(2020) 10 DRT CK 0007

In the Debts Recovery Tribunal

Case No : Original Application No. 520 Of 2014

Axis Bank Limited — APPELLANT

Vs

M/s. A and D Solaris And Ors. — RESPONDENT

Date of Decision : 21-10-2020

Acts Referred:

Recovery of Debts Due to Banks and Financial Institutions Act, 1993 — Section 2(c), 16

Citation : (2020) 10 DRT CK 0007

Hon'ble Judges : Ganapathi K.R.K, J

Bench : Single Bench

Advocate : M/s.V.V. Sivakumar, Mr. G. Sanjeevi

Final Decision : Allowed

Judgement

1. This Original Application has been filed by applicant bank against defendants for recovery of a sum of Rs.3,55,69,890/- (Rupees Three Crores Fifty Five Lakhs Sixty Nine Thousand Eight Hundred and Ninety only), due under Credit Facilities viz., Rs.1,73,10,746,42p due in respect of Cash Credit facility No.1, Rs.97,31,859.03p due in respect of Cash Credit facility No.2, Rs.3,41,217.72p due in respect of Cash Credit facility No.3 and Rs.81,86,067.26p due in respect of Cash Credit facility No.4, repayable together with interest @ 15.75% p.a. from the date of filing of this O.A. till the date of realization and for costs of the application and pass any or such other orders this Tribunal may deem fit in the circumstances of the case.

2. Summons to defendants are duly served. Though defendants entered appearance through their counsel, they did not choose to file written statement despite availing sufficient opportunities. Hence defendants were called absent and set ex-parte on 05.01.2015. Subsequently, OA came to be dismissed on 04.11.2015 pursuant to memo filed suggesting therein that against the outstanding dues from the group accounts, applicant bank agreed to settle the loan accounts for Rs.1,33,00,000/- out of which Rs.93 lakhs is towards the claim made in this OA, however with a default clause that applicant bank is entitled to

claim entire OA amount if instalments are not paid by the borrowers on or before 25.03.2016 and applicant bank sought permission of the Tribunal to withdraw the OA with liberty to reagitate its rights in the event of default of the borrowers. In view of the aforesaid memo, OA came to be dismissed as not pressed on 04.11.2015. Subsequently, MA No.162/2017 was filed by applicant bank seeking to restore the OA on the file of this Tribunal in view of the default by the borrowers to comply with OTS terms as undertaken by the defendants. Despite notice, as respondents did not choose to enter appearance, MA No.162/17 was allowed on 13.03.2018 restoring OA to file while notice to defendants after restoration was also ordered. Defendants 1 and 2 entered appearance and filed their written statement. D-3 and D-4 did not choose to appear and hence they were called absent and set ex-parte on 18.07.2018. Applicant bank filed its Proof Affidavit along with 53 documents, which were marked as Ex.A-1 to A-53. O.A. was finally heard and stood over this day for passing ex-parte final order.

3. The facts leading to filing of this O.A. are :-

a) First defendant is a proprietorship concern represented by its proprietor - second defendant. Defendants 2 to 4 are mortgagors and guarantors for the credit facilities availed by first defendant concern. First defendant represented by its Proprietor, second defendant, during the normal course of business, approached applicant bank on 11.03.2009, requested for financial assistance by way of working capital facilities. Considering the said request, applicant bank granted cash credit facility for a sum of Rs.1.50 Crore for the purpose of working capital to first defendant concern vide sanction letter dated 22.07.2009 (Ex.A-1).

b) Having availed aforesaid loan, defendants executed following documents in favour of applicant bank accepting the terms and conditions of sanction letter dated 22.07.2009 :

(i) Demand Promissory Note dated 25.07.2009 for Rs.64.00 Lakhs thereby agreeing to repay the limit with interest at 14.75% p.a., compounded with monthly rests, executed by first defendant (Ex.A-2) ;

(ii) Demand Promissory Note delivery cum Waiver letter dated 25.07.2009 executed by first defendant (Ex.A-3);

