

(2023) 08 CAL CK 0055
In the Calcutta High Court
Case No : WPA No. 16875 Of 2023

M/S. Olive Tree Retail Private Limited And Another APPELLANT
Vs
South India Bank Limited And Another RESPONDENT

Date of Decision : 17-08-2023

Acts Referred:

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

Citation : (2023) 08 CAL CK 0055

Hon'ble Judges : Sabyasachi Bhattacharyya, J

Bench : Single Bench

Advocate : Deepan Kumar Sarkar, Ashika Daga, Arti Bhattacharya, Siddhartha Banerjee, Avishek Guha, Akansha Chopra

Final Decision : Disposed Of

Judgement

Sabyasachi Bhattacharyya, J

1. The petitioner no.1-Company carries on the business of manufacturing and retailing of apparel and handloom and handicraft of West Bengal and is a small enterprise within the meaning of the Micro, Small and Medium Enterprises Development Act, 2006 (MSME).
2. The petitioner had taken various loans from the respondent no.1-Bank and serviced those till a considerable time into the Pandemic.
3. Subsequently, the petitioner also obtained a restructuring of loans from the respondent no.1-Bank.
4. Thereafter, allegedly being in financial doldrums due to downturn of trade and demonetization, the petitioner no.1 approached the Bank for a further one-time rescheduling, not amounting to restructure.
5. The same was not allowed and the petitioners' accounts were classified as NPA

(Non-Performing Asset) on November 29, 2021, which was informed to the petitioners by a communication dated November 30, 2021.

6. Pursuant to such classification, a notice under Section 13(2) of the SARFAESI Act, 2002 was issued on April 27, 2022 to the petitioners.

7. The petitioners approached this Court in a writ petition which was decided on January 19, 2023, setting aside the notice under Section 13(2) as well as restraining the respondent-Bank from acting upon its communication of NPA classification dated November 30, 2021. The respondent no.1-Bank was directed to reconsider the petitioners' request for one-time rescheduling of the loan.

8. Thereafter the request was rejected again by the respondent no. 1-Bank on April 10, 2023. It is alleged by the petitioners that the sole ground of rejection was that the petitioner had already availed of a previous restructuring of loan, which ground was specifically negated and turned down by the co-ordinate Bench in its order dated January 19, 2023. Hence, it is argued that the said rejection is contrary to the previous order of the learned Single Judge.

9. On May 10, 2023, a fresh notice was issued under Section 13(2), which prompted the petitioner to move the present writ petition, challenging the fresh notice under Section 13(2) as well as the rejection of the petitioners' request for rescheduling the loan.

10. Learned counsel for the petitioner contends that the purpose of rescheduling as contemplated in the Reserve Bank of India Circulars is to give a second chance to the small scale industries to repay their loans. It is argued that in the event a rescheduling is granted, it would enure to the benefit of both the petitioners, who can revive their business and repay the loans, and the Bank, which will, otherwise, have to undergo a lengthy process to recover the dues.

11. The petitioners, it is submitted, agreeable to sell their Delhi flat for the purpose of repaying the loan. However, such request has been turned down by the respondent no.1-Bank, disabling the petitioners from repaying their loan.

12. It is argued that the rejection of the request for one-time review is contrary to Clause 4 of the Resolution Framework 2.0 issued by the RBI, on which the petitioner relies. Clause 4 clearly envisages that, irrespective of having obtained a prior restructuring, an applicant is entitled to apply for a one-time review under Clause 4.

13. Clause 2 of the Framework, it is argued, is to be read in conjunction with Clause 4, which has not been done by the respondent-Bank.

14. It is further argued that the learned Single Judge, while passing the order dated January 19, 2023, had, in effect, set aside the NPA classification of the petitioners' account. As such, the entire exercise of rejection of the petitioners' request for review as well as the issuance of Section 13(2) notice afresh is bad in law.

15. Learned counsel for the respondent no.1-Bank refutes the argument that the learned Single Judge, vide Order dated January 19, 2023, had set aside the NPA classification.

16. It is submitted that, by the said order, only the communication of the NPA classification by the letter dated November 30, 2021 had been kept in abeyance, subject to the reconsideration of the petitioners' proposal by the respondent no.1-Bank. The classification itself, it is argued, was never set aside.

17. Next, supporting the refusal of the petitioners' request for rescheduling, learned counsel appearing for the Bank alleges several alleged defaults committed by the petitioners. It is submitted that the petitioners, despite having several opportunities to repay the loans, failed to take advantage of the same.

18. It is argued that the petitioners' accounts were classified as NPA as long back as on November 29, 2021. The petitioners, till date, have not done anything to inspire confidence regarding repaying the balance amount due from the petitioners.

