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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Decided on: 06.09.2022

+ **W.P.(C) 2123/2021 & CM APPL. 6212/2021**

BIBA SAWHNEY

..... Petitioner

Through: Mr. Rajeev Mehra, Sr. Adv. with
Mr. Sanjeev Bhandari, Mr. Pallav
Saxena and Mr. Mohd. Nauseen
Samar, Advs.

Versus

**EDELWEISS ASSET RECONSTRUCTION
COMPANY LTD**

..... Respondent

Through: Mr. Ayush Acharjee, Adv.

CORAM:

HON'BLE MR. JUSTICE NAJMI WAZIRI

HON'BLE MR. JUSTICE VIKAS MAHAJAN

NAJMI WAZRI, J. (ORAL)

The hearing has been conducted through hybrid mode (physical and virtual hearing).

1. This writ petition impugns the order dated 09.05.2018 passed by the Debts Recovery Tribunal, Delhi in O.A. No. 241 of 2015 and the subsequent orders passed by the Debts Recovery Appellate Tribunal, in Appeal No. 249 of 2019 on 14.08.2020 and 18.11.2020, dismissing the petitioner's appeal against the said DRT order. The last order was on account of the appeal not accompanying the statutory pre-deposit of 50% of the decretal amount.

2. The petitioner says that the appeal was not disposed-off on merits but was found to be not maintainable on account of non-deposit of the statutory amount. Essentially, the order of DRT is to be examined, which has held the petitioner jointly liable, along with five other persons, for payments of a sum of Rs.145,69,70,298/- along with future interest @11% per annum from the date of filing of OA. The recovery has been directed to be effected from the sale of mortgaged property situated at Second Floor, Flat no. 102, Block No. 3, Parking Space No. 103, Brighton Marina, Cawthorn Billins Sharpe, 59/61, Guildford Street, Luton Bedfordshire LUI 2NL in London.
3. The learned Senior Advocate for the petitioner submits that this is a stark case of an innocent person being held liable for re-payment of loans with which she has nothing to do and the facts of the case would show that the impugned order has erred both in facts and in law. The petitioner stood as one of the guarantors for loans/credit facility taken by the original defendant no.1 i.e., M/s. Net 4 India Ltd. between 06.08.2002 till 13.12.2008 for an amount of Rs.47.45 crores. The credit facility was regularly serviced.
4. The petitioner resigned from the post of Nominee Director of the Company on 08.12.2009. No additional loans were taken in 2009. By the lender's sanction letter dated 09.06.2010 an enhanced credit facility was granted to M/s. Net 4 India Ltd. and individual guarantees too, were executed. On 18.06.2010, in the List of Personal Guarantors, albeit the petitioner's name is mentioned, she had not signed any personal guarantee document. Nor was she a part of this enhanced credit sanction granted on 15.04.2011, therefore no liability

could devolve upon her. Interestingly, in this document, (Annexure-1, Part-1) titled as Special Covenants, in the portion where the bank specifically lists the names of personal guarantors, the petitioner's name is not included, she was consciously excluded. She was not a signatory to any document for sanction of further credit facilities after 13.12.2008. Her guarantee has been released by the lender's appropriate authority.

5. Another credit facility was extended on 02.09.2011 in which the personal guarantee was furnished by the following persons:- (i) Mr. Jasjit Singh Sawhney, Director, (ii) Mr. Amarjit Singh Sawhney, Director, (iii) Mr. Pawanjot Kaur Sawhney. By a sanction letter dated 19.01.2012, yet another enhanced credit facility was sanctioned, in which personal guarantees were furnished by the following persons:- (i) Mr. Jasjit Singh Sawhney, Director, (ii) Mr. Amarjit Singh Sawhney, Director, (iii) Mr. Pawanjot Kaur Sawhney (iv) Ms. Suzzan Pai. None of these credit facilities include the petitioner as a guarantor, nor was any other document signed or admitted by her as a guarantor for repayment of the credit facility. Similar was the position in the subsequent credit facilities extended by the lender-State Bank of India on 10.09.2012.
6. The lender-Bank had ensured that it took personal guarantees to its satisfaction, from persons of sufficient means to secure the credit facility extended to the borrower i.e., M/s. Net 4 India Ltd. In so far as the letter dated 15.04.2011 is concerned, it has clearly conveyed to the borrower that the guarantee of Ms. Biba Sawhney stood released by the appropriate authority/Bank. Evidently, nothing more is needed to

be conveyed to her apropos release and discharge of her guarantees or of any possible liability to the lender. The loans were to be fully secured by the subsequent guarantors, therefore, there would possibly be no cause for the lender or a subsequent assignee to pursue any case for re-payments/recovery of the loans against the petitioner.

