

(2012) 06 GUJ CK 0027

In the Gujarat High Court

Case No : Special Civil Application No. 3028 of 2012 With Civil Application No. 3798 of 2012 in Special Civil Application No. 3028 of 2012

Micro Forge (India) Ltd. and 6

APPELLANT

Vs

State Bank Of India

RESPONDENT

Date of Decision : 11-06-2012

Acts Referred:

Constitution of India, 1950 — Article 226, 226(3), 226(3)
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 13(2), 13(4), 14, 17

Citation : (2012) 06 GUJ CK 0027

Hon'ble Judges : K.M. Thaker, J

Bench : Single Bench

Advocate : A.S. Vakil for Petitioners - 7, for the Appellant; Nalini S. Lodha for Respondent(s) : 1, for the Respondent

Judgement

Honourable Mr. Justice K.M. Thaker

1. The petitioners have taken out present petition against the respondent State Bank of India seeking below mentioned relief and directions:

"7.(A) to set aside the auction held on 24.2.2012 and direct the respondent Bank to consider and accept the OTS proposal dated 12.12.2011 of Micro Forge India Private Limited as further improved by email / fax communication dated 3.3.2012 and to consider and accept the OTS proposal dated 12.12.2011 of New Tech Forge and Foundry Limited.

(B) to restrain, pending the hearing and final disposal of the present petition, the respondent bank from confirming the sale in respect of the factory, land and building and plant and machinery of the petitioner No. 1 Company pursuant to the auction dated 24.2.2012.

(C)....."

1.1 The petitioner No. 1 and petitioner No. 7 are companies which availed loan

facilities from the respondent bank. So far as petitioner No. 7 is concerned, the loan were granted by consortium of financial institutions of which respondent bank was also a member.

1.2 The petitioners failed to discharge their respective obligations of repayment of loan amount. Therefore the respondent bank initiated proceedings under Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as "SARFAESI Act") and after following procedure u/s 13(2), 13(4) and Section 14 of SARFAESI Act the respondent bank took over possession of the secured assets.

1.3 Thereafter, the respondent bank put up the properties of respondent No1 and 7 i.e. the secured assets for auction sale. The first two attempts failed. Therefore the respondent bank initiated third attempt which succeeded so far as the petitioner No. 1 is concerned but it failed so far as the properties of petitioner No. 7 is concerned.

1.4 The auction sale of the secured assets of petitioner No. 1 was conducted on 24.2.2012 and the respondent bank accepted the highest bid made during the auction process conducted on 24.2.2012.

1.5 It is after the said stage that the petitioners preferred present petition and prayed for above mentioned relief/s.

1.6 During the pendency of the petition the respondent bank has taken out an application under Article 226 (3) of the constitution of India which came to be registered as Civil Application No. 3798 of 2012.

The captioned petition appears to have been filed on or around 6.3.2012 and was circulated for admission hearing, for first time on 7.3.2012. After hearing learned Counsel for the petitioner, the Court passed below mentioned order on 7.3.2012:

"Leave to amend.

NOTICE returnable on 29.3.2012. Meanwhile, the respondent Bank is directed not to create any further equities.

Direct service is permitted today."

2. So far as the factual backdrop leading to present petition is concerned, the facts which emerged from the record and are relevant for present purpose are as mentioned below.

2.1 The petitioner No. 1 and petitioner No. 7 are the borrowers of the respondent bank. For the said purpose, the petitioner Nos. 1 and 7 mortgaged certain properties with the respondent bank. They are borrowers in default.

2.2 In view of default by the petitioner Nos. 1 and 7 the respondent bank recalled the loan facility and initiated proceedings for auction sale of the mortgaged property.

2.3 The properties mortgaged by petitioner No. 1, after two previous unsuccessful attempts, have been auction sold (during third attempt) by the respondent bank and the successful bidder i.e. auction purchaser has deposited 25% of the sale consideration determined during auction process.

2.4 Before the said auction purchaser could make payment of balance amount of sale consideration and before the respondent bank could issue sale certificate, the petitioners preferred present petition wherein, the Court, by way of ex-parte interim order dated 7.3.2012 directed that the respondent bank shall not create any further equities.

2.5 It is necessary to mention at this stage that the petitioner preferred present petition after the auction sale (after previous two attempts) was concluded and the auction purchaser had made payment of 25% of the sale consideration. It is pertinent to note that on earlier two occasions of auction sale, the petitioner did not come forward with such petition and / or with a request that its proposal for settlement may be accepted. So far as the petitioner No. 7 is concerned, even the third attempt of auction sale of the properties mortgaged by the said petitioner has failed.

2.6 In this background the petitioner now claims that the auction sale of the properties of petitioner No. 1, which is already concluded in favour of the auction purchaser, may be set aside and petitioners' proposal for One Time Settlement may be accepted i.e. respondent may be directed to accept the said proposal of the petitioner.

3. Before proceeding further it is necessary to clarify that the proposal of One Time Settlement which the petitioner has made to the respondent bank is not under any scheme launched by the respondent bank or it is not under any scheme of or direction by Reserve Bank of India (RBI for short).

3.1 Actually no scheme in nature of One Time Settlement is in operation in the respondent Bank.

3.2 In fact, the request made by the petitioner herein is unilateral proposal made by the petitioners to the respondent bank, and by present petition the petitioners request the Court to direct, and thereby compel, the respondent bank to accept the proposal for one time settlement.

3.3 Therefore, the relief prayed for by the petitioner is required to be examined from the said perspective and not as if the proposal of One Time Settlement (hereinafter referred to as "settlement") made by the petitioner is under some scheme launched by the bank itself or by RBI.

4. As mentioned above the properties which were mortgaged by petitioner No. 1 have been auction sold by respondent bank. Therefore the said petitioner now seeks that the said auction sale of its properties may be set aside by the Court and the respondent bank may be directed to accept the proposal for settlement.

4.1 The petitioners have, so as to support and justify the said request, mentioned certain factual aspects and have also made certain allegations against respondent bank.

Therefore, it is necessary to take into consideration the factual backdrop as well as allegations made by the petitioners.