(iii) First defendant executed Letter of Arrangement - Cash Credit Advances dated 25.07.2009 in favour of applicant bank. In consideration of applicant bank agreeing to grant defendants cash credit facility to the extent of Rs.64.00 Lakhs vide its sanction letter dated 22.07.2009 (Ex.A-4) ;

(iv) First defendant executed Agreement for Hypothecation of Current Assets dated 25.07.2009. Letter of Arrangement - Cash Credit Advances dated 25.07.2009 in favour of applicant bank. In consideration of applicant bank agreeing to grant defendants, cash credit facility to the extent of Rs.64.00 Lakhs vide its sanction letter dated 22.07.2009. Under the terms of this Agreement, defendant hypothecated in favour of applicant bank, all the current assets, both present and future consisting stock including raw material, stock in process, cash etc. and morefully described in "Schedule A" (Ex.A-5) ;

(v) Second defendant executed Deed of Personal Guarantee dated 25.07.2009 in favour of applicant bank in consideration of applicant bank agreeing to grant first defendant cash credit facilities aggregating to Rs.64.00 Lakhs vide its sanction letter dated 22.07.2009 (Ex.A-6) ;

(vi) Third defendant executed Deed of Personal Guarantee dated 25.07.2009 in favour of applicant bank in consideration of applicant bank agreeing to grant first defendant cash credit facilities aggregating to Rs.64.00 Lakhs vide its sanction letter dated 22.07.2009 (Ex.A-7) ;

(vii) Fourth defendant executed Deed of Personal Guarantee dated 25.07.2009 in favour of applicant bank in consideration of applicant bank agreeing to grant first defendant cash credit facilities aggregating to Rs.64.00 Lakhs vide its sanction letter dated 22.07.2009 (Ex.A-8) ;

(viii) First defendant executed term loan agreement-I dated 25.07.2009 in favour of applicant bank in consideration of applicant bank agreeing to grant defendants term loan facility to extent of Rs.50.00 Lakhs (Ex.A-9) ;

(ix) First defendant executed deed of hypothecation of machinery and other movable fixed assets dated 25.07.2009 in favour of applicant bank in consideration of applicant bank agreeing to grant first defendant credit facilities aggregating to Rs.50.00 Lakhs vide its sanction letter dated 22.07.2009 (Ex.A-10) ;

(x) First defendant executed Term Loan Agreement - II dated 25.07.2009 in favour of applicant bank in consideration of applicant bank agreeing to grant defendants term loan facility to the extent of Rs.36.00 (Ex.A- 11)

(xi) First defendant executed deed of hypothecation of machinery and other movable fixed assets dated 25.07.2009 in favour of applicant bank in consideration of applicant bank agreeing to grant first defendant credit facilities aggregating to Rs.36.00 Lakhs vide its sanction letter dated 22.07.2009 (Ex.A-12) ;

(xii) Second defendant executed deed of personal guarantee dated 25.07.2009 in favour of applicant bank in consideration of applicant bank agreeing to grant first defendant term loan credit facilities - I and II aggregating to Rs.86.00 Lakhs vide its sanction letter dated 22.07.2009 (Ex.A-13) ;

(xiii) Third defendant executed deed of personal guarantee dated 25.07.2009 in favour of applicant bank in consideration of applicant bank agreeing to grant first defendant term loan credit facilities - I and II aggregating to Rs.86.00 Lakhs vide its sanction letter dated 22.07.2009 (Ex.A-14) ;

(xiv) Fourth defendant executed deed of personal guarantee dated 25.07.2009 in favour of applicant bank in consideration of applicant bank agreeing to grant first defendant term loan credit facilities - I and II aggregating to Rs.86.00 Lakhs vide its sanction letter dated 22.07.2009 (Ex.A-15) ;

c) Second, third and fourth defendant executed simple Mortgage Deed dated 30.09.2009 in favour of applicant bank whereby defendants mortgaged and deposit with applicant bank, title deeds relating to immovable property situated at Mayiladuthurai to create security for applicant bank agreeing to grant first defendant credit facilitites (Cash Credit + Term Loan - I & II) aggregating to Rs.1.50 Crores vide its sanction letter dated 22.07.2009 (Ex.A-16) ; The due repayment of above credit facilities also guaranteed by creating pledge on fixed deposit receipt of Rs.25.00 Lakhs in favour of applicant bank for the credit facilities availed. The said fixed deposit was subsequently closed by defendants. After completing the execution of all documents, applicant bank disbursed to defendants working capital credit facilities totaling Rs.1.50 Crore, repayable in 90 days and the term loan I and II to be repaid in 60 months.

