CASE NO.:
Appeal (civil) 3239 of 1995

PETITIONER:
INDUSTRIAL FINANCE CORPORATION OF INDIA LTD.

Vs.

RESPONDENT:
THLETDC.AN&NAONROSR.E SPINNING & WEAVING MILLS

DATE OF JUDGMENT: 12/04/2002

BENCH:
Umesh C. Banerjee & Y.K. Sabharwal

JUDGMENT:

Banerjee, J.

The general rule of equity expounded by Sir Samuel Romilly as counsel and accepted by the Court of Chancery in Crythorne v. Swinburne (1807) 14 Ves. 160, that the surety will be entitled to every remedy which the creditor has against the principal debtor, including the enforcement of every security stands statutorily recognised and incorporated in Section 141 of the Indian Contract Act as regards the discharge of a surety from liability, when the creditor parts with or loses the security held by him with, however, an insignificant variation to the effect that the surety is entitled to the securities given to the creditor, both before and after the contract of surety.

It is on this score thus Section 141 of the Act ought to be noticed at some length more so by reason of the same being the sheet-anchor in support of Respondents' presentation before this Court in the instant appeal to the effect that the surety is entitled to the securities given to the creditor, both before and after the contract of surety and in the event the same stands dissipated then and in that event there is cessation of liability to the extent of such dissipation or extinction. An indeed bold proposition but the same stands accepted by the High Court and hence the appeal before this Court. Before, however, adverting to the issue as above, it would be rather convenient to note certain decisions of this Court as well as of the English Court for further appreciation of the matter.

In State of Madhya Pradesh v. Kaluram (1967 (1) SCR 266 = AIR 1967 SC 1105) this Court pointedly stated that the expression "security" in the Section is not used in any technical sense; it includes all rights which the creditor has against the property on the date of the contract. In Kaluram (supra) this Court also lent its approval of Hannen, J. in Wulff and Billing v. Jay, (1872 (7) QB 756), wherein the learned Judge stated the law as follows :-

" I take it to be established that the defendant became surety upon the faith of there being some real and substantial security pledged, as well as his own credit, to the plaintiff; and he was entitled, therefore, to the benefit of that real and substantial security in the event of his being called on to fulfil his duty as a surety, and to pay the debt for which he had so become surety. He

will, however, be discharged from his liability as surety if the creditors have put it out of their power to hand over to the surety the means of recouping himself by the security given by the principal. That doctrine is very clearly expressed in the notes in Rees v. Barrington, 2 White and T.L.C., (4th Ed.) at p. 1002 'As a surety, on payment of the debt, is entitled to all the securities of the creditor, whether he is aware of their existence or not, even though they were given after the contract of suretyship, if the creditor, who has had, or ought to have had, them in all full possession or power, loses them or permits them to get into the possession of the debtor, or does not make them effectual by giving proper notice, the surety to the extent of such security will be discharged. A surety, moreover, will be released if the creditor, by reason of what he has done, cannot, on payment by the surety, give him the securities in exactly the same condition as they formerly stood in his hands'" - and it is on this score this Court, relying on the aforesaid, in Kaluram (supra) observed that "The surety is entitled on payment of the debt or performance of all that he is liable for to the benefit of the rights of the creditor against the principal debtor which arise out of the transaction which gives rise to the right or liability. The surety is therefore on payment of the amount due by the principal debtor entitled to be put in the same position in which the creditor stood in relation to the principal debtor. If the creditor has lost or parted with the security without the consent of the surety, the latter is by the express provision contained in Section 141, discharged to the extent of the value of the security lost or parted with."

(Emphasis Supplied)

At this juncture, it would also be convenient to note the true effect of Sections 139 and 140 of the Indian Contract Act, 1872 as well, which read as under :

"139. Discharge of surety by creditor's act or omission impairing surety's eventual remedy. If the creditor does any act which is inconsistent with the rights of the surety, or omits to do any act which his duty to the surety requires him to do, and the eventual remedy of the surety himself against the principal debtor is thereby impaired, the surety is discharged.

140. Rights of surety on payment or performance. - Where a guaranteed debt has become due, or default of the principal debtor to perform a guaranteed duty has taken place, the surety upon payment or performance of all that he is liable for, is invested with all the rights which the creditor had against the principal debtor."

A reference to a Full Bench judgment of the Madras High Court at this juncture would also be very apposite. In A.L.S.P.PL. Subramania Chettiar (d) and Anr. v. Moniam P.Narayanaswami (AIR 1951 Madras (FB) 48), the High Court stated in paragraph 12 as below :-

"Unhampered by judicial decisions also, on a fair reading of the provisions of the Contract Act, I am inclined to hold that as the liability of the surety is co-extensive with that of the principal debtor, if the latter's liability is scaled down in an amended decree, or otherwise extinguished in whole or in part by statute, the liability of the surety also is pro tanto reduced or extinguished. Paragraph

192 of Halsbury's Laws of England, Vol.16, 1935 Edn., contains the following passage :

"Whatever expressly or impliedly discharges the principal debtor from liability usually discharges the surety also by implication, as his position is thereby altered without his consent, notwithstanding that the alteration is accomplished by operation of law. He is therefore discharged where he can establish that the alteration changes the nature of his liability, but not otherwise."

This shows that extinction of a debt in whole or in part by operation of law will do, and that the creditor need not take any part in realising the principal debtor from his liability. Mr. Ramachandra Aiyar relied on a passage in para 195 which runs as follows :

"Though an alteration in the position of the surety by the principal debtor's discharge, or otherwise, accompanied by the operation of law, may discharge him this is not always the case."

But this passage will not, in my opinion, help the appellant in this case as the exceptions given there relate to the release of the principal debtor's liability under the law of limitation, bankruptcy laws, etc. (which merely bar the remedy) and not to the extinction of the principal debtor's liability, as here under the Madras Agriculturists' Relief Act."