5. The petitioner No. 1 company claims that it had submitted a proposal for settlement to the respondent bank somewhere in February 2009 offering payment of Rs. 6 crores against its entire dues of more than 50 crores and the said petitioner desired that in consideration of such payment the respondent bank should issue "No Due Certificate" and it should also withdraw all charges against the petitioner No. 1 company, the Directors and the guarantors/ sureties.

5.1 It appears that the respondent bank did not find the said proposal of the petitioner worth consideration because the bank considered the amount offered by the petitioner as very low, particularly against its outstanding dues which are said to be more than 50 crores.

5.2 Therefore, vide its communication of February 2009, the respondent bank informed the petitioner that if the petitioner No. 1 wants the bank to consider the proposal then the said petitioner may revise its offer and should make proposal for payment of reasonable and acceptable amount towards its dues. It appears that the petitioners submitted an offer somewhere in November 2010 which offer also was considered too low compared to the total dues, hence it was not found acceptable. On 30.11.2010 the respondent bank informed the petitioner that its request was not acceptable.

5.3 The respondent bank, thereafter, initiated proceedings under SARFAESI Act by invoking provision u/s 14 of the said Act. The Magistrate passed order in favour of the respondent bank in the application preferred by the bank.

5.4 Aggrieved by the said order the petitioners commenced proceeding u/s 17 before the Debt Recovery Tribunal.

5.5 The learned Tribunal considered the interim relief applications preferred by the petitioners along with applications u/s 17 of the SARFAESI Act and rejected the said applications for interim relief by order dated 18.1.2011.

5.6 Subsequently, the respondent bank issued public advertisement / notice dated 30.5.2011 for auction sale of the secured assets. However, the said proceedings did not receive proper response, and it failed.

6. So far as the petitioner No. 7 company is concerned, the chronology of events is more or less similar (with exception of changes in dates) to the chronology with reference to the case of the petitioner No. 1 company. It appears that the petitioner No. 7 company had also submitted proposal for "settlement" offering payment of about Rs. 63 Crores against outstanding dues of about more than Rs. 180 crores.

6.1 So far as the petitioner No. 7 company is concerned it is also necessary to mention that the respondent bank is not the only bank who has granted advance to the petitioner No. 7 company but there is a consortium of financial institutions who granted loan facility and the above mentioned amount of about Rs. 180 crores is the claim of the entire consortium of financial institutions. However, the other members of the consortium are not impleaded as party opponent in this petition, though petitioner No. 7 also claims similar relief as the petitioner No. 1.

6.2 In view of the default by petitioner No. 7 in making payment of the loan amount, proceeding u/s 13(4) were initiated, wherein the District Magistrate passed order dated 4.11.2010.

6.3 Accordingly the respondent took over possession of the mortgaged properties i.e. secured assets which included residential property, factory, building, land etc., of the petitioner No. 7 company and Directors / Guarantors.

6.4 It appears that while the petitioner Nos. 1 and 7 pursued their proposal for settlement, a company viz. Southern Ispat and Energy Limited (hereinafter referred to as "3rd party") came in picture and according to the petitioner the said 3rd party showed interest in purchasing the manufacturing facilities of the petitioner Nos. 1 and 7. The petitioners have also claimed that the said 3rd party had made offer to the petitioner Nos. 1 and 7 for composite acquisition of both companies i.e. petitioner Nos. 1 and 7 companies.

6.5 The petitioners approached respondent bank with the said proposal of the 3rd party and requested the respondent bank to consider their proposal for One Time Settlement for both companies and insisted that the settlement should be composite for both companies i.e. proposal of settlement by both companies should be considered and accepted together / simultaneously.

6.6 This condition of the petitioners" required that the members of consortium who advanced loan to petitioner No. 7 company should also be brought in picture since their consent for the petitioners" request for settlement would also be necessary.

6.7 It appears that for one reason or another the discussions and negotiations between the petitioner Nos.1 and 7 and the respondent bank prolonged and did not materialize into any substantial settlement.

6.8 After sometime, the respondent bank initiated 3rd attempt by issuing advertisement / notice inviting offers for auction sale of the secured assets of the companies.

6.9 It comes out from the record that during the said third attempt a bidder came forward and submitted his bid in response to the advertisement which the respondent bank found acceptable and the respondent bank, accepted the bid of the above mentioned auction purchaser.

6.10 The auction purchaser has made payment of 25% of the sale consideration.

6.11 It is at the said stage that the petitioners No. 1 and 7, along with other five petitioners have preferred present petition which appears to have been filed on 6.3.2012 and first order in the petition came to be passed on 7.3.2012 (which is reproduced hereinabove earlier). Under the said order the Court directed office to issue notice to the respondents bank which was to be made returnable on 29.3.2012. The Court, by the said ex-parte order dated 7.3.2012 directed that the respondent bank to not to create further equities.

6.12 After the said order dated 7.3.2012 but before the returnable date of the notice the respondent bank filed Civil Application being Civil Application No. 3798 of 2012 on or around 27.3.2012 and it was circulated and placed before the Court on 28.3.2012. On 28.3.2012 the Court passed below mentioned order in the said Civil Application.

"Rule.

Having regard to the fact that the main writ petition being Special Civil Application No. 3028 of 2012 is likely to be listed for further hearing on 29.3.2012 (i.e. tomorrow), office to make the Rule returnable on 29.3.2012."

6.13 On the next date of hearing i.e. on 29.3.2012 below mentioned order was passed in the said Civil Application.

"Mr. A.S.Vakil, learned advocate, waives service of notice of Rule on behalf of the respondents.

S.O. to 30.3.2012."

6.14 Subsequently orders have been passed from time to time, however they are recorded on the file of writ petition i.e. SCA No. 3028 of 2012 and not on the record of Civil Application.

6.15 The process directed to be issued under order of Court was made returnable on 29.3.2012.

6.16 On 29.3.2012 the Court adjourned the proceedings to 30.3.2012 and extended ad-interim relief which was granted vide order dated 7.3.2012, until 30.3.2012 i.e. next date of hearing.

