

(2015) 11 CAL CK 0013
In the Calcutta High Court
Case No : C.O. 1064 of 2015

Arya Bhandar Pvt. Ltd.

APPELLANT

Vs

Kotak Mahindra Bank Ltd.

RESPONDENT

Date of Decision : 19-11-2015

Acts Referred:

Banking Regulation Act, 1949 — Section 21, 35A
Income Tax Act, 1961 — Section 119
Reserve Bank of India Act, 1934 — Section 3
Securitisation and Reconstruction of Financial Assets and Enforcement of Security
Interest Act, 2002 (SARFAESI) — Section 13(2), 13(4)

Citation : (2015) 11 CAL CK 0013

Hon'ble Judges : Harish Tandon, J.

Bench : Single Bench

Advocate : Amit Gupta and Subrata Goswami, for the Appellant; Joy Saha, Anirudha Roy, Sarathi Dasgupta and Sreetama Manna, for the Respondent

Final Decision : Dismissed

Judgement

Harish Tandon, J.—The Debt Recovery Appellate Tribunal has remanded the original application to be considered afresh after setting aside the order passed by the Debt Recovery Tribunal allowing an application filed by the petitioner herein for direction upon the HDFC Bank to accept the payments in terms of One Time Settlement (OTS) issued by the Reserve Bank of India.

2. Bereft of unnecessary details, it would suffice the purpose of determining the points involved in this revisional application from the following facts.

3. A proceeding was initiated before the Debt Recovery Tribunal under Section 19 of the DRT Act by the State Bank of India, the opposite party No. 2 herein, for recovery of a sum of Rs. 1,38,67,768/- against the petitioners before the Debt Recovery Tribunal-I, Kolkata which was registered as OA No. 254 of 1999. In course of the said proceeding, a letter dated 27.01.2006 was issued by the Assistant General Manager of the SBI forwarding the proposal for One Time

Settlement in terms of the guidelines issued by the Reserve Bank of India on non-performing assets account for Small and Medium Enterprises sector. The said letter reveals the minimum amount payable by the petitioner at Rs. 99,52,453.07/- out of which 25% of the said amount shall be payable upfront within a month from the settlement and the remaining balance of 75,000/- to be paid within an year in installment. The petitioner responded the said letter and agreed to pay the minimum amount as indicated and asked for the confirmation of the settlement so that, 25% of the said amount can be paid upfront and the balance 75 % shall be paid in three installments within a year. The petitioner, thereafter, did not respond to the said letter and neither of the parties could pursue the same further. It is a matter of record that the SBI assigned the loan account to Kotak Mahindra Bank, the opposite party No. 1 herein, on 29.03.2006. The Kotak Mahindra Bank filed an application on 05.09.2006 for addition as a co-applicant with the State Bank of India. The factum of One Time Settlement was brought on record by the petitioner while opposing the said application filed by the Kotak Mahindra Bank but subsequently the said application was allowed without considering the plea of OTS.

4. Subsequently a further application was taken out on 14.03.2013 by the petitioner for an order directing the opposite parties to accept the settlement in terms of the mandate of the Reserve Bank of India. A further application was taken out on 17.02.2014 for similar direction but the same does not appear to have been taken on record as the requisite Stamp Duty was not paid on the said application. The Debt Recovery Tribunal took up the interlocutory application as well as the main application and dispose of the same holding that the SBI was bound to accept the OTS in terms of the RBI guidelines and the Kotak Mahindra Bank being the assignee of the said debt is equally bound. The proceeding was disposed of directing the petitioner to pay 25% of the OTS amount within three weeks from the date and the balance within one year from the date of the order along with interest prevailing with a State Bank of India to the Kotak Mahindra Bank. The Debt Recovery Tribunal further incorporated the default clause that in case of failure to pay the aforesaid amount, Kotak Mahindra Bank would be entitled to recover the entire amount claimed in the original application. The Kotak Mahindra Bank carried the said order to the Debt Recovery Appellate Tribunal. The Appellate Tribunal as indicated above set aside the said order by which the Debt Recovery tribunal directed the Banks to accept the OTS and received the amount in terms thereof and remanded the original application to be heard afresh on merit.

