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IN THE HIGH COURT OF DELHI AT NEW DELHI

Decided on : 28.01.2015

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W.P.(C) 5857/2014

IDBI BANK LIMITED

.....Petitioner

Through : Sh. Sanjay Bhatt, Advocate.

Versus

ESSLON SYNTHETICS LTD. AND ORS.....Respondents

Through : Sh. Rajiv Kapur and Ms. Aparna Iyer,
Advocates, for Respondent No.6.

Ms. Praveena Gautam, Advocate, for Respondent No.8.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE R.K. GAUBA

MR. JUSTICE S. RAVINDRA BHAT (OPEN COURT)

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1. The Writ Petitioner (hereafter "IDBI") is aggrieved by and impugns an order dated 19.02.2014, of the Debts Recovery Appellate Tribunal ("DRAT") in M.A. No. 161/2010 ("impugned order").

2. IDBI is a banking company within the meaning of Section 5 of the Banking Regulation Act, 1949. The first Respondent ("Esslon") is an incorporated company currently under liquidation proceedings before the Allahabad High Court. The third Respondent are Public Financial Institutions under Section 4A of the Companies Act, 1956, which extended independent financial assistance to the first respondent. Respondent Nos. 6 to 9 are banks that have extended independent financial assistance to the

first respondent. The Petitioner and Respondent Nos. 3 to 9 hold *pari passu* charge over all properties of Esslon; Respondent Nos. 3 to 9 have been impleaded proforma in the case.

3. Lohia Machines Limited (“LML”) was a company in possession of a Scooter Manufacturing Division and four units of Manufacturing and Processing Synthetic Fibre (“Fibre Division”). At the request of LML, the Petitioner granted approval to the revival scheme for LML, which provided for

- a. Converting LML into a Joint Venture of Indian Promoters and PIAGGIO (LML’s Italian Collaborators);
- b. Delinking the first Respondent from LML, then a subsidiary of LML and going by the name of LML Fibres Ltd.;
- c. Transferring LML’s Fibre Division to the first Respondent;
- d. Taking over and assuming the LML liabilities to the Petitioner, among others, in part consideration for transfer of the Fibre Division to the first Respondent.
- e. Creation of securities on the assets by the first Respondent in favour of the Petitioner, among others for the entire financial exposure.

4. IDBI, Esslon, LML and IFCI (acting as lead institution for itself and others) approved the Revival Scheme. IDBI entered into a Multi-Partite Agreement (“MPA”) dated 28.12.1990 setting out the terms and conditions of the agreement between LML and Esslon; in this Esslon *inter alia*, undertook all of the liabilities of LML in respect of IDBI’s dues. The parties to the MPA were LML, LML Fibres Ltd. (now Esslon Synthetics), IFCI

(Lead Institution), IDBI, ICICI, IRBI, and SBI Kanpur, Bank of India (Kanpur), Bank of Baroda (Kanpur), and Bank of Tokyo. Under the Deed of Conveyance dated 27.12.1990, Esslon agreed to take over and assume the term loan liabilities of LML worth ₹ 2999 lakhs as on 31.08.1990 to various banks; this included the Petitioner's dues of ₹ 958.29 lakhs. Esslon executed a Joint Deed of Hypothecation dated 28.12.1990 with IDBI and the other banks creating a first *pari passu* charge in favour of all of them on the whole of its movable properties. Esslon also created an equitable mortgage on its immovable properties in favour of IDBI and the other institutions. Simultaneously, Shri Sitaram Singhanian ("second Respondent") executed an unconditional and irrevocable Deed of Guarantee on 28.12.1990 guaranteeing the repayment of the monies payable by Esslon in favour of IDBI, as well as fulfilment of agreement between the two, *inter alia*. As further security, Esslon procured Pledge of Equity Shares held by its promoters/group companies along with voting rights in favour of IDBI, *inter alia*. Respondent No. 2 was the Chairman and Managing Director of LML prior to the Deed of Conveyance executed on 27.12.1990, pursuant to which, he became the Chairman and Managing Director of Esslon.

