

(2013) 10 AHC CK 0051

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 40181 of 2012

Anil Kumar Wedhera

APPELLANT

Vs

Debt Recovery Appellate Tribunal and Others

RESPONDENT

Date of Decision : 01-10-2013

Acts Referred:

Citation : (2013) 9 ADJ 565 : (2014) 1 AWC 182 : (2014) 2 BC 79 : (2014) 140 FLR 147 : (2013) 121 RD 485

Hon'ble Judges : Tarun Agarwala, J

Bench : Single Bench

Advocate : Keshari Nath Tripathi, P.K. Mishra, V.B. Upadhyay and Pankaj Barman, for the Appellant; Ashish Agarwal, K.M. Asthana, Kaushal Kant, Madhukar Dixit, S.A. Agarwal, S.C., Sanjiv Singh, R.B. Sahai and Kaushal Kant, for the Respondent

Final Decision : Allowed

Judgement

Tarun Agarwala, J.—Cash credit facility was granted by the Union Bank of India to M/s. Bahuuddeshiya Audyogik Utpadan Sahkari Samiti Limited and M/s. Janta Udyog Samit. The petitioner is a guarantor for M/s. Bahuuddeshiya Audyogik Utpadan Sahkari Samiti Limited and was also the Secretary in Janta Udyog Samiti. The Accounts became irregular and were declared as non-performing assets (NPA). Approximately a sum of Rs. 1.5 crores became due and payable by these two Samities. The respondent bank proceeded to recover the amount by filing two claim applications before the Debts Recovery Tribunal, which, after contest, was decreed by an order dated 19/20.8.2005 for recovery of approximate Rs. 1.50 crores. It transpires that parties entered into a One Time Settlement on 22.8.2006 pursuant to the guidelines issued by the Reserve Bank of India. The One Time Settlement was settled by the higher authorities of the bank for Rs. 75 lacs, which was to be deposited within a week and the balance Rs. 65 lacs was to be deposited by 20th September, 2006. Based on this One Time Settlement, the petitioner deposited Rs. 7.5 lacs on 22.8.2006 and Rs. 2.5 lacs on 23.8.2006 and, consequently, the first part of the One Time Settlement

was compiled by the petitioner. The balance amount of Rs. 65 lacs was required to be paid on or before 20.9.2006.

2. It further transpires, that the petitioner made a request to the bank seeking permission to sell the properties, which was mortgaged with the bank, namely, property No. 128/31, K-Block, Kidwai Nagar, Kanpur. Since permission was not forthcoming and, in the meanwhile, the respondent bank issued a letter dated 11.1.2007 intimating the petitioner that the One Time Settlement had become defunct and has been withdrawn. The Bank also issued a sale proclamation notice for sale of the mortgaged property.

3. At this stage, the petitioner knocked the doors of the High Court by filing Writ Petition No. 8566 of 2007, which was disposed of at the admission stage itself by an order dated 19.2.2007. For facility, the order of the Writ Court dated 19.2.2007 is being extracted herein:

Heard Sri V.B. Upadhyay, learned Senior Advocate, assisted by Sri Pankaj Barman for the petitioners and Sri R. B. Sahai, learned Counsel for the respondents.

Brief facts of the case are that there was a one time settlement for an amount of Rs. 75,00,000/- between the petitioners and the respondent Bank. Initially, the petitioners were required to deposit a sum of Rs. 10,00,000/- within a week from the date of acceptance of one time settlement. The petitioners deposited an amount of Rs. 7.50 lakh on 22.8.2006 and the balance amount of Rs. 2.50 lakh as required under the one time settlement proposal. Meaning thereby that the first condition of one time settlement was complied with by the petitioners. It is pertinent to mention here that the petitioners are guarantor. The Bank can recover its dues first from the borrower and in case the borrower fails to repay the dues then it can be recovered from the guarantors.

The petitioners request that they may be issued a letter of permission from the respondent Bank to sell the property No. 128/131/10, K-Block, Kidwai Nagar, Kanpur within a period of one month. After selling the aforesaid property, the petitioner will deposit Rs. 30,00,000/- with the respondent Bank within a period of three months thereafter. In case, the aforesaid conditions are complied with the then balance amount of Rs. 35,00,000/- will be deposited by the petitioners within a period of three months thereafter.