6.17 On 30.3.2012 the proceedings were adjourned to 10.4.2012 and the ad-interim relief was directed to continue until then.

7. In backdrop of the aforesaid facts and circumstances, Mr.Thakore, learned Senior Counsel with Mr. Vakil, learned advocate for the petitioners has, while alleging that the discretion is not exercised reasonably after considering relevant aspects, submitted that though the settlement proposed by the petitioners is not under any scheme by RBI or by the respondent Bank, it deserved proper consideration by the respondent Bank and the discretion available to the respondent Bank should be exercised reasonably otherwise the Court, in exercise of powers under Article 226 of the Constitution, can give necessary directions to

the respondent Bank. It is also alleged that the decision by the respondent suffers from error of not considering the proposal objectively and reasonably. The petitioners have also alleged that the proposal dated 12.12.2011 was not put up before the consortium and it did not receive objective consideration. The petitioners have alleged that the reason assigned for rejecting the proposal is not based on any material. It is also submitted on behalf of the petitioners that as against the proposal for Rs. 8 Crores and further assurance to pay the statutory dues to the tune of Rs. 3.12 Crores i.e. the proposal for a sum of Rs. 11.12 Crores, the bank has accepted the bid for Rs. 7,61,04,000/- which shows that the respondent bank has acted arbitrarily and unreasonably inasmuch as the proposal for more amount is rejected and the bid of lesser amount is accepted. The petitioners have also challenged the respondent bank's decision of accepting the bid in the auction on the ground that even the said bid is in nature of conditional offer and the respondent bank has allowed extension of time to the said bidder. The petitioners have on the said grounds claimed that the auction sale should be set aside and the decision of the respondent bank to accept the bid for sum of Rs. 7,61,04,000/- also may be set aside and the respondent bank may be directed to accept the proposal for settlement made by the petitioners.

7.1 In response to the Civil application No. 3798 of 2012 taken out by the respondent bank, the petitioners have, while opposing the said application, submitted that the proceedings of the civil application and the writ petitions have been adjourned beyond the period of 15 days and the order of interim relief has been extended after presentation of the application and that therefore the application does not survive and the provisions under Article 226(3) of the Constitution will cease to apply so far as the contention to the effect that there is automatic vacation of interim relief is concerned.

7.2 Per contra the learned Senior Counsel Mr. Nanavati for the respondent bank has opposed the petition and the relief prayed for by the petitioners. The learned Senior Counsel for the bank submitted that the petition seeking acceptance of proposal for settlement is not maintainable and does not deserve to be entertained. The petition and the relief prayed for by the petitioners are also opposed on the ground that the petitioners had approached the learned Tribunal seeking similar relief against the auction sale of the secured assets and the learned tribunal has rejected the relief prayed for by present petitioners and that therefore a writ petition praying for relief which has been rejected by the learned tribunal does not deserve to be entertained. It is also claimed that the order passed by the tribunal could have been but has not been, challenged by the petitioners, before the appellate tribunal and that therefore also the petition does not deserve to be entertained. The petition and the relief prayed for are also opposed on the ground that they suffer from the vice of delay and laches and are also hit by principle of acquiescence.

7.3 Mr. Nanavati, learned Senior Counsel for respondent bank also submitted that the petitioner has approached after the auction process is concluded and

25% amount out of total sale consideration is already received and that therefore also the petition at this stage is not maintainable and does not deserve to be entertained. It is also claimed that at the time of two auction process held earlier the petitioner never approached the Court or never raised any objection. It is also submitted that writ petition would not lie to compel the bank to accept proposal for settlement. While making reference of the petitioners' letter dated 12.12.2011 learned Senior Counsel for respondent bank submitted that the petitioner made conditional offer and if the terms and conditions, more particularly the conditions mentioned at clause No. 1 clause No. 3 to clause No. 8 coupled with the time limit mentioned by the petitioner in the said communication mentioned by the petitioner are taken into account then it would be clear that the decision of the bank of not accepting such proposal cannot be considered arbitrary. Learned Senior Counsel for the respondent bank also submitted that the petitioners and / or the guarantors - sureties have surreptitiously disposed of the mortgaged properties on or around 8.1.2010.

7.4 With reference to the Civil application No. 3798 of 2012 filed by respondent bank, learned Senior Counsel submitted that the order restraining the bank from creating further equity i.e. either accepting the balance amount of sale consideration and / or executing sale deed in favour of the successful bidder was passed ex-parte on 7.3.2012 while issuing notice to the respondent bank which was made returnable on 29.3.2012. It is further claimed that the respondent bank filed the said civil application on 22.3.2012 i.e. before the returnable date i.e. 29.3.2012 and in view of the provision under Article 226 (3) of the Constitution the said ex-parte relief would automatically stand vacated and that therefore the said ex-parte order should be treated as vacated upon conclusion of the period prescribed under Article 226(3) of the Constitution.

7.5 On the other hand learned Counsel for the petitioner i.e. the opponent in the civil application submitted that after the application was filed and after the respondent bank entered appearance in the proceedings related to the petition, the proceedings of the petition were adjourned and the operation of the order has been extended by the Court by making orders to that effect and that therefore the said application was rendered and has been rendered infructuous or ineffective.

7.6 So as to support their respective - rival contentions the learned Counsel for the petitioners and the respondent bank have relied on the decisions in case of R.C. Chaudhary vs. Vice-Chancellor, Dr. Bhim Rao Ambedkar University (AIR 2004 Allahabad page 95), Haryana Steel and Alloys Ltd. Vs. IFCI Ltd. and Another, , District Development Officer vs. Maniben Virabhai (2000 (2) GLH 204), Purshottam Co-operative Housing Society Ltd. vs. Surat Municipal Corporation (2002 (3) GLH 222), Veraval Mercantile Co-operative Bank Ltd vs. Reserve Bank of India (2006 (4) GLR 3156) District Judge vs. S.N. Pandor (the decision in Letters Patent Appeal No. 61 of 1995) Shailly Constructions Pvt. Ltd. vs. State of Gujarat (the decision dated 30.8.2011 in Special Civil Application No.

4393 of 2011).

