(2020) 08 DRT CK 0002

In the Debts Recovery Tribunal

Case No : Original Application No. 603 Of 2015

Indian Overseas Bank APPELLANT

Vs

Sino Mathai And Ors. RESPONDENT

Date of Decision : 31-08-2020

Acts Referred:

Recovery of Debts Due to Banks and Financial Institution Act, 1993 — Section 19
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 — Section 13(2), 13(4)

Citation : (2020) 08 DRT CK 0002

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

Bench : Single Bench

Advocate : M/s. Ananda Gomathy, R.Roshan, A. Periyasamy

Final Decision : Allowed

Judgement

1. This application is filed by the applicant bank under Section 19 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 against the defendants jointly and severally, for recovery of a total sum of Rs.1,04,10,214/- (Rupees One Crore Four Lakhs Ten Thousand Two Hundred Fourteen Only) i.e.,

(i) A sum of Rs.30,77,477/-(Rupees Thirty Lakhs Seventy Seven Thousand Four Hundred Seventy Seven Only) in respect of Cash Credit Facility together with further interest at the rate of 13.75% p.a. Plus 2% Penal Interest p.a. with monthly rests against defendants 1 to 3; and

(ii) A sum of Rs.73,32,737/- (Rupees Seventy Three Lakhs Thirty Two Thousand Seven Hundred Thirty Seven Only) in respect of Term Loan together with further interest at the rate of 15.50% p.a. Plus 2% Penal Interest p.a. with monthly rests against defendants 1 to 3;

from 09.11.2015 till the date of payment in full, for sale of the schedule 'A &B' mentioned properties along with costs of this application.

2. Summon to defendants are duly served. Defendants entered appearance

through their counsel and filed written statement. Applicant bank filed its Proof Affidavit along with 24 documents, which are marked as Ex A-1 to A-24. O.A. was finally heard and stood over till this day for passing ex-parte final order.

3. Brief facts of the application:

3.1 First Defendant, Mrs. Sino Mathai is the Proprietrix of M/s. Shine Food Tec., the 2nd defendant and the 3rd defendant is the husband of 1st defendant. First defendant approached applicant bank for sanction of Cash Credit facility and Term loan facility for her business purposes. Based on her request, applicant bank vide its Credit Sanction Advice dated 21.12.2009 (Ex A-1) had sanctioned a sum of Rs.75,00,000/- (Rupees Seventy Five Lakhs Only) towards Term Loan and Rs. 20,00,000/- (Rupees Twenty Lakhs Only) towards Cash Credit facility.

3.2 For the Term loan, on 21.12.2009 first defendant executed the following documents:-

i) Demand Promissory Note for a sum of Rs.75.00 lakhs (Ex A-2)

ii) Term Loan Agreement for Rs.75.00 lakhs hypothecating the machinery and its Stocks & Trade along with Consent-cum-Authorization Letter (Ex A-3)

iii) Consent-cum-Authorization Letter (Ex A-4)

iv) Letter seeking permission to pay in EMI. (Ex A-5)

v) Personal Guarantee & Consent-cum-Authorization Letter dated 21.12.2009 (Ex A-6) executed by third defendant

3.3 For the Cash Credit facility, on 21.12.2009 first defendant executed the following documents:

i) Demand Promissory Note for a sum of Rs.20.00 lakhs (Ex A-7)

ii) Letter enclosing the D.P. Note (Ex A-8)

iii) Letter of Hypothecation, hypothecating the stocks along with Consent-cum-Authorization Letter (Ex A-9)

iv) For the CCF, the 3rd defendant executed Personal Guarantee and Consent-cum-Authorization Letter on 08.01.2011, which is marked as Ex A-10

3.4 In order to secure the above said facilities, first defendant created Mortgage on 21.12.2009 in favour of the applicant bank thereby, mortgaging her properties morefully mentioned in Schedule 'B' to the OA.

