been reached when the proceedings became stayed.
- (5) In computing the period of limitation for the enforcement of any right, privilege, obligation or liability, the period during which it or the remedy for the enforcement thereof remains suspended under this section shall be excluded.”

5. It appears from sub Section (3) of Section 22 of the SICA that where under Section 16, an enquiry is pending or Scheme referred to in Section 17 is in operation or during the period of consideration of

the Scheme under Section 18 or where any Scheme is sanctioned, the court may by order declare with respect to the sick industrial company that all other contracts, assurances of property, agreements, settlements, awards, orders or other instruments in force shall remain suspended. In the present case firstly the scheme is still pending and even otherwise the respondent's debt is not covered in the said scheme, therefore, I am of the opinion that the court in view of the abovementioned facts and circumstances can consider the objection filed by the petitioner under Section 34 of the Act. Para 49 of the judgment referred by the learned counsel for the respondent reads as under:-

“49. The provisions contained in sub-section (1) of Section 22, however, appear to be clear and unambiguous. Sub-section (3) of Section 22, on the other hand, does not speak of automatic suspension of the proceedings or bar to the jurisdiction of the court in entertaining any application. The provision empowers the Board to make a declaration in terms whereof, *inter alia*, operation of a settlement or award, not only where the industrial company is a party, but also where the same would be applicable thereto, would remain suspended. It envisages suspension of not only operation of any contract of assurances of property, agreement, settlement, award, standing orders, etc., but also the rights, privileges, obligations and liabilities accruing or arising thereunder. The result of such declaration is not far to seek. Such declaration, however, either for suspension or operation of the contract or award, etc. for the rights, privileges, obligations and liabilities or all or any of the rights, privileges, obligations and liabilities accruing or arising thereunder is to be made specifically. The Board may choose to make either of the declarations, as provided for thereunder. The period for such suspension, however, is controlled by the proviso appended thereto.”

6. In view thereof, the contention of the learned counsel for the petitioners has no force and the submission of the petitioners that this

court cannot proceed further is contrary to the law and facts referred. In another decision of the Apex court in the case of **Deputy Commercial Tax Officer vs. Corromandal Pharmaceuticals, AIR 1997 SC 2027**, it is held that Section 22 of SICA cannot be used to breed dishonesty.

7. It is a matter of fact that the above OMPs are pending for the last more than 4-1/2 years, therefore, these petitions/objections under Section 34 of the Act can be considered by this court on merit.

8. List this petition for final disposal on 1st May 2009 before the appropriate bench as per roster after obtaining the orders from the Hon'ble Judge Incharge (Original Side).

MANMOHAN SINGH, J

APRIL 09, 2009
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