Considering the facts and circumstances of the case, the respondent Bank is directed to issue a letter of permission to the petitioners to sell the aforesaid property. In case the aforesaid property is sold by the petitioners and the amount of Rs. 30,00,000/- indicated above, is deposited with the respondent Bank within the time stipulated, then the petitioners may be issued letter of permission for selling the other property mortgaged with the respondent Bank within one month thereafter and the petitioners will deposit the balance amount of Rs. 35,00,000/- within three months thereafter. In case the entire amount due against the petitioners is deposited, the title deeds of the property mortgaged

with the respondent bank will be returned to the petitioners within three weeks from the date the entire amount of the bank is cleared of.

In case of default, the petitioners will be liable to pay costs of Rs. 1,30,000/- to the respondent bank.

With the aforesaid direction, the writ petition is disposed of.

4. The Division Bench, after considering the matter, directed the bank to issue a letter of permission to the petitioner to enable him to sell the property. The Court further directed that after the petitioner sells the property, Rs. 30 Lacs would be deposited by him, and thereafter the bank would give further permission within one month thereafter to sell other properties and that the petitioner would deposit the balance amount of Rs. 35 lacs within three months thereafter. The Court further directed that, if the entire amount was deposited, the title deeds would be returned by the bank within three weeks after the deposit of the entire amount and, in case of default, the petitioner would pay a cost of Rs. 1.30 Lacs. The aforesaid order dated 19.2.2007 was modified upon an application moved by the petitioner by an order dated 2.3.2007. The order of the Court dated 19.2.2007 remained the same except with a slight modification, namely, that upon deposit of Rs. 30 lacs, the title deed of the first property would be given to the petitioner to enable him to execute the sale-deed with the prospective buyer.

5. Pursuant to the aforesaid direction of the Writ Court, the petitioner was given permission and the property was sold. It has come on record that the amount of Rs. 30 lacs was deposited by the petitioner on or before 18.6.2007. This fact is found from the letter of the bank dated 18.6.2007 acknowledging the deposit of Rs. 30 lacs by the petitioner and the return of the title deeds by the Bank. This letter also gave further permission to the petitioner to sell the remaining two properties mortgaged with the bank and further reminded the petitioner to deposit the balance amount of Rs. 35 lacs within three months.

6. It transpires, that the petitioner thereafter came up with another stand, namely, that the bank itself should sell the property rather than the petitioner and when this request failed, the petitioner filed Writ Petition No. 34598 of 2007, praying that the bank should be directed to sell the mortgaged property. This Court disposed of the writ petition by an order dated 31.7.2007 directing the petitioner to deposit a sum of Rs. 10 lacs and pay the entire loan amount in various instalments and in the event of default, the order would stand automatically vacated.

7. On 7.8.2007, the respondent bank issued a reminder to the petitioner to deposit Rs. 35 lacs by 18.9.2007 pursuant to the order of the Writ Court, dated 19.2.2007, passed in Writ Petition No. 8566 of 2007. The writ petition as well as the counter-affidavit is silent on the course of action taken by the parties from 7.8.2007 to 20.7.2009. It seems that nothing was done by either of the parties for clearing the One Time Settlement, and eventually, the bank proceeded to recover the amount as per the Debts Recovery Tribunal's order by filing an

application for sale of the mortgaged property.

8. A sale certificate was issued by the Recovery Officer, fixing 28.8.2009, for holding the auction. The auction was held and the bid of respondent No. 5 was accepted for Rs. 75.55 Lacs. This auction was subsequently, confirmed by the Tribunal, against which the petitioner preferred an appeal before the Debts Recovery Appellate Tribunal. Since the Presiding Officer was not available and the interim application could not be considered, the petitioner filed Writ Petition No. 70481 of 2009, in which various interim orders were passed from time to time granting protection to the petitioner, and eventually, by an order of 19.1.2010, the writ petition was dismissed with the observation that since the Appellate Tribunal was now functioning, the petitioner should approach the Appellate Tribunal for interim protection. In the meanwhile, the Writ Court further directed that, in the event, the petitioner deposits a sum of Rs. 35 Lacs, the petitioner would not be dispossessed till the stay application was not decided by the Appellate Tribunal.

9. Pursuant to the order of the Writ Court, the petitioner deposited Rs. 35 lacs with the respondent bank on 29.1.2010. The Appellate Tribunal, after hearing, dismissed the appeal by an order dated 25.11.2011. A review application was filed, which was rejected by an order dated 12.1.2012. The petitioner, being aggrieved by the action of the respondent Bank and by the order of the Recovery Officer, the Tribunal and the Appellate Tribunal, has filed the present writ petition.