5. In 1994-95, Esslon made reference to Section 15(1) of the *Sick Industrial Companies (Special Provisions) Act, 1985* to the BIFR. The latter held that it was just and equitable to wind up the first Respondent, following which the Allahabad High Court ordered winding up of Esslon on 27.03.1996. Liquidation proceedings are in progress currently.

6. Subsequently, Esslon failed to make payments due to IDBI as well as defaulted in complying with the MPA. On 25.03.1997, IDBI issued a recall notice against Esslon and subsequently invoked the guarantee of

Respondent No. 2 *vide* letter dated 06.04.1998. However, both Esslon and Respondent No. 2 failed to pay.

7. On 06.01.2000, IDBI filed an application before the Debt Recovery Tribunal, Delhi (“DRT”) under Section 19 of the *Recovery of Debts Due to Banks and Financial Institutions Act, 1993* (“RDDB & FI Act”) registered as O.A. No. 08/2000. The prayer of IDBI before the DRT was *inter alia*, to *pass a final order and issue a recovery certificate for a sum of Rs. 43,10,52,975.00/- due as on 31.12.1999 in favour of the Petitioner and against Respondent No. 1 and 2, jointly and severally together with further interest and other charges thereon at the contractual rate till payment and/or realisation in full.*”

8. No Written Statement or Status Report was filed by Esslon. However, the second Respondent appeared and opposed O.A. No. 08/2000 by filing a Written Statement-cum-Counter Claim by way of set off. None appeared for Respondent Nos. 3 to 9, and they were proceeded against *ex-parte*. In his written statement, the second respondent stated that all the documents were signed/executed by Esslon and himself under undue influence and coercion by LML and also the Banks and Financial Institutions, which allegedly connived with LML. Subsequently, the second Respondent moved an application, I.A. No. 67/2008 for impleadment of LML as a necessary party to the O.A. No. 08/2000 under Section 22 of the RDDB & FI Act read with Rule 18 of the DRT (Procedure) Rules analogous to Order I Rule 10 of the Civil Procedure Code, 1908 (“CPC”). In reply, IDBI said that although the loan was granted to LML, the agreement between Esslon and LML provided that Esslon would undertake all the term-loan liabilities of LML, including the sum of ₹958.29 lakhs due to IDBI. IDBI also pointed out how the second

respondent had not disputed the genuineness of the agreement in itself.

9. The second Respondent filed a rejoinder reiterating the contents of his I.A. No. 67/2008, as well as asking for O.A. No. 08/2000 to be dismissed for failure to implead LML, which he contended was a necessary party to the proceedings therein; as well as contending that the Deed of Conveyance, the MPA, and the Deed of Guarantee were sham transactions that the first and second Respondents had agreed to under undue influence and coercion.

10. The DRT passed an order dated 10.08.2009 allowing I.A. No. 67/2008, directing IDBI to implead LML as a defendant in the array of parties. Thus aggrieved, IDBI filed an appeal, M.A. No. 161/2010 before the Debt Recovery Appellate Tribunal (“DRAT”). However, the DRAT dismissed the appeal, upholding the DRT’s order, *vide* the impugned order dated 19.02.2014.

11. The relevant part of the impugned order is reproduced hereunder:

“9. ...

Undoubtedly, while a request for adding the name of a party or for directing to strike out the name of a party, the condition precedent is that the Court must be satisfied that the presence of the party to be added would be necessary in order to enable the Court to effectively and completely adjudicate upon and settle all[1] questions involved in the suit. While considering any such plea one cannot lose sight of the fact that the plaintiff in a suit being a dominus litis may choose a person against whom he wishes to litigate and that he cannot be compelled to sue a person against whom he does not wish to seek a relief, it can, therefore, be said that a person who is not a necessary or property party [sic] cannot be impleaded.

