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IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on : 06.03.2012

Decided on : 23.05.2012

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EFA (OS) 23/2011 & C.M. APPL. 10277/2011 (for stay)

DR. B.K. MODI

..... Appellant

Through : Mr. Harish Malhotra, Sr. Advocate with Mr. Rajiv Nayyar, Sr. Advocate with Ms. Shweta Bharti, Mr. Vineer Dwivedi, Mr. Neelish Sinha and Mr. Y. Gupta, Advocates

VS

M/S. MORGAN SECURITIES & CREDITS PVT. LTD.

....Respondent

Through : Mr. P.S. Bindra with Ms. Inglee Ray Barooah, Advocates

EFA (OS) 26/2011, C.M. APPL. 12158/2011

MORGAN SECURITIES & CREDITS PVT. LTD.

....Appellant

Through : Mr. P.S. Bindra with Ms. Inglee Ray Barooah, Advocates

VS

DR. B.K. MODI

..... Respondent

Through : Mr. Harish Malhotra, Sr. Advocate with Mr. Rajiv Nayyar, Sr. Advocate with Ms. Shweta Bharti, Mr. Vineer Dwivedi, Mr. Neelish Sinha and Mr. Y. Gupta, Advocates

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE S.P. GARG

MR. JUSTICE S. RAVINDRA BHAT

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C.M. APPL. 12159/2011 IN EFA (OS) 26/2011

For the reasons mentioned in the application, C.M. Appl. 12159/2011 is allowed.

EFA (OS) 23/2011 & C.M. APPL. 10277/2011 AND EFA (OS) 26/2011 & C.M. APPL. 12158/2011

1. This common judgment would dispose of two appeals directed against a judgment and order of a learned single judge of this Court, dated 24-03-2011 in EP No. 112/2010. The impugned judgment overruled the contentions of the appellant in EFA No. 23 of 2011, (hereafter “B.K.Modi”) that execution proceedings were not barred in any manner, by operation of Section 22 of the Sick Industrial Companies (Special Provisions) Act, 1985 (hereafter “SICA”). The second appeal (EFA 26/2011) is by Morgan Securities Ltd (hereafter “Morgan”); it claims to be aggrieved by a part of the same order, to the extent it excludes one of the properties of B.K. Modi, on the ground that it is a dwelling house (hereafter “the suit property”) from execution proceedings.

2. The facts necessary for deciding the controversy are set out hereafter. M/s Modi Rubbers Ltd. borrowed Rs 5 Crores from Morgan Securities through an inter corporate deposit on 20-3-2001; the money was payable in ninety days with 21% interest. V.K. Modi and B.K. Modi stood as guarantors. On the failure of the Modi Rubber Pvt. Ltd to pay back the inter-corporate deposit with interest within the required time, Morgan Securities referred the matter to arbitration. The Sole arbitrator allowed the claim and granted the award in favour of the Morgan Securities, on 6th May 2004. Modi Rubber, V.K. Modi and the Appellant were held jointly and severally liable to pay Rs 6,72, 63,015/- (up to the date of reference) with interest @ 21% from the date of reference till the date of award and simple interest @ 18% p.a. from the date of award till realization to the Respondent. Morgan Securities, filed Execution Petition No. 84/2004 against V.K. Modi for execution of award dated 06.05.2004.

3. In the meanwhile on 17.05.2004, the Board for Industrial Finance and Reconstruction (BIFR) declared Modi Rubbers Ltd a sick industrial company under SICA and sanctioned a revival scheme 08.04.2008, which was challenged by the Morgan Securities before AAIFR. In respect of this award, objections under Section 34 of the Arbitration and Conciliation Act were filed by B.K. Modi, (OMP 277/2001) V.K. Modi (OMP 278/2004) and Modi Rubbers Pvt. Ltd (OMP 267/2001). The objections were dismissed by a Learned Single Judge by common order dated 21st October 2009. The three judgment debtors, i.e B.K. Modi, V.K Modi and Modi Rubbers Pvt. Ltd. filed appeals against this order. B.K Modi withdrew his appeal (FAO (OS) 39/2010) on 19th January 2010. The appeals of Modi Rubbers Pvt. Ltd. and V.K. Modi FAO (OS) 620/2009, were subsequently dismissed vide order dated 09.02.2010. Thus, B.K. Modi's liability as a judgment debtor to satisfy the decree and award attained finality, on 19-1-2010.