8. I have considered the rival submissions made by learned Counsel for the contesting parties and the material available on record.

8.1 It emerges from the record that it was as back as in June 2008 that the respondent bank initiated (so far as petitioner No. 1 to 6 is concerned) proceedings for recovery of about Rs. 37 crores and in May 2008 the respondent bank and other members of consortium initiated proceedings against petitioner No. 7 along with petitioner No. 1 to 3 and other guarantor / sureties for recovery of about Rs. 1,05,60,56,081/-.

8.2 Thereafter, in July 2008 the notices u/s 13(2) of SARFAESI Act were issued against petitioner No. 1 and petitioner No. 7 and other guarantors / sureties.

8.3 It was after the said proceedings that the petitioner No. 1 approached the respondent bank, somewhere in February 2009, with a proposal for settlement of the dues in the sum of about Rs. 38 crores plus interest and offered to make payment of about Rs. 6 crores (i.e. only about 16% of total claim) for complete settlement of the entire claim of the bank and other proceedings.

8.4 The bank did not find the offer acceptable and it was rejected. The petitioner No. 1 tried to improve upon that offer which also did not satisfy the bank. Thereafter somewhere in March 2010 the petitioner No. 7 also approached the bank with proposal for settlement.

8.5 It also transpires that somewhere in 2008 the petitioner No. 1 had also made reference to Board of Industrial Finance and Reconstruction. However, somewhere in or around June 2010 the Board rejected the reference with observation that the networth of the company was positive and the company had not approached the Board with clean hands. The reference was considered not maintainable.

8.6 In pursuance of the above mentioned notices u/s 13(2) of SARFAESI Act and thereafter, on or around 3.12.2010 and 8.12.2010 the respondent bank took possession of the secured assets qua the petitioner No. 1 and petitioner No. 7 respectively.

8.7 On or around 23.11.2010 petitioner No. 1 and petitioner No. 7 took out separate proceedings u/s 17 of SARFAESI Act wherein the learned tribunal at Ahmedabad passed common order dated 18.1.2011 and rejected the application / request for interim relief. The main applications i.e. SA No. 143 of 2010 and 144 of 2010 are pending before the learned tribunal wherein the said order dated 18.1.2011 has, until now, not been challenged by the said petitioners. In background of above mentioned events the respondent bank initiated proceedings for auction sale of the secured assets.

9. At this stage it is pertinent to mention that in July 2011 the petitioner No. 7 had informed the respondent bank that the third party (from which the petitioner

No. 1 and petitioner No. 7 had received the proposal) was interested in taking over both units i.e. manufacturing facilities of petitioner No. 1 and petitioner No. 7. The petitioner No. 7, vide its letter dated 5.7.2011 informed the respondent bank that:

We would like to inform you that our investor M/s. Southern ISpat. (Mr.Vivek Agraval) are interested for take over of both unit under OTS proposal and having the sufficient fund for both units.

As per last meeting dated 20.11.2010, our investor are ready for take over New Tech Forge and Foundry Limited in Rs. 63 crores under OTS proposal along with additional liabilities of sales tax, excise, PGVCL etc

Also our investors M/s. Southern Ispat (Mr. Vivak Agraval) are interested for takeover of our unit Micro Forge (I) Ltd. Under OTS proposal as par tender value of Rs. 10.70 crores along with additional liabilities of sales tax, excise, PGVCL etc.

We have a good chance of settle the dues of both units and our investor are having sufficient fund for takeover of both units therefore we request your to please consider our request and inform us so we can settle the dues of both units."

9.1 It transpires that thereafter the petitioner No. 1 informed the bank, vide its letter dated 12.12.2011 that:

Against this background, our investor M/s. Sourthern Ispart td. (SIL) is willing to take over MFIL's manufacturing facilities and operate the same after settling the dues of bank as well as statutory dues and dues of Government undertakings. The investor is quire strong financially and is having the capacity for raising resources for this purpose.

10. What is pertinent to mention at this stage is that the said proposal was conditional proposal inasmuch as the petitioner no.1 also mentioned the conditions which were part of the proposal. Since the petitioners have challenged respondent bank's decision of not accepting the proposal for settlement, it would be relevant to take into consideration the terms and conditions which the petitioner no.1 mentioned in its said communication. Reference of the said terms is made hereinafter at later stage. However, it is necessary to recall that the petitioners insisted that the proposal for settlement by petitioner No. 1 and petitioner No. 7 should be considered conjointly.

11. In this background the respondent bank informed the two petitioners vide its two separate letters dated 22.12.2011 that such conditional proposal were not acceptable. Subsequently in January 2012 the respondent bank published public notice for auction sale of the secured properties of petitioner No. 1 and petitioner No. 7. The auction of certain properties was held on 23.2.2012 and the other properties was held on 24.2.2012. The respondent bank received offer for a sum of Rs. 761.04 lacs for secured assets of petitioner No. 1. The respondent bank has claimed that the successful bidder has already (i.e. before the submission of

present petition and before the Court directed that process be issued to the respondent bank) deposited 25% amount of the sale consideration.

12. It is pertinent that just two days before the date of auction the petitioner No. 1, through its advocate published a public notice declaring that the respondent bank had not mentioned complete details of the statutory details.

13. The petitioners seek direction against the respondent bank to consider and accept their proposal dated 12.12.2011 for One Time Settlement. The respondent bank has considered the proposal but not accepted it. If the directions as prayed for by the petitioners were to be granted it would amount to interference with the commercial decision of the respondent bank.

13.1 In exercise of prerogative jurisdiction under Article 226 of the Constitution of India the Court would not, ordinarily, interfere with such decision by an authority. Such decisions are based on relevant data and details and commercial wisdom and prudence of the authority and are taken by keeping in focus the interest of the bank / financial institutions, and Court would not be justified in imposing its understanding and view.

13.2 Besides this, such cases are in the realm of contract and that therefore the will or wish of one party cannot be foisted upon other party against its free will or against its commercial decision taken on strength of its experience, in view of its business interests and in light of its commercial prudence.

