

(2023) 01 CAL CK 0037
In the Calcutta High Court
Case No : WPA No. 11406 Of 2022

M/S Olive Tree Retail Private Limited & Anr. APPELLANT
Vs
South Indian Bank Limited & Anr. RESPONDENT

Date of Decision : 19-01-2023

Acts Referred:

Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 — Section 13(2), 13(4), 13(4)(a), 13(4)(b), 13(4)(c), 13(4)(d), 17(1)
Banking Regulation Act, 1949 — Section 21, 35A

Citation : (2023) 01 CAL CK 0037

Hon'ble Judges : Moushumi Bhattacharya, J

Bench : Single Bench

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

Final Decision : Allowed

Judgement

Moushumi Bhattacharya, J

1. The petitioners have assailed a Notice dated 27.4.2022 issued by the respondent no. 1 South Indian Bank by which the petitioners' accounts with the respondent Bank was classified as a Non Performing Asset (NPA). The petitioners were asked to discharge their liabilities in full within 60 days from the date of receipt of the impugned Notice beyond which the Bank threatened to take the measures prescribed under the provisions of the SARFAESI Act, 2002. The impugned Notice was issued under section 13(2) of the Act. The petitioners also seek a declaration that the Bank's failure to extend the restructuring of the three loans of the petitioners is arbitrary and contrary to the Resolution Framework (R.F) 2.0 dated 5.5.2021 issued by the Reserve Bank of India.

2. The petitioner no. 1 claims to be a small enterprise within the meaning of The Micro, Small and Medium Enterprises Development Act, 2006 (MSME Act) and the petitioner no. 2 is a shareholder and Managing Director of the petitioner no.

1.

3. The petitioners seek to enforce the RBI Circular R.F 2.0 and claim, through learned counsel appearing for the petitioners, that the said Circular casts a positive statutory duty on the Bank to grant restructuring to already restructured loans of MSMEs. Counsel submits that the relief claimed in respect of the impugned Notice dated 27.4.2022 is only consequential in nature and that the cause of action with regard to the failure of the respondent Bank arose prior to the 13(2) Notice. Counsel submits that the petitioners' loan accounts would have remained a standard asset as on 31.3.2021 if the loans would have been restructured in accordance with the R.F 2.0. Counsel refers to several contemporaneous representations made by the petitioners to the Bank on R.F 2.0 and the Emergency Credit Line Guarantee Scheme (ECLGS) Loan prior to declaration of the petitioner's accounts as NPA. Counsel also relies on representations made after the impugned declaration between 1.12.2021 and 10.2.2022 which were prior to the impugned Notice dated 27.4.2022 none of which were considered by the Bank in terms of R.F. 2.0. Counsel submits that the first petitioner satisfied all the conditions for obtaining effective restructuring through a one-time measure in accordance with the R.F. 2.0. It is submitted that the petitioners have submitted two plans, which if permitted by the Bank, would clear all the existing loans and the petitioners do not intend to continue with adversarial proceedings against the respondent Bank.

4. Learned Counsel appearing for the respondent no. 1 / South Indian Bank urges that the writ petition is not maintainable since the petitioners have challenged a Notice issued under the provisions of the SARFAESI Act and that too against a private Bank. Counsel submits that the writ petition is in any event premature as the Bank has not invoked any measures under section 13(4) of the Act. It is submitted that even otherwise on merits, the first writ petitioner was not eligible to seek restructuring within the provisions of R.F. 1.0 as well as R.F. 2.0. Counsel submits that the petitioner no. 2 had also not perfected his security interest with regard to the immovable property offered by the wife of the petitioner no. 2. Counsel submits that upon the death of the petitioner's wife the responsibility devolved upon the minor son and therefore the petitioner no. 2 was obliged to take steps for perfecting the security which was not done.

The Court's view on the point of maintainability:

5. The issue raised on behalf of the respondent Bank that the petitioners should be before the Debts Recovery Tribunal is answered against the respondent and in favour of the petitioners for the following reasons.

6. First, section 17(1) of the SARFAESI Act, 2002 entitles any person including a borrower to make an application before the DRT having jurisdiction in the matter within a certain timeframe against any of the measures taken by a secured creditor under section 13(4) of the Act. Section 13(4) authorises a secured creditor to take any one or more of the measures under 13(4) (a) to (d) to

recover the secured debt. In the present case, the Notice dated 27.4.2022 was issued under section 13(2) of the Act which would be evident from the impugned Notice itself. Hence, the stage for approaching the DRT, which is the statutory alternative remedy under the SARFAESI Act, had not arrived as on the date of the impugned Notice. *Phoenix Arc Private Limited vs. Viswa Bharati Vidya Mandir.*; (2022) 5 SCC 345 and *United Bank of India vs. Satyawati Tondon*; (2010) 8 SCC 110 both cited by the Bank, involved Notices under section 13(4) of the Act and hence are distinguishable from the facts of the present case.