d) First defendant again approached applicant bank for renewal and enhancement of credit facilities. Considering the said request, applicant bank enhanced cash credit facility to Rs.3.20 Crores, for the purpose of working capital, repayable interest at the rate of 12.75% per annum. The said facility was to be repaid on demand and interest payable on monthly basis. Letter of Sanction dated 11.05.2010 is marked as Ex.A-17;

e) As per the said letter of sanction dated 11.05.2010, primary security for working capital demand loan was extension of hypothecation of current assets of first defendant. The collateral security was personal guarantees of the second, third and fourth defendant and equitable mortgage and exclusive charge on land of immovable properties owned by second, third and fourth defendant as mentioned in "Schedule B".

f) Defendants executed following documents on 03.07.2010 for Rs.1.58 Crores towards cash credit facility in favour of applicant bank accepting the terms and conditions of sanction letter dated 11.05.2010 :

Towards Cash Credit Facility of Rs.1.58 Crores :

(i) Demand Promissory Note for Rs.1.58 Crores (Ex.A-18) ;

(ii) Demand Promissory Note delivery cum waiver letter payable on demand for Rs.1.58 Crores (Ex.A-19) ;

(iii) Letter of Arrangement - Cash Credit Advances (Ex.A-20) ;

(iv) Agreement for Hypothecation of current assets (Ex.A-21) ;

(v) Deed of personal guarantee executed by second defendant (Ex.A-22) ;

(vi) Deed of personal guarantee executed by third defendant (Ex.A-23) ;

(vii) Deed of personal guarantee executed by fourth defendant (Ex.A-24) ;

g) Defendants executed following documents on 01.11.2010 for Rs.75.00 Lakhs towards cash credit facility in favour of applicant bank accepting the terms and conditions of sanction letter dated 11.05.2010 :

Towards Cash Credit Facility of Rs.75.00 Lakhs :

(i) Demand Promissory Note for Rs.75.00 Lakhs (Ex.A-25) ;

(ii) Demand Promissory Note delivery cum waiver letter payable on demand for Rs.75.00 Lakhs (Ex.A-26) ;

(iii) Letter of Arrangement - Cash Credit Advances (Ex.A-27) ;

(iv) Agreement for Hypothecation of current assets (Ex.A-28) ;

(v) Deed of personal guarantee executed by second defendant (Ex.A-29) ;

(vi) Deed of personal guarantee executed by third defendant (Ex.A-30) ;

(vii) Deed of personal guarantee executed by fourth defendant (Ex.A-31) ;

h) Second, third and fourth defendant created an equitable mortgage over their immovable property morefully described in Schedule B in favour of applicant bank on 03.11.2010 by depositing original title deed of immovable property situated at Mayiladuthurai. Declaration cum Confirmation Deed dated 03.11.2010 are marked as Ex.A-32 & A-33. Second, third and fourth defendant executed Simple Mortgage Deed dated 08.11.2010 in favour of applicant bank and registered as Doc.No.2649 of 2010, with SRO, Mayiladuthurai (Ex.A-34) ; The Record of Mortgage of Deposit of Title Deeds dated 03.11.2010 along with title documents are marked as Ex.A-35;

i) First defendant executed duly stamped balance outstanding confirmation of Rs.3,00,35,954.74 as on 31.12.2010 in favour of applicant bank towards cash credit of Rs.64,00,000/-, Rs.1.58 Crores and Rs.75.00 Lakhs facility availed. Thereafter, all the defendants executed following Acknowledgments of Debt in favour of applicant bank whereby the defendants acknowledged their indebtedness to applicant bank with regard to Term Loan - I and Term Loan - II facility :

(i) Balance Confirmation as of 31.12.2010 of Rs.3,00,35,954.74 (Ex.A-36) ;