Having noted the decisions as above it would be rather convenient to have the factual details at this juncture since facts are required tobe assessed in its proper prospective and while assessing the same if it is so found that the assessment of the factual matrix fully fits in with the statutory requirement noticed hereinbefore no exception can be taken to the judgment under appeal. Let us thus refer the facts as below:

(a) Presently we are not called upon to dilate in detail the factual element, excepting where it is so required by reason of the decree obtained by the plaintiff/appellant for the balance of principal and interest treating the principal and interest as on 31.3.1974 as Rs.48,50,000/- and Rs.22,36,707.95 with subsequent interest at the contract rate without penal rate of interest from 1.4.1994, with proportionate costs.

(b) The Trial Court resolved almost every issue in favour of the plaintiff except however as regards the issue of penal interest decreed the suit as noticed above.

(c) The decree however stood challenged by the respondent herein inter alia on two several counts: the first being the factum of intervention of law to wit the Nationalisation Act and on the second the existing provisions of Sections 140 and 141 of the Contract Act: The High Court however answered the same in the affirmative and in favour of the defendants in the suit and hence the

petition for special leave before this Court and the subsequent grant of leave by this Court.

Incidentally, the introduction of the Nationalisation Act has obviously weighed with the High Court in particular the mechanism provided in terms of Sections 20 and 21 of the Act.

Before however adverting thereto certain further factual details ought to be noticed for correct appreciation of the matter in its proper perspective. The facts disclose:

Having intended to set up another spinning unit at Mahe (Pondicherry State), the first respondent approached the appellant/plaintiff for financial assistance and obtained sanction for Term Loan Facility for Rs.35,00,000/-. Pending legal formalities, the appellant/plaintiff granted Rs.15,00,000/- as interim loan on 25.3.1963 on which date the first respondent deposited the title deeds of certain immoveable properties with the plaintiff's branch at Madras and thus, agreed to create an equitable mortgage thereby. The first respondent also executed a deed of hypothecation in respect of moveable assets such as plant, machineries, etc. and a promissory note for the said amount of Rs.15,00,000/-. This, however, later was merged in the Term Loan amount of Rs.35,00,000/- secured by a deed of mortgage executed by the first respondent on 2.5.1963. The first respondent executed a legal mortgage under a document registered with the then Notary of Pondicherry as security for the repayment of the entire term loan of Rs.35,00,000/- on 30.4.1963, which also included the deferred payment guarantee facility of Rs.5,62,230.40. This was followed by an equitable mortgage by the deposit of title deeds in respect of the moveables at Cannanore as security for the Deferred Payment Guarantee facility for Rs.5,62,230.40 on 3.8.1963, in addition to a promissory note for the said amount. The first defendant also executed bipartite agreement embodying the terms and conditions contained in the memorandum of final terms and conditions for the Deferred Payment Guarantee amount.

That Defendants 2 to 4 in suit and one K. Damodaran (since deceased) executed a deed of mortgage in their individual capacity guaranteeing joint and several liability for the repayment of the loan advanced to the first defendant under the deed of guarantee dated 25.3.1963. On 8.12.1964 defendants 2 to 4 and Damodaran and defendants 5 to 6 executed a similar deed of guarantee for the total sum of Rs.52,00,000/-; Rs.17,00,000/- having been granted as further Term Loan by the plaintiffs. Defendants 2 to 6 and K. Damodaran also executed a deed of counter guarantee in their individual capacity undertaking a joint and several liability for the prompt repayment of the instalments by the first defendant on 3.8.1963. Defendants 5 to 6 also executed a separate deed of counter guarantee on 29.4.1965. According to the plaintiff, the conditions of counter guarantee contained inter alia a clause that the guarantee would stand enforceable against defendants 2 to 6 and late K. Damodaran, notwithstanding that the security specified in the security documents or any of them, be outstanding and unrealised from the principal debtors.

According to the plaintiff, they granted additional loan of Rs.17,00,000/- to meet the urgent financial need of the first defendant on the same terms and conditions as contained in the

memorandum dated 2.11.1964. The first defendant executed a deed of further charge dated 4.5.1965 once again creating a mortgage. This document created a mortgage over Mahe unit and another deed of further charge dated 29.4.1965 over its Cannanore Unit. Defendants 2 to 6 and late K. Damodaran also executed a personal guarantee on 8.12.1964 undertaking a joint several liability to repay the sum of Rs.62,00,000/-. Out of the second loan of Rs.17,00,000/-; Rs.13,00,000/- were paid on 8.12.1964 and Rs.6,00,000/- were paid on 2.6.1965 at Madras. At the request of the first defendant, on their representations about the financial difficulties, the plaintiff revised the schedule of repayment with effect from 15.10.1966 under four separate deeds of modifications dated 31.7.1968; 31.7.1968; 27.1.1970 and 27.1.1970 respectively.

Indian Rupee was devalued on 6.6.1966 which increased the liability of the plaintiff under the Deferred Payment Guarantee by Rs.2,37,580.33. According to the plaintiff, in terms of the bi-partite agreement read with amendatory agreement, the above increase also became the liability of defendants 1 to 6, for which the plaintiff again obtained an equitable mortgage by deposit of title deeds pertaining to the Cannanore and Mahe Units on 11.7.1970. The total contingent liability on account of the default at that time was worked out at Rs.1,11,199.11 the total Deferred Payment Guarantee thus increased to Rs.6,73,429.51.

