IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.904/2018

Asset Reconstructiion Company (India) Ltd. ... Petitioner

V/s.

V. Hotels Ltd. & Ors. ... Respondents

Mr. Tushad Cooper a/w. Mr. Vinod Kotghari, Ms. Gauri S. Joshi I/b. M/s. Apex Law Partners for the Petitioners
Mr. D. J. Khambata, Senior Advocate with Mr. V. R. Dhond, Senior Advocate, Mr.Rohan Cama, Mr. T. N. Tripathi, Ms. Sapna Rachure I/b. M/s. T. N. Tripathi & Co. for the Respondents

CORAM: K.K. TATED &
S. K. SHINDE, JJ.

DATED : OCTOBER 19, 2018

P.C. :

1 Heard. By this Writ Petition under Article 226 of the Constitution the Petitioner seeks to challenge the order dated 21.11.2017 passed by the Debts Recovery Appellate Tribunal, Mumbai in Appeal No.96/2016 and the order dated 23.02.2016 passed by the learned Presiding Officer, Debts Recovery Appellate Tribunal in interim Application No.67/2016 in Original Application No.114/2005 rejecting the Petitioner's Application for carrying out amendment in Original Application No.114/2005.

2 In the present proceedings initially the Vijaya Bank had filed Original Application No.114/2005 before the DRT – II Mumbai for recovery of sum of Rs.24,78,44,290/- on 12.05.2005. Pursuant to the assignment agreement dated 29.01.2010 the Vijaya Bank, as an assignor, u/s.5 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 (hereinafter referred to as the said Act) assigned the financial assistance granted by it to Respondent No.1 to 4 together with all underlying security, interest and all its right, title and interest to the Petitioner.

3 Thereafter the Petitioners were brought on record in Original Application No.114/2005 on 29.10.2014.

4 During pendency of the proceedings before the Debts Recovery Tribunal, sanction letter dated 28.02.2011 was issued by the Petitioner in favour of the Respondent No.1 for One Time Settlement of the dues on various terms and conditions contained therein. As per the said One Time Settlement, the borrower agreed to repay the outstanding amount to the extent of Rs.150.76 crores with interest @ 22% p.a. compounded with monthly rest from 01.06.2010 till the date of repayment.

5 As the Respondents Borrower failed to repay the entire amount, the Petitioners filed interim Application No.67/2016 before Debts Recovery Tribunal – II for amendment in the Original Application. By this amendment Application, the Petitioners sought permission from the Debts Recovery Tribunal to allow them to add certain paragraphs and also prayer clauses

in Original Application No.114/2005. That Application was rejected by the Debts Recovery Tribunal on 23.02.2016. Hence, the Petitioners preferred Appeal No.96/2016 before the Debts Recovery Appellate Tribunal Mumbai. Same was rejected on 21.11.2017. Thereafter the Petitioners preferred the present Writ Petition.

6 The learned counsel for the Petitioner submits that both the authorities below i.e. Debts Recovery Tribunal and Debts Recovery Appellate Tribunal erred in coming to the conclusion that the Petitioners have failed to make out a case for carrying out amendment as per their Application in Original Application No.114/2005. The learned counsel for the Petitioners submits both the authorities below failed to appreciate that the amendment was absolutely necessary and crucial in deciding the issue raised by the Petitioners and the written statement filed by the Respondents. He submits that both the authorities have failed to appreciate the fact that the contents of the amendment Application, were already part of the record by way of additional claim affidavit of the Petitioners and to the knowledge of the Respondents also.

7 The learned counsel for the Petitioners submits that the Debts Recovery Appellate Tribunal has erred in coming to the conclusion that there was delay on the part of the Petitioners to make Application for amendment. He submits that, that cannot be a ground for rejecting their Application for amendment.

8 The learned counsel for the Petitioners submits that at the

time of deciding the amendment Application, it is a duty of the court/ authority to see whether for deciding the main issue, amendment is required or not. He submits that in the present proceedings in view of the subsequent development i.e. sanction letter dated 28.02.2011, modification of agreement dated 29.09.2011 and the Respondents agreed to pay interest @ 22% p.a. and those facts were required to be brought on record to decide the Original Application on its own merits.

9 The learned counsel for the Petitioners submits that at the time of deciding the Application for condonation of delay the authority/court should take lenient view. In support of his contention/submission, the learned counsel for the Petitioners has relied on the judgment of the apex court in the matter of ***Rajesh Kumar Aggarwal and Ors. Vs. K. K. Modi & Ors. (2006) 4 SCC 385***. He submits that the apex court, in this matter held that the court should allow all amendments that may be necessary for determining the real question in controversy between the parties, provided it does not cause injustice or prejudice to other side. It is the primary duty of the court to decide whether such an amendment is necessary to decide the real dispute between the parties. The Court should also take notice of the subsequent events in order to shorten the litigation to preserve and safeguard the rights of both parties. He relies on paragraph 14 of the said judgment, which reads thus:

> *14. Order 6 Rule 17 of CPC reads thus:*
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> ***"17) Amendment of Pleadings*** *- The court may at any stage of the proceedings allow either party to alter or*

amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties:

Provided that no application for amendment shall be allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial."