4. On 23.02.2010, Modi Rubbers was discharged by BIFR as its net worth turned positive. The BIFR directed Modi Rubbers to implement the unimplemented portion of the sanctioned revival scheme. The appeal, with respect to the sanctioned scheme before the AAIFR, was withdrawn, shortly after, on 23.04.2010. Morgan Securities then proceeded against B.K Modi and Modi Rubbers for execution of the arbitral award through Execution Petition No. 111 and 112/ 2010. Both B.K Modi and Modi Rubbers gave an undertaking before the Court that they would not create any third party interest in respect of their assets. Against this order of the High Court dismissing their appeal in FAO (OS) 620/2009, Modi Rubbers preferred a petition under Article 136 of the Constitution, before the Supreme Court, being SLP (C) No. 14293/2010. The Supreme Court issued notice and stayed

the execution proceedings on 05.07.2010. In respect of the undertaking given by Modi Rubbers Ltd. to the High Court in Execution Petition No. 111/2010, it approached this High Court seeking permission to sell its shares and assets through Execution Application 440/2010. The Court issued notice but did not grant any interim relief.

5. On 25.08.2010, an SLP (No. 21589/2010) filed by V.K Modi against the order of the High Court in the appeal, FAO 75/2010 was clubbed with MRL's SLP (No. 14293/2010). The Court issued notice subject to the deposit of Rs 5 Crores with the Supreme Court. In these circumstances, B.K Modi filed an application for recalling his concession, leading to withdrawal of FAO (OS) 39/2010, (which had been dismissed as withdrawn on 19-1-2010), before the High Court, but this was dismissed on 21-09-2010. He then filed a special leave petition, SLP (C) No. 36522/2010 which too was dismissed on grounds of delay and laches on 21-1-2011.

6. On 07.02.2011, B.K. Modi filed E.A. No111 and 112/2010 for stay of further proceedings in the Execution Proceeding No. 112/2010 which had been initiated against him on the ground of the Supreme Court's order in the SLPs of Modi Rubbers and V.K Modi i.e., SLP Nos. 14239/2010 and 21589/2010 and for stay of execution under Section 22(1) of SICA 1985 (these orders only related to the execution proceedings against V.K. Modi and Modi Rubbers Ltd.). Against the order in E.A 440/2010, where permission to sell shares and assets had been sought, but declined, Modi Rubbers filed a Special Leave Petition before the Supreme Court, SLP No. 26699/2010, and submitted that it was ready to furnish bank guarantee for the entire amount of interest payable in terms of its arbitral award. On

19.03.2011, the bank guarantee was deposited by Modi Rubbers Ltd. in the Supreme Court.

7. By the impugned judgment the Learned Single Judge, in EP No. 112/2010 against B.K. Modi, ordered that the proceedings would continue and also directed the attachment of the property belonging to M/s Spice Entertainment Ltd. with liberty to seek for modification, vacation or variation of the impugned order by submitting documents of title indicating the ownership of the attached property. B.K. Modi claims that this is contrary to the Supreme Court's stay on proceedings. On 06.05.2010, B.K. Modi filed a modification application. The Court granted a week's time to the decree holder Morgan Securities, to file a reply and then adjourned it to 27.05.2011. Hence, this matter came in appeal.

Contentions in B.K. Modi's Appeal

8. It is contended that the learned Single judge erred in not adjudicating on the two applications filed by B.K. Modi for the stay of execution proceedings under Section 22(1) of SICA 1985, till the disposal of Civil appeal No 5437/07, since in *Zenith Steel Tubes & Industries Ltd vs. SICOM Ltd.* (2008) 1 SCC 533, this issue was referred to a Larger Bench for resolution of conflict in the judgments of the Supreme Court. The case is currently pending adjudication, and that till the issue is settled, the award should not be enforced. The impugned judgment did not pay heed to the fact that there are divergent opinions of the Supreme Court regarding interpretation of Section 22(1) of the SICA, with respect to whether the specific protection given to Guarantors under 'suits' would also extend to 'proceedings'; and that this point of interpretation would need to be settled if

there has to be a fair determination of the rights of B.K. Modi and the other judgment debtors.

9. It was argued on behalf of Mr. B.K. Modi that the Single judge erred in holding that the stay order issued by the Supreme court in the two Petitions filed by the co-judgment debtors, did not operate as a general stay to his benefit. It is submitted that the learned Single Judge failed to appreciate that three execution proceedings instituted by Morgan Securities were in respect of the same award, where the judgment debtor Modi Rubbers and V.K Modi were made jointly and severally liable; those execution proceedings were stayed. Consequently, there was nothing which compelled the Trial Court to proceed with the execution of the award, only in the case of B.K. Modi. There was also no requirement to give separate securities by each judgment debtor when the total amount awarded had already been secured. It is submitted that since the appeal against the award is still pending in the Supreme Court, the impugned order for the execution of the award is illogical because, if the award is set aside, B.K. Modi would be seriously prejudiced; and even if the award is confirmed, Morgan Securities can recover the amount from the security already provided for the amount determined along with the interest. It was urged that the impugned judgment is unsustainable, because interest on the amount decreed has been secured and deposited in the Supreme Court. Further, this would amount to execution of the common arbitral award twice.