7. Second, prayer (c) of the writ petition which is for a declaration that the Notice issued under section 13(2) namely of 27.4.2022 is liable to be set aside, is consequential to prayers (a), (b), (e) and (f) which are for declarations that the failure of the Bank in extending the benefit of restructuring of the three loans of the petitioners is contrary to the spirit of Resolution Framework 2.0 of the Reserve Bank of India. Prayers (e) and (f) are for a mandamus on the respondent Bank to disburse the ECLGS Loan to the petitioner no. 1 and to restructure the three loans of the petitioner Company in terms of R.F 2.0. There is no doubt that if the loans of the petitioners had been restructured, the impugned Notice issued under section 13(2) of the SARFAESI Act would not have been issued at all. Moreover, the cause of action in respect of the failure / inaction of the Bank to restructure the loans is prior to the declaration of the petitioners' loan accounts as NPA and also prior to issuance of the Notice under section 13(2) of the 2002 Act.

8. The cause of action pleaded in the writ petition persuades this Court to hold that the writ petition is not a SARFAESI action simpliciter and is premised on the statutory duty cast upon the respondent Bank to enforce the RBI Circular R.F. 2.0. which was to be enforced in accordance with its object and intendment and the respondent Bank was to exercise its discretion in the matter of restructuring the petitioners' loans as an MSME. The writ petition brings to the fore the failure of the respondent Bank to exercise its discretion in accordance with the Circular on acceptable and transparent standards. The decisions relied on by the Bank namely *Sunitha Roy vs. Canara Bank*; 2020 SCC OnLine Ker 5120, *Katepalli Lavanya vs. Union of India*, *M/s. Digivision Electronics Ltd. vs. Indian Bank*; 2005 SCC OnLine Mad 478 do not apply to the facts since all these decisions dealt with section 13(2) notices without any duty on the part of the respondents to enforce an RBI Circular. *Federal Bank Ltd. vs. Sagar Thomas*; (2003) 10 SCC 733 held specifically at paragraph 33 of the Report that a writ petition is maintainable against a private Bank if it involves enforcement of a statutory duty on the part of the Bank. In the facts of that case however, Federal Bank was denied relief since it involved a private contract of service between Federal Bank and one of its employees. The facts did not involve a RBI Circular having statutory force as in the R.F 2.0 in the present case. This Court holds that the writ petition is maintainable for the above reasons.

Merits of the case urged on behalf of the parties :

9. Certain facts are required to be stated before assessing the weight of the competing submissions.

The undisputed facts :

10. The petitioner no. 1 is an MSME and sells handlooms and handicrafts through retail stores and online platforms. The petitioner no. 2 is a shareholder and the Managing Director of the petitioner no. 1. The petitioner no. 1 availed of loan facilities from the respondent Bank for about Rs. 5.9 crores from 2013. There was no default between 2013 – 2021. The petitioner no. 1 was constrained to seek restructuring of loans from the Bank by reason of the downturn in retail business after demonetisation. The request for restructuring was made on the basis of future apprehension and without any actual default in the payment. The restructuring was granted with effect from January, 2020 and the loan was segregated into three separate loans; i) Cash Credit Open Loan (CCOL), ii) Working Capital Term Loan (WCTL) and iii) Funded Interest Term Loan (FITL). The petitioners gave a two-storied building at Bangur Avenue jointly owned by second petitioner and his mother and a flat in Delhi jointly owned by the second petitioner and his wife as security for restructuring. The petitioner complied with the obligations of restructuring from January, 2020 onwards. The Covid 19 Pandemic started from March, 2020 and the petitioner's physical stores shut down due to the ensuing lockdown. Although the petitioners incurred huge financial losses, the petitioners continued to service the CCOL loan. The WCTL and FITL loans were under a moratorium period during the Pandemic and were due to end in August, 2020. The petitioner could not service the loans from 2021 onwards due to the continuing Pandemic related lockdown.

The RBI Circulars :

11. The RBI (respondent no. 2 before this Court) issued a statutory Circular under the Banking Regulation Act, 1949 namely Resolution Framework 1.0. on 6.8.2020 to help preserve long term viability of firms. The intended object was to alleviate Covid 19-related stress. A revised statutory Circular was issued namely Resolution Framework 2.0 dated 5.5.2021 for Resolution of Covid-19 related stress of MSMEs which is relevant to the present case since the petitioner no. 1 is an MSME.