The plaintiff-corporation has stated that the first defendant repaid only Rs.3,50,000/- towards the first loan and the additional loan advanced by the plaintiff and certain amounts towards interest due on the two loans and under the Deferred Payment Guarantee, the total interest paid was Rs.16,03,224.47. The Central Government, however, took over the management of Mahe and Cannanore Units under the Industrial Development and Regulation Act. The foreign suppliers invoked the Deferred Payment Guarantee against the Plaintiff, as the first defendant paid instalments under the Deferred Payment Guarantee contract to the foreign suppliers upto January, 1972 and thereafter defaulted to pay any installment. As a result of this default of the first defendant, the plaintiff was obliged to make the installment payment to the foreign suppliers.

According to the plaintiff, the first defendant acknowledged the liability but failed to repay. Defendants 2 to 6, however, repudiated their liability on 21.12.1974 .

Incidentally, the Sick Textile Undertakings (Nationalisation) Ordinance was promulgated under which the two Units of the first defendant at Cannanore and Mahe were nationalised. The Ordinance was replaced by Act 57 of 1974. All properties and the management of the undertakings of the first defendant stood transferred and vested in the Central Government free from all encumbrances and charges with effect from 1.4.1974. But, in terms of Section 6, according to the plaintiff-corporation of the said Act, the liabilities of the first defendant incurred prior to 1.4.1974 continue and remain alive and enforceable against the first defendant.

The first defendant had not filed any written statement. Defendants 2 to 6 together, defendants 4 and 5 together and third defendant alone, filed their respective written statement, the common defence being that the documents allegedly executed by them were all executed only in their capacity as the Directors of the Company. Late Damodaran and defendants 2 to 6 were partners of the firm Messrs Damodaran and Company, which functioned as the Managing Agents of the first defendant Company till 31.1.1966. The system of Managing agents,

however, was discontinued with effect from 31.3.1966 in accordance with the provisions and notifications under the Companies Act, 1956. The only business task which the firm of defendants 2 to 6 and Damodaran carried on was the business of working of the first defendant Company. According to these defendants, the bargaining task of the transactions between the first defendant and the plaintiff-Corporation was the relationship of managing agency existing between the firm Damodaran & Co. and the first defendant-Company. The statutory termination of the managing agency system and consequential severance of relationship between the firm Damodaran & Co. and the first defendant-company resulted in frustration of the contract between the plaintiff on the one hand and the defendants 1 to 6 on the other. Thus, according to these defendants, the contractual obligations have become incapable of being performed in the same capacity in which the parties entered into contract with the plaintiff. Their further case is that the first defendant-Company has not defaulted till they were in the capacity of Managing Agents of the Company. Only after the termination of the managing agency system, the business of the first defendant-Company suffered seriously and the first defendant became a defaulter from 15.10.1968. Apart from technical grounds, these defendants have alleged that the plaintiff is guilty of gross prejudice of the various terms and conditions of the deed of mortgage and the deeds of first charge which has resulted in the impairment of the remedy of the surety or guarantee against the principal debtor. They have alleged that the plaintiff had allowed the first defendant to sell some valuable machineries belonging to the company without getting the sale proceeds properly appropriated towards the principal amount due to the plaintiff under the mortgage deeds. This the plaintiff did although the second defendant had notified the intended sale of the machineries to it and requested it to invoke the power under the deeds of mortgage. They have further alleged that had the plaintiff taken over the management of the company under the provisions of the Industrial Development and Regulations Act at the earliest date of default, the nationalisation of the two units of the first defendant under the Sick Textile Undertakings (Nationalisation) Act, 1974 would not have occurred and the plaintiff would have realised its entire claim from the units. The further defence on which we shall have to pay a little more attention has been raised in the written statement which is mainly on the question of entertainability of any suit on behalf of the plaintiff against the defendants, when all assets of the first defendant Company have vested in the Government of India under the Sick Textile Undertakings (Nationalisation) Act (hereinafter referred to as 'the Act') and the compensation for the vesting of the Mills in the Government has already been declared. The plea raised in this behalf is that the plaintiff being a secured creditor of the owner of the Mills is bound to put forward all the claims and receive payment out of the compensation amount fixed under the Act.

The principal issue with which the parties went into trial had three several parts :

I. Whether the mortgage deeds executed by the defendants are not capable of being enforceable in law ?

II. Whether defendant Nos.3 to 6 (presently respondent Nos.4, 6, 7 and 8 in the petition) are liable under the Contract of Guarantee ?

III. Whether the liability of defendant Nos.2 to 6 (presently respondent Nos.2, 3, 4 and 6 in the petition) stood discharged on account of the latches on behalf of the plaintiff ?

Apart from the issue of penal interest, the trial Court answered all the issues noted above, in favour of the plaintiff. There was, however, one additional issue which stood considered by both the trial Court as well as the appellate Court to wit, the effect of the Nationalisation Act (Sick Textile Undertakings (Taking Over of Management) Act, 1972) and it is on this score the trial Court stated as below :-

"So far as the assets that were taken over by the Government are concerned, compensation had been fixed in the Act and further considered by the Commissioner for the Sick Textile Mills and in fact the plaintiff has been paid major portion of the compensation during the pendency of the suit. There is absolutely no question of frustration of any contract between the plaintiff and the defendants. The plaintiff, being in the position of a creditor, has nothing to do with the loss or profit in the business of the first defendant or with the nationalisation of the undertakings of the first defendant."

It is the definite finding of the trial Court that introduction of the Act of 1972 in the Statute Book has had no effect whatsoever as regards the liability to make the payment and the trial Court had the following statutory provision (Section 5 of the Nationalisation Act as above) to note in support of its finding :

"5. Owner to be liable for certain prior liabilities (1) Every liability, other than the liability specified in sub-section (2) of the owner of a sick textile undertaking, in respect of any period prior to the appointed day, shall be the liability of such owner and shall be enforceable against him and not against the Central Government or the National Textile Corporation."

The Court recorded that the aforesaid provision has been engrafted in the Statute to protect the rights of the plaintiff.