10. It was urged that the learned Single judge did not consider the conflict between the applicability of the Arbitration and Conciliation Act 1996 and the SICA 1985, since the amount due to the decree holder had been included in the sanctioned scheme, the appropriateness cannot be challenged by the

decree holder. Another related submission was that the scheme of the BIFR was still under the process of implementation; consequently Section 22(1) of the SICA 1985 applies to MRL and its guarantors. Reliance was placed on *Chandan Capital Services Pvt. Ltd. vs. Mid East India Ltd. & Anr.* (2004) 119 Comp Case 288, which held that a guarantor was placed on equal footing as that of the industrial company with respect to the benefit provided under this section.

11. It was submitted that the impugned judgment is not sustainable because there can be only one satisfaction of the common Arbitral Award, which had already been done by the other co-Judgment Debtors by securing the whole award amount along with the interest before the Supreme Court. It was also urged, in addition, that the learned Single judge fell into error in not seeing that the liability of the guarantor, i.e. B.K. Modi, was co-extensive with that of the principal borrower, i.e. Modi Rubbers Ltd, by virtue of Section 128 of the Contract Act. Therefore, the pendency of the proceedings before the Supreme Court, and the interim order of that court, directing deposit of some amount, limited the liability of the guarantor; he could not be made to pay anything beyond what the creditor agreed to accept in the said pending proceedings.

12. It was urged that the learned Single Judge also erred in directing the attachment of the property 36, Amrita Shergill Marg, New Delhi-3. The appellant claims that this property does not belong to the judgment debtor but to M/s Spice Entertainment Ltd. Since Spice Entertainment has nothing to do with the loan transaction or the arbitral award, its property could not be attached. It was submitted further that despite an application, EA 275/2011 raising these very grounds, the Court erroneously directed attachment of the

said property. The impugned judgment was therefore, contrary to Section 60, CPC. It was contended that the choice of the dwelling home was that of the judgment debtor, and not of the Court.

13. It was argued on behalf of Morgan Securities, in response to B.K.Modi's appeal, that the principle of finality applies, and bars any inquiry about whether proceedings under Section 22 SICA are pending. It was submitted that even when objections were pending before the Court hearing the objections to the award under Section 34, Arbitration and Conciliation Act, a submission that Section 22 barred proceedings, and that the statutory scheme covered the debt in question, was made. The Court rejected that argument, and went on to uphold the award. The appeal preferred to the Division Bench, and later withdrawn, by B.K. Modi, also contained grounds containing the same submission. However, the unconditional withdrawal of that appeal, and the attempt to have that concession (leading to withdrawal) reviewed were futile. B.K. Modi's special leave petition too was dismissed. Therefore, it is not open to him to argue that Section 22 bars execution of the award.

14. It was submitted that in any event, the decision in *Kailash Nath Agarwal* was clear, in that the bar for enforcement of guarantees was only in respect of suits, and no other proceedings. It was submitted that the legislature consciously chose to restrict the bar to suits, for enforcement of a guarantee, and not to bar all proceedings, such as execution and distress proceedings. It was argued that Section 128 of the Contract Act, in no way detracted or limited the option of a creditor to recover the amount, or balance amounts from a guarantor to a debt, if the principal borrower was not in a position to pay the whole amount.

15. Morgan Securities, in its appeal, is aggrieved by the impugned judgment, to the extent that it excludes the suit property, from execution proceedings. It is urged that the materials on record showed, on the contrary that Dr. B.K. Modi lived in Singapore, and whenever he lived in Delhi, it was in the Amrita Shergil Marg property. Once he revealed that he had three properties, it was not open for him to exclude one or the other and exercise any choice. The object of Section 60 (1) (ccc) was to enable the judgment debtor bare necessities of life, and not exercise choice in regard to keeping the best properties, resulting in depriving and defeating a decree holder's just rights.

