
(2022) 04 P&H CK 0056

In the Punjab And Haryana At Chandigarh

Case No : Civil Writ Petition No. 4520 Of 2021 & Civil Writ Petition No. 4631 Of 2016

Amrik Singh

APPELLANT

Vs

DCB Bank Ltd. And Another

RESPONDENT

Date of Decision : 06-04-2022

Acts Referred:

Constitution Of India, 1950 — Article 226
Securitisation And Reconstruction Of Financial Assets And Enforcement Of Security Interest Act, 2002 — Section 3, 4, 5, 9, 9(2), 12A, 12B, 13(2), 13(4), 17, 17(1), 17(2)
Banking Regulation Act, 1949 — Section 21, 21(3), 35A

Citation : (2022) 04 P&H CK 0056

Hon'ble Judges : Ramachandra Rao, J; Jasjit Singh Bedi, J

Bench : Division Bench

Advocate : Jyoti Sareen, ADS Sukhija

Final Decision : Allowed

Judgement

M.S. Ramachandra Rao, J

The Background facts

The petitioner is the proprietor of a proprietary concern by name, M/s New Bajaj Electronics, dealing in the business of electronic goods.

His brother was the proprietor of another proprietary concern by name, M/s Bajaj T.V. Centre.

These two concerns availed loan from the respondents-DCB Bank against property to the tune of Rs.67 lakh in 2013. The loan against property was later enhanced to Rs.95 lakh in September, 2015, repayable over a period of 15 years in equal monthly installments of Rs.1.14 lakhs each. The petitioner, in his personal capacity, also stood a guarantor to the credit facility availed by the firms by mortgaging his property in favour of the respondents-DCB Bank.

When the EMIs of the loans were not paid, the respondents declared the loan accounts as NPA on 01.12.2018 and issued notice dt. 06.12.2018 (P1) under Section 13(2) of the Securitization & Reconstruction of Financial Assets & Enforcement of Security Interest Act, 2002 [for short 'the SARFAESI Act'].

The First OTS dt.22.08.2019

Petitioner and his brother submitted an OTS proposal alongwith a demand draft of Rs.10 lakh on 22.08.2019 (P2) to the respondents with a condition to encash the same subject to acceptance of the settlement proposal. The respondents however encashed the said demand draft but did not accept the settlement proposal.

The Second OTS dt.18.06.2020 and its refusal Petitioner and his brother again made a joint settlement proposal on 18.06.2020 (P3) offering Rs.75.32 lakh to the respondents but, the same was not accepted.

Revised Settlement proposal dt. 16.7.2020 and its acceptance Petitioner then submitted a revised settlement proposal on 16.07.2020 (P4) offering Rs.85 lakh.

On 25.07.2020, the respondents-Bank accepted the settlement proposal submitted by the petitioner for Rs.85 lakh and issued a OTS sanction letter dt.25.07.2020 (P5).

According to the said sanction letter, Rs.25 lakh is payable by 31.07.2020, Rs.20 lakh by 30.08.2020 and Rs.40 lakh by 30.09.2020.

Petitioner by 30.09.2020 paid a sum of Rs.49 lakh as against the total settlement amount of Rs.85 lakh and was unable to raise the balance amount of Rs.36 lakh by the last date of payment i.e. 30.09.2020.

Request of petitioner for extension of time to pay amount as the OTS sanctioned and its refusal

On 30.09.2020, petitioner requested the respondents-Bank to grant extension of 90 days time for making payment of the balance amount of Rs.36 lakh. He stated that delay had occurred in making this payment as the purchaser to whom the petitioner had sold the property did not make payment of Rs.40 lakh in time (which was to be paid by the said purchaser by 28.09.2020). It was also mentioned that due to Covid-19, there was slow down in business because of which the purchaser of the property could not raise the funds to make full payment to the petitioner by the last date and thus, the petitioner was constrained to seek extension.

When there was no response from the respondents-Bank, petitioner represented on 31.12.2020 seeking time to make payment of Rs.36 lakh with interest for the delayed payment.

According to the petitioner, the official of respondent No.2-Bank refused to receive the letter/representation dt. 31.12.2020 (P7) and so he sent the same by

registered post.