5. The learned Advocate for the petitioner assailed the order of remand passed by the Appellate Tribunal on the ground that if the application in terms of the OTS is taken out within the last date fixed for the same, the opposite parties being the Scheduled Bank are bound to act on such settlement and cannot come out of the same. It is further submitted that the One Time Settlement Scheme was floated by the RBI which is binding on all the Scheduled Bank who cannot depart and take contrary stands. To buttress the aforesaid submissions, the

reliance is placed upon a judgment of the Supreme Court in case of *Sardar Associates and Others Vs. Punjab and Sind Bank and Others*, . It is further submitted that the State Bank of India assigned the loan account to the Kotak Mahindra Bank before the last date of acceptance of the OTS without intimating the same to the petitioner who signified the acceptance of the said OTS on the same date to the SBI and, therefore, both the Banks are bound to accept the OTS. The petitioner further submits that the policies of the Reserve Bank of India in exercise of the statutory power partakes the statutory character and, therefore, is legally enforceable. It is strenuously submitted that the Appellate Tribunal has wrongly observed that the petitioners were keeping silence for more than 8 years and did not approach the Court promptly. According to the petitioner, the factum of accepting the OTS was brought to the notice of the Debt Recovery Tribunal immediately after an application was filed by the Kotak Mahindra Bank seeking its addition as co-applicant. Lastly it is submitted that the Kotak Mahindra Bank cannot take a different stand and avoid the responsibilities of the assignor.

6. Mr. Joy Saha, the learned Advocate for the opposite party, on the other hand, says that the petitioner was never ready and willing to accept the OTS, in as much as, there was no payment upfront required under the said OTS. He vehemently submits that the OTS has a limited span of life and there was no attempt on the part of the petitioners to approach within the said period and, therefore, the Debt Recovery Tribunal acted illegally and in excess of the jurisdiction in directing the Kotak Mahindra Bank to accept the amount in terms of the OTS. To support the impugned order, Mr. Saha submits that the Appellate Tribunal have meticulously examined the contentions of the respective parties and have correctly observed that the conduct of the petitioner is such that it disentitles them to claim any relief under the OTS. He placed reliance upon a letter dated 28.11.2006 issued by the petitioner No. 2 who is a Managing Director of the petitioner No. 1 offering a sum of Rs. 30 lakhs as lump sum payments towards One Time Settlement of the legal dues and submits that the said letter is evident of the facts that the petitioners have backed out from the settlement and, therefore, the order of the Appellate Tribunal should not be interfered with.

7. It emerges from the respective submissions of the Counsels that the policies of the Reserve Bank of India issued in exercise of the power conferred under Section 21 of the Banking Regulation Act has a statutory flavour and binds the Scheduled Bank. Otherwise as well as the Supreme Court in case of *Sardar* (supra) have unequivocally observed that the RBI guidelines on One Time Settlement for small and medium enterprises account is binding on all the Public Sector Bank in view of Section 21 of the Banking Regulation Act, 1949. The judgment was cited before the Debt Recovery Tribunal who applied the ratio laid down therein and interpreted it in favour of the petitioner. On the other hand, the Appellate Tribunal though noticed the above decision but set aside the judgment and order of the Debt Recovery Tribunal solely on the ground that keeping

silence for more than 7 years disentitles the petitioner to get benefit under the OTS. In *Sardar* (supra), the Apex Court noticed the genesis of the powers of the Reserve Bank of India to formulate the policies of the Banking Companies which emanates from Section 21 of the Banking Regulation Act as well as Section 35A of the Act subsequently inserted and brought into the said Act by Banking Companies (Amendment) Act, 1956. It is no longer *res integra* that the Reserve Bank of India is a statutory authority and exercises supervisory powers in the matter of functioning of the Scheduled Banks under the Reserve Bank of India Act, 1934. On promulgation of the Banking Regulation Act, 1949, to consolidate and amend the law relating to Banking, the definition of the Reserve Bank is given to mean the Reserve Bank of India constituted under Section 3 of the Reserve Bank of India Act, 1934. In *Sardar* (supra), certain properties were mortgaged in favour of Punjab & Sind Bank by way of security to a loan account disbursed for business purposes after declaring the assets as non-performing assets in terms of the guidelines issued by the Reserve Bank of India. A proceeding was initiated under Section 13(2) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 for recovery of the amount together with interest. After taking further action under Section 13(4) of the SARFAESI Act, the Bank approached the Debt Recovery Tribunal for the claim due to the borrower which was eventually allowed. The order of the Tribunal was challenged before the Appellate Tribunal which was disposed of directing the Respondent-Bank to settle the case of the Appellant in terms of the guidelines issued by the Reserve Bank of India and further restrained the Bank from recovering the amount in terms of the judgment and recovery certificate issued by the Tribunal. Subsequently an application for review was filed and the Appellate Tribunal reversed its earlier decision which was challenged before the Supreme Court by the borrower. In the above backdrop, it is held:

"31. It may be that no specific prayer was made but the same, in our opinion, keeping in view the provisions of the 2002 Act, did not preclude the Appellate Tribunal to consider the offer of the appellants. The Appellate Tribunal in terms of the provisions of the Act like the original Tribunal is interested only in recovery of the amount. While doing so, it, in our considered opinion, has the requisite jurisdiction to consider the prayer made by a debtor for one-time settlement particularly in view of the fact that the same is within the purview of One-Time Settlement Scheme of Reserve Bank of India."