The records depict that the High Court, however, was approached in appeal basically on two counts as below :-

(1) There is error both in fact and in law in accepting the case of the plaintiff inspite of such acts of the plaintiff that it allowed appropriation of the securities without the consent of the sureties and inspite of specific objection in this behalf by the second defendant appellant; and

(2) Because of the intervention of the law, all the assets of the first defendant Company stood vested in the Central Government and what has been protected by Section 5(1) of the Act is not such interest as that of the plaintiff but only such liabilities which are specified in Sub-Section (2) thereof.

Upon specific reliance on to Sections 140 and 141 of the Indian Contract Act (noticed above), the High Court stated "Section 140 and 141 of the Indian Contract Act together safeguard the interests of the surety on the payment or performance by the principal debtor and in respect of the security which the creditor has against the principal debtor. Where a guaranteed debt has become due, on default of the principal debtor to perform a guaranteed duty and the surety is required thus to meet the guarantee, the surety upon payment or performance of all that he is liable for, is invested with all the rights which the creditor had against the principal debtor at the time when the contract for suretyship is entered into, whether the surety knows of the existence of such security or not

and if the creditor loses or without the consent of the surety, parts with such security, the surety is discharged to the extent of the value of the security. On the facts of the instant case, when it is conceded that a substantial part of the claim has been realised by the creditor (plaintiff) from the assets of the Company by way of compensation and the creditor has lost all such securities which the principal debtor (Company) had created in its favour and on which security alone it had advanced loans to the Company, it is possible as the learned counsel for the appellants has suggested, to think that the creditor has lost the security and thus, had fallen in a position that unless it is held that the surety is discharged to the extent of the value of the security, the sureties cannot be put in the same position as the creditors upon the security of the principal debtor."

The High Court further went on to observe "We have no information, however, as to the extent of the security that the company had provided to the plaintiff or the extent of the discharge of the debt covered by the sureties of each individual guarantor and it is not possible thus to work out the equities which must always be the first action of the court in the cases of the sureties who for the reason either of the default of the principal debtor or for the default of the creditor and/or matters beyond the control of all concerned, are put to make good all legal claims of the creditor. Such equities as are envisaged under Section 140 and 141 of the Indian Contract Act , in our view, are not available to the plaintiff so that it may, after realising the claims from the appellants (sureties), come to have the benefit of the securities. In the view that we have taken, we do not think, any further argument on either side is required to be examined by us, as the view that we have taken above is enough to hold that the plaintiff, that is to say, the creditor must be in a position to deliver the securities which he had against the principal debtor to the sureties before it (plaintiff) takes its claim against the sureties. This, in our view, is enough to hold that the present suit against the sureties must fail."

It is this finding which is under challenge before this Court under Article 136 of the Constitution and this Court on 6th March, 1995 granted special leave to appeal upon condonation of a short delay involved in the filing of the petition. Before dealing with the respective contentions, this Court records its appreciation for the assistance rendered by the two learned senior advocates, Mr. C.A. Sundaram and Mr. Mahendra Anand, appearing for the appellants and respondents respectively before this Court.

Felicitous as always, Mr. Sundaram drawing inspiration from a decision of this Court in Maharashtra State Electricity Board, Bombay v. Official Liquidator, High Court, Ernakulam & Anr. (1982 (3) SCC 358) contended that by reason of the factum of the liability of the surety being co-extensive with that of the principal debtor and a discharge which the principal debtor may secure by operation of law, the same does not absolve the surety of his liability. In Maharashtra State Electricity Board (supra) this Court categorically recorded a finding that the principal debtor being in liquidation would not have any effect on the liability of the guarantor. The observation of this Court obtained its sustenance from Section 128 of the Indian Contract Act, which in no uncertain terms prescribes, as noticed above, that the liability of the surety is co-extensive with that of the principal debtor. The statutory provision of the Indian Contract Act, however, records such unless, of course, it is otherwise provided by the Contract. Let us, therefore, at this juncture, consider the recording of the contract of guarantee which reads as below :-

1. If at any time default shall be made in the payment of the principal interest or any other moneys for the time being due

to the Corporation upon the security of the Deeds of Mortgage for Rs.35,00,000/- dated 30th April, 1963 and 2nd May, 1963 and the Deeds of Further Charge and equitable mortgage in connection with the loan of Rs.17,00,000/- aggregating Rs.52,00,000/- (Rupees fifty two lacs only) the Guarantors on demand shall pay to the Corporation the whole of such principal interest and other moneys which shall then be due to the Corporation as aforesaid and will indemnify and keep indemnified the Corporation against all loss of principal interest or other moneys secured by the Mortgage dated 30th April, 1963 and 2nd May 1963 and Deeds of Further Charge and equitable mortgage and all costs, charges and expenses whatsoever which the Corporation may incur by reason of any default on the part of the Company, its successors or assigns.

2. The Corporation shall have the fullest liberty without effecting this guarantee to postpone for any time or from time to time the exercise of the power of sale or any other power or powers conferred by the Deeds of Mortgage and Further Charge and to exercise the same at anytime and in any manner and either to enforce or forbear to enforce the covenants for payment of principal or interest or any other covenants contained or implied in the Deeds of Mortgage and Further Charge or any other remedies or securities available to the Corporation AND the Guarantors shall not be released by any exercise by the Corporation of its liberty with reference to the matters aforesaid or any of them or by reason of time being given to the Company, its successors or assigns or of any other forbearance act or omission on the part of the Corporation or any other indulgence by the Corporation to the Company or by any other matter or thing whatsoever which under the law relating to sureties would but for this provision have the effect of so releasing the Guarantors.