(ii) Stamped Acknowledgement of debt dated 02.01.2011 of Rs.37,08,614/- (Ex.A-37) ;

(iii) Stamped Acknowledgement of debt dated 02.01.2011 of Rs.26,61,907/- (Ex.A-38) ;

j) First defendant executed following documents on 03.03.2011 for Rs.23.00 Lakhs towards cash credit facility in favour of applicant bank accepting the terms and conditions of sanction letter dated 11.05.2011:

Towards Cash Credit Facility of Rs.23.00 Lakhs :

(i) Demand Promissory Note for Rs.23.00 Lakhs, thereby agreeing to repay the same along with interest @ the rate of 14.25% compounding and payable with monthly rests (Ex.A-39) ;

(ii) Demand Promissory Note delivery cum waiver letter payable on demand for Rs.23.00 Lakhs (Ex.A-40) ;

(iii) Letter of Arrangement - Cash Credit Advances (Ex.A-41) ;

(iv) Agreement for Hypothecation of current assets (Ex.A-42) ;

(v) Deed of personal guarantee executed by second defendant (Ex.A-43) ;

(vi) Deed of personal guarantee executed by third defendant (Ex.A-44);

(vii) Deed of personal guarantee executed by fourth defendant (Ex.A-45) ;

k) Thereafter, first defendant created additional security for aforesaid facility and second defendant executed letter evidencing pledge of fixed deposit receipt dated 04.03.2011 a sum of Rs.20.50 Lakhs (Ex.A-46) ;

l) Defendants approached applicant bank for renewal and reduction of the above facility to Rs.3.00 Crores to meet working capital requirement. Based on the request, applicant bank sanctioned renewal of credit facility of Rs.3.00 Crores dated 09.12.2011 to defendants (Ex.A-47) ; Defendants executed duly stamped document of Acknowledgment of Debt dated 12.12.2011 in favour of applicant bank for the above credit facility whereby defendants acknowledged their indebtedness to applicant bank as on 10.12.2011 for a sum of Rs.3.00 Crores. Second and third defendants stood as guarantor for the above said confirmation of debt is marked as Ex.A-48 ;

m) After availing the loan, defendants failed and neglected to repay the dues with interest under the aforesaid credit facility, inspite of repeated demands and reminders made by applicant bank. Correspondence from applicant bank to defendants is marked as Ex.A-49. Defendants executed duly stamped document of Acknowledgment of Debt dated 03.10.2012 for cash credit facility whereby defendants acknowledged their indebtedness to applicant bank as on 03.10.2012 a sum of Rs.3,03,60,546.76p. Second and third defendants stood as guarantor for the above said confirmation of debt (Ex.A-50).

n) Subsequent to availment of aforesaid credit facilities, defendants defaulted in repayment of dues. Hence, applicant bank classified the loan account of first defendant as NPA on 31.12.2012. Letter communicating classification of account is marked as Ex.A-51. Applicant bank issued recall notice dated 31.03.2014, through its counsel, calling upon the defendants to repay their dues. Office copy of the said legal notice dated 31.03.2014, postal receipts and postal acknowledgment cards are collectively marked as Ex.A-52. Despite efforts of Applicant Bank, defendants did not make any repayment.

o) Hence above O.A. has been filed for recovery of a sum of Rs.3,55,69,890/-

(Rupees Three Crores Fifty Five Lakhs Sixty Nine Thousand Eight Hundred and Ninety only), together with further interest thereon, as evidenced by Statement of Accounts (Ex.A-53) filed along with O.A.

3. Brief averments of reply Statement filed by Defendants 1 & 2 :

a) It is submitted that above OA has to be dismissed in-limine as applicant chose to withdraw the above OA based on the Compromise Memo between the applicant and defendants without seeking liberty to revive the OA in the Prayer column. As such they are debarred from reviving OA in the eye of Law.