3.5 After availing the above facilities, the defendants defaulted in repayments and the operation of the account were not proportionate to the limits and the defendants were only routing minimum transaction. Further the defendants failed to maintain adequate stocks and failed to submit stock statement on time. The interest was also not properly serviced and the stocks & factory were underinsured. On 22.11.2012, 1st defendant executed a Revival Letter (Ex A-11) acknowledging debt due, for the purpose of limitation, for extending the validity of the documents executed for both Term Loan and Cash Credit facility. Similarly, a revival letter dated 22.11.2012 (Ex A-12) was also executed by the 3rd defendant who is the Guarantor for the above loans.

3.6 As collateral security for due repayment of the credit limit availed, first defendant deposited with applicant bank the title deeds pertaining to her immovable property morefully described in Schedule B to OA. Sale deed Doc No.1474 of 1995 dated 04.05.1995, Sale deed Doc No.752/1966 dated 21.06.1966 and other related documents deposited by first defendant with applicant bank are marked as Ex A-13 to Ex A-22. The operation of the accounts by the defendants was far from satisfactory and were classified as NPA on 29.04.2013.

3.7 Since payments were not forthcoming from the defendants, the applicant bank issued Notice under section 13(2) of the SARFAESI Act on 15.12.2014 (Ex A-23), followed by Possession Notice under Section 13(4) of the Act on 11.09.2015. Inspite of receiving the demand notice, defendants did not make any attempt to discharge the loans. Hence applicant bank was constrained to file the present O.A. for recovery of a total sum of Rs.1,04,10,214/- (Rupees One Crore Four Lakhs Ten Thousand Two Hundred Fourteen Only) together with further interest thereon, as evidenced by Statement of Accounts (Ex A-24) filed along with O.A.

3.8 During the pendency of OA, applicant bank on 05.03.2019 filed a memo before this Tribunal stating that Item 1 of 'B' schedule property was sold for Rs.13.50 lakhs under SARFAESI proceedings. Accordingly, part satisfaction of the OA claim in a sum of Rs.13.50 lakhs was recorded on 25.04.2019 and Ex A-13 was ordered to be returned to applicant bank under proper acknowledgment.

4. Brief averments of Written Statement filed by defendants:-

4.1 Written statement is filed on behalf of first defendant. Defendants 2 and 3 filed memo dated 13.10.2016 adopting the written statement filed by first defendant. Defendants denied various allegations/averments contained in the O.A except those are specifically admitted therein.

4.2 It is stated that 1st defendant is a women entrepreneur and she is Proprietrix of M/s.Shine Food Tec, the 2nd defendant. 1st defendant approached applicant bank seeking financial assistance for purchase of machinery for starting a Food Processing Unit. On careful consideration of the loan application, applicant bank sanctioned Cash Credit facility of Rs.20.00 lakhs and a Term Loan of Rs.75.00 lakhs (with a repayment term of 84 EMI with an initial Holiday period of 6 months). To secure the loan, 1st defendant gave her property as collateral security and 3rd defendant, being husband of 1st defendant gave his personal guarantee for the above loan.

4.3 When the business was performing well and the operation of the accounts also smooth, all of a sudden, due to Thane Cyclone, entire factory got damaged and defendants incurred huge loss. Despite defendants having paid a sum of Rs.12.50 lakhs on 06.04.2013, applicant bank proceeded ahead with Securitization Act and issued a Notice under section 13(2) of SARFAESI Act against defendants on 15.12.2014 demanding a sum of Rs.69,18,330.86 out of which, a sum of Rs.48,66,000/- raised towards Term loan account and a sum of Rs.20,84,000/- was raised towards Cash Credit account. Upon receipt of the above said notice, defendant submitted a letter dated 10.02.2015 requesting applicant bank to restructure the loan account and grant extension of time for repayment as under:-

i) Existing Term Loan of Rs.48.66 lakhs will be repaid in 60 monthly installments from April, 2016 after one year Holiday period.

ii) Existing Cash Credit of Rs.20.84 lakhs to be converted into Working Capital Term Loan (WCTL) repayable in 60 months from April 2016.

iii) Unpaid interest of Rs.19.12 lakhs to be converted into FITL repayable in 36 months starting from April 2016.

iv) New Cash Credit of Rs.25.00 lakhs may be sanctioned.