13.3 Furthermore, the Court cannot compel the respondent bank to accept less amount than what it would be otherwise entitled to receive or recover. Such decision can be taken only by the respondent after considering the fact and circumstances of each case on their own merits.

13.4 Even in exercise of power of judicial review the Court would be extremely slow, rather loath, to interfere in such matters. The Court may interfere if the decision, apparently and ex facie, appear to be infected with malafides or arbitrariness. The allegation or possibility of arbitrariness will have to be examined in light of commercial perspective and prudence with which the decision is taken and not merely from judicial perspective. A decision which is alleged to be or appears to be arbitrary may, in fact, not be arbitrary when the decision is examined from all perspective including commercial perspective and attending or attached circumstances or the conduct of the petitioners. It would not be justified to overlook or discount such aspect while examining the grievance or request of the petitioners. The grievance and request of the petitioners in present case has to be examined by keeping in focus the aforesaid aspects, or else the Court may step into prohibited area or forbidden territory or the Court may touch the matters or subject which are exclusively in the realm of the discretion and will or wish of the bank.

14. The learned Senior Counsel for petitioner No. 1 at the outset, very vehemently assailed the action of respondent bank of forwarding its decision of

rejecting the proposal (vide its communication dated 22.12.2011) at the registered office of petitioner No. 1 and No. 7 on the ground that the said intimation was forwarded at the said address despite the fact that the said premises was under possession with the respondent bank and though the respondent bank was aware about the said fact, it forwarded the intimation to the said address. The learned Senior Counsel for petitioner alleged malafides by making such allegations.

14.1 The learned Senior Counsel for respondent bank opposed the said submission and allegation with equal vehemence. He submitted that the said property (premises in question) was never in possession of the respondent bank and the very basis of the allegation is factually incorrect. He also submitted that even otherwise the said allegations lie ill in the mouth of petitioners who, all along, forwarded all their correspondence including their proposals and requests on the letter head which reflected / contained the same address as the address of petitioner No. 1 company (i.e. the premises at which the Registered office is situate) at which the respondent bank forwarded its intimation.

14.2 The counsel for respondent bank also emphasized that the petitioners had never informed the respondent bank any other address with instruction to forward all letters notices etc at such other address and / or about the fact that some other creditor had taken over the possession of the said premises. In view of such facts any fault cannot be found with the respondent Bank.

14.3 The learned Senior Counsel for respondent bank also submitted that even in the cause title of the memo of petition the petitioner No. 1 and petitioner No. 7 have shown the said address as the address for service of process by the Court and that therefore also such submission and allegations are wholly unjustified and misleading.

14.4 Furthermore, it emerges from the record that even the letters which the said third party addressed to the petitioner No. 1 and / or petitioner No. 7 were addressed at and forwarded to the same address i.e. at the registered office of the petitioner No. 1 company (where the respondent bank had forwarded the Notice) with reference to which the petitioners have now raised grievance.

14.5 It appears that in absence of sufficient grounds on merits the petitioners have, out of desperation, raised such contention and allegation which they are not able to substantiate.

14.6 Thus, so far as the said allegation is concerned, the record reveals that the allegation is not only incorrect and baseless but is wholly unjustified and also lacks bonafides. When the petitioners mention the same address as the address of their registered office in the cause title of petition, then it lies ill in mouth of the petitioners to make such allegation against the respondent bank only to raise grounds of malafides.

15. Now, so far as the auction is concerned, it is not in dispute that even the

third attempt of auction of the properties of petitioner No. 7 has failed. It is also not in dispute that on earlier occasion two attempts to auction sale the properties of petitioner No. 1, had failed and the attempt which is now impugned in present petition was third attempt.

15.1 Furthermore, when the respondent bank published the public notice / advertisement declaring that the auction process of the properties will be held on 24.2.2012, just two days before the date of auction process, the petitioner No. 1 got published a public notice stating, inter alia, that the bank had not mentioned the correct and complete details of its debt. The said public notice was an attempt to frustrate or sabotage the auction process.

15.2 Ultimately when the auction was conducted and after the respondent bank accepted the highest bid in respect of the properties of petitioner No. 1 company, present petition came to be filed.

15.3 Although, petitioner No. 7 is also one of the petitioners in present petition and it has also raised grievance about the decision to not to accept its offer, the petitioners have chosen to not to implead the other members / secured creditors of the consortium who have advanced loans to the petitioner No. 7 company.

15.4 If at all the petitioners' intention was really and merely to ask the respondent bank to consider its proposal before proceeding with the third attempt, then the petitioner would have and could have taken steps before the actual process of auction was conducted.

15.5 However, the above mentioned factual matrix and details of the events which emerge from the record not only establishes the vice of delay and laches but also demonstrates lack of bonafides and also establishes that the petitioners seek to frustrate or delay the respondent bank's process of selling the secured assets and realizing at least part of its dues.

15.6 An action which is tainted with delay, laches and lack of bonafides cannot justify and maintain allegation about arbitrariness on part of the bank in not accepting proposal for one time settlement requiring the bank to forego most of its dues.

16. Another important and relevant aspect which deserves to be taken into account and kept in focus is that the third party has, interestingly, not participated in the auction process and / or never approached the respondent bank directly with its proposal.

16.1 If the said third party was genuinely interested in taking over the property in question it could have and ought to have participated in the auction process. The petitioners have not been able to offer any explanation as to why the said third party did not directly participate in the auction process.

17. Against the respondent bank's objection as to the maintainability of present petition, the petitioner has claimed that when the respondent bank has exercised

discretion malafide or by ignoring relevant consideration then petition would be maintainable.

17.1 So far as the allegation about malafide is concerned such allegation are easier to make but difficult to prove. Any allegation about malafide against any particular officer is not made. Any allegation about institutional malafide i.e. malafide on part of the bank and / or on part of the officers concerned and involved in the decision making process are neither made nor established and any material to even suggest such malafides is not placed on record.

17.2 The one allegation which was made very vehemently and on high voltage viz. bank forwarding the intimation of not accepting the proposal at the premises which was allegedly, in possession of respondent bank has turned out to be not only incorrect but has also emerged as an allegation made only out of desperation and despite knowledge about correct factual position (discussed hereinabove earlier).