3. The Guarantors will observe and perform all the terms, conditions and covenants contained in the Deeds of Mortgage and Further Charge which bear on the payment by the Company of the principal interest or any other money for the time being due to the Corporation in such manner in which the Company is liable for the due observance and performance of the said terms, conditions and covenants.

4. The guarantee herein contained shall be enforceable against the Guarantors notwithstanding that the securities specified in the Deeds of Mortgage and Further Charge or any of them shall at the time when proceedings are taken against the Guarantors hereunder be outstanding or unrealised.

The Contract of Guarantee thus on a plain reading does not provide any contra note pertaining to the liability of the surety so as to create an exception within the meaning of Section 128 of the Indian Contract Act. It is on this score that Mr. Anand relying on the language of Section 141, with his persuasive eloquence contended that the Statute, in fact, has conferred a right or entitlement or a benefit on to a surety on every security which the creditor has against the principal debtor at the time of entering into the Contract of Guarantee between the parties undoubtedly, a very attractive proposition at this juncture- thus it becomes rather imperative to note Section 141 of the Contract Act in extenso for the purposes of appreciation of the rival submissions made in regard thereto. Section 141 of the Indian Contract Act, 1872 reads as under :

"141. Surety’s right to benefit of creditor’s securities A surety is entitled to the benefit of every

security which the creditor has against the principal debtor at the time when the contract of suretyship is entered into, whether the surety knows of the existence of such security or not; and if the creditor loses, or without the consent of the surety, parts with such security, the surety is discharged to the extent of the value of the security."

Before we engulf ourselves into the wider issue as to the effect of Section 141, be it noted that Mr. Anand in elucidation of his submission strongly relied upon a decision of the Court of Queens Bench in England in the case of Baily v. De Crespigny (LR (1869) IV QB 180). The facts in Baily's case depict that the defendant, in 1840, demised by deed certain premises to the plaintiff for a long term of years, and the defendant covenanted that "neither he nor his assigns would, during the term, permit any messuage, &c., to be built on a paddock fronting the demised premises;" alleging as breaches, (1), that the defendant during the term permitted a railway station to be built on the paddock; (2) that the defendant assigned the paddock to a railway company, who erected the railway station on the paddock. Plea : that after the making of the lease the railway company required to take the paddock under powers given them by an Act of Parliament of 1862, for purposes for which they were by the Act empowered to take the same; that the paddock was land which the company were empowered to take compulsorily for the purposes of the undertaking authorized by the Act; and that the company under the powers so conferred did compulsorily purchase and take the paddock, and that the assignment by the defendant to the company was the assignment in completion of such compulsory purchase; that the company afterwards built on the paddock the erections complained of, which were erections reasonably required for the purposes of the undertaking authorized by the Act.

It is on the basis of the fact situation of the matter in Queens Bench decision that Hannen, J. speaking for the Bench stated as below :

"The substantial question, therefore, raised on this record is whether the defendant is discharged from his covenant by the subsequent act of Parliament, which put it out of his power to perform it.

We are of opinion that he is so discharged on the principle expressed in the maxim "lex non cogit ad impossibilia."

We have first thus to consider as to the exact meanings of the words or expressions used in the covenant between the parties. There can be no doubt that a man may by an absolute contract bind himself to perform which subsequently however becomes impossible, or to pay damages for the non-performance and this interpretation is to be placed upon an unqualified undertaking, where the event which causes the impossibility was or might have been anticipated and guarded against in the contract, or where the impossibility arises from the act or default of the promissor.

But where the event is of such a character that it cannot reasonably be supposed to have been in the contemplation of the contracting parties when the contract was made, they will not be held bound by general words which, though large enough to include, were not used with reference to the possibility of the particular contingency which afterwards happened. It is on this principle that the act of God is in some cases said to excuse the breach of a contract.

The Latin Maxim referred to in the English judgment "lex non cogit ad impossibilia" also expressed as "impotentia excusat legem" in common English acceptation means, the law does not compel a man to do that which he cannot possibly perform. There ought always thus to be an invincible disability to perform the obligation and the same is akin to the Roman Maxim "nemo tenetur ad impossibilia" In Broom's Legal Maxims the state of the situation has been described as below :-

"It is, then, a general rule which admits of ample practical illustration, that impotentia excusat legem ; where the law creates a duty or charge, and the party is disabled to perform it, without any default in him, and has no remedy over, there the law will in general excuse him (t) : and though impossibility of performance is in general no excuse for not performing an obligation which a party has expressly undertaken by contract, yet when the obligation is one implied by law, impossibility of performance is a good excuse. Thus in a case in which consignees of a cargo were prevented from unloading a ship promptly by reason of a dock strike, the Court, after holding that in the absence of an express agreement to unload in a specified time there was implied obligation to unload within a reasonable time, held that the maxim lex non cogit ad impossibilia applied, and Lindley, L.J., said : "We have to do with implied obligations, and I am not aware of any case in which an obligation to pay damages is ever cast by implication upon a person for not doing that which is rendered impossible by causes beyond his control".

This effort to search out the meaning of the Latin Maxim has been only to identify the situation which prompted the learned Judge of the Queens Bench to come to the conclusion as above. There, thus, has to be an impossibility of performance of the obligation. The fact situation presently under consideration before us thus has to be assessed whether in fact there was any such impossibility or not. Let us be quite candid about laying down the principles that rights created under Statute cannot stand obliterated without cogent reasons and not on mere frivolity. In any event, the right conferred in terms of a deed of guarantee cannot but be stated to be an independent right which stands recognised by the Statute and thus cannot in any manner be whittled down without a just causa. Baily's decision (supra) in our view does not lend any assistance in the fact situation of the matter under consideration. There was in fact an impossibility of performance which prompted the Court to excuse the guarantor from its performance by reason of the impossibility of the situation and for reasons that the same stood beyond the control of the guarantor. The situation presently however, is not so.