7. Before the DRT, the petitioner had contended that pursuant to the release of her guarantee by the lender, she was not a signatory to any document therefore she had no liability towards the respondent and stood fully discharged as a guarantor from any loans/credit facilities taken/enjoyed by the borrower and no liability could be fastened upon her. Liability, as may be, was effectively taken over by the subsequent guarantors, and it is in this context that her name was deleted from the array of defendants.
8. The case was heard but the judgment was not rendered by the DRT for over 11 months. According to the appellant, this is an unexplained delay and the appellant has reservations about it.
9. Be that as it may, on the undisputed facts as recorded hereinabove that the petitioner cannot be held liable for any re-payment. The order of DRT is unsustainable in law because it has erred on facts on the record. It has held *inter alia* as under:-

“27.....I have perused the record. Record reveals that the applicant (SBI) has sanctioned the credit facility vide sanction letter dated 10.09.2012 (Exhibit AW1/132) which was duly accepted by the defendants. In consideration of the said sanction the defendants executed the various loaning documents on 11.09.2012, Supplemental Agreement of Loan for Increase in the overall limit Exhibit AW1/134. Supplemental Deed of Guarantee for Increase in Overall limit Exhibit

AW1/138 & AW1/39 and the present OA is filed on 29.07.2015. Hence, I am of the view that the OA is well within the limitation period. Therefore, the objection is hereby rejected.”...

10. Interestingly, though it was never the assignee respondent's case before the DRT that the present petitioner had signed any document furnishing any guarantee for the credit facility sanctioned on 10.09.2012. Indeed, the petitioner is not even mentioned anywhere in the sanction letter dated 10.09.2012. Furthermore the impugned order has held as under:-

“....I have perused the sanction letter dated 15 04.2011 and also perused the link letter dated 07.05.2011 Exhibit AW1/112 which reveals that defendants have admitted the liability and also admitted all security documents executed on 31.10.2002 and modify time to time i.e. 01.04.2003, 27.02.2004, 13.05.2005, 10.11.2005, 08.02.2006, 31.08.2006, 20.02.2007, 18.12.2008 and further modified the documents on 30.06.2009, 15.12.2009 and 18.06.2010 and also the relative securities there under are in full force and valid. They also confirm and ratify all the transaction in the accounts of M/s Net 4 prior to the date of execution of this letter. Further, defendants failed to prove that the agriculture land could not be mortgaged and also at the time of the mortgage they themselves offered the said property now in the garb of agriculture land they cannot take any advantage as held by Hon'ble Apex Court in the recent judgment of ITC Limited Vs. Blue Coast Hotel Limited and Ors.”...

11. The aforesaid conclusion that the defendants (including the present petitioner) had “admitted the liability and also admitted all security documents” executed from 31.10.2002 till 15.12.2008, the conclusion drawn is erroneous because all such documents of guarantee executed by the petitioner- Biba Sawhney stood released, in terms of the

lender's letter dated 15.04.2011. Therefore the finding apropos the petitioner, in the impugned order is factually incorrect, unsustainable and hereby set aside.

12. The petitioner could be expected to provide the details regarding documents which she has not executed. Nobody can be required to prove negative or a void. That which does not exist cannot be proven. It was for the creditor to show that the petitioner, along with others, was liable to pay the loans or that the monies could be recovered from the guarantee extended by the petitioner. In so far as the petitioner is concerned, the guarantees given by her till 31.12.2008 stood released by the bank and subsequently all the credit facilities including the credit continuing from or taken by the borrower, when the petitioner had given guarantee, were secured/replaced by personal guarantees executed by the four persons as mentioned in paragraph 5 hereinabove from which the petitioner has been specifically and consciously excluded.

13. The petitioner relies upon the dicta of this court in ***Central Bank of India vs. Systems & Softwares & Ors. 2003 SCC Online Del 469***, the said paragraphs of the said judgment reproduced hereunder:-

“...17. If a party is left with no remedy to recover the loan from the Principal Debtor it cannot recover it from the Guarantor also as the liability of the Guarantor emanates and flows from the liability of Principal Debtor. If claim against Principal Debtor gets time barred so does the claim against Guarantor. The liabilities are joint and several and cannot be segregated or bifurcated much less for the purpose of limitation. If the documents executed by Principal Debtor towards cash credit facility or loan term facility cannot be invoked on account of claim of the creditor being time barred, the document executed

by the Guarantor for the same reason also cannot be executed. Had the plaintiff bank any intention to get the renewal of facility secured by way of guarantee it was incumbent upon the plaintiff bank to get Form of Guarantee also renewed as other documents were got executed from defendants 1 and 2.

18. Thus from any angle we may examine the claim of the plaintiff against defendants 3 and 4 it is not only barred by limitation but also is not maintainable in view of plaintiff's failure to get Form of Guarantee renewed when cash credit facilities were renewed and fresh set of documents were got executed and signed by defendants 1 and 2.