17.3 In light of the facts discussed above, it has emerged that the petitioners made the said allegation without any justification and basis. Besides this, any material to establish such serious allegation about malafides has not been placed on record. The petitioners have failed to make out any case against the respondent on ground of malafides.

18. Now, so far as the allegation about arbitrariness in decision to not to accept the proposal made by the petitioners, it is pertinent to recall that so far as petitioner No. 7 is concerned the loans were advanced by a consortium of financial institutions however any allegation against other members of consortium are not made. Not only this, but the other member financial institutions of the consortium are not even impleaded as party opponent in present petition.

18.1 It has emerged from the facts and material on record including the communication conveying the decision about the proposal, that the said decision is purely commercial decision taken by the financial institutions in their commercial prudence and to protect their interests including commercial interest and Court would neither sit in appeal over such decision nor would the Court be justified and equipped to examine and evaluate the merits or otherwise of the said decision.

18.2 One of the submissions made by the petitioners so as to assail the decision to not accept the proposal made by the petitioners is that the amount offered by the petitioners was higher than the amount which the respondent bank could fetch by auction sale of properties of petitioner No. 1 company and that therefore the decision of the respondent bank to reject the proposal is arbitrary and unjust.

18.3 On this count it is necessary to recall some of the terms and conditions mentioned by the petitioners (which the petitioners insisted that the respondent bank must agree to and accept). They are:-

One Time Settlement amount of Rs. 8/- Crore towards Full and Final Settlement of Banks Liabilities with interest for bank (SBI).

SBI shall provide a balance confirmation on approval of One Time Settlement to the Company.

SBI shall withdraw all the legal cases and action against the existing members of management and promoters, guarantors, Group Company and auditor etc.

On withdrawal of all legal cases and actions, the members of existing management and promoters shall withdraw all the cases filed against SBI.

SBI shall provide No Objection Certificate and certificate for vacation of the charge on the assets of the company, guarantor and guarantee of Group Company and release charge of the banker on the asset of the company and provide all assistance for creating a charge of the banker of the strategic investor on the assets of the company and no any charge will be made in all mortgaged assets min future for any other dues in whatever from after section and payment of OTS amount.

SBI shall assure to remove the existing promoter and Management's name from the defaulters list of CIBIL or any other body.

The strategic investor has agreed to this OTS proposal subject to receipt of final approval from SBI to be received on or before 31st March, 2012.

This proposal is valid subject to approval of our other proposal of M/s. Newtech forge and foundry Ltd.

SBI will not make further auction till OTS proposal of the company is pending.

Payment to SBI shall be made only after obtaining letter of settlements from all of them.

Please also find below stages of payment of our OTS proposal.

Rs. 0.25 Crore will be deposit of Escrow Agent to be appointed mutually by Banks, MFIL and investor for a period of 3 months after got in principally approval of SBI and will get expired if OTS proposal is not approved within a period on or before 31st March 2012.

Within 30 days of approval of the offer by all banks, we shall deposit 4/- crore after receipt of final sanction letter of SBI

Rs. 3.75/- crore within four months @ rate of interest 12.50% annum."

18.4 From even plain reading of the above mentioned terms and conditions mentioned and insisted upon by the petitioners it becomes obvious that the petitioners intended to ensure that not only all proceedings taken out against them and other guarantors / sureties should come to an end but the financial institutions should give - up and should not reserve or keep open the liberty and

option to continue or initiate any proceedings against the companies or directors or guarantors / sureties for recovering the balance amount of the outstanding dues. As a consequence of such terms (i.e. if the terms mentioned by the petitioners were to be accepted) the bank, will not be able to take any measures or any steps to recover the balance amounts in accordance with law. Whereas the situation would be different (and advantageous) for the bank after taking the option of proceeding with the auction inasmuch as bank's other options remain open and after accepting the proposal the bank will be still (i.e. even after accepting highest bid for the property of petitioner no.1) able to take other and further measures to recover the balance amount i.e. the difference between the claim amount and the amount received on auction sale. On the other hand such option and opportunity would have come to an end if the bank had accepted the proposal for settlement.

18.5 In such situation if such conditions are not accepted and/or if they are considered as not acceptable by the bank then it cannot be said to be an arbitrary or malafide decision.

18.6 It would be appropriate, at this stage, to take into account the reply given by the bank to the petitioners. In its reply to the petitioner No. 1 the respondent bank has stated that:

"We refer to your letter dated 12.12.2011 offering to pay Rs. 8.00 crore as one time settlement (OTS), on deferred payment basis, towards settling the dues of SBI, against principal outstanding of Rs. 43.45 crore (mentioned by you in your letter under reference) and advise that while SBI had not agreed to any amount in your meeting with us on 05.12.2011, nevertheless, the offer made by you in your letter under reference was put up for consideration of the Branch Screening committee, when the same was rejected as it was found to be too low compared to the total dues of the Bank as also the fact that the guarantors to the loan are men of means, property details of whom have been submitted by us to DRT for injunction order. As such, the offer is rejected, which please note.

2. While the offer is rejected on the grounds of a very low amount offered against huge dues of the SBI as mentioned in para 1 above, we find other conditions made out in your letter dated 12.12.11 as unacceptable namely;

The promoters will withdraw all legal cases filed against SBI after withdrawal of all legal cases and action against the company / its present promoters, guarantors, group company and auditor by SBI.

SBI shall.....provide all assistance for creating a charge of the banker of the strategic investor on the assets of the company.

The proposal is valid subject to approval of OTS proposal of New Tech Forge and Foundry Ltd (NTFFL). Please note that while SBI is the sole banker in MFIL and has absolute charge on the assets of the company, NTFFL is a consortium advance, where other Banks in the consortium are free to decide on any OTS

offer.

Payment to SBI (in MFIL) shall be made only after obtaining letter of settlement from all the Banks. We understand that this relates to all the Banks in consortium. As already advised at (iii) above, the account of NTFFL is a consortium finance and SBI has no say in decision of other lenders.