Points in issue

16. It can be seen that the following points arise for consideration, in these appeals:

- (1) Whether Section 22 SICA bars proceedings seeking to recover amounts pursuant to decrees made against guarantors;
- (2) Is it open to B.K. Modi to urge that execution proceedings against him are barred since the debt arising from the award against him, was covered by a sanctioned scheme under SICA;
- (3) Is a guarantors' liability limited, as contended on behalf of B.K. Modi, by virtue of Section 128, Contract Act
- (4) Is the impugned judgment to the extent it grants liberty to B.K. Modi to apply for excluding the Amrita Shergill Marg property from execution proceedings, justified in law;

Point No. 1

17. For a better appreciation of the issue, it would be necessary to extract Section 22 of SICA, the relevant part of which reads as follows:

“22.Suspension of legal proceedings, contracts, etc.:-(1) Where in respect of an industrial company an inquiry under Section 16 is pending of 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 shall lie or be proceeded with further, except with the consent of the Board or, as the case may be, the Appellate Authority.’

SICA was amended by Act No. 12 of 1994 which came into force on 1.02.1994. One of the amendments made was to Section 22 (1). By Section 12(a) of the Amendment Act, the following words were added after the words *"appointment of a receiver in respect thereof"* in the text of the original SICA:

"And no suit for 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."

18. In *M/S Patheja Bros. Forgings & Ors vs. ICICI Ltd & Ors* (2000) 6 SCC 545, the question was whether the creditor could maintain a suit against a guarantor in respect of a debt which was not discharged by the industrial company, which then went sick, and came under the purview of SICA. The Supreme Court held that:

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

As of today, there is an appeal in respect of the first appellant pending before the Appellate Authority under the said Act Therefore, the first respondent's suit for the enforcement of the guarantees in respect of the loans granted to the first appellant cannot be proceeded with unless consent as required by Section 22 is obtained.”

19. *Kailash Nath Agarwal v Pradeshiya Industrial and Investment Corporation of UP* 2003 (4) SCC 305 was a decision in which the Supreme Court reviewed its earlier decisions, in the context of a legal proceeding which was not a “suit”. The Court, after considering the previous law, and the amendment in 1994, as well as other previous decisions – including *Patheja Brothers and Forgings*, held that:

“We do not read the observations quoted as holding that protection of guarantors of loans to a sick company is an object of the 1994 amendment which object must colour our interpretation of the amendment. Till 1994 no protection was afforded to the guarantors under the Act at all. A limited protection has been given in 1994. The expression used being clear and unambiguous, it is not for us to question the wisdom of the legislature in giving the limited protection it did or why such protection was necessary at all. Finally, the phrase introduced by the 1994 amendment relates to the pre-decretal stage because recovery proceedings by way of execution is already covered under the first half of sub-section (1) of Section

22. *If the procedure under the U.P. Act is covered under the word 'proceeding' in the first limb of Section 22(1) of SICA, which it is according to Maharashtra Tubes, it is not a 'suit' for recovery under the second limb of that Section. As rightly contended by learned counsel appearing for PICUP, the proceedings under the U.P. Act are really recovery proceedings within the meaning of the word 'proceeding' as defined in Maharashtra Tubes. Since Section 22(1) only prohibits recovery against the industrial company, there is no protection afforded to guarantors against recovery proceedings under the U.P. Act."*

20. In *Paramjeet Singh Patheja vs ICDS Ltd* 2006 (13) SCC 322, it was held that:

"The argument on behalf of the first respondent is that while this provision provides for the continuation of proceedings against the industrial company, there is no provision in the said Act which provides for the continuation of any held-up proceeding against the guarantor of a loan or advance to such company and that, therefore, Section 22 should be read as applying only to a suit against the industrial company and not a guarantor. Apart from the fact that, as indicated above, the language of Section 22 is explicit, the scheme would provide for the repayment of the loan or advance and, therefore, would take within its ambit the claim on the guarantee; the question of proceeding with the suit against the guarantor would not arise. On the other hand, if the industrial company cannot be revived by a scheme, the embargo under Section 22 would cease to operate."

A significant aspect which has to be noticed is that in *Paramjeet Patheja*, the previous decision in *Kailash Nath Agarwal* was not even considered. It is in this context, that in *Zenith*, the matter was referred for consideration by a three judge Bench of the Supreme Court.