8. A further question cropped up in the appeal before the Supreme Court whether the guidelines or the policies issued by the Reserve Bank of India confers a right on the borrower to ask for a mandatory direction upon the Scheduled Bank for its adherence. A definition was sought to be made between a statutory and non-statutory guidelines and since the guidelines issued by the Reserve Bank of India has a statutory flavour, it is observed:

"44. In *Union of India v. Azadi Bachao Andolan* it was held that a circular issued

by the Central Board of Direct Taxes (CBDT) was not inconsistent with the provisions of the Income Tax Act, 1961 and was valid and efficacious. The assessing officers chose to ignore the guidelines and hence CBDT was justified in issuing "appropriate guidelines" under Circular No. 789. The said circular does not in any way crib, confine or cabin the powers of the assessing officers with regard to any particular assessment. It merely formulates broad guidelines to be applied in the matter of assessment of the assesses covered by the provisions of the Indo-Mauritius Double Taxation Avoidance Convention, 1983.

45. In CIT v. Anjum M.H. Ghaswala it was pointed out that the circulars issued by CBDT under Section 119 of the Income Tax Act have statutory force and would be binding on every Income Tax Authority although such may not be the case with regard to press releases issue by CBDT for information of the public.

46. In UCO Bank v. CIT this Court opined that "the circulars as contemplated therein cannot be adverse to the assessee" (SCC p. 605, para 9). Thus, the authority which wields the power for its own advantage when required to wield it in a manner it considers just by relaxing the rigour of the law or in other permissible manners as laid down in Section 119 . The power is given for the purpose of just, proper and efficient management of the work of assessment and in public interest.

47. In BSNL v. BPL Mobile Cellular Ltd. it was held that: (SCC p. 617, para 39)

"39. ... The directions contained in the said circular letters are relevant for the officers who are authorised not only to grant licences but also enter into contracts and prepare bills. The circular letters having no statutory force undoubtedly would not govern the contract."

48. A distinction, thus, must be made between statutory and nonstatutory guidelines. A distinction must also be made between the circulars which are relevant but not binding on the third parties and which are imperative in character.

49. As regards Reserve Bank of India Guidelines, it was the direction of the Appellate Tribunal that the respondent Bank should settle the case of the appellants under the RBI Guidelines through a one-time settlement and should invite a proposal for settlement and recovery of the agreed amount."

9. The Supreme Court held that the policies or the guidelines issued by the Reserve Bank of India is a statutory one and the Scheduled Bank cannot depart therefrom. It further emerged that a borrower has a right to seek for a mandatory direction from the competent forum upon the Scheduled Bank to act strictly in terms of the said policies/guidelines.

10. In view of the above enunciation of law, let me consider whether the Appellate Tribunal have erred in passing the impugned order. Admittedly the original application was pending when the Reserve Bank of India formulated a policies/guidelines in the form of One Time Settlement and directed the

Scheduled Bank to observe the same strictly in terms thereof. It is not in dispute that the SBI issued a letter dated 27.01.2006 in terms of the said OTS indicating the minimum amount of Rs. 9,80,52,453.07/- to be paid under the said scheme provided an application signifying the acceptance thereof is submitted on/or before 31st March, 2006. The outer limit within which the settlement is required to be reached was further indicated to be on or before 30th June, 2006. The other salient feature of the said application is that one lump sum upfront payment of at least 25 % of the amount of the settlement should be made and the balance 75% is required to be paid in installment over the period of one year together with the interest at Bank's Prime Lending Rate (PLR) from the date of the settlement till the date of final payment. The petitioner applied on 29.03.2006 and agreed to pay the minimum amount as indicated above and agreed to pay 25% of the said amount within one month from the date of receipt of the acceptance of settlement and remaining 75% to be paid in three equal installments over a period of one year from the date of payment of first installment. Indisputably, there was no response to the said offer; rather on the same date, the SBI assigned and transferred the loan account and the debt to the Kotak Mahindra Bank. The Debt Recovery Tribunal took an exception to the aforesaid action of the SBI and observed that it ought to have waited till the last date fixed for submission of an application. It would be relevant to quote the relevant excerpts which runs thus:

"In terms of the RBI guidelines for one-time settlement of all NPAs covered under the said scheme. It was specifically indicated that same to be applied amongst eligible borrowers in a non-discriminatory manner that is to say the guideline to be followed in a unbiased manner to all the eligible borrower. But in the present case SBI, without waiting for the acceptance letter, has assigned the date on 29.3.2006 for an amount of Rs. 99.52 lacks, exactly the amount offered to the Defendant No. 1 for OTS in terms of RBI guidelines. It is not a case where there is no acceptance letter by 31.3.2014. As already stated herein above, the question would have been a different had the SBI assigned the debt after 31.3.2014 and for an amount other than that is offered under the OTS to the borrower under the RBI guideline. It was the duty of the Kotak Mahindra Bank while making due diligence for acquiring the loan account of the Defendant No. 1 should have ascertained regarding the RBI circular and the issuance of the letter. The question arose had there not been an assignment by SBI to Kotak Mahindra Bank, SBI was bound to accept the OTS in terms of RBI guidelines. Since, there is an assignment, the assignee Kotak Mahindra Bank has stepped into the shoes of SBI, is equally bound to accept the terms of settlement in terms of RBI guidelines."

11. The Appellate Tribunal reversed the aforesaid finding of the Debt Recovery Tribunal as an application for a direction to act in terms of the OTS was taken out after a gap of nearly 7 years and if the same is allowed, it would amount to losing an enormous interest which the bank is entitled to receive, the observation of the Appellate Court is quoted below:

"The learned counsel for the appellant, Kotak Mahindra Bank also would argue that if at all the borrower had any grievance that the bank did not give effect to the compromise then they should have, even in the year 2006 itself approached the Hon"ble High Court for issuance of a direction in a writ petition, but no such step was taken. After lapse of almost seven years the borrower did not choose to file an application during the year 2013 for "OTS" and if that is considered certainly the bank would be in a disadvantageous position losing enormous interest. I would like to uphold such an argument as put forth on the side of the appellant and it is quite obvious that paying a sum of Rs. 99,52,453.07 during the year 2006 cannot be equated to the fact of deposit of the sum during the year 2013. I recollect the following maxims-

(1) Bis dat qui cito dat. (He pays twice who pays promptly).

(2) Qui tardius solvit minus solvit (A person who pays too late pays less than he ought).

As such, simply because the OTS scheme was contemplated in the year 2006 by the Reserve Bank of India, the same cannot be got enforced during the year 2013 and subsequently. As such the P.O without considering the pros and cons of the matter simply thrust a settlement upon the Kotak Mahindra Bank, which is the assignee of the loan account from the State Bank of India."

12. In my humble opinion, there is no difficulty to say that the observations of the Appellate Court in above context is wrong both on facts and law. In the earlier portion of the impugned order, the Appellate Court recorded that in course of the hearing of an application filed by the Kotak Mahindra Bank for their addition as co-applicant, the factum of One Time Settlement was brought to the notice of the Court and, therefore, the application filed subsequently by the borrower should not have been defeated on the ground of delay. There is no difficulty to say that the assignee having step into the shoes of the assignor is bound by his all acts. The right which accrued to the borrower and have been asserted in any form before the judicial authority cannot be defeated as the substantive application has not been taken out. But this Court cannot brush aside the subsequent facts which though noticed by the Appellate Tribunal but did not give much credence to. The conduct of the parties in prevaricating the stands in course of the proceeding may be the relevant factor to deny the relief. Even after opting for a settlement within the stipulated time, the petitioner No. 2, the Managing Director of the petitioner No. 1, caused letter dated 28.11.2006 offering the One Time Settlement upon the payment of a lump sum of Rs. 30 lakhs towards the total dues of the Bank. In the said letter, the petitioner wanted to recile from their earlier offer and, therefore, have impliedly waived their right under the OTS.

13. It is sought to be explained by the petitioner that such offer was made by the petitioner No. 2 in his individual capacity and as a guarantor which cannot operate against the petitioner No. 1 who submitted itself within the said OTS and

have not backed out therefrom. The intention of the parties can be best gathered from the language employed in the document. It is manifest from the said letter that a new proposal and/or offer was mooted out in contradiction to an earlier offer.

14. In view of the above, this Court, therefore, does not find that the order of the Appellate Court should be interfered with.

15. The revisional application is thus dismissed.

16. However, there shall be no order as to costs.