This rule declares that the Court may, at any stage of the proceedings, allow either party to alter or amend his pleadings in such a manner and on such terms as may be just. It also states that such amendments should be necessary for the purpose of determining the real question in controversy between the parties. The proviso enacts that no application for amendment should be allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter for which amendment is sought before the commencement of the trial."

10 The learned counsel for the Petitioners also relies on the judgment of the apex court in the matter of ***Andhra Bank Vs. ABN Amro bank N. V. 2007 6 SCC 167.*** He submits that in this authority the apex court held that the delay should not be ground for dismissing the Application for carrying out amendment. He further submits that the apex court held that at the time of deciding amendment Application court should not go into the merits of the matter.

11 The learned counsel for the Petitioners also relies on the judgment of the apex court in the matter of ***B. K. Narayana Pillai Vs. Parmeshwaran Pillai & Anr. (2000) 1 SCC 712***. He

submits that in this authority the apex court held that the Application under Order VI Rule 17 of the Code of Civil Procedure, 1908 for amendment of the pleadings should be permitted, where it would result in solution of real controversy between the parties without altering the original cause of action.

12 The learned counsel for the Petitioners also relied on the apex court judgment in the matter of ***Ragu Thilak D. John V.s S. Rayappan and Ors. (2001) 2 SCC 472***. He submits that in this authority, the apex court held that dominant purpose of Order VI Rule 17 of the Code of Civil Procedure, 1908 is to minimize the litigation.

13 The learned counsel for the Petitioners also relied on unreported order dated 05.12.2016 passed by the Division Bench judgment of this court (Coram : S. C. Dharmadhikari & B. P. Colabawalla, JJ) in UPL Ltd. Vs. Standard Chartered Bank and Anr. in Commercial Appeal (L) No.31/2016 in Chamber Summons No.816/2015 in Suit No.4651/1999, wherein it is held that the court should not go into the facts and merits of the amendments to be introduced at the stage of granting leave to amend. He submits that in the case in hand both the authorities below have rejected their Application for amendment considering the merits of the matter.

14 On the basis of this submission, the learned counsel for the Petitioners submits that the impugned order passed by both the authorities below are required to be set aside and the Application

filed by them being I.A.No.67/2016 for amendment in Original Application be allowed with costs. He further submits that if Application is not allowed, irreparable loss and injury will be caused to them.

15 On the other hand the learned senior counsel for the Respondents vehemently opposed the Writ Petition. He submits that there are concurrent findings of fact recorded by both the authorities below. Therefore, there is no question of entertaining the Writ Petition under Article 226 of the Constitution of India. He further submits that bare reading of the amendment Application filed by the Petitioner before Debts Recovery Tribunal shows that, if amendment is allowed, entire cause of action is going to change in original Application. He submits that the Petitioners have made the present amendment Application mainly on the basis of sanction letter dated 20.02.2011 and modification of agreement dated 29.09.2011. He submits that the Petitioners, on their own by letter dated 17.06.2013 revoked the sanction letter. He relies on last paragraph of the said letter which reads thus:

> *"Since, VHL has defaulted in making payments of settlement amount in accordance with the terms and conditions stipulated in the Sanction Letters, Arcil hereby revokes the sanctioned settlement. All the monies paid till date pursuant to the Sanction Letters stand forfeited and adjusted against the total outstanding dues of VHL."*

16 The learned senior counsel for the Respondent submits that in view of revocation of sanction letter, nothing survives in

the amendment Application made by the Petitioner. He submits that these facts were rightly appreciated by both the courts below. Therefore, there is no question of entertaining the present Writ Petition.

17 The learned senior counsel for the Respondents submits that on the basis of the sanction letter dated 28.02.2011 and the modification of agreement dated 29.09.2011 the Petitioners issued demand notice dated 10.07.2013 u/s.13(2) of the said Act for a sum of Rs.235,46,34,381/- against the loan taken by the Respondents from four bank as mentioned in the said notice. While calculating this amount the Petitioners have charged interest @ 22% p.a. with compound monthly rests from 01.07.2012 to 30.06.2013. This issue reached upto this court by way of Writ Petition No.2948/2016 which was withdrawn by the Petitioners on 31.08.2018. Therefore, there is no question of again permitting the Petitioners to carry out amendment in the Original Application.

18 The learned senior counsel for the Respondents submits that there was gross delay on the part of the Petitioners to make an Application for amendment. He submits that on 18.01.2016 the final arguments were started before the Debts Recovery Tribunal. Thereafter within three days, the Petitioners had made an Application for amendment on 21.01.2016. He submits that in view of the amended provisions of Order VI Rule 17 of the Code of Civil Procedure, 1908, once the trial begins, usually the court should not allow the amendment and these facts were considered

by both the courts below and rightly rejected the Petitioner's Application for amendment.