19. As a consequence, suit against defendants 3 and 4 fails. However, suit of the plaintiff against defendants 1 and 2 succeeds on the basis of documents which were executed on 8-9-1993 and particularly the acknowledgment of liability as well as statement made by defendant No. 2 on 24.8.1995 in the court.”...

14. In *Satish Chandra Jain vs. National Small Industries Corporation Ltd. And Ors.* AIR 2003 SC 623, the Supreme Court held that when there is a credit facility and a subsequent second agreement is entered into for enhancement of that credit facility, the same amounts to novation of the contract and the earlier guarantors shall stand discharged by a fresh guarantee which was duly accepted by the Bank, thus, the earlier guarantors would not be bound by their earlier deed of guarantees. The relevant paragraphs are reproduced hereunder:-

“...7. From the facts enumerated hereinabove, it is clear that originally when the hire-purchase agreement had been entered into between the parties in June, 1983, the appellant had stood as one of the guarantors. This agreement, however, was superseded by a new one on 2nd April, 1986. The latter

agreement does not say that the earlier agreement of guarantee stood terminated nor does it state that the earlier agreement of guarantee continues. In fact, in the latter agreement of 2nd April, 1986, there is no mention of the earlier agreement entered into by the appellant as a guarantor. The conduct of the parties, however, shows that respondent No. 1 after 2nd April, 1986 did not regard the appellant as one of the guarantors. Apart from the recital in the agreement of 2nd April, 1986, inter alia, to the effect that a fresh agreement had been entered into and Rajiv Jain and Ajit Prasad Jain have agreed to stand as guarantors, respondent No. 1, when it filed the suit in the Delhi High Court chose not to implead the appellant herein as one of the defendants. Rajiv Jain and Ajit Prasad Jain were impleaded as defendants primarily on the ground that they were guarantors under the fresh agreement dated 2nd April, 1986. There is no reference in the plaint to the earlier deed of guarantee dated 7th June, 1983 executed by the appellant nor is there any prayer in the plaint for a decree against the appellant herein or in respect of the agreement of 1983. This apart, even in the certificate of recovery which was sent by respondent No. 1 to the collector, Meerut, the arrears were stated to be due from Rajiv Jain and Ajit Prasad Jain in the capacity as guarantors apart from the company and its directors. The appellant herein was admittedly not a director of the company and his name does not find mention in the certificate of recovery.

8 . Without going into the question whether the provisions of the U.P. Public Monies (Recovery of Dues) Act, 1972 could be invoked on the facts of this case against the appellant, we find that in fact there was no such invocation in the present case. Furthermore, the second agreement of 2nd April^ 1986 amounted to novation of contract as a result of which the earlier guarantors stood discharged and fresh guarantees of Rajiv Jain and Ajit Prasad Jain were accepted by respondent No. 1. It is for this reason that respondent No. 1 chose not to file any suit against the appellant thereby clearly indicating that it did not regard the appellant as a guarantor or a person who was still bound by the deed of guarantee executed on 7th June, 1983. The

argument of continuing guarantee, therefore, cannot be applied in the present case.”...

15.This petition seeks issuance of an appropriate writ, order or direction for quashing the impugned orders. The learned counsel for the respondent assignee, fairly, does not dispute the facts of the case as noted hereinabove. The powers of the High Court under Articles 226 and 227 of the Constitution of India are rather extensive and the power granted under Article 227 extends to superintendence over all courts and all Tribunals throughout the territory in relation to which the High Court exercises the said jurisdiction.¹ When facts of any case are as stark as noted hereinabove, not exercising court’s superintendence over Tribunals against orders, such as the one impugned in the present case, which has erred not only in fact but in law, would be a failure of the court’s duty. The power of this court’s superintendence under Articles 226 and 227 is expressly reiterated in section 18 of the Recovery of Debts and Bankruptcy Act, 1993.

16.Once the lender-Bank has itself released the guarantee of the petitioner, the latter cannot be subjected to any recovery proceedings apropos credit facilities/loans enjoyed by the borrowers. Especially, since all loans, including the subsequent enhanced credit facility were duly secured by the lender from subsequent guarantors. That being the position, there is hardly any ground which can sustain the impugned order apropos the petitioner. Accordingly, the DRT order dated 09.05.2018, insofar as it fastens any liability on the petitioner, it is set aside. Consequently, the orders of the DRAT dated 14.08.2020 and

¹ *Rajesh Jhunhunwala and Ors. vs. J&K Bank Limited and Ors-in W.P (C) No. 10949/2019.*

18.11.2020, are also set aside insofar as they relate to the petitioner.
17. The petition is disposed-off, in terms of the above.

NAJMI WAZIRI, J

VIKAS MAHAJAN, J

SEPTEMBER 06, 2022/dss