Filing of instant Writ Petition

Petitioner therefore, filed the instant Writ Petition for a direction to the respondents to accept the balance amount of Rs.36 lakh out of the total settlement amount of Rs.85 lakh along with interest at 9% p.a. w.e.f. 01.10.2020 to 31.12.2020.

Contention of the counsel for the petitioner Counsel for the petitioner contends that the letter dt.31.12.2020 (P7) was received by the respondents on 02.01.2021 and the petitioner filed the instant Writ Petition on 24.02.2021, and thereafter, deposited the sum of Rs.36 lakh in the Punjab and Sindh Bank by way of a Fixed Deposit on 25.03.2021.

Counsel for the petitioner contends that since the petitioner had made a substantial payment towards OTS of Rs.49 lakh in the time period granted in the OTS sanctioned letter dt. 25.07.2020 (P5) by 30.09.2020, and due to unavoidable circumstances, the petitioner could not pay the balance of Rs.36 lakh before 30.9.2020, the respondents should be directed to extend the time for the OTS and accept the amount of Rs.36 lakh offered by the petitioner with interest for such delayed payment.

Counsel for the petitioner places reliance on the judgment of the Division Bench of this Court in Anu Bhalla and another Vs. District Magistrate, Pathankot 2021 (1) RCR (Civil) [CWP-5518-2028 P&H (DB) DT.22.09.2020] and also a decision in Aseem Gaind Vs. Axis Bank, Retail Assets Centre CWP-32015-2019 P&H (DB) DT.19.01.2022.

Counsel also contended that the OTS policy of the respondents-Bank was issued pursuant to the circular issued by the Reserve Bank of India on 04.10.2007 and 21.06.2010; that the said OTS policy was framed on 12.01.2016 and even thereafter was reviewed by the Board of Directors of the respondents-Bank on 01.06.2017; and it also contained Clause 6.9 which contemplated even delayed payment of OTS by extending timelines subject to approval by the sanctioning authority. He contended that the Writ Petition may, therefore, be allowed as prayed for.

Events after filing of the Writ Petition

Notice of motion was issued on 26.02.2021 for 22.07.2021 and reply was filed on behalf of the respondents on 22.11.2021. Rejoinder was filed on 21.12.2021. Thereafter, the matter was heard on 28.03.2022 and order was reserved.

The stand of respondents No.1 & 2

The respondents contended that the Writ Petition was not maintainable since the petitioner had not exhausted alternative remedy available under law.

According to the respondents, only one OTS proposal dt.22.08.2019 was received

by them.

They however admit that they had adjusted the sum of Rs.10 lakhs paid by the petitioner along with the said OTS proposal.

As regards the OTS sanctioned on 25.07.2020, it is contended that the petitioner was not able to fulfill obligation as per the said OTS, that it lapsed after 30.09.2020, and is no longer valid. It is contended that the petitioner was informed that the Bank will no longer receive Rs.36 lakh on account of non-fulfillment of terms of the OTS.

Stand taken by the petitioner in rejoinder

Rejoinder was filed by the petitioner contending that no alternative remedy is available to the petitioner under law for the relief sought in the Writ Petition and a Writ is maintainable for seeking extension of time to make balance amount under the OTS, which relief is sought by him in the Writ Petition.

He contended that after the sanction of OTS, when Rs.49 lakh was paid by the petitioner, the respondents ought to have taken into account the said payments and calculated interest on reducing balance, but instead pressed the ECS against the amount deposited by the petitioner and acted arbitrarily.

It is contended that the respondents inflated the amount payable by charging late payment interest arbitrarily.

He reiterated the contentions raised in the Writ Petition and stated that he had represented to respondent No.2 on 24.03.2021 enclosing copy of the FDR along with the cheque dt. 04.3.2021 with an offer to make payment of the balance amount of OTS with interest but, the respondents returned the cheque for Rs.36 lakh in May 2021 and acted arbitrarily.

Consideration by the Court

The instant Writ Petition is maintainable

As far as the maintainability of the Writ Petition is concerned, it is not in dispute that the respondents- DCB Bank is a Scheduled Bank mentioned in the Schedule of the Reserve Bank of India Act, 1934 and is governed by the Banking Regulation Act, 1949 [for short 'the Banking Act'].