10. The Court has heard at length Sri Kesari Nath Tripathi, the learned Senior Counsel assisted by Sri P.K. Mishra and Sri Pankaj Barman, the learned counsels for the petitioner, Sri Sanjeev Singh, the learned counsel for the respondent bank and Sri Madhukar Dixit, the learned counsel for the auction purchaser.

11. The submission of the learned Senior Counsel is, that the One Time Settlement was arrived at pursuant to the guidelines issued by the Reserve Bank of India, which still exists and has not been cancelled. Consequently, the bank committed an error in recovering the entire loan by filing an application before the Recovery Officer for sale of the mortgaged property, pursuant to the order of the Debts Recovery Tribunal allowing the claim application, which was passed in the year 2005. The learned Senior Counsel fairly conceded that the time stipulated under the One Time Settlement for deposit of the amount could not be adhered to and the petitioner failed to pay the entire amount, but, that did not give any right to the bank to recover the amount in this fashion, until and unless the settlement was withdrawn or cancelled, which has not happened till date.

12. The learned Senior Counsel submitted further that the time factor under the One Time Settlement was extended by order of the Writ Court dated 19.2.2007, passed in Writ Petition No. 8566 of 2007, which permitted the petitioner to deposit the balance Rs. 65 Lacs in two instalments over a period of time. The learned Senior Counsel also pointed out the order of the Writ Court dated 19.1.2010, passed in Writ Petition No. 70481 of 2009, which permitted the

petitioner to deposit the balance amount of Rs. 35 lacs in full and final settlement. The said portion of the order is extracted hereunder:

As the petitioner is being relegated to alternative remedy of appeal before the Debts Recovery Appellate Tribunal, and the Chairman of the said Tribunal is not available at present, it is hereby directed, as offered by the petitioner, that subject to petitioner's deposit, within ten days from today, a sum of Rs. 35,00,000/-, the petitioner shall not be dispossessed from the property in dispute till application for stay is not considered by the appellate forum. Such amount so deposited will be adjusted towards full and final payment. If amount is not deposited, authorities will be free to proceed. Appellate forum shall not be influenced by the orders passed by this Court and deal with the matter with independent mind.

Subject to observations made above, present writ petition is dismissed.

13. The learned Senior Counsel submitted that as on date, the petitioner has already deposited the entire amount under the One Time Settlement and, for the delay, the respondent bank can be compensated, but the action of the respondents in auctioning the property would serve no purpose other than putting the petitioner to an irreparable loss, especially when the petitioner is not the borrower, but, is a guarantor.

14. On the other hand, Sri Sanjeev Singh, the learned counsel for the respondent bank contended and admitted that after the claim of the bank was allowed by the Debts Recovery Tribunal, instead of recovering the entire amount, a One Time Settlement was arrived at between the parties on 22.8.2006. The learned counsel submitted that since the petitioner did not comply with the settlement and did not deposit the amount within the prescribed period, the bank withdrew the settlement by a letter dated 11.1.2007. The learned counsel expressed that even the order of the Writ Court dated 19.1.2007 was not complied with and the balance amount of Rs. 35 lacs was not deposited within the prescribed period. Consequently, when all efforts failed, the bank had no option but to proceed with the original recovery, as per the order of the Debts Recovery Tribunal, by filing an application before the Recovery Officer for sale of the mortgaged property. The learned counsel submitted that the action taken by the bank was neither arbitrary nor illegal and that the recovery was made within the four corners of the law and that the petitioner who is a defaulter could not be given any sympathy.

15. Sri Madhukar Dixit, the learned counsel for the auction purchaser submitted that he is a bona fide purchaser for value and that the auction was validly executed for recovery of the amount and, being the highest bidder, his bid was accepted, which was subsequently confirmed in accordance with the provision of Rule 62 of the Income Tax Rules. The learned counsel submitted that the entire amount of Rs. 75.5 lacs has already been deposited with the bank and that he has unnecessarily been dragged into this litigation for no rhyme or reasons.