21. It would be necessary to also notice that in a recent Division Bench judgment of this Court, in *Inderjeet Arya & Anr vs ICICI Bank Ltd* (WP. 7253/2011 decided on 2-5-2012) it was held, after an exhaustive analysis of the relevant previous judgments, that:

"The argument on behalf of the first respondent is that while this provision provides for the continuation of proceedings against the industrial company, there is no provision in the said Act which provides for the continuation of any held-up proceeding against the guarantor of a loan or advance to such company and that, therefore, Section 22 should be read as applying only to a suit against the industrial company and not a guarantor. Apart from the fact that, as indicated above, the language of Section 22 is explicit, the scheme would provide for the repayment of the loan or advance and, therefore, would take within its ambit the claim on the guarantee; the question of proceeding with the suit against the guarantor would not arise. On the other hand, if the industrial company cannot be revived by a scheme, the embargo under Section 22 would cease to operate."

22. The above discussion would reveal that the decision in *Kailash Nath Agarwal* dealt with and interpreted Section 22 to mean that the creditor of a sick industrial company was free to initiate proceedings, against a guarantor, for recovery of amounts due and payable by the principal debtor or borrower. The Court had considered the previous decisions, including *Patheja Brothers and Forgings*, and further analyzed the impact of the 1994 amendment. The decision in *Paramjeet Patheja*, on the other hand, has articulated an expansive interpretation of the expression "proceeding" without noticing the previous law, the impact of the amendment, and the decision in *Kailash Nath Agarwal*.

23. The injunction in respect of an industrial company, under Section 22, prohibiting institution or continuation of legal proceedings is that “*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 shall lie or be proceeded with further..*” As far as the proceedings in respect of guarantors is concerned, the bar is more limited; what is prevented is articulated as “*no suit for 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.*” It is immediately apparent that there is an express bar to “execution” and “distress” against the assets of an industrial proceedings. However, there is a conscious omission in the very same provision, when the amendment of 1994 was introduced; what was prevented as against guarantors was “suit for recovery of money or enforcement of security...or of any guarantee in respect of loans”. Clearly, the use of the expression “execution” in respect of one class of subject matter, i.e. assets of industrial company, to bar such proceedings, and the omission (from the subject matter of bar) of execution, compels this court to hold that such execution proceedings against guarantors are maintainable. One cannot forget that before the amendment, all manner of proceedings, including suits against guarantors, were maintainable.

24. As far as the submission that the Court should not have proceeded with the matter, because the Supreme Court has, in *Zenith*, referred the question of interpretation of Section 22, is concerned, the argument is unpersuasive. This is because if such a course were indeed to be adopted,

adjudication would be impossible, and the Courts across the country would be crippled and unable to decide issues which arise before them, each time, such conflicts or differences in judicial approach to a problem are referred to, or are pending before, a larger Bench of the Supreme Court. The correct approach which High Courts have to follow in such cases, was indicated by the Punjab and Haryana High Court, in *M/s Indo Swiss Time Limited, Dundahera Vs. Umrao*, AIR 1981 P & H, by a Full Bench as follows:

"Now the contention that the latest judgment of a co-ordinate Bench is to be mechanically followed and must have pre-eminence irrespective of any other consideration does not commend itself to me. When judgments of the superior Court are of co-equal Benches and therefore, of matching authority then their weight inevitably must be considered by the rationale and the logic thereof and not by the mere fortuitous circumstances of the time and date on which they were rendered. It is manifest that when two directly conflicting judgments of the superior Court and of equal authority are extant then both of them cannot be binding on the courts below. Inevitably a choice, though a difficult one, has to be made in such a situation. On principle it appears to me that the High Court must follow the judgment which appears to it to lay down the law more elaborately and accurately. The mere incidence of time whether the judgments of coequal Benches of the Superior Court are earlier later is a consideration which appears to me as hardly relevant".

In *Ganga Saran v. Civil Judge, Hapur, Ghaziabad and Ors* AIR 1991 All 114, a Full Bench of the High Court of Allahabad considered this question. The Full Bench observed that:

"7. One line of decision is that if there is a conflict in two Supreme Court decisions, the decision which is later in point of time would be binding on the High Courts. The second line of

decisions is that in case there is a conflict between the judgments of Supreme Court consisting of equal authorities, incidence of time is not a relevant factor and the High Court must follow the judgment which appears it to lay down law elaborately and accurately... ”