Admittedly, the OTS policy framed by the respondents was pursuant to certain circulars issued by the Reserve Bank of India. Clause 6.1 of the OTS Policy of respondents placed before this Court states as under: -

"6.1 Introduction

The Reserve Bank of India vide Circular DBOD No.BP.BC.34/21.04.048/2007-08 dt. October 4, 2007 directed the banks to lay down policies and guidelines covering among other things valuation procedure to be followed to ensure that the economic value of financial asset is reasonably estimated bases on the

assessed cash flows arising out of repayments and recovery prospects. Also, RBI vide circular BP.BC. NO.112/21.04..048/2009-10 dt. June 21, 2010 required the sanctioning authority to append a certificate on compromise settlement conforming to the regulatory guidelines. To comply with the regulatory guidelines, the Bank has put in place Board approved One Time Settlement Policy on 12th January 2016 which was reviewed by Board of Directors on 1st June 2017.”

(emphasis supplied)

It is not in dispute that the Reserve Bank of India is a statutory authority and exercises supervisory power in the matter of functioning of Scheduled Banks. It supervises the Scheduled Banks and is empowered to issue guidelines from time to time under Section 21 of the Banking Regulation Act, 1949 [for short ‘the 1949 Act’].

The guidelines issued by the Reserve Bank of India are binding on all Scheduled Banks as per the decision of the Supreme Court in *Central Bank of India Vs. Ravindra* 2002(1) SCC 367.

In *Sardar Associates and others Vs. Punjab and Sind Bank and others* 2009(8) SCC 257, the Supreme Court held, following the above decision, that the Reserve Bank of India, in exercise of the power conferred on it under Section 21 of the 1949 Act, can formulate policies which banking companies are bound to follow; and Sub Section (3) of Section 21 of the 1949 Act mandates that every banking company shall be bound to comply with the directions given to it in terms thereof. It also noted that Section 35-A of the 1949 Act empowers the Reserve Bank of India to issue directions inter alia in the interest of banking policy. It held that pursuant to the guidelines issued by the Reserve Bank of India, an OTS Scheme is framed by a Bank and so the said Bank cannot violate the terms of the said Scheme but must act according to the guidelines framed by the Reserve Bank of India. It declared that if in terms of guidelines issued by the Reserve Bank of India, a right is created in a borrower, a Writ of Mandamus can also be issued since the guidelines of the Reserve Bank of India have statutory flavor as held in the *Central Bank of India* case (3 Supra).

In fact a Division Bench of this Court in *Anu Bhalla* (1 Supra), specifically held that in exercise of jurisdiction under Article 226 of the Constitution of India, High Courts would have the jurisdiction to extend the period of settlement as originally provided for in the OTS letter subject to certain guidelines laid down in the said judgment.

It held that One Time Settlement is not cloaked with rigorous principles which may not permit extension of period to pay the remaining/balance settlement amount; and in fact OTS policies of certain Banks themselves contain provisions for extension for the time period in their respective settlement Policies.

Once this is so, the Bench held that there is no reason to hold that the Courts, in

exercise of their equitable jurisdiction under Article 226 of the Constitution of India, cannot extend such time period of settlement.

It held that the willful defaulters and fraudsters would not be entitled to such extension, and in the case of a deserving borrower, who has deposited substantial amount within the original stipulated period of settlement, and proved his bona fides, and is willing to clear the remaining amount in a reasonable period and also compensate the creditor with interest for the period of delay, the Court can consider extending the period with some flexibility to achieve the ultimate aim of such settlement.

It laid down certain illustrative guidelines which are required to be considered cumulatively or individually on case to case basis to decide whether in a given case an applicant would be entitled for the extension of OTS.

They are as under:-

A. The original time provided in the Settlement:-

If the time period originally stipulated in the settlement letter to pay off the settlement amount is short or is not excessive, the case for extension could be considered, and reasonable time must be given to the borrower to arrange the funds to clear off the OTS.

B. Extent of payments already deposited under the settlement or before filing of the petition:-

If the borrower has already paid substantial amounts to the creditor under the OTS, and for some remaining amounts, is seeking a reasonable extension, such request can be considered favourably.

C. Reasons which led to delay in payment –

If the borrower was prevented by certain reasons or circumstances beyond his control, it could be a reason to consider an extension favourably. It would be imperative for the borrower to show, that he made his best efforts to ensure that the requisite amounts are arranged within the specified time, but in spite of all his best efforts, he could not arrange for the same.

