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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **Date of Decision: 19.02.2019**
% **W.P.(C) 1697/2019**

JAGDISH KHATTAR

..... Petitioner

Through: Ms. Maneesha Dhir, Ms. Jayashree S.
Dasgupta and Ms. Swati Sharma and
Mr. Mahipal Singh, Advs.

versus

PUNJAB NATIONAL BANK AND ORS. Respondent

Through: Mr. Sartaj Singh, Adv. for R-1.

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

HON'BLE MR. JUSTICE A.K. CHAWLA

VIPIN SANGHI, J. (ORAL)

C.M. No. 7764/2019

1. Exemption allowed, subject to all just exceptions. The application stands disposed of.

W.P.(C) 1697/2019 & C.M. No. 7763/2019

2. The petitioner has preferred the present writ petition to seek the setting aside of the orders dated 29.01.2019 and 07.02.2019 passed by the Debt Recovery Appellate Tribunal (DRAT) in the Miscellaneous Appeal No. 37/2019, preferred by the petitioner.

3. The petitioner is arrayed as respondent No. 2 in the Original

Application preferred by the creditor bank i.e. Punjab National Bank (PNB). Respondent No.1 M/s Carnation Auto India Pvt. Ltd. is the principal borrower. The petitioner is the Managing Director of the principle borrower company, and also stood as personal guarantor in respect of the credit facilities availed from the lender bank. While the Original Application preferred by the respondent Bank was at the stage of final arguments, the defendant Nos. 2 to 5 in the Original Application moved an application i.e. I.A. No. 1719/2018 to seek amendment of the written statement.

4. By the said amendment, the said defendants sought to incorporate, inter alia, averments in relation to the Corporate Insolvency Resolution Process (CIRP) initiated by the creditor bank under Section 7 of the Insolvency and Bankruptcy Code, 2016. The petitioner sought to incorporate the facts relating to a resolution plan proposed by one Hykart Sales Private Limited. The petitioner sought to incorporate pleas that the said resolution plan was considered in the meeting of the Committee of Creditors viz. PNB and IFCI Venture Capital Funds Ltd. on several occasions, and that on 22.06.2018 the PNB, having 66.26% of the voting shares, voted against the approval of the resolution plan, while the other creditor, namely IFCI Venture Capital Fund Ltd. – having 33.64% voting shares, abstained from voting. Consequently, the resolution plan came to be rejected. The applicants/ Defendant Nos. 2 to 5 sought to incorporate the plea that despite the Resolution Plan finally offering around Rs. 26 crores to the Applicant Bank i.e. PNB, the same was rejected and application for liquidation of the Debtor Company was filed before the NCLT, which was approved by the NCLT on 01.08.2018. The petitioner also sought to raise a

plea that the Contracts, Intellectual Property, Trade Marks and movable Assets were proposed to be sold at a throw away price of Rs. 38 lakhs to harass Defendant Nos. 2 to 5. They claimed that the brand value of the debtor company was valued at Rs. 94.84 crores by the PNB. Consequently, the petitioner sought to invoke Section 141 of the Contract Act, to say that the petitioner herein, who stands in the position of a surety in respect of the credit advanced by the applicant bank/ PNB, is entitled to the benefit of the said security i.e. brand value, and since the creditor bank/ PNB has parted with the said brand value without the consent of the petitioner/ surety, the petitioner's surety stands discharged to the extent of the valuable security, which was assessed at Rs. 94.84 Crores.

5. The said application for amendment was disallowed by the DRT vide order dated 08.01.2019 since the same had been moved highly belatedly at the stage of final hearing of the Original Application.

6. The petitioner then preferred the aforesaid Miscellaneous Appeal No. 37/2019 before the Tribunal. On 29.01.2019, a notice was issued in the said Miscellaneous Appeal returnable to the respondents in the said Appeal. On 07.02.2019, the respondent bank/ PNB entered appearance and sought time to file replies. Time was granted to file replies before 07.03.2019, when the Appeal was directed to be listed for final hearing.

7. The grievance of the petitioner is that the Appeal has been listed on 07.03.2019, whereas the Original Application is listed for final arguments on 25.02.2019 and if the DRT proceeds to dispose of the Original Application on that day, the Miscellaneous Appeal itself would become infructuous. The

petitioner has, therefore, assailed the orders passed by the DRT on 08.01.2019, as well as the orders passed by the DRAT on 29.01.2019 and 07.02.2019.

8. At the outset, we informed learned counsel for the petitioner that we were not inclined to interfere with the impugned order or the ongoing proceedings before the DRT and DRAT since we were, prima facie, not satisfied that there was justification to seek amendment of the written statement by Defendant Nos. 2 to 5 and also about the bona fides of the said defendants in moving the amendment application when the final hearing in the O.A. No. was in progress.

9. Ms. Dhir, learned counsel for the petitioner has advanced her submissions on the aspect of justification for moving the amendment application at the stage when the Original Application itself was being finally heard, and also on the justification for seeking the amendment, as sought by the petitioner and the other defendants.