A Division Bench of this Court quoted an earlier decision, and after considering the Allahabad and Punjab, approved them, in *Virender Kumar @ Bittoo v. State*: 59 (1995) DLT 341 (DB) also considered the question of conflict of judgments of different Benches of the Supreme Court of co-equal strength. The Division Bench noted with approval the decision of the Full Bench of the Allahabad High Court in the case of *Ganga Saran* (supra) as having been laid down that if there is a conflict between two decisions of equal Benches of the Supreme Court, which cannot possibly be reconciled, the courts must follow the judgment which appears to them to state the law accurately and elaborately and particularly so when the later decision of the Supreme Court did not notice the earlier decision. Following *Virender Kumar*, this Court is of opinion that the ruling in *Kailash Nath Agarwal* is appropriate for many reasons; in that judgment, the Supreme Court considered all the previous rulings, as well as the impact of the 1994 amendment. More importantly, the Court considered the conscious legislative attempt in restricting the scope of Section 22 in respect of guarantors. These reasons were not taken into consideration – as indeed, even the decision in *Kailash Nath Agarwal* itself, by the subsequent ruling in *Paramjeet Patheja*. Being decisions of co-ordinate benches, the one applicable closest to the facts, and being in accord with legislative intent, this Court prefers the reasoning in *Kailash Nath Agarwal*. Consequently, it is held that execution proceedings against a guarantor – especially one

against whom the decree has become final – and whose appeal was withdrawn (which too achieved finality) are legal and maintainable. This Court consequently finds no infirmity with the reasoning of the learned single judge.

Point No. 2

25. This issue normally would not have arisen, and in any event would have been covered by the determination of Point No. 1. However, since the parties argued on this aspect, a decision is called for.

26. The final order on the validity of the award passed by the single judge had ruled that when the competence of the arbitral tribunal to hear that matter was questioned on the ground of Section 22(1), since this matter was referred to arbitration in 2002 itself when the company was not a sick company, and the award was passed in 2004, (when there was no order of the BIFR declaring the company as a sick company), this plea could not be taken.

27. The record also reveals that earlier, during the pendency of proceedings or objections under Section 34 of the Arbitration and Conciliation Act, this issue was agitated before a learned Single Judge of the Court, as a preliminary objection. The Court through order dated 09-04-2009 held that since the loan fell outside the scheme of the BIFR, this contention could have no force and that Section 22(1) could not be used to breed dishonesty. It was held that:

“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.”

In the Appeal to the Division Bench against the order of the learned Single Judge when the issue of the validity of the arbitral proceedings was again raised, that Court too did not rule in favour of B.K. Modi in respect of the contention. The latter's appeal, FAO(OS) 39/2010 was dismissed as withdrawn vide order dated 19.01.2010. This issue was again agitated in the review proceedings by B.K. Modi, seeking to recall the said order dated 19.01.2010; however, the review petition was unsuccessful. B.K. Modi's special leave petition against the dismissal of his review petition, was also rejected. Consequently, the issue has attained finality. There is no merit in B.K. Modi's contention on this aspect.

Surety's liability

28. It was argued on behalf of B.K. Modi that in law, a surety's liability is co-extensive with that of the principal debtor. Here, the creditor had no problem with accepting an order whereby only Rs.5 crore stands deposited in the Supreme Court. Those special leave proceedings would in all probability, end in Modi Rubbers, the principal borrower's liability being scaled down. In these circumstances, B.K. Modi cannot be made liable to pay anything more than Modi Rubbers. In this regard, reliance was placed on Section 128 of the Contract Act.

29. For a proper appreciation of this question, it would be necessary to first extract the relevant provisions, i.e. Sections 128 and 134 of the Contract Act. They read as follows:

“128 SURETY'S LIABILITY.

The liability of the surety is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract.

Illustration

A guarantees to B the payment of a bill of exchange by C, the acceptor. The bill is dishonoured by C. A is liable not only for the amount of the bill but also for any interest and charges which may have become due on it.

134 DISCHARGE OF SURETY BY RELEASE OR DISCHARGE OF PRINCIPAL DEBTOR.

The surety is discharged by any contract between the creditor and the principal debtor, by which the principal debtor is released, or by any act or omission of the creditor, the legal consequence of which is the discharge of the principal debtor.

Illustrations

(a) A gives a guarantee to C for goods to be supplied by C to B. C Supplies goods to B, and afterwards B becomes embarrassed and contracts with his creditors (including C) to assign to them his property in consideration of their releasing him from their demands. Here B is released from his debt by the contract with C, and A is discharged from his suretyship.

(b) A contracts with B to grow a crop of indigo on A's land and to deliver it to B at a fixed rate, and C guarantees A's performance of this contract. B diverts a stream of water which is necessary for irrigation of A's land, and thereby prevents him from raising the indigo. C is no longer liable on his guarantee.

(c) A contracts with B for a fixed price to build a house for B within a stipulated time. B supplying the necessary timber. C guarantees A's performance of the contract. B omits to supply the timber. C is discharged from his suretyship.”