10. The above general rule is, however, subject to the provisions of Order I, Rule 10(2) CPC, which has been referred to above. It

may need a mention here that a necessary party is a person who ought to have been joined as a party and in whose absence no effective order can be passed by the Court. Consequently, if a necessary party is not impleaded, the suit itself is liable to be dismissed. As already observed, a proper party is a party who, though not a necessary party, is a person whose presence would enable the Court to completely, effectively and adequately adjudicate upon all matter in dispute. He need not be a person in favour of or against whom decree is to be made. Here only it is important to note that if a person is not found to be a proper or necessary party, the Court has no jurisdiction to implead him against the wishes of the plaintiff.

11. The request of respondent No.2 is to be considered in the light of law laid down and noticed above. The impugned order is thus required to be examined in this background. Undisputed facts are that this loan was obtained by M/s LML Ltd. This loan may have been assigned to M/s LML Fibre by way of multipartite agreement and presently the bank and financial institution may not be claiming any relief against M/s LML Ltd., but certainly M/s LML Ltd. cannot be claimed to be a stranger to the transaction of loan. When the issue of liability arises, respondent no. 2 obviously cannot be stopped from pleading that the assigning of this loan to M/s LML Fibre was legally not permissible or cannot be enforced against it. The issue whether multipartite agreement alone is sufficient to bind respondent No.2 with the liability is to be considered by the Tribunal. The decision will depend upon the facts and nature of evidence led and the value attached to the evidence and pleadings. If for some reason or the other any defect is noticed in -the agreement, or some defect is found in assigning this loan to M/s Fibre Division, then the bank and financial institution would find themselves struck [sic] and handicapped. As on date, M/s LML Ltd. may not be appear to be a necessary party as the appellants are not claiming any relief against the said company, but eventuality thereof cannot be completely ruled out. One has to bear in mind that this loan was taken by M/s LML Ltd. and the prime responsibility to discharge this liability may be that of M/s LML Ltd. After the tripartite agreement or after having

assigned this loan to M/s LML Fibre, which is its subsidiary, M/s LML Ltd. not appear to be a necessary party but would appear to be a proper party. Its presence would be necessary for complete and final decision of questions involved in the proceedings.

12. In view of the above position, I am not inclined to interfere in the impugned order passed by the Tribunal below directing the appellant bank to implead M/s LML Ltd as a party respondent. I am of the considered opinion that M/s LML Ltd, would be a proper party if not a necessary party in the present lis initiated by IDBI and IFCI.”

12. IDBI submits that more than 14 years have elapsed since the filing of O.A. No. 08/2000, and that the purpose of the RDDB & FI Act has not been served. In spite of IDBI's status as *dominus litis*, the DRAT order has effectively compelled IDBI to sue a person from whom the latter is not seeking any relief. This points to IDBI's belief that there has been no application of mind by the DRAT and that the decision ought to be set aside. The respondents argue that the impugned order is a reasoned one, and concurrent. Not being a final order, the court should not interfere with it, since it merely adds a party to the proceedings for a fuller adjudication of the disputes.

13. The questions that must be settled by this Court are:

- a) Whether the DRT has the jurisdiction to implead a third party to the suit under the RDDB & FI Act? In light of the same, whether the DRAT was correct in upholding the order of the DRT?
- b) Even if the DRT did have the jurisdiction to implead LML, whether LML is either a necessary or a proper party to O.A.

08/2000, and, thus, whether it must be impleaded to the same, as per Order I Rule 10(2) of the CPC?

14. The avowed objective of the RDDB & FI Act, apparent from its statement of objects is, *inter alia*, "*expeditious adjudication and recovery of debts due to banks and financial institutions.*" In *Union of India v. Delhi High Court Bar Association*, (2002) 4 SCC 275, the jurisdiction of the DRT and the DRAT was discussed and the Court ruled that all powers of courts devolve on those tribunals in respect of the subject matter they are entitled to deal with. The RDDB & FI Act was, therefore, intended to enable banks and financial institutions to recover their debts in a speedy manner, free from all the usual impediments that arise in recovery proceedings. Section 17 of the RDDB & FI Act gives effect to that intent.

