**(2020) 09 DRT CK 0005**

**In the Debts Recovery Tribunal**

**Case No :** Original Application No. 426 Of 2015

M/s. Punjab National Bank — APPELLANT

Vs

M/s. Omr Check Point Enclave — RESPONDENT

**Date of Decision :** 11-09-2020

**Acts Referred:**

Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 — Section 13(2)

**Citation :** (2020) 09 DRT CK 0005

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

**Bench :** Single Bench

**Advocate :** E. Venkatesh Babu, M/s K. Jothilingam

**Final Decision :** Allowed

# Judgement

1. This Original Application has been filed by applicant bank against defendants for the recovery of an aggregate sum of Rs.45,31,962.36 (Rupees Forty Five Lakhs Thirty One Thousand Nine Hundred Sixty Two and Paise Thirty Six only) being Rs. 38,60,065/- due under Term Loan repayable together with interest thereon at the rate of 14.50% p.a. with monthly rests and Rs.6,71,897.35p due under Cash Credit (Hyp) repayable together with interest thereon at the rate of 14.00% per annum with monthly rests in respect of two loan accounts, from the date of filing of this O.A. till the date of realization, for costs of the application and to pass such other or further orders as this Tribunal may deem fit and proper in the circumstances of the case.

2. This O.A. was taken up for hearing on 13.08.2015. Summons were served on defendants. Counsel appeared on behalf of the defendants filed Reply Statement as well as Counter Proof Affidavit and contested the case on behalf of the defendants. Applicant bank filed its Proof Affidavit along with 19 documents, which were marked as Ex. A-1 to A-19. The O.A. was finally heard and stood over till this day for passing ex-parte final order.

3. The facts leading to filing of this O.A. may be tersely stated as follows :-

a) Defendants 2 & 3, who are the partners of 1st defendant firm, approached applicant bank for Cash Credit (Hyp) facility and Term Loan for the business of servicing of cars and other motor vehicles. Based on such request, applicant bank sanctioned Cash Credit (Hyp) facility of Rs.1,50,00,000/- and Term Loan of Rs.39,00,000/- to the defendants vide its Sanction Letter dated 25.09.2013 (Ex. A-1), by securing hypothecation of stocks, stores and spares of car repair items and receivables, shed, plant and machinery listed in the Schedule to the O.A.

b) For the said loan, defendants executed security and other loan documents in favour of applicant bank viz. Partnership Letter, Undertaking and Declaration dated 25.09.2013 (Ex. A-2), Agreement of Hypothecation of Assets dated 25.09.2013 (Ex. A-3), Agreement of Term Loan dated 25.09.2013 (Ex. A-4) and Common Agreement dated 25.09.2013 (Ex. A-5). Apart from the above, 3rd defendant has offered his property as security by deposit of title deeds and created equitable mortgage over the same and executed Memorandum of Deposit of Title Deeds dated 03.10.2013 (Ex. A-6) in favour of applicant bank.

c) After availing the loan, defendants committed default in repayment of above said loan and in spite of repeated requests and reminders, defendants wilfully neglected to repay the loan dues. Hence, applicant bank was constrained to invoke the provisions of SARFAESI Act by issuing a Demand Notice dated 01.11.2014 (Ex. A-7) under Section 13 (2) of the said Act. Fearing further proceedings, defendants 2 & 3 approached applicant bank seeking permission to sell the mortgaged property and undertook to deposit the sale proceeds as part payment in the loan accounts, which was accepted by applicant bank and thereby, a sum of Rs.1.68 Crore was realized by applicant bank. Thereafter, defendants acknowledged the outstanding dues to applicant bank vide their letter dated 29.12.2014 (Ex. A-8), followed by Balance & Security Confirmation document dated 13.01.2015 (Ex. A-10).

d) Since there was no response from defendants, applicant bank sent letters to defendants on 05.02.2015 (Ex. A-11) and 25.03.2015 (Ex. A- 12) demanding payment of outstanding amount. Instead of settling the dues, defendants 2 & 3 sent a notice through lawyer dated 09.04.2015 (Ex. A-13) to applicant bank disputing their liability, which was duly replied by applicant bank through their reply dated 24.04.2015 (Ex. A- 14). Subsequently, there were exchange of correspondences (Ex. A-15 to A-18) between the applicant bank and defendants through their counsels. However, the balance outstanding amount of applicant bank remains unpaid by defendants.

e) Hence, the above O.A. has been filed for recovery of a sum of Rs.45,31,962.36 (Rupees Forty Five Lakhs Thirty One Thousand Nine Hundred Sixty Two and Paise Thirty Six only) together with further interest thereon, as evidenced by the Statement of Accounts (Ex.A-19) filed along with the O.A.