30. The true effect of a contract of guarantee, that it binds the surety, even if the principal borrower is unable to repay the debt, or for involuntary reasons, is prevented from doing so (such as insolvency, liquidation, etc) was explained by the Supreme Court in *Maharashtra State Electricity Board v Official Liquidator*, High Court 1982 (3) SCC 358 in the following words:

“Under Section 128 of the Indian Contract Act, the liability of the surety is co-extensive with that of the principal debtor unless it is otherwise provided by the contract. A surety is no doubt discharged under Section 134 of the Indian Contract Act by any contract between the creditor and the principal debtor by which the principal debtor is released or by any act or omission of the creditor, the legal consequence of which is the discharge of the principal debtor. But a discharge which the principal debtor may secure by operation of law in bankruptcy (or in liquidation proceedings in the case of a company) does not absolve the surety of his liability (see Jagannath Ganeshram Agarwala v Shivnarayan Bhagirath (AIR 1940 Bom 247 : ILR 1940 Bom 387 : 42 Bom LR 451); see also In re Fitzgeorge Ex parte Robson ((1905) 1 KB 462 : 74 LJ KB 322 : 90 LT 206)). In view of the unequivocal language of the letter of guarantee, no reliance can be placed by the Company in liquidation on the decision of this Court in Punjab National Bank Limited v. Bikram Cotton Mills ((1970) 2 SCR 462 : (1970) 1 SCC 60 : AIR 1970 SC 1973) in which the surety's liability was limited to the 'ultimate balance' found due from the principal debtor and the said balance had not been ascertained before the institution of the suit. The facts of this case are distinguishable from the facts in the case before us. As mentioned earlier the liability of the Bank to pay the amount as per the letter of guarantee did not depend upon prior proof of any default on the part of the Company in liquidation. Whether the whole of Rs 50,000 should be demanded or any lesser sum should be demanded from the Bank was entirely within the choice of the Electricity Board.

The Bank has, therefore, to pay the amount due under the letter of guarantee given by it to the Electricity Board. On such payment it is open to the Bank to have recourse to the securities given by the Company in liquidation for the purpose of the issue of the letter of guarantee. The Electricity Board is not concerned with what the Bank does in order to reimburse itself after making payment of the amount guaranteed by it. It is the responsibility of the Bank to deal with the securities held by it in accordance with law. It was not, however, open to the Company Judge to make any order under the Companies Act prohibiting the Electricity Board from realising the amount guaranteed by the Bank as this had nothing to do with the assets of the Company in liquidation. The order of the Company Judge and the judgment of the Division Bench in appeal are, therefore, liable to be set aside and they are accordingly set aside.”

The principle was again reiterated in *Industrial Finance Corporation Of India Ltd., Appellant V. Cannanore Spinning And Weaving Mills Ltd & Ors* [(2002) 5 SCC 54] as follows:

“the principle of the aforesaid decision of this Court is equally applicable in the present case. The right of the appellant to recover money from Respondents 1, 2 and 3 who stood guarantors arises out of the terms of the deed of guarantee which are not in any way superseded or brought to a naught merely because the appellant may not be able to recover money from the principal borrower. It may here be added that even as a result of the Nationalisation Act the liability of the principal borrower does not come to an end. It is only the mode of recovery which is referred to in the said Act.”

31. In *Bank of Bihar Ltd. v. Damodar Prasad and another*, [1969] 1 SCR 620, the Supreme Court outlined the duty of the guarantor under the provisions of the Contract Act, explaining that a decree made against him

jointly with the principal borrower can be independently executed or enforced, in the following terms:

"It is the duty of the surety to pay the decretal amount. On such payment he will be subrogated to the rights of the creditor under Section 140 of the Indian Contract Act, and he may then recover the amount from the principal. The very object of the guarantee is defeated if the creditor is asked to postpone his remedies against the surety. In the present case the creditor is banking company. A guarantee is a collateral security usually taken by a banker. The security will become useless if his rights against the surety can be so easily cut down."

The principle discussed in the above decision, was reiterated by a three judge bench of the Supreme Court held, in *State Bank of India vs. Indexport Registered & Ors.* AIR 1992 SC 1740, that for the purpose of execution of a decree, it is not necessary that the decree holder must first execute the decree against the principal debtor, and thereafter proceed against the guarantor if the decree still remains outstanding. The surety has no right to restrain execution against him until the creditor has exhausted remedies against the principal debtor.

32. In the light of the above discussion, this Court finds the submission about unenforceability of the decree against B.K. Modi, on the ground that the petition of the principal debtor is pending before the Supreme Court insubstantial.