10. So far as the aspect of delay in moving the amendment application is concerned, Ms. Dhir points out that in the proceedings undertaken under the Insolvency and Bankruptcy Code, 2016, developments took place as late as on 22.06.2018 when the COC rejected the resolution plan. On 01.08.2018, the Liquidator was appointed and on 04.10.2018, notice was issued for auction of the brand value with reserve price of Rs. 38 lakhs and the auction itself was held on 20.10.2018. Thus, amendment application could not have been moved earlier.

11. On the aspect that the amendment was justified, Ms. Dhir submits that since the petitioner is alleged to be a personal guarantor in respect of the loan advanced to the debtor company, he is entitled to invoke Section 141 of the Contract Act as the brand value of the debtor company, which was valued at Rs. 94.84 crores by the applicant bank/ PNB, itself, has been disposed of for a meager amount of Rs. 38 lakhs.

12. Having heard Ms. Dhir, as well as learned counsel for the respondent No.1, who appears on advance notice, we are of the view that the step taken by the petitioner and the other defendants in moving the amendment application, itself, was completely frivolous and also demonstrates possible mala fide on their part – the objective of the said move being to stall the ongoing recovery proceedings before the DRT.

13. The developments which have been sought to be brought on record, by way of amendment of the written statement before the DRT have absolutely no bearing to the issue which arises for determination in the Original Application. The DRT, while determining the Original Application, is only concerned with the aspect of the liability of the debtor company and, consequently, of the guarantors on the basis of the loan transaction undertaken between the creditor bank and the borrower.

14. The facts that the resolution plan was rejected by the PNB; or that brand value of the debtor company was valued at Rs. 94.84 crores by the creditor bank itself; or that the reserve price of the same was fixed by the liquidator at Rs. 38 lakhs; or that the same was sold in public auction, in our view, have no bearing whatsoever on the aspect of determination of the

financial liability, if any, towards the creditor bank of the debtor company and the guarantors. It is pointed out by learned counsel for the respondent No.1 that, in case, the petitioner had any grievance with regard to the valuation of the brand value of the debtor company, that was an aspect which was open to appeal in terms of the provisions of the Insolvency and Bankruptcy Code, 2016.

15. Ms. Dhir has placed reliance upon the decision in ***Revajeetu Builders and Developers v. Narayanaswamy and sons and Others***, (2009) 10 SCC 84, and in particular paragraph 63 of the said decision, which enlists the factors to be taken into consideration while dealing with an application of amendment. The Supreme Court has set out the following factors that the Courts should take into account while dealing with an amendment application:-

“63. On critically analysing both the English and Indian cases, some basic principles emerge which ought to be taken into consideration while allowing or rejecting the application for amendment:

(1) whether the amendment sought is imperative for proper and effective adjudication of the case;

(2) whether the application for amendment is bona fide or mala fide;

(3) the amendment should not cause such prejudice to the other side which cannot be compensated adequately in terms of money;

(4) refusing amendment would in fact lead to injustice or lead to multiple litigation;

(5) whether the proposed amendment constitutionally or fundamentally changes the nature and character of the case; and

(6) as a general rule, the court should decline amendments if a fresh suit on the amended claims would be barred by limitation on the date of application.”

16. When we apply the aforesaid principles to the present case, we find that none of the six principles set out herein above are satisfied in the present case. Firstly, the amendment is not imperative for proper and effective adjudication of the case. They are most irrelevant. The conduct of the petitioner and other defendants in moving the amendment application certainly does not appear to be bona fide, as the application appears to have been moved only with a view to delay the disposal of the Original Application. The amendment at this belated stage would surely cause prejudice to the creditor bank since its Original Application would itself get delayed if the amendment is allowed. Far from causing injustice to the petitioner – if the amendment were to be refused, it would lead to grave injustice to the creditor bank to allow the amendment at this stage. By the proposed amendment, the petitioner and other defendants are seeking to introduce aspects into the case which have no relevance to the determination of the primary issue before the DRT.

17. Ms. Dhir has also sought to place reliance on ***Amrit Lal Goverdhan Lalan (dead) by his Legal Representative v. State Bank of Travancore and Others***, AIR 1968 SC 1432, wherein the Supreme Court has observed as follows:

“It is true that Section 141 of the Indian Contract Act has limited the surety's right to securities held by the creditor at the date of his becoming surety and has modified the English rule

that the surety is entitled to the securities given to the creditor both before and after the contract of surety. But subject to this variation, Section 141 of the Indian 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.”

18. In our view, this decision is not attracted in the facts of the present case, since the brand value of the debtor bank has been sold by the liquidator under the provisions of the Insolvency and Bankruptcy Code, 2016 and that too by holding a public auction. The submission of the petitioner premised on Section 141 of the Contract Act is completely misconceived and frivolous.

19. The petition is, accordingly, dismissed with costs of Rs.1,00,000/- to be deposited by the petitioner in the Prime Minister's National Relief Fund within 4 weeks. In case, the costs are not paid and receipt not filed, the matter be listed before Court for enforcing compliance.

20. The petition stands disposed of in the aforesaid terms.

VIPIN SANGHI, J.

A.K. CHAWLA, J.

FEBRUARY 19, 2019
N.Khanna