4.4 Applicant bank without considering their proposal, has chosen to file the above O.A. for recovery of the amount. Further, the defendant submits that they have not executed any Revival Letter as contended by the applicant.

4.5 Further, the statement of account filed by the applicant bank is not pertaining to the loan account and the SOA and Revival Letter do not correlate with each other.

4.6 It is stated that defendants approached applicant bank and explained their situation as to how the Unit ran into difficult time because of Thane Cyclone. In fact, the other Banks have given relief in terms of RBI Circular dated 05.04.2012 but the applicant bank has neither bothered to consider the RBI's Circular nor the Government of Puducherry directive to the Bank to conduct SLBC meeting and consider the cases for small entrepreneur who have lost their business in the Thane Cyclone.

4.7 It is stated that the action of applicant in rushing to this Tribunal for recovery of Debts violates fair practices code and opposed to equity and fair play. The Bank being a State under the Article 12 of the Constitution of India is bound to act in a fair and responsible manner. The bank is also bound by the RBI Circular which specifically emphasises the obligation of the Bank to redress the grievance of industries affected by Natural Calamities. It is needless to point out that the guidelines of RBI are binding on the Bank and in the instance case, Bank has acted in violation of RBI guidelines. Therefore, action initiated by the Bank for recovery is not valid in the eye of law and is premature.

4.8 It is stated that the loan account of the defendant has become NPA due to reasons beyond control of defendants. In any event, Government of India and RBI had directed the Bank to give a helping hand to Units which had suffered due to natural calamities. But Bank in a mechanical manner filed the above O.A which is not maintainable under law. Unless the Bank provide the relief package as per RBI guidelines and Government's directions, applicant bank will not have a cause of action to file above O.A, therefore, the question as to whether Bank had a cause of action for filing the O.A as on date of filing of the suit when the request for restructuring in terms of RBI guidelines and the Government of India directive was pending with the Bank has to be taken up as a preliminary issue and decided.

5. In the light of the contest aforesaid, the points that arise for consideration are:

(i) Whether the applicant has established its claim against the defendants? If so, for what amount?

(ii) Whether the applicant is entitled for pendent lite and future interest and if so, at what rate?

6. Points:

6.1 The defendants, in their Reply Statement, even while denying the claim of applicant bank, stated that the interest claimed by applicant bank is exorbitant, that defendants have not executed any Revival Letter, that only due to loss in their business because of Thane Cyclone, they could not repay the loan amount subsequently, that bank failed to consider RBI's circular nor the Government of Puducherry directive to conduct meeting for considering the cases of small entrepreneur who have lost their business in Thane Cyclone, that the Statement of Accounts filed by applicant bank is not pertaining to the loan account of defendants, that bank without taking into consideration the payments made by defendants in a sum of Rs.12.50 lakhs on 06.04.2013, proceeded under SARFAESI Act, that bank failed to consider their request for restructuring of loan and grant extension of time for repayment and hence the claim cannot sustain under law and liable to be dismissed.

6.2. On perusal of the above said contentions raised by defendants in their Reply Statement, it is clear that they are only regular defences usually taken by borrowers/defendants to avoid the claim of bank. After availing the loan from applicant bank, defendants cannot escape from their legal debts now by citing various excuses / reasons including by stating that O.A. has been filed by applicant bank only with the intention to harass defendants. Default by defendants in their repayment schedule, much prior to Thane Cyclone outwits their contention for restructure and rephasing of loan dues in addition to sanctioning fresh loan of Rs.25 lakhs. Hence, all the contentions of the borrower/ defendants fail and the documents filed by applicant bank establish and confirm the default. The present application is filed well within limitation and this Tribunal possesses jurisdiction to entertain and dispose of the claim. Defendants thus failed to rebut the claim of applicant bank and the same remained unchallenged or un-impeached by any rebuttal evidence.