4. Defendants filed their Reply Statement and also Counter Proof Affidavit in the

 

above O.A. denying and reiterating certain averments contained in the O.A., wherein, they have specifically stated as follows :-

a) The loan account could not be regularized due to fluctuation in market and unforeseen circumstances ;

b) Even though defendants requested applicant bank to restructure the loan and to give them time for settling the dues, applicant bank refused to listen to such request ;

c) Though defendants did not want to sell the property, they were forced by applicant bank that if defendants do not come for One Time Settlement, then bank would initiate SARFAESI proceedings, which would be very drastic ;

d) Even though the market value of the property would be about Rs.2 Crore, it fetched only Rs.1.68 Crore in the sale ;

e) Defendants disputed the claim of applicant bank by sending notice through their lawyer ;

f) After having issued a receipt acknowledging the payment in full, applicant bank is estopped from making fresh claim ;

g) Applicant bank should have filled up the blank signed papers, which were given for release of property

5. Counter Proof Affidavit is filed on behalf of defendants, reiterating the same contentions as raised in their written statement.

6. Defendants relied on the following case laws in support of their case:

(i) A.V. Rangacharya & Anr - Vs. - Pillanjinappa & Another reported in ILR 1999 Kar 1524

(ii) In re : Kuttadan Velayudhan & Others reported in AIR 2001 Ker 123

(iii) K.M. Shaffi - Vs.- Smt Dayamathi Bai reported in ILR 1999 Kar 3667

(iv) Karewwa & Others - Vs. - Hussensab Khansaheb Wajantri & Others reported in (2002) 10 SCC 315

(v) Krishna Mohan Kul & Another -Vs. - Pratima Maity & Others reported in (2004) 9 SCC 468

(vi) Ladli Prashad Jaiswal - Vs. - The Karnal Distillery Co. Ltd. & Others reported in AIR 1963 SC 1279

(vii) Lakshmamma & others - Vs. - M. Jayaram reported in AIR 1952 Mys 114

(viii) Mohammed Ewaz & Another - Vs. - Birj Lall & Another reported in (1876 -77) 4 IA 166

(ix) Noorjahan Bibi - Vs.- Abdul Wahab Rawther & Another reported in (1997) 1

 

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(x) Prem Singh & Others - Vs - Birbal & Others reported in (2006) 5 SCC 353

(xi) S.S.M. Soundappan & others - Vs. - K.G. Balakrishnan & others reported in (1997) 2 CTC 385

(xii) Selvaraju Kounder - Vs. - Sahadeva Kounder reported in AIR 1998 Mad 58

(xiii) Sri N.M. Ramachandraiah - Vs. - The State of Karnataka reported in AIR 2007 Kar 164

(xiv) Suguna & Another - Vs. - Vinod G. Nehemiah & Others reported in (2008) 5 Mad LJ 167

(xv) Vijaya College Trust - Vs. - Kumta Cooperative Arecanut Sales Society reported in AIR 1995 Kar 35

(xvi) Vishwanath Bapurao Sabale - Vs. - Shalinibai Nagappa Sabale reported in (2009) 12 SCC 101

(xvii) Sundaramoorthy - Vs. - R. Palanisamy in CRP (Pd) No.1982 of 2008

(xviii) R. Dennis Raja - Vs. - T. Subbiah in Cr. RC. (MD) No.582 of 2008

7. Points for Consideration :-

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

(ii) Whether the averment in the receipt that "the outstanding due from the defendants is discharged in full and that there are no dues from the defendants vide Receipt dated 12.01.2015 duly registered as Document No.170/2015" is binding upon the applicant bank?

(iii) Whether the contentions of the defendants asking for waiver of the balance of amount in view of the said statement in the Release deed dated 12.01.2015 is valid and tenable?

(iv) Whether bank had furnished documentary proof in support of its contentions for recovery of the balance amount due subsequent to the execution of registered release deed dated 12.01.2015?

(v) If so, to what relief?

8. Points :-

8.1 Both parties admit to the sanction, grant and utilisation of loan funds as described in the OA, both in the form of Cash Credit facility as well as Term Loan for the business requirements of defendants. It is also not in dispute that defendants fell in arrears of their repayment and their default persisted despite repeated requests and demands by the applicant bank to regularise their loan account. It is also on record that applicant bank as secured creditor, had invoked its mortgage rights subsisting over the immovable property under SARFAESI Act.

 

However, there appears to be a concluded sale, which was admitted and accepted by the defendants.