12. R.F. 2.0 permitted Banks including the respondent no. 1 Bank to grant further restructuring as a one-time measure of already restructured loans of MSMEs. This would be evident from Clauses 2 and 4 of R.F. 2.0.

The petitioner's case :

13. The first petitioner satisfied all the requirements under R.F. 2.0 for availing the benefit of a one-time restructuring of its three loans; the petitioner was an MSME as on 31.3.2021 and was GST-registered. The aggregate loan exposure of the petitioner no. 1 was below Rs. 25 crores. The petitioners' eligibility would appear from Clause 2 of R.F. 2.0.

14. Most important, all the three loan accounts of the petitioner no. 1 were "standard assets" as of 31.3.2021 (Clause 2(iv)). The restructuring of the borrower's account was to be invoked by 30.9.2021 and the restructuring was to be treated as invoked when the lending institution and the borrower agreed to proceed with the efforts towards finalising restructuring plans to be implemented in respect of the borrower (Clause 2 (vi)). The first petitioner invoked this clause by making an application on 6.7.2021 and an e-mail dated 15.7.2021. The respondent Bank was bound by the RBI Circular of R.F. 2.0. and was statutorily mandated to consider the application of petitioner no. 1 in accordance with the requirements in Clauses 2 and 4 of R.F. 2.0. The respondent no. 1 Bank failed in its duty to do so.

15. Several representations were made by the petitioner in this regard. The respondent Bank however failed to consider the applications or representations in terms of the R.F. 2.0 and rejected the application of the first petitioner on the ground of the security interest involving the son of the petitioner no. 2 not being perfected. The representations made by the petitioners on 17.9.2021, 27.11.2021 and 1.12.2021 were also not considered by the respondent Bank in accordance with the parameters of R.F. 2.0.

Emergency Credit Line Guarantee Scheme (ECLGS) Loan :

16. The respondent Bank offered to grant ECLGS Loan to the first petitioner under the Scheme formulated by the Ministry of Finance, Government of India through the National Credit Guarantee Trustee Company Limited of 23.5.2020 which was formulated to help Banks for extending emergency credit facilities during Covid-19 crisis to MSMEs like the petitioner no. 1. The representatives of the Bank assured the petitioners that the ECLGS Loan would be provided to the petitioner no. 1 and the petitioner no. 1 hence wrote to the Bank on 30.8.2021 requesting sanction of loan on account of the financial stress suffered by the petitioner no. 1 due to the Pandemic. The petitioner no. 1 could not avail of the loan in 2020 since the petitioner no. 1 was servicing the CCOL Loan at that time. The respondent Bank however agreed to grant the ECLGS Loan to the petitioner no. 1 on 30.7.2021 and 11.8.2021. The petitioner no. 1 accordingly applied for the ECLGS Loan on 30.8.2021, 3.11.2021 and 6.11.2021. The second petitioner's wife passed away during the Covid-19 Pandemic and the Delhi Flat which was given as a security for the three loans and was jointly owned by the petitioner no. 2 and his wife, devolved upon the petitioner no. 2 and his minor son. The respondent Bank asked the petitioner no. 2 to obtain guardianship of his minor son from a competent Court in order to get the ECLGS Loan. The petitioner no. 2 complied with this requirement and filed appropriate proceedings before the Court in Delhi on 2.9.2021. The respondent Bank however rejected the petitioner's request for ECLGS Loan on 9.11.2021 on the ground of "non-perfection of security interest involving minor interest..."

The primary grievance of the petitioners :

17. All the three loan accounts of the petitioner no. 1 were declared NPAs on 26.11.2021 and 30.11.2021 by the respondent Bank. (The 26.11.2021 declaration related to the Funded Interest Term Loan (FITL) and the 30.11.2021 related to the Cash Credit Open Loan (CCOL) and Working Capital Term Loan (WCTL)). The impugned declaration was despite the first petitioner not committing any default in respect of the CCOL which was also declared as NPA on 30.11.2021. The second petitioner also submitted a viability plan on 28.12.2021 as per the request of the respondent Bank. The viability plan was not considered by the respondent Bank and the impugned Notice under section 13(2) of the SAFAESI Act, 2002 was issued by the respondent Bank on 27.4.2022.