15. The second Respondent filed a Counter Claim in O.A. No. 08/2000 lodged by IDBI. Sections 19(6) and (8) of the RDDB&FI, stipulate the requirements for a counter claim, wherein those asking for the latter need to show "*a debt to be set-off*" and a cause of action *vis-à-vis* the original applicant. That there exists no debt that IDBI needs to settle as against Esslon or the second respondent is abundantly clear, and has not been disputed by any of the parties to this suit. Therefore, the counter claim by the second Respondent is by itself *prima facie*, not permissible. However, this Court's views on this aspect are not dispositive of the issue and should not be read as such.

16. In *Nahar Industrial Enterprises Ltd. v. HSBC*, (2009) 8 SCC 646 the Supreme Court held that:

“86. Debt Recovery Tribunal cannot pass a decree. It can issue only recovery certificates. [See Sections 19(2) and 19(22) of the Act]. The power of the Tribunal to grant interim order is attenuated with circumspection. [See Dataware Design Labs. v. State Bank of India (2005) 12 Comp. Cas. 176 (Ker) at 184]. Concededly in the proceeding before the Debt Recovery Tribunal detailed examination; cross-examinations, provisions of the Evidence Act as also application of other provisions of the Code of Civil Procedure like interrogatories, discoveries of documents and admission need not be gone into. Taking recourse to such proceedings would be an exception. Entire focus of the proceedings before the Debt Recovery Tribunal centres round the legally recoverable dues of the bank.

...96. The Tribunal was constituted with a specific purpose as is evident from its statement of objects. The preamble of the Act also is a pointer to that too. We have also noticed the scheme of the Act. It has a limited jurisdiction. Under the Act, as it originally stood, [the Tribunal] did not even have any power to entertain a claim of set off or counter-claim. No independent proceedings can be initiated before it by a debtor.

97. A debtor under the common law of contract as also in terms of the loan agreement may have an independent right. No forum has been created for endorsement of that right. Jurisdiction of a civil court as noticed hereinbefore is barred only in respect of the matters which strictly come within the purview of Section 17 thereof and not beyond the same. The Civil Court, therefore, will continue to have jurisdiction.

98. Even in respect of set off or counter-claim, having regard to the provisions of Sub-sections (6) to (11) of Section 19 of the Act, it is evident:

a) That the proceedings must be initiated by the bank

b) Some species of the remedy as provided therein would be available therefor.

c) *In terms of Sub-section (11) of Section 19, the bank or the financial institution is at liberty to send a borrower out of the forum.*

d) *In terms of the provisions of the Act, thus, the claim of the borrower is excluded and not included.*

e) *In the event the bank withdraws his claim the counter-claim would not survive which may be contrasted with Rule 6 of Order VIII of the Code.*

f) *Sub-section (9) of Section 19 of the Act in relation thereto has a limited application.*

g) *The claim petition by the bank or the financial institution must relate to a lending/borrowing transaction between a bank or the financial institution and the borrower.*

h) *The banks or the financial institutions, thus, have a primacy in respect of the proceedings before the Tribunal.*

i) *An order of injunction, attachment or appointment of a receiver can be initiated only at the instance of the bank or the financial institution. We, however, do not mean to suggest that a Tribunal having a plenary power, even otherwise would not be entitled to pass an order of injunction or an interim order, although ordinarily expressly it had no statutory power in relation thereto.*

j) *It can issue a certificate only for recovery of its dues. It cannot pass a decree.*

k) *Although an appeal can be filed against the judgment of the Tribunal, pre-deposit to the extent of 75 % of the demand is imperative in character.*

l) *Even cross-examination of the witnesses need not be found to be necessary.*

m) *Subject to compliance of the principle of natural justice it may evolve its own procedure.*

n) It is not bound by the procedure laid down under the Code. It may however be noticed in this regard that just because the Tribunal is not bound by the Code, it does not mean that it would not have jurisdiction to exercise powers of a court as contained in the Code. Rather, the Tribunal can travel beyond the Code of Civil Procedure and the only fetter that is put on its powers is to observe the principles of natural justice.