8.2 At the time of execution of release of registered mortgage, which is nomenclatured as Receipt executed on 12.01.2015 by the then Manager of Oriental Bank of Commerce, which subsequently merged into present applicant bank i.e., Punjab National Bank, in favour of the mortgagor Sh. S.Karuppasamy, S/o. Mr. K.Shanmugavel, who is the partner of first defendant partnership firm and the mortgagor herein, the averments therein read as follows:

"Mr. S. Karuppasamy, S/o. Mr. K.Shanmugavel residing at Flat No. 31, 3rd Floor, Ratna Apartments, No.35, Velachery Main Road, Velachery, Chennai-600 042 hereinafter called the Party of the Second Part WHEREAS THE part of the second part created a security over the Schedule mentioned property by way of Memorandum of Deposit of Title Deeds, in favour of the Party of the First Part, for a sum of Rs.1,89,00,000/- (Rupees One Crore Eighty Nine Lakhs Only) under the Deed of Memorandum of Deposit of Title Deeds, dated 03.10.2013 Document No. 5706/2013 in the Office of the Sub- Registrar, Velachery.

WHEREAS the Party of the First Part received the entire principal total amount for Rs.1,89,00,000/- (Rupees One Crore Eighty Nine Lakhs Only) with interest from the Party of the Second Part herein. This receipt of which, sum of the Party of the First Part both hereby admit, acknowledge the same and acquit the Party of the Second Part from any further payment and discharge thereof against the description of Schedule Property.

SCHEDULE"

8.3 These averments have now been taken by the defendants individually and independently of the total documents and being contested that the applicant bank had executed a registered instrument containing therein that it has received entire amount towards principal and that there are no dues payable from the defendants and therefore now contend for discharge of the entire OA claim as not repayable by the defendants. In continuation of the said line of defense, it is also their contention that since applicant had executed a registered document before a public authority admitting the averments as true and correct and discharging the defendants of any further liability and did not take any further steps either to amend the said registered instrument or seek cancellation or annulling or any other legal procedure to circumvent their admission, which now estops them from filing the present OA and also making any claims against defendants in the name of recovery. It appears both parties have exchanged legal notices in between them regarding the said issue. While it is the stand of the bank that the said Receipt executed was erroneous in averring total discharge of the debt due from the defendants, it is contested that defendants had executed Acknowledgment of Balance Debt and balance confirmation subsequent to the date of the said receipt and release deed i.e., after 12.01.2015. It is also their contention that the amount paid by the borrowers would satisfy only a part of the debt and therefore for the balance they had executed a letter therein in their own handwriting admitting the outstanding amount due from the defendants to applicant bank (Ex A-8 dated 29.12.2014), which reads as follows:-

"We confirm that the balance outstanding in the loan account of OMR Checkpoint after payment of Rs.1.68 Crore is Rs.40,83,108.36. We confirm to repay the balance dues by way of credit transactions in the account from business or sale of other property and also sale of stocks, equipments held by us. The bank may initiate legal action under SARFAESI and for filing suit under DRT to recover the amount outstanding in the loan accounts. We shall also confirm to operate this bank account and not to operate any other bank account henceforth."

8.4 This Ex A-8 dated 29.12.2014 confirms that borrowers are aware of the recovery of Rs.1.68 crores by sale of the property and that there is an outstanding balance of Rs.40,83,108.36p as on the said date of execution of letter i.e., 29.12.2014. The purported document dated 12.01.2015 nomenclatured as receipt contains an acknowledgment of Rs.1,89,00,000/- related to the original sanction of Rs.1.5 crores towards Cash Credit and Rs.39 lakhs towards Term Loan, thus aggregating to Rs.1,89,00,000/- which is admitted as received along with interest by the applicant bank.

8.5 A reading of Exhibit A-9 confirms that the amount mentioned therein is with regard to the discharge amount of the secured mortgage and not the amount recovered against the sale of mortgaged property. Thus, the amount of Rs.1,89,00,000/- reflecting in the said document relate to the amount that has to be cleared for release and discharge of the mortgage and not any amount that has been admitted to as paid by the borrowers, for the simple reason that the sale price of the mortgaged property admitted by both parties is only an amount of Rs.1.68 crores and not anything more. This fact prevents the defendants from taking a different stand on the surmise that there is an admission of discharge of full liability by the borrowers while on the contrary they admit in Exhibit A-8 that the sale and crediting of the proceeds of sale of the mortgaged property is only Rs.1.68 crores leaving a balance of Rs.40,83,108.36p. It only confirms the erroneous drafting of Exhibit A-9 nomenclatured as receipt creating a bubble of doubt, which is since dispensed by this explanation.