19. It is argued that in terms of Clause 2 of the Resolution Framework 2.0 of the RBI, it is clear that, having availed of the facility of restructuring once, no applicant can re-avail the same. Learned counsel places particular reliance on the language of Clause 4 of the said Resolution Framework and argues that the same speaks about a one-time measure to review the working capital sanctioned limit and/or drawing power based on a reassessment of the working capital cycle, reduction of margins, etc, without the same being treated as restructuring. It is submitted that the said provision is not attracted to the offer of the petitioners at all, more so, since the only request of the petitioners seems to revolve around the sale of the Delhi flat.

20. It is argued that the request of the writ petitioners was rather vague as it appears from an undated representation annexed to the previous writ petition. A copy thereof annexed to the written notes of arguments of the respondent no.1-Bank indicates that the same restricts itself to a proposal to sell the flat situated at Chittaranjan Park, New Delhi.

21. Learned counsel for the Bank places reliance on a judgment of the Supreme Court reported at 2023 SCC OnLine SC 435 [South Indian Bank Ltd. and Others Vs. Naveen Mathew Philip and Another]. By placing reliance on the ratio laid down therein, learned counsel for the respondent no.1-Bank argues that the High Court has the jurisdiction not to entertain a writ petition where there is an effective alternative remedy available to the aggrieved person. Since the present challenge has been preferred against a notice issued under Section 13(2) of the 2002 Act, the appropriate remedy available to the petitioner would be a challenge before the Debts Recovery Tribunal (DRT), it is contended.

22. Learned counsel also cites United Bank of India Vs. Satyawati Tondon and others, reported at (2010) 8 SCC 110, where a similar principle had been laid

down, holding that there is a need for circumspection by High Courts in deviating from the rule of exhaustion of alternative remedies before exploring the jurisdiction of the writ court under Article 226 of the Constitution, to ensure that statutory schemes are not defeated by exercise of their writ jurisdiction.

23. The Bank cites *M. Sons Gems N Jewellery Private Limited and others Vs. Reserve Bank of India and others*, reported at 2022 SCC OnLine Del 3355, where the court observed that on measures having been taken under Section 13(4) of the SARFAESI Act, 2002 and before the date of sale/auction of the property, it would be open to the borrower to file an appeal (petition) under Section 17. It was also observed that under sub-section (2) of Section 13 it is incumbent upon the secured creditor to serve sixty days' notice before proceeding to take any measure under sub-section (4) of Section 13. If the borrower raises any objection or places facts for consideration of the secured creditor after receiving the notice under Section 13(2), such reply must be considered with due application of mind, it was observed. The reasons so communicated shall only be for purpose of information/knowledge of the borrower without giving rise to any right to move the Debts Recovery Tribunal.

24. A consideration of various judgments cited by learned counsel clearly shows that, at the stage of Section 13(2) of the 2002 Act, the only remedy available to the recipients of the notice is to file a reply to the secured creditor. However, in the present case, the same would merely be an illusory remedy, since the Bank has already expressed its mind in its refusal to reject the request of the petitioners for one-time review.

25. Even as per the judgments cited by the respondent no.1-Bank, the appropriate stage to prefer a challenge under Section 17 of the 2002 Act is upon service of notice or taking of measures by the secured creditor under Section 13(4) of the said Act and not prior to that.

26. In the present case, such stage having not yet been reached, it would be too early to move the Tribunal and the writ petition is an appropriate remedy.

27. That apart, the petitioner is justified in arguing that the erroneous and illegal classification of an account as NPA is not amenable to challenge under Section 17 of the 2002 Act. Hence, on both such scores, the present challenge under Article 226 is maintainable.

28. Insofar as the bar of exhaustion of alternative remedy is concerned, the same pales into insignificance, although a well-settled principle of law, in view of no efficacious alternative remedy being available to the petitioner.

29. Thus, the challenge as to maintainability of the writ petition is turned down.

30. For proceeding to adjudicate the present case, the Resolution Framework 2.0 dated May 5, 2021 issued by the RBI is required to be looked into.

31. Clause 2 thereof provides that in view of the uncertainties created by the

resurgence of the Covid-19 Pandemic in India in the then recent weeks, it had been decided to extend the above facility for restructuring existing loans without a down-grade in the asset classification subject to the condition stipulated therein.

32. The petitioners satisfied the stipulations therein insofar as the petitioners' account was "standard asset" as on March 31, 2021 and the aggregate exposure of the borrower/petitioner did not exceed Rs.25Cr. on March 31, 2021.

33. The possible bar as cited by the respondent no.1-Bank is Clause 2(v) of the said Framework, which provides that, to avail the relief, it was mandatory that the borrower's account was not restructured in terms of the previous Pandemic circulars, referred to collectively as the "MSME Restructuring Circulars".