16. Having heard the learned counsel for the parties, the Court finds that the Reserve Bank of India had issued guidelines to all the public sector banks in the year 2005 directing the banks to enter into a One Time Settlement for recovery of Non Performing Assets below Rs. 10 crores. The scheme floated by the Reserve Bank of India was required to be implemented by all public sector banks. Necessary guidelines were issued to provide a non-discriminatory and mandatory guidelines under the Reserve Bank of India Act for involving non-performing assets action holders in a scheme of One Time Settlement. The underlying purpose was that a defaulter should not be left remediless and that even a defaulter still had some rights to return the credit facility, which he had availed from a financial institution. The Reserve Bank of India guidelines gave such defaulter a breathing time and a One Time Settlement was a method to ameliorate the dues of the bank and save the defaulter from his property being sold out as a distress sale.

17. The Supreme Court in *Sardar Associates and Others Vs. Punjab and Sind Bank and Others*, , has considered these guidelines of the Reserve Bank of India in detail giving statutory recommendation to such guidelines.

18. In *Shyam Ice and Cold Storage Private Ltd. v. M/s. Syndicate Bank and another*, S, the petitioner, in the said case, became a defaulter. Proceedings u/s 13(2) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as the "SRFAESI Act") was initiated at the same time when One Time Settlement proceedings were going on between the parties. At this stage, the petitioner filed the Writ Petition questioning the veracity of the notice issued u/s 13(2) of the SRFAESI Act. The Division Bench held, that during the pendency of the proposal for One Time Settlement, the bank could not proceed or take steps under the SRFAESI Act and such steps were not permissible. The Division Bench held, that even a defaulter has his rights and can be proceeded against him only in accordance with law. The Division Bench further held that merely because a defaulter had made some default in payment of the instalments would not mean that he should be dealt with double and multiple blows and that he had a right for consideration of a One Time Settlement under the Reserve Bank of India guidelines.

19. Taking a clue from the decision, the petitioner's case is on a better footing. In the instant case, after the claim of the bank was decreed by the Tribunal, a One Time Settlement was arrived at between the parties. The petitioner initially deposited a sum of Rs. 10 lacs and deposited another sum of Rs. 30 lacs on or before 18.6.2007 and the balance Rs. 35 lacs on 29.1.2010. At the moment, the entire amount as per the One Time Settlement amounting to Rs. 75 lacs has been deposited by the petitioner, though belatedly.

20. The contention of the Union bank, that on account of failure to deposit the amount under the One Time Settlement within the stipulated period, the bank had rightly cancelled the settlement on 12.1.2007 is erroneous. The Court has

perused the said letter and finds that the contention of the petitioner cannot be accepted, for the reasons stated hereunder.

21. The settlement was issued by the higher authorities as is clear from letter of settlement dated 22.8.2006. The cancellation was not issued by the higher authorities. The letter dated 12.1.2007 has been written by the Chief Manager of the bank. There is nothing to indicate that the Chief Manager was authorised to cancel the settlement which was approved by the higher authorities. Assuming that the Chief Manager had the authority to cancel such a settlement, the said letter became redundant for the simple reason that the petitioner had filed Writ Petition No. 8566 of 2007, which was disposed of by an order dated 19.2.2007 extending the One Time Settlement with certain directions, namely, that the petitioner would deposit the balance Rs. 65 lacs in two instalments, over a period of time. As per the letters of the bank dated 18.6.2007 and 7.8.2007, the One Time Settlement was extended and accepted by the Bank and the petitioner was permitted to deposit the balance amount till 18.9.2007. Part of Rs. 65 lacs was deposited on 18.6.2007 but the balance Rs. 35 lacs was not deposited on or before 18.9.2007 and was deposited after almost two and a half years on 29.1.2010.

22. In the light of the aforesaid, the Court is of the opinion, that the One Time Settlement was not withdrawn and was extended by an order of the Writ Court dated 19.2.2007. The Writ Court in its order categorically stated that, in the event, the petitioner makes a default, a cost of Rs. 1.30 lacs would be paid. The Court did not pass any order that its order would stand automatically vacated in the event of default committed by the petitioner. Nothing has been brought on record by the bank to show that upon non-compliance of the order of the Writ Court dated 19.2.2007 or the order of the Writ Court dated 31.7.2007 the bank thereafter, withdrew or cancelled the One Time Settlement.

23. In the absence of withdrawal of the One Time Settlement, the action of the bank, in pursuing the application for sale of the mortgaged property before the Recovery Officer, was patently erroneous and without any authority of law as well as against the guidelines of the Reserve Bank of India.