D. Payments having been accepted by the Bank/Financial Institution, after the stipulated date:-

If some payments were accepted by the Bank even after the stipulated period of time, it would show that the time was not the essence of contract, and it would be apparent from such conduct, that certain amount of relaxation or flexibility in making the payment of OTS amount is reserved between the parties.

E. Bona fide Intent of the borrower to pay the remaining amounts under the settlement –

The bonafide intention of such an applicant could reasonably be tested by asking

such an applicant to deposit some further amount, towards the balance amount before calling upon the bank to consider the issue of extension. If such amounts are deposited under the orders of Court and the bonafides are established, such an applicant would be entitled for a favourable consideration of an application for extension.

F. Time period being demanded by the applicant to clear the remaining / balance settlement amount.

An applicant whose intention would be to clear the balance settlement amounts, would not claim an unreasonable period of time extension, as otherwise, the intention would be to gain more time, without any actual intent to clear the settlement. In the facts and circumstances of each case, the Courts would therefore determine a reasonable period, to enable the borrower to clear the remaining settlement amount, subject of course, to payment of reasonable interest for the delayed period, to balance the equities.

G. Attending factors and circumstances–

Illustrations of such factors could be the situation created by COVID-19 pandemic, and the difficulties in arranging the amounts could be taken note of while determining the period of extension to be granted to an applicant. Likewise, losses suffered on account of natural calamities, unfortunate accidents, fire incidents, thefts, damage by floods, storms etc. could also be the factors to be taken into account for extension of time.

H. Irreparable loss and injury to the applicant

The Division Bench in Anu Bhalla (1 Supra) clarified that the guidelines/factors are not exhaustive but only illustrative for the guidance of the parties and the Courts, while considering the prayer by the borrower for extension of the time under OTS on case to case basis. It also held that the Courts would be free to consider the credentials of the borrower as well, being an equitable and discretionary relief.

Several decisions rendered by different High Courts and Supreme Court were considered by the said Division Bench while rendering the above judgment in Anu Bhalla (1 supra).

Therefore, the contention of the respondent-Bank that in no circumstance can the Court grant extension of time for completion of the payment under the OTS, cannot be countenanced. Such a power undoubtedly exists, though not as a matter of right, and must be exercised by a High Court keeping in mind the above guidelines/principles.

In the instant case, not only was the OTS policy framed by the respondents-Bank but, there was a sanction also accorded for the OTS vide Annexure P5 dt.25.7.2020 to the petitioner by the said Bank.

In the OTS Policy framed by the respondents-Bank, Clause 6.9 states as under: -

"In case of all compromise proposals sanctioned by the Bank, there would be some sacrifice of Interest and/or principal. Hence it is of paramount importance that the Bank needs to recover the agreed amount as per compromise arrangement in accordance with the agreed terms and in time. If any amount is not paid as per agreed terms, follow-up with the borrower should be immediately initiated and pursued to recover the overdue amount as per agreed terms. Collections team should initiate recovery action and in case default persist for more than 90 days. Any extension of timelines for payment of agreed amount should be approved by respective sanctioning authority. However, if the advance is not secured and borrower is paying installments with some day, the settlements could be continued with intimation/ratification of sanctioning authority." (emphasis supplied)

A reading of the above Clause itself indicates that in certain circumstances there could be extension of timelines for payment of agreed amount payable under the OTS though approval of the respective sanctioning authority is stated to be required.

Having regard to the terms of the above Clause in the OTS Policy, it is not open to the respondents-Bank to take a stand as it did in its reply at Para 11 that once the petitioner was not able to fulfill his obligation as per the OTS, the OTS lapses and would no longer be valid.

It was duty bound to consider whether the request made by the petitioner on 30.09.2020 for extension of time to comply with the OTS by 90 days is justified or not. It cannot be blindly rejected. Since the respondents-Bank has acted contrary to the terms of its own OTS policy, framed as per the RBI directives, a right is created in the petitioner which is certainly enforceable by way of a Writ Petition under Article 226 of the Constitution of India.

So we reject the plea of the respondents that the instant Writ Petition is not maintainable.