In reference to the second limb of Section 141, in particular the words "the creditor loses" Mr. Anand contended that the legislature has been rather candid in not incorporating any reservation or qualification for the word 'lose'. In continuation thereof it was submitted that the same would thus include as a matter of fact, both voluntary and involuntary act or acts of the creditor, expression would mean and imply, both and the same is an inescapable conclusion when read in contradistinction with Sections 134 and 139 of the Act. Mr. Sundaram, on the other hand, with equal felicity of expression contended that the words noticed above cannot but mean involvement of some voluntary act of the creditor, as otherwise it loses its efficacy and placed in juxtaposition with the second limb of the Section would lead to an utter absurdity. The intent of the law makers is quite candid and apparent by reason of the particular user of expression to wit, (i.) 'or without the consent of the surety'; and (ii) 'parts with such security'. It has been contended that the true intent of the statute

cannot be derived from reading in part only and it is one of the golden rule of statutory interpretation that the statutory provision be read in its entirety rather than a word or words in isolation of others 'if creditor loses' has to be attributed a meaning as being stated by Mr. Anand, that is to say without there being any voluntary act on the part of the creditor, it cannot possibly be said to be in unison with the other part of the Statute obviously it shall have to be read as a voluntary act by reason whereof he loses the security and which thus tantamounts to be without the consent of the surety. The expression 'or' in between the words 'creditor loses' and 'without the consent of the surety' and the coma read in its proper sphere after the word 'loses' and 'surety' stands out to be significant since the same qualifies only the latter part of the second limb, namely, parting with such security. The expression 'creditor loses' cannot mean and imply an involuntary act but by reason of an act which is attributable to the creditor. The second alternative, parting with security without the knowledge of the surety is a contra situation, but affords a meaning to the words used in the first para, to wit, 'the creditor loses'. Section 141 of the Contract Act would lose its efficacy and the Act would render itself totally nugatory if the meaning is to be attributed in the manner as suggested by Mr. Anand. A definite volition is required to come within the ambit of Section 141. The heading of Section 141 also lends, though not normally a part of the statutory provision, assistance in interpreting the statutory intent since heading always serves as a guide to depict the intention. Adverting to the contract of guarantee be it noted that though it is not a contract regarding a primary transaction : but it is an independent transaction containing independent and reciprocal obligations. It is on principal to principal basis and by reason wherefor the Statute has provided both the creditor and the guarantor some relief as specified in this Chapter of Contract Act (between Sections 130 to 141). Section 141 thus involves an issue of a deliberate action on the part of the creditor and not a mere fortuitous situation beyond the control of the creditor. It is in this context strong reliance was placed on a decision of the Privy Council in China and South Sea Bank Ltd. v. Tan (1989 (3) All ER 839), wherein Lord Templeman speaking for the Council stated the law as below :-

"In the present case the security was neither surrendered nor lost nor imperfect nor altered in condition by reason of what was done by creditor. The creditor had three sources of repayment. The creditor could sue the debtor, sell the mortgage securities or sue the surety. All these remedies could be exercised at any time or times simultaneously or contemporaneously or successively or not at all. If the creditor chose to sue the surety and not pursue any other remedy, the creditor on being paid in full was bound to assign the mortgage securities to the surety. If the creditor chose to exercise his power of sale over the mortgage security he must sell for the current market value but the creditor must decide in his own interest if and when he should sell. The creditor does not become a trustee of the mortgaged securities and the power of sale for the surety unless and until the creditor is paid in full and the surety, having paid the whole of the debt is entitled to a transfer of the mortgaged securities to procure recovery of the whole or part of the sum he has paid to the creditor.

The creditor is not obliged to do anything. If the creditor does nothing and the debtor declines into bankruptcy the mortgaged securities become valueless and if the surety decamps abroad the creditor loses his money. If disaster strikes the debtor and the mortgaged securities but the surety remains capable of repaying the debt then the creditor loses nothing. The surety contracts to pay if the debtor does not pay and the surety is bound

by his contract. If the surety, perhaps less indolent or less well protected than the creditor, is worried that the mortgaged securities may decline in value then the surety may request the creditor to sell and if the creditor remains idle then the surety may bustle about, pay off the debt, take over the benefit of the securities and sell them. No creditor could carry on the business of lending if he could become liable to a mortgagee and to a surety or to either of them for a decline in value of mortgaged property, unless the creditor was personally responsible for the decline. Applying the rule as specified by Pollock CB in Watts v. Shuttleworth (1860) 5 H&N 235 at 247-248, 157 ER 1171 at 1176, it appears to their Lordships that in the present case the creditor did not act injurious to the surety, did not act inconsistent with the rights of the surety and the creditor did not omit any act which his duty enjoined him to do. The creditor was not under a duty to exercise his power of sale over the mortgaged securities at any particular time or at all."

In Halsbury's Laws of England Fourth Edition (para 335), it has been, relying upon four rather old decisions of the Court of Appeal , Wheatley v. Bastow (1855) 7 De G M & G 261 at 279-280 per Turner LJ; Hardwick v. Wright (1865) 35 Beav 133; Polak v. Everett (1876) 1 QBD 669 at 675, C.A. per Blackburn J, Carter v. White (1883) 25 ChD 666 at 670, CA., categorically stated "A transaction which causes no loss of securities, or a loss not attributable to the fault of the creditor, will not discharge the guarantor."