24. Once the bank accepts a One Time Settlement, it could not recover the amount as per the original decree without revoking the One Time Settlement. The discretion available to the bank to recover the amount was examined by the Supreme Court in *Mardia Chemicals Ltd. Vs. Union of India (UOI) and Others Etc. Etc.,* wherein the Supreme Court held-

the financial institutions, namely, the lenders owe a duty to act fairly and in good faith. There has to be a fair dealing between the parties and the financing companies/institutions are not free to ignore performance of their part of the obligation as a party to the contract. They cannot be free from it..... This is also the basic principle of the concept of lenders liability. It cannot be a one-sided affair shutting out all possible and reasonable remedies to the other party,

namely borrowers and assume all drastic powers for speedier recovery of NPAs. Possessing more drastic powers calls for exercise of higher degree of good faith and fair play. The borrowers cannot be left remediless in case they have been wronged against or subjected to unfair treatment violating the terms and conditions of the contract. They can always plead in defence deficiencies on the part of the banks and financial institutions.

25. The Supreme Court in *M/s. Sardar Associates (supra)* has held that a public sector bank is otherwise bound by the guidelines issued by the Reserve Bank of India. Consequently, this Court sees no reason why these guidelines should not be enforced. In the instant case, the bank itself accepted the One Time Settlement. Part performance was made by the petitioner and a sum of Rs. 40 lacs out of Rs. 75 lacs was deposited on or before 18.6.2007 during the extended period granted by the Court. The balance Rs. 35 lacs was deposited on 29.1.2010. The One Time Settlement has not been withdrawn till date. The Court is of the opinion, that the proceedings initiated by the bank before the Recovery Officer for sale of the property was ex-facie illegal, which cannot be sustained.

26. While entertaining the present writ petition, this Court, by an interim order dated 17.8.2012, had directed the petitioner to deposit a further sum of Rs. 15 lacs, which the petitioner has deposited. For the delay in depositing the amount as per the One Time Settlement, the bank can be compensated in terms of money. Out of Rs. 75 lacs, the petitioner had paid Rs. 40 lacs on or before 18.6.2007 pursuant to the order of the Writ Court dated 19.2.2007. The balance amount of Rs. 35 lacs was deposited on 29.1.2010. For this delay of approximately two and half a years, the bank can be compensated in terms of interest.

27. The Court finds that the bank has behaved like Shylock. The Court is reminded of Shakespeare's play "Merchant of Venice" wherein Shylock insisted on his "pound of flesh" for non-payment of the loan given to his friend Antonio. While the matter was being decided by a Court, Portia submitted that "justice should be tempered with mercy". In the instant case, the Court finds that the petitioner is a guarantor and is not the borrower, who had taken the loan. The bank should have proceeded initially against the borrower for recovery of the amount but chose not to do so and targeted its guns against the guarantor. Till date, the bank has not taken any steps to recover any amount from the borrower. The petitioner, who is a guarantor, came forward to pay the amount, which he has done though belatedly. The Court finds that pursuant to the interim order, the petitioner has deposited a sum of Rs. 15 lacs.

28. Considering the fact there has been a delay of two and half years in depositing the amount and the bank also has to look after the interest of its depositors coupled with the fact that these are commercial transactions, which involves a high rate of interest, the Court is of the opinion, that in the event the petitioner deposits a further sum of Rs. 15 lacs on or before 30.10.2013, the recovery against the petitioner will come to an end conclusively in full and final

settlement, pursuant to the One Time Settlement, dated 22.8.2006 and justice would be served to all the parties. The title deeds of the mortgaged property/ properties would be returned to the petitioner within two weeks of such deposit. The impugned orders of the Recovery Officer, the Debts Recovery Tribunal and the Debts Recovery Appellate Tribunal, confirming the auction of the mortgaged property, are quashed. The respondent bank is directed to return the amount to the auction purchaser alongwith interest @ 10% p.a. within four weeks from the date of the presentation of the certified copy of this order.

29. In addition to Rs. 15 lacs, the cost of Rs. 1.3 lacs as imposed by the Court by its order dated 19.2.2007 is also required to be deposited by the petitioner, i.e., a total sum of Rs. 16.30 lacs to be deposited on or before 30.10.2013. It is made clear that no further time would be granted to the petitioner and, in the event, the amount is not deposited, the auction in favour of respondent No. 4 will stand confirmed and the Writ Petition would be dismissed without any further orders from the Court.

30. The writ petition is allowed subject to the aforesaid conditions. In the circumstances of the case the parties shall bear their own cost.