34. Admittedly, the petitioner had opted for a restructuring under the January 1, 2019 Circular, which was one of the circulars contemplated in sub-clause (v). The question is whether Clause 4 of the Framework is to be read in conjunction with Clause 2.

35. Before deciding the issue, Clause 2(v) and Clause 4 of the Framework are set out below:

"2(v) The borrower's account was not restructured in terms of the circulars DOR.No.BP.BC/4/21.04.048/2020-21 dated August 6, 2020; DOR.No.BP.BC.34/21.04.048/2019-20 dated February 11, 2020; or DBR.No.BP.BC.18/21.04.048/2018-19 dated January 1, 2019 (collectively referred to as MSME restructuring circulars).

.....

4. In respect of accounts of borrowers which were restructured in terms of the MSME restructuring circulars, lending institutions are permitted, as a one-time measure, to review the working capital sanctioned limits and/or drawing power based on a reassessment of the working capital cycle, reduction of margins, etc. Without the same being treated as restructuring. The decision with regard to above shall be taken by lending institutions by September 30, 2021. The reassessed sanctioned limit/drawing power shall be subject to review by the lending institution at least on a half yearly basis and the renewal/reassessment at least on an annual basis. The annual renewal/reassessment shall be expected to suitably modulate the limits as per the then-prevailing business conditions."

36. A borrower is debarred under Clause 2 to get a restructuring again if it had previously availed similar relief under previous Circulars, collectively referred to as the "MSME Restructuring Circulars".

37. Clause 4, on the other hand, permits a request for one-time review to be made even if the borrower availed of restructuring under the "MSME Restructuring Circulars".

38. Thus, at the outset, the impugned order rejecting the petitioners' application for one-time rescheduling on the ground of the petitioners having previously

availed of such loan stands vitiated, being on an entirely erroneous interpretation of Clause 4, which stands on an independent footing, irrespective of the borrower having availed of Clause 2 benefit previously.

39. A scrutiny of Clause 4 reveals, contrary to the argument of the respondent no.1-Bank, the one-time relief which the lending institutions are permitted to extend to the borrower is not restricted only to working capital sanctioned limits. The language used in Clause 4 refers to a review of the working capital sanctioned limit "and/or drawing power based on a reassessment of the working capital cycle, reduction of margins, etc.", which is on a very wide footing and confers wide leeway to the lending institutions to review the situation. A relief given on such aspects might enhance the spending power of the borrower, directly or indirectly, thus aiding the borrower to revive its business and repay the loan.

40. The said clause also provides that the reassessed sanction limits/drawing power shall be subject to review by the lending institution at least on a half yearly basis and the renewal/reassessment at least on an annual basis. The annual renewal/reassessment is expected to suitably modulate the limits as per the then-prevailing business conditions. These put in place sufficient safeguards for the lender.

41. Under Clause 4 of the Resolution Framework 2.0, the lender has to take into account the "then-prevailing business conditions", which exercise was not done by the respondent no.1-Bank at all in the present case.

42. The Bank could very well have assessed the situation on practical considerations, keeping in view the previous conduct and antecedents of the petitioners, which continued to repay its loans even during a substantial portion of the Pandemic period, not taking undue advantage of the RBI Circulars then prevailing. In fact, the restructuring was sought by the petitioners in due time and honoured to the best of its abilities. The initial restructuring was claimed on May 5, 2021, that is, much before the petitioners' account was classified as NPA.

43. Instead of considering the said one-time request of the petitioners on merits and in the light of the relevant factors, the Bank proceeded, in the first place, to play the role of Shylock and go on to declare the accounts as NPA on November 29, 201.

44. If we peruse the impugned refusal dated April 10, 2023, the Bank shut all doors for the borrower at the outset by observing that the case at hand was already restructured on November 20, 2019 based on the RBI Circular dated January 1, 2019 and hence the same cannot be restructured again as per the Resolution Framework 2.0, contrary to the letter and spirit of Clause 4 of the said Framework.

45. By citing such restructuring as a ground not to look into the matter, the respondent no.1-Bank flouted not only Clause 4 but also the observations of the

learned Single Judge made in the previous writ petition, bearing WPA No.11406 of 2022. A similar refusal by the respondent no.1-Bank on the previous occasion had been deprecated by the co-ordinate Bench in observing that the Bank was to consider the restructuring of the three loans of the petitioner no.1 "afresh" in terms of the Resolution Framework 2.0, subject to the petitioner no.1 fulfilling all the conditions contained therein. The eligibility of the petitioners was to be considered strictly in accordance with RF 2.0. However, in the present case, despite the petitioners being fully eligible, the petitioners' request for review was not considered by the Bank at all.