The interpretation offered by Mr. Anand as regards Section 141 of the Act also stands decried and negated by the Punjab High Court in Krishan Talwar v. Hindustan Commercial Bank Ltd. & Anr. (AIR 1957 Punjab 310). The basic situation stands very well elucidated in Rees v. Barrington 2 White & Tudor's L.C., 4th Edn.at p. 1002, wherein the effect of Section 141 stands expressed as below :-

"As a surety, on payment of the debt, is entitled to all the securities of the creditor, whether he is aware of their existence or not, even though they were given after the contract of suretyship, if the creditor who has had, or ought to have had, them in his full possession or power, loses them or permits them to get into the possession of the debtor, or does not make them effectual by giving proper notice, the surety to the extent of such security will be discharged. A surety, moreover, will be released if the creditor, by reason of what he has done, cannot, on payment by the surety, give him the securities in exactly the same condition as they formerly stood in his hands."

This Court in Kaluram's case (supra) in its Three-Judge Bench judgment upon approval has been pleased to take note of the situation that subject to certain variations Section 141 of the Contract Act incorporates the Rule of English Law relating to the discharge from liability of a surety when the creditor parts with or loses the security held by him. Incidentally, the decision in Kaluram (supra) as also a later decision of this Court in State Bank of Saurashtra v. Chitranjan Rangnath Raja & Anr. (1980 (4) SCC 516) was dealing with a contra situation and came to a conclusion that by reason of the deliberate act of the principal debtor or the creditor and without the knowledge, consent and approval of the surety, question of further liability would not arise and in the contextual facts discharged the guarantor the situation presently, however, is converse thereto by reason of the fact that it is not by any definite act of the creditor or the debtor but by an operation of law for which none of the parties had any control. Significantly, it may be stated that the liability of the guarantor cannot but be stated to the a strict liability and even if the principal debtor is

discharged from his liability unless such discharge is through the act of the creditor without consent of the surety/guarantor, the creditor'r right of action against the surety is preserved.

Turning attention to the effect of the Sick Textile Undertakings (Nationalisation) Act, 1974, a bare perusal of some of the provisions will indicate that there is no discharge of the liability of principal debtor, leave alone that of the surety. Sections 3, 4, 5 and 20 of the Act of 1974, if read together, would depict that the liability of the owner of the undertaking/the debtor continues and it is only that the claim against the security which stands discharged by reason of the statutory shift of the charge on to the compensation. The liability of the principal debtor does not in any way come to an end neither that of the guarantor. It is in this context, a recent Three-Judge Bench decision of this Court in Civil Appeal No.15521 of 1996 (Punjab National Bank v. State of U.P. & Ors.) is of utmost relevance since the same pertains to the involvement of the same Act of 1974 and together with the issues as regards the liability of the guarantor and principal debtor. Since the order as passed by this Court is rather short, we feel it inclined to quote the order in its entirety. The order reads as below :-

"The appellant had, after respondent No.4's management was taken over by the U.P. State Textile Corporation Ltd. (respondent No.3) under the Industries (Development and Regulation) Act, advanced some money to the said respondent No.4. In respect of the advance so made, respondents 1, 2 and 3 executed deeds of guarantee undertaking to pay the amount due to the Bank as guarantors in the event of the principal borrower being unable to pay the same.

Subsequently, respondent No.3 which had taken over the management of respondent No.4 became sick and proceedings were initiated under the Sick Textile Undertakings (Nationalisation) Act, 1974 (for short "the Act"). The appellant filed suit for recovery against the guarantors and the principal-debtor of the amount claimed by it.

The following preliminary issue was, on the pleadings of the parties, framed :

"Whether the claim of the plaintiff is not maintainable in view of the provisions of Act 57 of 1974 as alleged in para 25 of the W.S. of defendant No.2?"

The trial court as well as the High Court both came to the conclusion that in view of the provisions of Section 29 of the Act, the suit of the appellant was not maintainable.

We have gone through the provisions of the said Act and in our opinion the decision of the Courts below is not correct. Section 5 of the said Act provides for the owner to be liable for certain prior liabilities and Section 29 states that said Act have a overriding effect over all other enactments. This Act only deals with the liabilities of a company which is nationalized and there is no provision therein which in any way affects the liability of a guarantor who is bound by the deed

of guarantee executed by it. The High Court has referred to a decision of this Court in Maharashtra State Electricity Board, Bombay v. The Official Liquidator, High Court, Ernakulam & Anr., AIR 1982 SC 1497 where the liability of the guarantor in a case where liability of the principal debtor was discharged under the insolvency law or the company law, was considered. It was held in this case that in view of the unequivocal guarantee such liability of the guarantor continues and the creditor can realize the same from guarantor in view of the language of Section 128 of the Contract Act as there is no discharge under Section 134 of that Act.

In our opinion, 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 deeds 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.

For the aforesaid reasons, this appeal is allowed, the preliminary issue framed by the trial Court is decided in favour of the appellant and the case is remanded to the trial Court for decision on merits. No costs.

IA No.3 fild in this Court by respondent No.3 under Section 22 of the Sick Industrial Companies (Industrial Provisions) Act, 1995, is dismissed as withdrawn with liberty to the appellant to move the appropriate application before the trial Court."

A faint attempt has been made during the course of hearing that the decision of the Punjab National Bank (supra) may not have a binding effect by reason of this being an order only and not a detailed judgment. We are, however, unable to record our concurrence therewith.

The Three-Judge Bench decision in Punjab National Bank (supra) categorically dealt with the issue as to the effect of the Act of 1974 and this Bench records its respectful concurrence therewith, apart from the same being a binding precedent in the normal circumstances, in terms of a Constitution Bench decision of this Court in Pradip Chandra Parija & Ors. v. Pramod Chandra Patnaik & Ors. (2002 (1) SCC 1). In any event, this Court in no uncertain terms in Patheja Bros. Forging & Stamping & Anr. v. ICICI Ltd. & Ors. (2000 (6) SCC 545) made it abundantly clear that when the words of the 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. The provisions of the Nationalisation Act as noticed above, are otherwise clear and categorical as to the extent of its applicability and the state of affairs upon introduction of the Legislation on the Statute Book and we need not dilate thereon.