The plea of availability of alternative remedy to petitioner is rejected

The plea of alternate remedy raised by the respondents, probably referring to the remedy available under Section 17 of the SARFAESI Act, in our considered opinion, is not a tenable plea either.

The Debt Recovery Tribunal constituted under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, is the Forum mentioned in Section 17 of the SARFAESI Act, and is empowered to deal with applications against the measures to recover secured debts, referred in Sub Section (4) of Section 13 of the SARFAESI Act, taken by the Secured Creditor, and under Sub Section (2) of Section 17 of the SARFAESI Act is empowered to consider whether any such measure taken by the secured creditor for enforcement of security are in accordance with the provisions of this Act and the rules made thereunder.

In cases, like the instant one, where such measures have not been initiated yet,

the remedy under Section 17(1) of the SARFAESI Act cannot be availed prima facie. Also where extension of time for OTS is to be granted or not is not an issue normally within the purview of the DRT having regard to the language contained in Sec.17 of the SARFAESI Act.

The decision in Phoenix ARC Private Limited is inapplicable.

Reliance placed by the counsel for the petitioner on the Supreme Court judgment in Phoenix ARC Private Limited Vs. Vishwa Bharati Vidya Mandir & Ors CIVIL APPEAL NOS. 257-259 OF 2022 DECIDED ON 12.01.2022 is of no avail because firstly the respondents-Bank is not an Asset Reconstruction Company unlike the appellant in the said case. Secondly, in that case a writ petition had been moved in the High Court by the respondent in the said civil appeal against the appellant Assets Reconstruction Company, complaining of action initiated under Section 13(4) of the SARFAESI Act and in that context, on the facts of the said case, the Supreme Court expressed a view that the Writ Petition under Article 226 of the Constitution of India is not maintainable when there is an effective alternate remedy available unless the case of the petitioner falls within the exceptions carved out in Whirlpool Corpn. Vs. Registrar of Trade Marks (1998) 8 SCC 1 and other judgments mentioned therein.

The Court held that when the appellant in that case gave a notice to the respondent-borrower to make payment within two weeks failing which a further proceeding under Section 13(4) of the SARFAESI Act was proposed - against such a proposed action, the Writ Petition is not maintainable or entertainable.

There is also an observation that a Writ Petition against the private financial institution such as Asset Reconstruction Company under Article 226 of the Constitution of India against the proposed action/actions under Section 13(4) of the SARFAESI Act can be said to be not maintainable and that the said Asset Reconstruction Company was not performing public functions which are normally expected to be performed by the State authorities.

The attention of the Supreme Court does not appear to have been drawn to the fact that the Asset Reconstruction Companies owe their origin to Section 3 of the SARFAESI Act and their registration is done by the Reserve Bank of India, and such registration can be cancelled by the Reserve Bank of India under Section 4 of the SARFAESI Act. Under Section 5 of the SARFAESI Act they are permitted to acquire financial assets of any Bank or Financial Institution. Under Section 9 of the SARFAESI Act, the Asset Reconstruction Company is empowered to adopt certain measures for asset reconstruction, and under Sub Section (2) of Section 9 of the SARFAESI Act, the Reserve Bank is empowered to determine the policy and issue necessary directions including the direction for regulation of management of the business of the borrower and fees to be charged. Reserve Bank of India is given power to supervise over the Asset Reconstruction Companies under Section 12A and 12B of the SARFAESI Act.

A learned Single Judge of the Andhra Pradesh High Court in Ghanta

Infrastructures Ltd. Vs. Asset Reconstruction Company (India) Ltd. MANU/AP-0004/2008 Held, after considering all the provisions of the SARFAESI Act, that a Writ Petition under Article 226 of the Constitution of India is maintainable against an Asset Reconstruction Company. The said decision was also confirmed by a Division Bench constituted by Justice Anil Ramesh Dave and Justice R. Subhash Reddy in Writ Appeal No. 412 of 2008 on 24.09.2009. The decision of the Division Bench was also confirmed as SLP(C) No. 012697 of 2010 filed against the said judgment was dismissed on 07.05.2010.

For the aforesaid reasons, we hold that the decision is Phoenix ARC Private Limited (5 Supra) cannot be of any assistance to the respondents.

We shall now consider the question:

“Whether in the facts and circumstances of the case, the petitioner is entitled to grant of extension of time for complying with the OTS sanctioned on 25.07.2020 and if so, on what terms?”