SBI will not make further auction till OTS proposal is pending.

Balance of Rs. 3.75 Crore to be paid in 4 months @ rate of interest 12.5% per annum.

18.7 Similarly, in its reply to the petitioner No. 7 the respondent bank stated, inter alia that:

We refer to your letter dated 12.12.2011 offering to pay Rs. 63 crore as one time settlement (OTS), on deferred payment basis, towards settling the dues of all Banks in consortium, against principal outstanding of Rs. 147.48 crore with interest charged up to 30.06.08 (mentioned by you in your letter under reference) and advise that while SBI had not agreed to any amount in your meeting with us on 05.12.2011, nevertheless, the verbal offer made by you in your meeting held on 05.12.11 was put up for discussion in lenders meet held on 09/12/2011, when the offer was rejected by all members as it was found to be too low compared to the present total dues of the Banks with interest. As such, the offer is rejected, which please note.

2. While the offer is rejected on the grounds of very low amount offered against huge dues of the lenders as mentioned in para 1 above, we find other conditions made out in your letter dated 12.12.11 as unacceptable namely;

The promoters will withdraw all legal cases filed against the member Banks of Consortium after withdrawal of all legal cases and action against the company / its present promoters, guarantors, group company and auditor.

All the member Banks of consortium shall.....provide all assistance for creating a charge of all consortium bankers of the strategic investor on the assets of the company.

The proposal is valid subject to approval of OTS proposal of Micro Forge (India) Ltd (MIFL). Please note that while NTFFL is a consortium advance, SBI is the sole banker in MFIL and has absolute charge on the assets of MFIL.

The consortium banks will not make further auction till OTS proposal is pending."

18.8 In the first instance it becomes clear from the replies that all relevant aspects were considered while taking the decision in question, and that therefore, the allegation that the proposal have been rejected arbitrarily or without considering the relevant aspects, does not hold good.

18.9 On the other hand, it becomes clear from the impugned decision of the respondent bank that even after auction sale of some of the properties of the

petitioner No. 1 company and even after accepting the bid of the highest bidder in the auction process, it is still open to the respondent bank, (since the proposal as made by the petitioners is not accepted) to take all measures, available in law, for recovery of its balance dues from the petitioner companies and the guarantors / sureties whereas if the proposal were accepted (as is being insisted by the petitioners) then the respondent bank would have been obliged to not only drop present proceedings but would not be able to take any measures against the petitioner companies and / or the guarantors or sureties to recover the balance amount of its dues by taking other available measures and reduce the extent of its losses and short-fall.

18.10 If such conditions, which would take away and cut down bank's legally available options for recovering the balance amounts, are considered unacceptable by the respondent bank then the Court cannot find any fault with such decision and in any case such decision, taken in bank's commercial wisdom and for protecting its commercial interest, cannot be considered or branded as arbitrary or unjust or actuated by malafies.

19. Now, so far as the other submission (to justify the allegation about arbitrariness) viz. the amount offered by petitioners was higher than the auction amount, is concerned, it is appropriate to consider that by pursuing the option of auction and by accepting the highest bid the respondent bank has kept its option and its right to take all other legally available measures (against the petitioners and the guarantors / sureties) to recover the balance amounts of its claims, open and alive.

19.1 When such decision are called in question and are placed for consideration then they must be examined from all perspectives which are and might have been taken into account by the bank.

19.2 The impugned decision therefore, cannot be evaluated only from one perspective (i.e. from the perspective that the offer made by the petitioners was, to some extent, higher than the highest bid in the auction process) and the said proposal cannot be divorced from the associated or closely connected fact that the petitioners required the bank to sacrifice and let go much more than merely the difference between the amount receivable by it upon acceptance of the highest bid and the proposal by the petitioners, but such decisions have to be considered from several perspectives for which the respondent bank alone would be best judge and court cannot step into the said field.

19.3 One of the perspectives which the bank seems to have kept in focus is the situation discussed above viz. the conditions mentioned by the petitioners which would drastically curtail or virtually take away bank's options to take further measures to recover the balance dues. The Bank appears to have considered the said consequence costlier than the difference between the bid amount and petitioner's proposal.

19.4 While considering the said contention and objection by the petitioners it is

also necessary to keep in focus the fact that on earlier two occasions the attempts to auction sale the properties had failed and that therefore it was but natural and normal for the respondent bank to be anxious to dispose the properties in question as early as possible so as to restrict its losses on account of mounting interest and also to arrest deterioration in the condition of building, plant and machinery.

19.5 In such circumstances, coupled with the above mentioned aspects, if the respondent bank, on third attempt, accepted the highest bid then such decision, in light of the facts and material obtaining on record, cannot be faulted by the court and / or cannot be considered arbitrary or unjust, much less malafide.

20. The other ground urged by the petitioners against respondent bank's decision is that when the successful bidder / auction purchaser made a conditional offer then the proposal by the petitioners should have been accepted. On this count it appears that the request made by the auction purchaser was about extension of time in making complete and full payment of the sale consideration. Whereas the conditions mentioned by the petitioners in their proposal required the bank and the consortium to sacrifice or let go major or substantial part of their claims as well as its other options and rights.

20.1 While considering the petitioners' request for direction against respondent bank compelling the bank to accept the proposal (for one time settlement) made by the petitioners, it is pertinent to keep in focus that the "settlement" if finalized, will be converted into agreement. An agreement presupposes free will of the parties. An agreement must be arrived at with consent and free will of the parties to the agreement and the parties should be ad idem. The Court cannot compel parties, against their free will, to enter into contract and one of the parties cannot be compelled against its will to accept the offer made by other side. Thus, in present case Court cannot compel the bank to accept the proposal against its free will or against its commercial produce. The Court also cannot direct the respondent bank and it cannot be compelled, to sacrifice substantial part of its claim and / or its other options and rights and that too against its free will and also against its commercial decision and interest. The only exception to the said rule would be malafide or arbitrariness. As mentioned earlier it is easy to allege malafide but difficult to prove. Proper foundation has to be laid, exact details should be mentioned, specific names must be mentioned, the concerned persons should be impleaded (as party defendant) in the proceedings and proper evidence should be placed on record so as to allege and establish malafides. So far as the arbitrariness is concerned, merely because higher offer is not accepted, it cannot be concluded or even assumed that the respondent has acted arbitrarily. If compromise or sacrifice which the bank has to make outweighs the offer or if the aspects taken into account by the bank while not accepting the offer are relevant and germane to the decision, then allegation of arbitrariness cannot be sustained or accepted. The bank is best judge of the relevant circumstances and its own commercial interest and Court would be slow and

reluctant to interfere with such decision, more so when the decision does not spell out arbitrariness or malafides.

