

(2012) 02 AHC CK 0018

In the Allahabad High Court

Case No : Civil Misc. Writ Petition No. 8377 of 2012

M/s. Shyama Ice and Cold Storage (P) Ltd. and Others

APPELLANT

Vs

M/s. Syndicate Banks and Another

RESPONDENT

Date of Decision : 29-02-2012

Acts Referred:

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

Citation : (2012) 4 ADJ 452 : AIR 2012 All 87 : (2012) 3 BC 804 : (2012) 3 BC 573

Hon'ble Judges : Vineet Saran, J; Ashok Pal Singh, J

Bench : Division Bench

Advocate : Shashi Nandan and Manish Goyal, for the Appellant; P.K. Singhal, for the Respondent

Final Decision : Allowed

Judgement

1. The petitioner No. 1 had taken a loan from the respondent-Syndicate Bank for which the petitioner Nos. 2 to 7 were guarantors. There was default in payment of the loan amount. By order dated 3.4.2010 passed by the General Manager, Syndicate Bank, Agra the account of the petitioners was declared Non-Performing Asset (NPA). The said order was challenged by the petitioners by filing Writ Petition No. 21868 of 2010 in which initially an interim order was granted staying the operation of the order dated 3.4.2010 but the same was not extended subsequently. The said writ petition is still pending. In the meantime, on 15.10.2011, the petitioners filed an application for One Time Settlement (OTS) which was under active consideration of the Bank. However, simultaneously proceedings under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short Act of 2002) were initiated against the petitioners and a notice u/s 13 (2) of the Act of 2002 was issued on 30.1.2012. Challenging the said notice dated 30.1.2012, this writ petition has been filed with a further prayer for a direction to the respondents to consider and decide the One Time Settlement proposal of the petitioners dated 15.10.2011.

We have heard Sri Shashi Nandan, learned Senior Counsel, assisted by Sri Manish Goyal, appearing for the petitioners as well as Sri P.K, Singhal, learned counsel appearing for the respondent-Bank and have perused the record.

2. Two supplementary affidavits have been filed by the petitioners and a counter-affidavit to the averments made in the writ petition has also been filed by the respondent-Bank. Learned counsel for the petitioners has made a statement that the petitioners do not wish to file rejoinder-affidavit. Learned counsel for the Bank has stated that they do not wish to file any reply to the supplementary affidavits. With consent of the learned counsel for the parties, this writ petition has been taken up for hearing at this stage.

3. The submission of the learned counsel for the petitioners is that the notice u/s 13 (2) of the Act of 2002 is bad in law and liable to be-set aside as the proposal for One Time Settlement is under active consideration of the Bank and as such, without taking any decision on the said proposal of the petitioners for One Time Settlement, the Bank should not be permitted to initiate proceedings under the provisions of the Act of 2002. It is contended that the petitioners would not be in a position to give a proper reply to the notice u/s 13 (2) of the Act of 2002 as long as decision on the proposal for One Time Settlement is pending because they would not know as to on what terms and for what amount the Bank may or may not agree to a settlement with the petitioners. It is further submitted that the OTS proposal dated 15.10.2011 remained under active consideration of the Bank as would be clear from the communication of the General Manager of the Corporate Office of the Bank dated 22.12.2011 by which the petitioners were requested to discuss the proposal of One Time Settlement with the Regional Office of the Bank at Agra. Besides this, after riling of this writ petition and after notice had been served on the learned counsel for the Bank, a communication dated 2.11.2011 had been received by the petitioner on 13.2.2012 whereby the Bank has communicated to the petitioners that if the petitioners were really interested for One Time Settlement, a concrete proposal spelling out the terms of payment, including advance down payment should be submitted. On 21.2.2012 when the matter was last taken up and directed to be listed today, the petitioners were permitted to submit their fresh proposal in response to the communication dated 2.11.2011. It is stated that in pursuance thereof the petitioners have given their fresh proposal dated 25.2.2012 for One Time Settlement, which has been received by the Bank on 27.2.2012.