Admittedly vide Annexure P-5 dt. 25.07.2020, the respondents had sanctioned an OTS for a total amount of Rs.85 lakh to the petitioner as per the OTS Policy framed by them. Under the terms of the said sanction, petitioner was to pay Rs.25 lakh by 31.07.2020, Rs.20 lakh by 30.08.2020 and Rs.40 lakh by 30.09.2020.

No doubt it contains a clause that in case of default in compliance with the above payment schedule, the settlement offer shall stand cancelled and the Bank reserves the right to re-debit petitioner's account with all waivers and initiate legal action.

It is not in dispute that by 30.09.2020, petitioner had paid Rs.45 lakh and the balance payable was Rs.40 lakh.

On 30.09.2020, petitioner made a request for extension of the OTS by 90 days on account of the Covid-19 Pandemic, slowing down of economy, slow flow of funds in the market and also on the ground that the purchaser of the mortgaged property delayed payment of the said amount to him.

Petitioner admittedly deposited Rs.4 lakh with the said letter/request dt. 30.09.2020.

So the balance payable after 30.09.2020 was Rs.36 lakh. Petitioner wrote a letter on 31.12.2020 that the balance amount of Rs.36 lakh plus interest from 01.10.2020 till that date was arranged by him, that he did not receive consent to deposit the same to adjust the account, and he would deposit the said amount within 48 hours of the respondents' giving consent.

Petitioner alleges that the incharge officer of the branch of the respondent No.2 refused to receive the said letter and so the petitioner sent it by Regd. Post and the same was received on 02.01.2021 by the respondent No.2.

The above facts reveal that the petitioner had deposited a substantial amount of Rs.49 lakhs out of Rs.85 lakhs sanctioned as OTS by 30.09.2020, the last date for payment fixed under the sanction letter dt. 25.07.2020 and thus proved his bona fide.

The difficulties caused to borrowers on account of the Covid-19 Pandemic in the year 2020 and 2021, the slowing down of the economy are matters of common knowledge. The petitioner claims that the purchaser of mortgaged property from the petitioner delayed payment of portion of the sale consideration as a consequence of which petitioner could not pay the same by 30.09.2020 and sought time till 31.12.2020 to pay the balance Rs.36 lakh with interest. We see no reason to disbelieve the petitioner's contention.

We are of the opinion that these difficulties faced by the petitioner cannot be brushed aside lightly and ought to be sympathetically considered by this Court keeping in mind that only two months and five days (the time gap between the date of sanction of OTS on 25.07.2020 and the date of 30.09.2020 which was the last date for payment of Rs.85 lakh) i.e. a very short time was granted, and only 90 days (till 31.12.2020) was sought for payment of the balance Rs.36 lakh.

The petitioner had arranged the balance Rs.36 lakh with interest by 31.12.2020 and claims to have approached the Bank with the letter to make the payment of the same, and when the official of the Bank refused to receive it, he sent it by Regd. Post which was received on 02.01.2021 by the respondent No.2/Bank.

Even thereafter, there was no response from the Bank and the petitioner had to file the instant Writ Petition on 24.02.2021.

We are satisfied that the material on record in this case indicates that the case of the petitioner falls within the parameters fixed in the decision of Anu Bhalla (1 Supra) by this Court, and that in the interest of justice and equity, the time for payment of the balance OTS amount ought to be extended, in the facts and circumstances of the case.

We are also of the opinion that the non acceptance of the amount of Rs.36 lakh with interest offered by the petitioner on 31.12.2020/02.01.2021 by the respondents is arbitrary and illegal and violative of Article 14 of the Constitution of India particularly when the OTS policy itself in Clause 6.9 contemplated extension of timelines for payment of the sanctioned OTS.

Since the pendency of this Writ Petition till date cannot be to the prejudice of the petitioner, the petitioner is directed to deposit the sum of Rs.36 lakh plus interest thereon at 9% per annum from 30.09.2020 till 02.01.2021 only within ten days from the date of receipt of a copy of this order; and the respondents are directed to adjust the same towards the OTS sanctioned on 25.07.2020 vide Annexure P-5, release the securities, if any, to the petitioner within two weeks of receipt of the above payment.

Writ petition is allowed accordingly. No costs.