Conclusions of the Court :

18. The fact that the petitioner no. 1 was eligible for restructuring both under R.F. 1.0 and R.F. 2.0 would appear from Clause 2(iv) of the R.F. 2.0; and further that the petitioner no. 1's accounts were "standard assets" as on 31.3.2021. It is significant that the loan accounts of the first petitioner were declared NPA only on 29.11.2021. Second, the respondent Bank's failure to consider the petitioner's applications is contradictory to the purpose for which R.F. 2.0 was structured and conceptualized by RBI, namely for a one-time measure of restructuring. Third, the petitioner no. 1 was well within the time limit contemplated under clause 2(vi) of R.F. 2.0 which mentioned that the restructuring was to be invoked within 30.9.2021; petitioner no. 1 invoked R.F. 2.0. on 6.7.2021 and 15.7.2021 which was also well within the time frame. Fourth, none of the representations filed with regard to R.F. 2.0 or ECLGS Loan were considered by the respondent Bank prior to the declaration of the accounts as NPA. All these representations were sent before the impugned declaration on 29.11.2021. Further representations made by the petitioners between 1.12.2021 and 10.2.2022 were also not considered by the respondent Bank in accordance with the R.F. 2.0. All these representations were made before the impugned Notice under section 13(2) of the SARFAESI Act, which was issued on 27.4.2022.

19. It is also relevant that R.F. 2.0 has been described as a "Circular" at Clause 2(x) of R.F. 2.0. R.F. 2.0 describes itself as a stress-reliever for MSMEs in view of the uncertainties created in the resurgence of the Covid-19 Pandemic in India. Clause 2 of R.F. 2.0 states that keeping the above reality in mind, the RBI has decided to extend the facilities of restructuring of existing loans to MSME borrowers without a downgrade in the asset classification subject to the conditions in R.F. 2.0. There is little doubt that R.F. 2.0 was issued in public interest having regard to the financial crunch faced by MSMEs in the wake of the Pandemic.

20. It is also without dispute that RBI Circulars have statutory force having been issued by the RBI under The Reserve Bank of India Act, 1934. These Circulars are binding on the constituent Bank and banks are under a statutory obligation to comply with the mandate of the Circulars. This was recognised in Central Bank of India vs. Ravindra; (2002) 1 SCC 367 where the Supreme Court held that the

power conferred by sections 21 and 35-A of the Banking Regulation Act, 1949 is coupled with a duty to act and further that the Reserve Bank of India, as the prime banking institution in the country, is entrusted with a supervisory role and is conferred with the authority of issuing binding directions having statutory force in the interest of the public.

21. The allegations of the respondent Bank that the rejection of disbursement of further credit facilities to the petitioner no. 1 on 9.11.2021 was on the ground of non-perfection of security interest is sufficiently belied by the facts before the Court. The petitioner's wife passed away on 11.10.2020 during the Pandemic and the petitioner no. 1 applied for the loan in July 2021. The petitioner no. 2 thereafter filed appropriate proceedings before the Court in New Delhi under the Guardian and Wards Act, 1890 which was allowed on 11.7.2022. This was done at the direction of the respondent Bank and for the purpose of perfecting the security interest since the Flat in Delhi, which was given as security for the restructuring, was in the name of the petitioner no. 2 and his wife. In any event, the petitioner no. 2's son attained majority on 8.8.2022 and the petitioners can therefore take appropriate steps in respect of the Delhi Flat to clear the loans. The stand of the respondent Bank is patently unreasonable in view of the aforesaid facts.

22. The conclusions of the Court are strengthened by a broader view of both the parties being benefited if the respondent Bank permits the petitioners to service their loans which the petitioners are admittedly in a position to do in the changed circumstances. This Court is unable to comprehend as to why the respondent Bank would invoke proceedings where the respondent Bank would not only have to engage in adversarial proceedings but also wait for a considerable time before the loan accounts of the petitioners are clear or settled or closed. The facts and the materials placed before the Court persuade the Court to hold that the respondent no. 1 Bank precipitated the events culminating in the issue of the impugned Notice under the SARFAESI Act without proper application of mind and due exercise of discretion.

23. This Court is inclined to grant the relief claimed for the above reasons.

24. WPA 11406 of 2022 is accordingly allowed by a declaration that the impugned Notice dated 27.4.2022 is liable to be quashed restraining the respondents from proceeding in accordance with the said impugned Notice as also the letter dated 30.11.2021. The respondent no. 1 Bank is directed 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 shall be considered strictly in accordance with R.F. 2.0. The respondent no. 1 Bank shall also consider whether the petitioners are entitled to the ECLGS Loan in view of the changed circumstances which have been placed before the Court. The respondent no. 1 Bank shall complete the entire exercise as directed within a period of 10 weeks from the date of this judgment.

Urgent photostat certified copies of this judgment, if applied for, be supplied to the respective parties upon fulfillment of requisite formalities.