(See Industrial Credit and Investment Corporation of India Ltd. v. Grapco Industries Ltd. [1999] 3 SCR 759: (1999) 4 SCC 710.)

The Tribunal, therefore, would not be a Civil Court.” [emphasis supplied]

17. In light of all the above, to answer the first question, this Court is of the opinion that it was never within the scope of the DRT's jurisdiction to entertain an application for impleadment of a third party, when the genuineness of the agreements on the basis of which IDBI was seeking the repayment of its debt was not contested by the first two Respondents, from whom the same is due. Furthermore, the allegation of second Respondent with respect to the Deed of Conveyance, the MPA, and the Deed of Guarantee being sham transactions exercised under undue influence and coercion is beyond the scope of the subject matter of the matters that are to be brought before the DRT as under the RDDB & FI Act. The Act clearly envisages that *only banks and financial institutions* may approach the DRT for the recovery of moneys owed to them by way of the issuance of a recovery certificate, with the appropriate procedure prescribed therein. To this extent, the order of the DRT was incorrect, and should not have been upheld by the DRAT.

18. The second question that must be answered by this Court is whether

LML is a necessary or a proper party to the proceedings at hand, as envisaged by Order I Rule 10(2). It is thus appropriate for us to reproduce the relevant provisions herein:

“10(2) Court may strike out or add parties. – The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added.”

19. The case of *Kasturi v. Iyyamperumal and Ors.*, (2005) 6 SCC 733, has established that a necessary party is one without whom no order can effectively be made; therefore, a necessary party is one that is directly affected or against whom relief is being sought. Whereas a proper party is one in whose absence an effective order can be made, but whose presence is still necessary for a complete and final adjudication of the proceedings

20. In *Anil Kumar Singh v. Shivnath Mishra alias Gadasa Guru*, (1995) 3 SCC 147, the Supreme Court with respect to Order I Rule 10(2) of the CPC observed as follows:

“By operation of the above-quoted rule though the Court may have power to strike out the name of a party improperly joined or add a party either on application or without application of either party, but the condition precedent is that the Court must be satisfied that the presence of the party to be added, would be necessary in order to enable the Court to effectually and completely adjudicate upon and settle all questions involved in the suit. To bring a person as party-defendant is not

asubstantive right but one of procedure and the Court has discretion in its proper exercise. The object of the rule is to bring on record all the persons who are parties to the dispute relating to the subject-matter so that the dispute may be determined in their presence at the same time without any protraction, inconvenience and to avoid multiplicity of proceedings.”

21. The Court first peruses the MPA; Clauses 4 and 5 of the MPA lay out the terms and conditions, from which it seems abundantly clear that all the requisite permissions to enter into the said agreement were satisfactorily obtained. Clause 21 of the MPA expressly conveys all of LML's liabilities to Esslon, as well as expressly releases LML from all its financial liabilities *vis-à-vis* the banks and the financial institutions.

22. For LML to be a necessary party, it must either be directly affected by the outcome of the proceedings or must be in a position to deliver on the relief claimed by IDBI. Therefore, a question that cannot be avoided is whether LML had any liabilities *vis-à-vis* IDBI. From a reading of the Deed of Conveyance as well as the MPA, it is clear that the debt owed to IDBI was agreed to be settled by Esslon, with the second respondent acting as guarantor for the repayment of the debt by Esslon. By virtue of the Deed of Conveyance, the MPA, and the Deed of Guarantee, it is inferred that LML was no longer involved in the repayment of the debts owed to IDBI. Thus, we cannot find LML to be a necessary party to the proceedings.