Point No. 5

33. The relevant portion of the impugned judgment, to the extent Morgan Securities feels aggrieved, reads as follows:

"The judgment debtor has filed an affidavit and has given the list of three immovable properties, one at Panchkula and two in

Delhi. The two properties in Delhi are the properties in Prithvi Raj Road, which is stated to be mortgaged to a bank and being used as a dwelling house. According to Section 60(1) (c) CPC, one dwelling unit cannot be attached, therefore, this property is exempted prima facie from attachment. The third property is stated to be a property at 36, Amrita Shergill Marg, which is stated to be in the name of a company but no documents of title or photocopies thereof are attached. The decree holder has also sought attachment of the said property. In absence of the documents of title of this property Ex.P.No.112/2010 Page 11 of 12 at Amrita Shergil Marg, the said property is attached. However, liberty is given to the judgment debtor to seek modification, vacation or variation of this order in case the documents of title indicating the ownership of company is shown in respect of this property.”

It was urged that under Section 60, CPC, there was no choice of the judgment debtor i.e. B.K. Modi to exclude any specific property. It is urged, more importantly, that the said judgment debtor does not live in Delhi, and that all the documents and pleadings, indicate that he lives in Singapore, and while in Delhi, he resides in the Amrita Shergill property. Therefore, the learned single judge fell into error in excluding the Prithvi Raj Road property. On the other hand, Counsel for B.K. Modi relied on the specific provision itself and contended that the choice of dwelling home which has to be excluded from execution, is that of the judgment debtor.

34. Section 60 (1) (ccc) of the Code of Civil Procedure 1908 as applicable to Delhi, reads as follows:-

“One main residential-house and other buildings attached to it (with the material and the sites thereof and the land immediately appurtenant thereto and necessary for their enjoyment) belonging to a judgment-debtor other than an agriculturist and occupied by him;

Provided that the protection afforded by this clause shall not extend to any property specifically charged with the debt sought to be recovered.”

35. The execution proceedings in the case concern three immovable properties; one at Panchkula and two in Delhi. The two properties in Delhi are the properties at Prithvi Raj Road, which it is claimed, is mortgaged to a bank and being used as a dwelling house. The third property is at 36, Amrita Shergill Marg.

36. This Court notices that the affidavit in support of the review petition, as well the affidavits in the appeals, including the appeals under consideration here, were filed on behalf of Dr. B.K. Modi by Mr. Atul Prakash, his power of attorney holder. The deed of power of attorney was executed on 17.3.2009. The address of residence of B.K. Modi, is 36, Amrital Shergill Marg. In these circumstances, and since there is no dispute that B.K. Modi is a Non-Resident Indian who lives in Singapore – but who might be living a part of the year in this country – it cannot be said that the Prithviraj Road property is the “main” dwelling house “occupied” by him. This Court also finds insubstantial, and without substance, the materials placed on record by him, to say that he occupies that property. They consist of property tax receipts; some grocery bills to “Modi House” and other electricity bills – some of which are issued to “Duncan House” at Himalaya House, Barakhamba Road, New Delhi. As a result, it is held that Morgan Securities’ appeal (EFA (OS) 26/2011 is entitled to succeed. The Prithviraj Road property in Delhi, also therefore, has to be the subject matter of attachment order in the execution proceedings. It is directed accordingly.

37. The above discussion would have been dispositive of the appeals. However, this Court is also conscious of the fact that by virtue of the interim

order of the Supreme Court, in the pending special leave petition, the principal borrower has deposited. Rs.5 crores. Yet, the balance Rs.13 crores towards the interest claim have not been provided for. Having regard to the fact that execution proceedings would end only in one order of satisfaction, this court is of the opinion that till final orders are made in the pending special leave petition, the executing court should not proceed to act on the entire decree, as regards the liability of Dr. B.K. Modi. Therefore, the execution proceedings as against him would proceed for recovery of the interest liability, i.e. Rs.13 crores. The executing court shall proceed to recover the other amounts, from Dr. Modi in the light of, and subject to final order of the Supreme Court. All rights of Dr. Modi, to recover any amounts from the principal borrower, or to seek restitution of any amounts which may become due from the decree holder, available in law, in terms of provisions of the Contract Act, and the Civil Procedure Code, are expressly reserved.

38. EFA (OS) No. 23/2011 is dismissed, but subject to the directions in the preceding paragraph. EFA (OS) No. 26/2011 is allowed.

S. RAVINDRA BHAT
(JUDGE)

S.P. GARG
(JUDGE)

MAY 23, 2012