Moreover, this Tribunal has clearly stated in the Order dated 04.11.2015 that the OA has been dismissed as not pressed and not stated as disposed in accordance with the Memo filed by the applicant. Hence, revival of OA is not permissible under Law.

b) It is further submitted that without prejudice to the above contention, the claim of interest with monthly rest made in the OA is not maintainable as the loan documents allegedly executed by defendants does not speak about monthly rest. The averments made in the prayer of the OA also does not speak about interest compounded at monthly rest or penal interest. As such the applicant is prohibited from claiming either interest at monthly rest or penal interest. Interest charged at 15.75% per annum also against the Guidelines issued by RBI. Hon'ble Supreme Court also held that in absence of specific plea about the Compounded rate of Interest in the Loan Documents, it should be treated as Simple Interest. Hence, the claim made in the OA with interest compounded cannot be sustained and OA has to be dismissed on this score also.

4. Points for Consideration :-

(i) Whether applicant bank is entitled to the relief sought for in the present OA ?

(ii) If so, to what relief?

Points :-

5. A careful examination of the pleadings in the Proof Affidavit and documents viz. Exhibits A-1 to A-24 evidence that the borrowal of credit facilities and execution of loan and security documents are true, in terms of averments made in Original Application as well as Proof Affidavit filed by applicant bank establishing its claim. Applicant bank filed Statement of Accounts duly certified under Bankers' Book Evidence Act, evidencing amount claimed against defendants. Defendants 3 and 4 were set ex-parte on 05.01.2015, but till this day did not take any action to set aside the ex-parte order and did not choose to contest the claim. Further, a careful scrutiny of records makes it clear that present application is filed well within limitation and this Tribunal possess necessary and proper jurisdiction to entertain and adjudicate the claim. No oral or documentary evidence on the side of defendants are produced or filed to dispute the claim of applicant bank. Defendants 3 and 4 neither confronted nor

rebutted the documents produced and relied upon by applicant bank. Hence, it can be concluded that applicant bank has proved its claim against defendants.

6. In view of what has been discussed above, it is observed that applicant bank has proved its O.A. claim against defendants and applicant is entitled to Recovery Certificate in O.A. in terms of the direction given below. Points (i) & (ii) are answered accordingly.

7. In the result :-

a) Applicant is entitled for a Recovery Certificate as against defendants Rs.3,55,69,890/- (Rupees Three Crores Fifty Five Lakhs Sixty Nine Thousand Eight Hundred and Ninety only), due under Credit Facilities viz., Rs.1,73,10,746,42p due in respect of Cash Credit facility No.1, Rs.97,31,859.03p due in respect of Cash Credit facility No.2, Rs.3,41,217.72p due in respect of Cash Credit facility No.3 and Rs.81,86,067.26p due in respect of Cash Credit facility No.4, together with further interest thereon at the rate of 10% per annum (simple), on the amount as determined above and remained unpaid from the date of this O.A. till the date of its realization with costs.

b) It is further ordered that any amount remitted by defendants or realised by the applicant bank during pendency of this O.A., shall be given due credit to the respective loan account of defendants.

c) It is ordered that in case of default by the defendants to pay the amount adjudged, applicant bank is entitled to sell all or that part of schedule mentioned mortgaged property and hypotheca as is sufficient to answer the claim of Recovery Certificate and appropriate the sale proceeds towards amount due.

d) If sale proceeds are not found sufficient, after defraying expenses of such sale for the payment of all such amounts, 2 to 4 defendants are personally liable for the deficiency of adjudged amount with interest and costs until realisation.

e) Schedule mentioned in the OA shall form part of the Recovery Certificate.

8. It is further ordered that 15 days time is granted to applicant bank to file Costs Memo from the date of receipt of this order, to enable Registry to prepare Recovery Certificate as directed above. If in case, Costs Memo is not filed within the above mentioned time, Recovery Certificate shall be prepared based on available records and forwarded to the Recovery Officer for execution in accordance with law.

9. Recovery Certificate be prepared as per the directions given above of this final order and issued accordingly. A copy of the order be communicated to the parties concerned in terms of Rule 16 read with Rule 2(c) of DRT (Procedure) Rules, 1993.

(Dictated to Steno (KN), transcribed by her, corrected, signed and pronounced by me in the Virtual Court, through Video Conference on this the 21st day of October, 2020)