19 The learned senior counsel for the Respondents submits that the case laws cited by the Petitioners are not applicable in the facts and circumstances of the present case. He submits that in the matter of K.K.Modi (supra), the apex court held that no Application for amendment should be allowed after the trial has commenced unless the court comes to the conclusion that in spite of due diligence the party could not have raised the matter for which the amendment is sought before commencement of the trial. He submits that in the case in hand the Petitioners have failed and neglected to make out any case as to why the Application for amendment was not made before commencement of the trial. He further submits that even the judgment of the apex court in the matter of Andhra Bank (supra) is not applicable in the case in hand, as the said authority is in respect of matter of the Special Court constituted under the Trial of Offences Relating to Transactions in Securitsation Act, 1992. He further submits that the judgment in the matter of B. K. Narayana Pillai (supra) is not applicable because same was the decision on the basis of the pre-amendment to Order VI Rule 17 of the Code of Civil Procedure, 1908.

20 On the basis of these submissions, the learned senior counsel for the Respondents submits that there is no substance in the Writ Petition and same may be dismissed with costs.

21 The learned senior counsel for the Respondents submits that in the present proceedings the Petitioners, by its revocation letter dated 17.06.2013 revoked the sanction letter dated 28.02.2011. Hence, on the basis of the said fact, the Application filed for amendment is not maintainable. In support of this contention, he relies on the judgment of the apex court in the matter of ***Jawahar Lal Wadhwa and Anr. Vs. Haripada Chakroberty AIR 1989 SC 606***.

> *"..............................Mr. Bhandare's argument really is to the effect that the Respondent wrongly repudiated the contract by his said letter dated 16th January, 1976, before all the mutual PG NO 521 obligations under the contract had been carried out, that is to say, he committed an anticipatory breach of the contract and in view of this, Appellant No. 1 was absolved from carrying out his remaining obligations under the contract and could claim specific performance of the same even though he failed to carry out his remaining obligations under the contract and might have failed to show his readiness and willingness to perform the contract. In our view, this argument cannot be accepted. It is settled in law that where a party to a contract commits an anticipatory breach of the contract, the other party to the contract may treat the breach as putting an end to the contract and sue for damages, but in that event he cannot ask for specific performance. The other option open to the other party, namely, the aggrieved party, is that he may choose to keep the contract alive till the time for performance and claim specific performance but, in that event. he cannot claim specific performance of the contract unless he shows his readiness and willingness to perform the contract. The decision of this Court in International Contractors Limited Vs. Prasanta Kumar Sur, (supra), properly analysed, only lays down that in certain circumstances it is not necessary for the party complaining of an anticipatory breach of contract by the other party to offer to perform his remaining obligations under the contract in order to show his readiness and willingness to*

> *perform the contract and claim specific performance of the said contract. Mr. Bhandare also referred to the decision of the Andhra Pradesh High Court in Makineni Nagayya and Others v Makineni Bapamma., AIR (45) 1958 A.P. 504. We do not consider it necessary to refer this decision as it does not carry the case of the Appellants any further. The ratio of the said decision in no way runs counter to the said position in law set out above."*

22 Bare reading of the Application made by the Petitioners for amendment shows that same is based on the sanction letter dated 28.02.2011 by which the Respondents agreed to settle the dues by OTS, wherein they agreed to pay interest @ 22% p.a. On the basis of the said sanction letter, the Petitioners as well as the Respondents entered into modification of agreement dated 29.09.2010. Bare reading of the said modification of agreement shows that the same is based on sanction letter dated 28.02.2011. Clause 3 of the said modification agreement dated 29.09.2011 reads thus:

> "3 The borrower expressly agrees and undertakes that outstanding of the Loans acquired by Arcil from Punjab Natiional Bank along with outstanding of the loans acquired by Arcil under various trust Arcil- V. Hotels Ltd. Trust, Arcil-V Hotels Ltd. - II Trust, Arcil-V Hotels Ltd. - III Trust and Arcil-V Hotels Ltd. - IV Trust from Bank of India, Punjab Natiional Bank, Union Bank of India and Vijaya Bank respectively, are now rescheduled IN TWO INSTALLMENTS AS UNDER in terms of terms of settlement letter dated 28.02.2011, aggregates as under:
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> a. Rs.10 Crores on acceptance of sanction letter dated February 28, 2011.
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> b. On September 30, 2011, the balance amount after adjusting the said Rs.10 crores from the aggregate amount of Rs.150.76 crores to be paid along with interest @ 22% per

annum compounded at monthly rests from July 1, 2010."

23 Once the sanction letter itself is revoked by the Petitioner by their revocation of sanction letter dated 17.06.2013, there is no question of enforcement of the same by carrying out amendment in Original Application. These facts were considered by the authorities below at the time of rejecting the Petitioner's Application for amendment.

24 Though the Petitioners have relied on several authorities, but when the main foundation i.e. sanction letter dated 20.02.2011 itself was revoked by them, there is no question of allowing the Petitioners to carry out amendment on the basis of the said letter.

25 In view of these facts, we do not find any substance in the Writ Petition. Hence, following order is passed.

a. Writ Petition stands dismissed.

b. No order as to costs.

c. The Debts Recovery Tribunal to decide the Original Application on its own merits without being influenced by the observations made by this court in this order.

(S. K. SHINDE, J.) **(K. K. TATED, J.)**