6.3 While perusing the documents, marked as Exhibits along with proof affidavit, it is observed that applicant bank had only furnished title deeds pertaining to Items 1 and 2 of Schedule B property in OA, but has not filed any document to establish creation of equitable mortgage in favour of applicant bank. However, it is a fact borne on record that Item No.1 of Schedule B property has been sold during the pendency of OA by applicant bank for a sum of Rs.13.50 lakhs and part satisfaction memo to that effect has since been filed and accordingly recorded. The original title deed (Ex A-13) pertaining to Item No.1 of Schedule B property is also returned to applicant bank under proper acknowledgment as per extant guidelines. Defendants, although had strongly contested the case did not dispute creation of security interest over the property nor has objected to the sale and appropriation of Item No.1 of Schedule B property. Basing on the admission by the mortgagor / first defendant in her written statement, creation of equitable mortgage as security for the loan funds utilized has been established, although there is no formal document that is furnished by the applicant bank. The acts of acquiescence and non-denial of the mortgage created would prove the situation otherwise that there must be a mortgage and security for the loan funds granted and utilized. Hence, this Tribunal concludes that there is a subsisting mortgage in favour of applicant bank over the schedule mentioned properties, as confirmed by the defendants in their written statement.

6.4. A careful scrutiny of the Proof Affidavit and the Exhibits A-1 to A-24 evidence the borrowal of the loan and execution of documents as true. Applicant bank has also furnished Statement of Accounts duly certified under Bankers Book Evidence Act, evidencing the amount claimed in the OA against defendants. Therefore, Tribunal is satisfied that applicant bank had established its claim and is entitled for Recovery Certificate in the OA in terms of the direction given below. Points (i) and (ii) are answered accordingly.

7. In the result:

(a) Applicant bank is entitled to recover against the defendants jointly and severally a total sum of Rs.1,04,10,214/- (Rupees One Crore Four Lakhs Ten Thousand Two Hundred Fourteen Only) i.e.,

(i) A sum of Rs.30,77,477/- due in respect of Cash Credit Facility together with further interest at the rate of 8% (simple) against defendants 1 to 3; and

(ii) A sum of Rs.73,32,737/- due in respect of Term Loan together with further interest at the rate of 8% (simple) against defendants 1 to 3; from the date of application till the date of payment in full, along with costs of this application.

(b) It is further ordered that in case of default of payment by the defendant, applicant bank is entitled to sell the Schedule A & B (Item II) mentioned properties and adjust the sale proceeds towards the amount due.

(c) If the sale proceeds are not found sufficient to cover the amount due and payable to applicant bank, defendants 1 and 3 are personally liable for all such amounts due.

(d) It is further ordered that any amount remitted or realized, if any, during the course of the proceedings, shall be given due credit to the loan account of the defendant. A sum of Rs.13.50 lakhs has been realized by way of sale of Item No. (i) of Schedule B property.

(e) Schedule A and Item II of Schedule B mentioned in this OA shall form part of Recovery Certificate.

(f) IA No.325/2019 was filed by applicant bank praying to direct the defendants to furnish security to the tune of Rs.30 lakhs failing which to pass an order of attachment of the property mentioned in schedule to IA belonging to third defendant. However as the said IA has not been prosecuted during the course of proceedings, no order could be passed and now as the main OA is concluded, this IA has now become infructuous, however liberty be with applicant bank to prosecute the same in their recovery proceedings.

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 directions given above of this final order and issued accordingly. A copy of the order be communicated to the parties concerned as per the extant guidelines.

(Dictated to PS, transcribed by her, corrected, signed and pronounced by me in Virtual Court, held through Video Conference on this the 31st day of August, 2020)