8.6 During the pendency of OA, defendants filed IA No.1093/18 praying to forward Ex A-10, being the Balance and Security Confirmation executed by defendants on 13.01.2015, to Forensic Experts for arriving at the age of ink as they are not disputing the signature but disputing the date of signature on it. Respondent / applicant bank filed their counter in IA. After hearing both parties, in the interest of justice, IA No.1093/18 was allowed vide proceedings dated 27.11.2018. However, when the said document was forwarded to Forensic Science Department, they returned the same stating that there is no technology or proposition of measuring the age of ink and hence they cannot do the same. In the circumstances, IA No.1093/18 was closed.

 

8.7 From the foregone contentions, the possible probability at the time of executing the alleged receipt before Sub Registrar on 12.01.2015, there could have been an objection that the receipt confirming the release can only be for the entire amount covered under the registered memorandum of deposit of deeds dated 03.10.2013, marked as Ex A-6, which was for a sum of Rs.1,89,00,000/- being the sanctioned amount and obviously the receipt must have been also executed for the said amount and a plain reading of the averments in Ex A-9 confirm that at the penultimate lines, "WHEREAS the Party of the First Part received the entire principal total amount for Rs.1,89,00,000/- (Rupees One Crore Eighty Nine Lakhs Only) with interest from the Party of the Second Part herein. This receipt of which, sum of the Party of the First Part both hereby admit, acknowledge the same and acquit the Party of the Second Part from any further payment and discharge thereof against the description of Schedule Property.", which concludes that the discharge is relating to the mortgage of immovable property as against which the whole amount for which the mortgage is created is mentioned as received, while it is the admitted case of both parties that by sale of the mortgaged property only a sum of Rs.1.68 crores has been realised(emphasis supplied). Defendants failed to explain as to whether the balance amount has been discharged by them and how they are rightful in presuming that as against an outstanding of Rs.2,08,83,108.36p as on 31.10.2014, an amount of Rs.1.68 crores would absolve them from their liability and discharge of the balance amount. It is also not explained as to what made them write in their handwriting confirming the balance outstanding due after discharge of Rs.1.68 crores. It is also not explained as to why they did not challenge the said amount of Rs.1.68 crores, as the sale value, if at all if their contentions are true that the property would fetch Rs.2 crores in the open market and that it has been sold for lesser value.

8.8 On consideration of the rival contentions of the parties, it is clear that on the default of borrowers / defendants, the mortgaged property has been sold and proceeds recovered as against which a discharge receipt has duly been executed by the applicant bank, discharging the said property from its mortgage while mentioning the mortgage amount of Rs.1.89 cores as the amount received by the applicant bank at the time of execution of the said receipt before SRO, which issue had led to this entire confusion and apprehension within the minds of defendants that their liability stood discharged, when in fact it is not so.

8.9 The case laws relied on by the defendants deal with different aspect and nothing related to the facts of this case either under the Evidence Act or under the Contract Act, as applicant bank had clarified its position after the alleged admission of receipt of entire consideration of Rs.1,89,00,000/- while the sale value is only Rs.1.68 crores and defendants did not have any answer about how a statement even if admitted to have been made by the bank would either absolve them or exonerate them from their liability, when it is their express case that they did not make any further payments beyond crediting the sale proceeds to their loan account, notwithstanding their own admission of debt due beyond

 

Rs.1.68 crores.

8.10 In the result, as there is debt due and liable to be discharged by defendants in favour of the applicant bank, present OA is liable to be allowed. However in the circumstances, there shall be no order as to interest since it is contested by defendants that substantial interest has already been discharged and further they had incurred heavy loss in their business which resulted in winding up of the same and levy of any interest would be overburdening the defendants. Points are answered accordingly.

9. In view of what has been discussed above, it is observed that applicant bank has proved its O.A. claim against defendants and applicant is entitled to a Recovery Certificate in O.A. in terms of the direction given below.

10. In the result :-

(a) Applicant is entitled for a Recovery Certificate as against defendants for a sum of Rs.45,31,962.36 (Rupees Forty Five Lakhs Thirty One Thousand Nine Hundred Sixty Two and Paise Thirty Six only) i.e., Rs.38,60,065/- due in respect of Term Loan facility and Rs.6,71,897.36p due in respect of Cash Credit (Hyp) facility, which remained unpaid from the date of this O.A. till the date of its realization with costs. No order as to interest.

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

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

(d) If sale proceeds are not found sufficient, after defraying expenses of such sale for the payment of all such amounts, defendants 2 & 3 are personally liable for the deficiency of adjudged amount with interest and costs until realisation.

(e) Schedule mentioned in the O.A. shall form part of Recovery Certificate.

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

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

 

(Dictated to PS, transcribed by her, corrected, signed and pronounced by me in Virtual Court, held through Video Conference this the 11th day of September, 2020)