23. Additionally, for LML to be a proper party to the proceedings, its presence must be necessary for a complete and effective adjudication of the proceedings, even if it is not required for an effective order. The O.A. 08/2000 is a debt recovery proceeding instituted by IDBI against the first

and second Respondents; with whom IDBI had valid, binding agreements for the repayment of the money due to it. The issues to be decided in O.A. 08/2000 are whether there is a sum of money due to the claimant; and whether that sum of money has been paid by the debtor(s) or not. There is no question of the presence of LML being required for the settling of the above issues, since it is abundantly clear that the debt was to be repaid by Esslon, and by the second Respondent in the event of the failure of first Respondent to do so. This Court is of the opinion that it would be perverse for a third, unrelated party to be impleaded in proceedings instituted by a creditor against its debtors as under the RDDB & FI Act.

24. In *Kasturi* (supra), the Supreme Court observed:

"That apart, from a plain reading of the expression used in sub-rule (2) Order 1 Rule 10 of the CPC "all the questions involved in the suit" it is abundantly clear that the legislature clearly meant that the controversies raised as between the parties to the litigation must be gone into only, that is to say, controversies with regard to the right which is set up and the relief claimed on one side and denied on the other and not the controversies which may arise between the plaintiff/appellant and the defendants inter se or questions between the parties to the suit and a third party. In our view, therefore, the court cannot allow adjudication of collateral matters so as to convert a suit for specific performance of contract for sale into a complicated suit for title between the plaintiff/appellant on one hand and Respondent Nos. 2 & 3 and Respondent Nos. 1 and 4 to 11 on the other. This addition, if allowed, would lead to a complicated litigation by which the trial and decision of serious questions which are totally outside the scope of the suit would have to be gone into."

25. The effect of impleading LML to O.A. 08/2000 shall be the opening up of a whole new suit, for which the DRT would be the incorrect forum and

one lacking jurisdiction. Since the DRT has been created with the specific purpose of enabling banks and financial institutions to recover the debts owed to them, the DRT cannot go into a dispute between a third party and one of the parties to an application before it for recovery of debts. Ideally, if Esslon and the second Respondent are so aggrieved by the MPA and would like to challenge its validity in law; notwithstanding that this action might be barred by limitation, it is not for the DRT to adjudicate upon the matter. Such a suit would lie before the Civil Court of appropriate jurisdiction, and not before the DRT.

26. It is, therefore, our opinion that the presence of LML is unnecessary to settle any of the claims in O.A. 08/2000, and that neither the DRT nor this Court can go into controversies that exist between one of the parties to these proceedings and a third party, i.e. between the first and second Respondents and LML. In addition, IDBI being *dominus litis* in the proceedings, this Court does not deem it appropriate for IDBI to be compelled to add a party against whom it is not seeking any relief, unless it is a legal compulsion, which is not the case herein.

27. Keeping the facts and circumstances of this case in mind, this Court is of the opinion that the DRT did not possess the jurisdiction to implead LML to O.A. No. 08/2000, and that the DRAT was incorrect in finding LML to be a proper party to these proceedings. In light of this, the order of the DRAT dated 19.02.2014, confirming the DRT's impleadment of LML to O.A. No. 08/2000, cannot be upheld. The orders of the DRT and DRAT are accordingly set aside. However, nothing in this order shall be read as reflecting the merits of the claim of IDBI, or the merits of the Respondents'

defence.

28. The DRT is directed to carry forward the debt recovery proceedings in O.A. No. 08/2000 in an expedited manner, as 25 years have elapsed since the MPA and 15 years since the filing of the application by IDBI, herein; working at cross-purposes with the intent of the RDDB& FI Act for speedy dispute resolution. The Writ Petition is allowed in these terms. No costs.

S. RAVINDRA BHAT
(JUDGE)

R.K. GAUBA
(JUDGE)

JANUARY 28, 2015