4. Sri P.K. Singhal, learned counsel for the respondent-Bank has, however, submitted that the proposal dated 15.10.2011 as well as one dated 25.2.2012 are not proper proposals under the One Time Settlement scheme of the Syndicate Bank and as such no action is required to be taken on the said proposals. He has thus stated that filing of such proposals would not amount to there being any valid proposals for One Time Settlement under the guidelines of the Bank and the submission of the petitioners that the proceedings under the Act of 2002 cannot be initiated because of the pendency of such proposal is

without any basis. He has further submitted that there is no bar in the Bank proceeding under the Securitisation Act of 2002 even if the One Time Settlement proposal is pending.

5. We have considered the rival submissions of the learned counsel for the parties and have perused the record.

6. From the record it cannot be said that the proposal of One Time Settlement of the petitioners is not pending with the Bank. The filing of the proposal/application dated 15.10.2011 is not denied. The pendency of the said application would be clear from the communication dated 22.12.2011 by which the petitioners have been requested by the Bank to discuss the matter further with the Regional Office with regard to One Time Settlement. Further by communication dated 2.11.2011 (received by the petitioners on 13.2.2012) the Respondent-Bank had required the petitioners to give concrete proposal spelling out terms of payment, meaning thereby that the matter of One Time Settlement of the petitioners was in active consideration by the bank officials.

7. Relying on the guidelines of the respondent-Bank, Sri Singhal states that along with the One Time Settlement application, the petitioners were required to deposit 25% of the amount on which the petitioners offered for settlement of the account. For this, he relies on Clause 5.11 of the Comprehensive Recovery Policy for Non-Performing Assets issued by the Corporate office of the Syndicate Bank. The said Clause 5.11 is reproduced below :

5.11. Down Payment :

A down payment of 25% of the offer amount shall be insisted from the borrowers at the time of entertaining the settlement proposals to ensure party's intention to pay the OTS amount. However relaxation in down payment not below 10% may be considered by the Regional Offices in respect of proposals with book balance above Rs. 1 lakh. The General Manager (Recovery) may permit the Regional Offices to accept the OTS proposals with out the down payment in deserving cases. Relaxation in down payment to any extent can be considered in the case of settlement proposals with book balance up to Rs. 1.00 lakh on case-to-case basis.

8. A perusal of the aforesaid clause would go to show that on the proposal for One Time Settlement being made by the borrower, the Bank is to insist on down payment of 25%. However, discretion is left with the Bank for making relaxation in down payment up to 10% by the Regional Office and in deserving case, by the General Manager, even on no down payment. The guidelines of the Reserve Bank of India in this regard are to the effect that the amount of settlement arrived at should preferably be paid in one lump sum, but in case the borrower is unable to pay the entire amount in one lump sum, at least 25% of the amount of settlement should be paid upfront and the balance amount of 75% should be recovered in installments within a period of one year together with interest at the existing Prime Lending Rate from the date of settlement up to the date of final

payment.

9. The guidelines of the Reserve Bank of India in this regard pre-supposes that the amount to be paid under the One Time Settlement has been arrived at and thereafter, to give effect to the said settlement, either the entire amount is to be paid in one lump sum or 25% immediately and balance 75% within one year. A perusal of Clause 5.11 of the policy of the Syndicate Bank also goes to show that the Bank should insist on 25% of down payment of the settlement proposal which may be relaxed by the Bank to 10% or even to nil. A joint reading of the Clause 5.11 of the guidelines of the Syndicate Bank and the guidelines of the Reserve Bank of India would make it clear that any amount which is to be deposited, whether it be 25% or 10% or even nil, would be of the amount to be paid under the One Time Settlement as may be arrived at between the parties. There cannot be a pre-condition to deposit 25% of the proposed amount at the time of making the proposal for One Time Settlement as the same would be against the guidelines issued by the Reserve Bank of India which are binding on all the scheduled banks, as has been held by the Apex Court in the case of Central Bank of India Vs. Ravindra and Others, and in the case of Sardar Associates and Others Vs. Punjab and Sind Bank and Others, .