Mr. Anand lastly contended that as a matter of fact by reason of the non-availability of the security in terms of Section 141, the Contract of Guarantee cannot but be termed to stand frustrated and it is in this context, Section 56 of the Contract Act has been taken recourse to. It may be noticed here that the Statute itself has recognised the doctrine of frustration and encompassed within its ambit an exhaustive arena of force majeure under which non-performance stands excused by reason of an impediment beyond its control which could neither be foreseen at the time of entering into the contract nor can the effect of the supervening event could be avoided or overcome. The decision of the Court of Appeal in F.A. Tamplin Steamship Co. Ltd. v. Anglo-Maxican Petroleum Products Co. Ltd. (1916-2 AC 397) (which stands quoted (with approval by this Court) in Naihati Jute Mills v. Khyaliram (AIR 1968 SC 522), seems to have settled the law on the same. Lord Loreburn in Tamplin Steamship stated :

"A court can and ought to examine the contract and the circumstances in which it was made, not of course to vary, but only to explain it, in order to see whether or not from the nature of it the parties must have made their bargain on the footing that a particular thing or a state of things would continue to exist. And if they must have done so, then a term to that effect would be implied; though it be not expressed in the contract."
Lord Loreburn went on to observe :-

"It is in my opinion the true principle, for no court has an absolving power, but it can infer rom the nature of the contract and the surrounding circumstances that a condition which was not expressed was a foundation on which the parties contracted Were the altered conditions such that, had they thought of them, they would have taken their chance of them, or such that as sensible men they would have said, "if that happens, of course, it is all over between us."

In Davis Contractors' decision (Davis Contractors v. Fareham U.D.C.: 1956 AC 696), an oft-cited decision as regards the doctrine of frustration, Lord Radcliffe formulated the doctrine of frustration in the manner following :-

"Frustration occurs whenever the law recognises that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract."

Needless to record that on a true perspective of Section 56 of the Contract Act, three essential conditions appear to be the realistic interpretation of the Statute. The conditions being (i.) a valid and subsisting contract between the parties; (ii) there must be some part of the contract yet to be performed; and (iii) the contract after it is entered into becomes impossible of performance.

Leaving aside the first condition, the second and the third one cannot, in our view, have any manner of application in the contextual facts. Recapitulating the facts briefly, the Nationalisation Act came into force in the year 1974 by reason of which the assets of a debtor company stand vested on the State. In terms of the provisions of the Nationalisation Act, there was appointed a Commissioner of Payments and by reason of the factum of the Appellant herein being a secured creditor, lodged its claim before the Commissioner of Payments in its entirety. The Commissioner of Payments, however, in terms of the provisions of the Nationalisation Act itself allowed a major portion of the claim but as regards the remainder, expressed its inability to pass any

order and the remainder or the balance of the claim stands out to be the subject matter of the present proceedings. Incidentally, there exists some departure and shift from the case made out before the High Court and the case before this Court since the frustration was said to have occurred by reason of statutory termination of the Managing Agency System. (Damodaran & Company, being the Managing Agent of the principal-debtor) It has been the definite contention before the High Court that the contractual obligation by reason of severance of relationship between Damodaran and the principal-debtor the contract had become incapable of being performed in the same capacity in which the parties had entered into the contract with the appellant herein. The case made out before this Court, however, is a complete departure therefrom and as a mater of fact introduction of the Legislation of 1974 in terms of which the entire assets stand vested has been taken recourse to as the supervening event and the contract of guarantee has thus become incapable of being performed for reasons beyond the control of the guarantors, having due regard to the statutory provisions, as appears from Section 141 of the Contract Act undoubtedly the shift and variation cannot but be attributed to be well imagined but irrespective of the same and in either of the situations (i.e. the plea before the High Court or the plea before this Court), the doctrine of frustration as envisaged in terms of Section 56 of the Contract Act does not and cannot have any manner of application in the contextual facts. It is on the failure of the principal debtor to pay the entire sum due, the guarantee stands invoked the Contract of Guarantee has no co-relation with that of the Nationalisation Act neither is dependent thereon : it is an independent contract and in all fairness has to be honoured to fulfil the contractual obligation between the surety and the creditor. Taking recourse to Section 141 by the surety, in our view, is utterly misplaced and we need not dilate once again, since we have already dealt with the issue hereinbefore in this judgment, except recording that doctrine of frustration as contended cannot be invoked having regard to the provisions of Section 141 of the Contract Act.

On the factual score, a Civil Suit stands filed and thereafter the claim was preferred before the Commissioner of Payments in terms of the Nationalisation Act. The right of a claimant to proceed before the Commissioner and to file a suit to recover the amount due to him cannot, in our view, on a perusal of the Statute, be taken away, though the Claimant would not be entitled to recover any amount at both the ends. The amount paid by the Commissioner would stand reduced to the extent of payment by the Commissioner. The filing of the Civil Suit thus is not barred as has been contended by Mr. Anand that once the claim stands paid, though partially, question of proceeding with the suit would not arise. It is in this context, we concur with the findings of the Bombay High Court in Oriental Coal Co. Ltd.,Calcutta v. M/s Mohanlal Kisanlal & Anr. (AIR 1984 Bom. 174) and record our approval and similar concurrence also goes to the decision of the Calcutta High Court in Barakar Coal Co. Ltd. v. N.C. Mehta [81 Cal WN 380 : AIR 1977 NOC 198 (Cal)].

In the premises aforesaid, we are unable to record our concurrence with the judgment under appeal and the same is thus set aside and the decree as passed by the learned Single Judge stands restored. Each party, however, will pay and bear its own costs.

J.
(Umesh C. Banerjee)

J.

(Y.K. Sabharwal)

April 12, 2002.