20.2 If, in such circumstance, the respondent bank considered it appropriate to accept the request by the highest bidder then the said decision cannot be considered by the Court as arbitrary or unjust or malafide, particularly when the attending facts and circumstances in backdrop of which the bank appears to have accepted the said request are available on record before the Court e.g. (1) failure of earlier two attempts to auction sale the properties, (2) the deteriorating condition of the building, plant and machinery, (3) rejection of reference (for declaration as sick industrial undertaking) by BIFR on the ground that the petitioners did not approach the Board with clean hands, (4) the unacceptable conditions imposed by the petitioners (which also required the respondent bank to close all options and measures for recovering the balance amount) (5) the conduct of the guarantors and sureties and directors of surreptitiously disposing the properties mortgaged (as security) by them etc.

20.3 When the respondent bank considered and found that acceptance of proposal by the petitioners would be more costly affair and would permanently impair and mar its interest as against acceptance of highest bid, though apparently it was, to some extent on lower scale as compared to composite / conjoint proposal made by the petitioners, such decision cannot interfere with and set aside by considering such decision as arbitrary or malafide or unjust.

20.4 Such decisions are taken with commercial prudence and with the central theme of protecting the overall and long term commercial interest of the bank. It is needless to state that such aspects fall within the purview and domain of the Bank who would be best judge of the situation and to take appropriate decision. The Court would, ordinarily, not interfere with such decisions and Court would not substitute it by its own views and decisions, unless the decision is infected or tainted by malafide or arbitrariness.

21. The petitioners have also attempted to assail the bank's decision on the ground that the subsequently improved offer is not considered by the respondent bank and that therefore the decision of the respondent bank is not proper and should be set aside.

21.1 On this count it is necessary to take into account, in addition to all the aspects discussed hereinabove, that since last more than two years the petitioners appear to be forwarding one proposal after another and/or they appear to be slightly modifying their proposal from time to time. 21.2 The further improvement in the proposal of which reference is made in the petition appears to be one more attempt of same nature and in same direction.

21.3 On this count, it is relevant and appropriate to recall and keep in focus the fact that the said third party (the prospective purchaser) never participated in the auction process and did not directly come forward with its offer and it never placed its offer before the bank for consideration.

21.4 Besides this, the conduct of the petitioners gives out that the petitioners are, for one reason or another delaying the process of auction sale of the properties in question (i.e. the secured assets) and/or are trying to frustrate the said process.

21.5 The action of the petitioner no.1 of publishing the advertisement just two days before the date of auction sale (declaring, inter alia, that the details of statutory dues mentioned in the advertisement issued by respondent bank were not accurate) was one such attempt or step in direction to frustrate the auction sale.

21.6 Therefore, the contention that the respondent bank has, as alleged by the petitioner, not considered the improved proposal i.e. allegedly improved after the respondent bank's decision dated 24.12.2011, is arbitrary and that therefore the auction sale of the properties should be set aside, does not deserve to be accepted. In view of this court, on such ground, the auction sale cannot be and does not deserve to be set aside and the respondent bank cannot be directed and compelled to accept the proposal made by the petitioners.

21.7 On plain reading of the proposal it is noticed that the proposal was conditional and if the respondent bank and / or the consortium considered the conditions unacceptable and / or considered the amount offered by the petitioners as too low compared to the total due and payable amount, then the Court cannot weigh such decision in golden scale and / or cannot substitute Court's view in place of the bank's perception, opinion and decision.

21.8 The relief prayed for by the petitioners would, if granted, amount to compelling the respondent bank to accept the proposal made by the petitioners even though the bank did not find it worth acceptance and would also amount to depriving the bank from receiving and recovering the due and payable amount. Such directions and / or relief cannot be granted by the Court. The respondent bank cannot be compelled, against its wish and free will and against its commercial wisdom. The direction to the Bank to accept the proposal for one time settlement, therefore, cannot be passed-granted. The request deserves to be rejected and is hereby rejected.

21.9 For the foregoing reasons and also having regard to the fact that the successful bidder has already paid 25% of the sale consideration amount and on overall consideration of the matter as well as the facts and circumstances which are in background of the decision and action of the respondent bank, the impugned auction sale, cannot be termed or considered as arbitrary and cannot be set aside and therefore the said request is also not accepted and is hereby rejected.

22. As an upshot of the above decision the petition does not deserve to be accepted and allowed. The reliefs prayed for do not deserve to be granted. The petition fails and is hereby rejected.

23. Since by present order the petition being Special Civil Application No. 3028 of 2012 itself is disposed of and consequently it is not necessary to pass any other or further and separate order in respect of Civil Application preferred by the respondent bank i.e. Civil Application No. 3798 of 2012. The said civil application No. 3798 of 2012 also stands disposed of. In this view of the matter, any other or separate order on the said civil application is not passed.

The petition is accordingly disposed of. The civil application also stands disposed of. Any interlocutory or interim - order or arrangement would also not survive. Orders accordingly. However there shall be no order as to costs.

K.M. Thaker,J.

FURTHER ORDER

After the order is pronounced, learned advocate for the petitioners has requested that the earlier order may be extended since the petitioners desire to take out appropriate proceeding by way of Appeal.

The request is opposed by Ms. Lodha, learned advocate for the respondent bank.

Mr. Vakil, learned advocate for the petitioners submitted that the order of ad-interim relief has been in operation since the day on which the petition was presented for hearing.

Considering the fact and circumstances of the case, the order which was in operation shall continue on same terms until 18.6.2012.