10. From the above, it cannot be said that the proposal made by the petitioner on 15.10.2011, in which the second prayer was to waive the interest from the date of the account becoming NPA i.e. 31.3.2010 and the balance amount be realized from the petitioners as One Time Settlement, is not a valid proposal for the One Time Settlement under the guidelines issued by the Bank or the guidelines issued by the Reserve Bank of India. Even otherwise, at no stage the respondent-Bank has ever communicated to the petitioners that the said proposal of the petitioners was against the terms of the Bank's policy or the guidelines issued by the Reserve Bank of India. On the contrary, on 22.12.2011 the petitioner was required by the Bank to discuss the proposal for One Time Settlement with the Regional Office, meaning thereby that the matter was under active consideration. Further, in response to the communication of the respondent-Bank dated 2.11.2011 and during pendency of this writ petition, another proposal for One Time Settlement dated 25.2.2012 has also been filed and is pending decision.

11. The question which now arises for consideration of this Court is as to whether during the pendency of the proposal for One Time Settlement the Bank can proceed to take steps under the provisions of the Act of 2002. In our view, the same would not be permissible. On one hand the Bank would be communicating to the petitioners for arriving at One Time Settlement, for which purpose the borrower would be taking steps to ascertain as to what best amount he would be able to pay so that the matter may be settled, and on the other hand the Bank would be pressurizing the petitioners to arrive at the settlement by issuing notice u/s 13 (2) of the Act of 2002 and thereby threatening that their assets would be attached and sold under the provisions of the Act of 2002 for recovery of the

dues of the Bank.

12. Although there may not be a bar in the Bank proceeding under the Act of 2002 even when the One Time Settlement proposal is under active consideration, but permitting simultaneous proceedings against the borrower would amount to wielding the sword and the stick at the same time, which would not be appropriate. Even a defaulter has his rights. He can be proceeded against only in accordance with law. Merely because he has defaulted in payment of some installments would not mean that he should be dealt a double or multiple blow. If he has a right to have his One Time Settlement considered (as per the Reserve Bank of India guidelines) then during the pendency of such One Time Settlement proposal, initiation of recovery proceedings under the Act of 2002 will not be permissible. It is for the Bank to choose as to whether they are to proceed for One Time Settlement or they are to recover money from the borrower under the Act of 2002 or any other process. It is only after the Bank rejects the application for One Time Settlement (or if accepted and the borrower does not comply with the terms of settlement) that the Bank can proceed to recover the dues. As held by the Apex Court, the guidelines of the Reserve Bank of India have statutory force. The scheme for One Time Settlement is under the guidelines of the Reserve Bank of India, which would mean that the petitioners have statutory right for their application/proposal for One Time Settlement filed under the scheme for being considered by the Bank. It is for the Bank to assess the proposal of the borrower and then either reject or accept the proposal after negotiations but as long as the said proposal remains pending with the Bank, it would neither be proper nor permissible for the Bank to proceed to recover the amount from the borrower.

13. In such view of the matter, it is directed that the proposal of the petitioners dated 15.10.2011 and the one dated 25.2.2012 for One Time Settlement be considered by the respondent-Bank in terms of the guidelines issued by the Reserve Bank of India as expeditiously as possible. The notice u/s 13 (2) of the Act of 2002 issued on 30.1.2012 during the pendency of the proposal for One Time Settlement is hereby quashed. If the proposal of the petitioners for One Time Settlement is not accepted, the respondent-Bank shall thereafter be at liberty to issue fresh notice under the Act of 2002 and proceed against the petitioners, in accordance with law. This writ petition stands allowed to the extent indicated as above.