46. The Bank also observed that the restructured plan proposed by the customer is financially and technically not viable, without any consideration whatsoever about the then prevailing business conditions and other factors which were required to be looked into by the Bank on an objective basis, even in terms of Clause 4, as well as in view of the observations made by the co-ordinate Bench on January 19, 2020. Having not done so, the said exercise of the Bank is palpably vitiated in law and contrary to the order of the co-ordinate Bench.

47. Insofar as the interpretation of the effect of the order of the co-ordinate Bench is concerned, we have to look at it from an objective perspective. By the said order, the learned Single Judge did not set aside the classification of NPA but observed that the respondents shall be restrained from proceeding in accordance with the impugned notice [under Section 13(2)] as also the letter dated November 30, 2021.

48. In the same sentence, the learned Single Judge observed that the writ petition was allowed by a declaration that the impugned notice dated April 27, 2022 was liable to be quashed.

49. Taken in conjunction, the said Section 13(2) notice must be deemed to have been quashed by the said order. However, the NPA classification was kept on hold, subject to the reconsideration by the Bank of the petitioners' application for restructuring (review?).

50. The petitioners' request for one-time review had been made before the NPA classification. If it was considered first and allowed, the account would not become NPA in the first place. Thus, the NPA classification cannot be taken in isolation but is also a logical culmination of a non-consideration of the one-time review request of the petitioner. Hence, since the learned Single Judge in WPA No.11406 of 2022 had kept the communication of the NPA classification on hold and made it subject to the fresh consideration of the review request, the fate of the NPA classification was linked to the outcome of such request.

51. In the present circumstances, thus, the issuance of a fresh notice, under Section 13(2) of the 2002 Act as well as the NPA classification emanate out of the refusal by the respondent no.1-Bank to consider the one-time request of the petitioners in proper context and by adhering to the factors stipulated in Clause 4 of the Resolution Framework 2.0 and law.

52. The Bank's April 10, 2023 rejection of the petitioners' one-time review request having been found to be vitiated, the same not only takes away the very basis of the NPA classification again but also jeopardizes the fresh notice under Section 13(2).

53. However, in the facts of the case, in the event the NPA classification itself is set aside, the same would lead to unnecessary multiplicity of proceedings, if the respondent-Bank, even after adhering to Clause 4 as well as the observations made herein, deem it fit to reject the one-time request of the petitioners afresh.

54. Thus, the appropriate measure would be to keep the NPA classification on hold, subject to a re-hearing of the petitioners' request for one-time measure by the Bank. However, the fresh issuance of Section 13(2) notice goes, since the same is a direct corollary of the vitiated refusal of the petitioners' request dated April 10, 2023.

55. Accordingly, WPA No.16875 of 2023 is disposed by quashing the notice issued afresh under Section 13(2) of the SARFAESI Act, 2002 on May 10, 2023. The respondent no. 1-Bank's rejection of the petitioners' one-time request of review under Clause 4 of the RBI Resolution Framework 2.0, vide order dated April 10, 2023, is hereby set aside.

56. The respondent no.1-Bank shall reconsider the petitioners' proposal for one-time review, adhering to the factors as stipulated in Clause 4 of the Resolution Framework 2.0 of the RBI and the observations made in this order. Since the petitioners have been making several proposals for such one-time measure throughout the pendency of litigation, for an effective resolution of the dispute, the petitioners are directed to consolidate their proposal/request of one-time review in writing and communicate it to the respondent no.1-Bank within a week from date.

57. The respondent no.1-Bank shall, upon such written proposal/request being made, consider the same afresh under Clause 4 of the Resolution Framework 2.0 issued by the RBI on May 5, 2021, adhering to the factors contemplated therein, in the light of the orders passed by Court, as expeditiously as possible, positively within a month from the written request/proposal being made by the petitioner. The outcome thereof shall be communicated by the Bank immediately thereafter, in writing, to the petitioner.

58. Till the communication of the outcome reaches the petitioner, the classification of the petitioners' account as NPA, dated November 29, 2021 shall remain on hold and shall not be given effect to by the Bank. The NPA classification would be subject to the decision of the respondent no. 1-Bank on the petitioners' review request/proposal and necessary steps in that regard shall be taken by the respondent no. 1 upon deciding petitioner's review request.

59. It is, however, made clear that this Court has not entered into the merits of the petitioner's entitlement to get the one-time review and it will be open to the

respondent no.1-Bank to decide the said proposal of the petitioner on its own merits, adhering to the guidelines as indicated hereinabove.

60. There will be no order as to costs.

61. Urgent certified server copies, if applied for, be issued to the parties upon compliance of due formalities.