$~38

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

<u>*Decided on 23rd February, 2015*</u>

\+ W.P.(C) 1584/2015

P & R OVERSEAS PVT. LTD. & ANR ..... Petitioners
Through Mr. Pallav Saxena, Adv.

versus

AUTHORIZED OFFICER, ORIENTAL BANK OF COMMERCE & ORS ..... Respondents
Through Mr. Balvinder Ralhan, Adv. for R-1 and R-2
Ms. Isha Abrol, Adv. for R-3

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE R.K.GAUBA

<u>MR. JUSTICE S. RAVINDRA BHAT (OPEN COURT)</u>

%

1. Issue notice.

2. Mr. Balvinder Ralhan, Advocate accepts notice on behalf of respondent Nos. 1 and 2 and Ms. Isha Abrol, Advocate accepts notice on behalf of respondent No.3.

3. Learned counsel for the parties state that the matter can be disposed of finally at this stage.

4. The petitioner is aggrieved by an order dated 15.1.2015 of the Debt Recovery Tribunal whereby an application for stay of dispossession was refused. It contends that the DRT acted in error and that given its (the

petitioner's) financial constraints, it would be unable to approach the DRAT in view of the statutory mandate of having to deposit not less than 25% of the outstanding dues as a pre-condition for the hearing of the appeal. The petitioners, who had availed credit facilities and are customers of the second respondent (hereinafter referred to as "the OBC"), was confronted with a notice dated 24.1.2013 under Section 13(2) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act (SARFAESI Act). Its objections were rejected by OBC on 4.4.2013 and consequently the possession notice was issued on 6.5.2013. The petitioner thereafter approached the DRT challenging the sale notice. That order granted opportunity to the petitioners/borrowers to file a fresh application, if any, to the same cause of action in case further notice was issued. Consequently, OBC issued another sale notice of Rs.2.65 crores, scheduling the date of auction as 15.1.2015. The petitioner challenged this in MA No.02/2015 in SA No.55/2011 for recalling of the impugned order.

5. The petitioner- as observed earlier - continues to be a customer of the OBC, had availed various credit facilities, some of which are the subject matter of the present proceedings. They contend that on 24.11.2009 in the course of their business, they approached the OBC which sanctioned their request for issuance of a letter of credit to the extent of Rs.2 crores on *ad hoc* basis; the sanction letter mentioned that the letter of credit would be of Royal Bank of Scotland (RBS), Russia. The third respondent – ICICI Bank was appointed as the advising bank. Apparently, the petitioner alleges that the letter of credit (LC) issued was not of RBS, Moscow. The LC covering letter, however, mentioned that the LC was issued by Royal Bank of

Scotland. It is urged that in these circumstances, when the OBC as a negotiating bank, sent the LC to the RBS, Moscow on 22/23.1.2010, the latter returned it on 25/27.1.2010. It is seriously urged that this amounted to a breach of contract and that the petitioner hence could not be held responsible for negligence on the part of the respondents i.e. OBC and ICICI Bank. The petitioner makes two further submissions, i.e. even though the OBC arguably contended that it was unaware of the developments, nevertheless its further actions in sending the LC to Royal Bank of Scotland Alliance, on 28.1.2010, which was received by the letter on 3.2.2010 and not advising the petitioner, as to lack of any response by that bank in Moscow, led to considerable losses. The petitioner submits that this omission or failure to inform the response of the LC issuing bank, - which was bound to comply with UCP 600, which obliged the RBS Alliance to either accept or reject the LC within 5 clear working days, also amounted to negligence. Counsel contends that since the petitioner was unaware and kept in the dark as to the outcome and fate of the LC, which in the first instance, covered foreign consignment of the goods (tomato pulps and tomato pastes), it was put to considerable loss and secondly, the final consignment covering almost 70% of the value of transactions were dispatched on 24.2.2010. It was submitted that petitioners' counter claim is pending in the DRT and that requiring them to deposit further amounts as a pre-condition for hearing of the miscellaneous appeal would be inequitable and harsh.

6. Counsel for the respondents urged that the statutorily mandated remedy i.e. an appeal to the DRAT has to necessarily be availed of by the petitioners, according to the procedure mandate in the SARFAESI and that

besides this the OBC has already auctioned the property on 15.1.2015 and received 25% of the bid auction. Counsel highlighted that the OBC was obliged in terms of the auction notice, to accept the balance amount and confirm the highest bid within the time frame and that since third party equities have entered the petitioner ought not to be granted relief at this stage. It is submitted that all the allegations with respect to negligence are on merits and should not be gone into by this Court – over a matter which the DRT can only consider prima facie on the issue of merits. The third respondent also supports submissions made by the OBC.

7. This Court has carefully considered the submissions and gone through the various documents on record including the sanction letter dated 24.11.2009 of the OBC and some of the communication including the letters of the ICICI dated 23.5.2011 and the 28.05.2011. There is some substance and merit in the petitioner's subject matter; prima facie it was not aware as to the status of the LC issuing bank and was kept in the dark that in fact it was not RBS but Royal Bank of Scotland Alliance. In fact ICICI's letter states inter alia :

> *"Furthermore, kindly note that ICICI had duly advised the BIC Code/name of the Issuer i.e. BIC code as "RBSBRUMMXXX RBS, MOSCOW RU" and that prior to the shipment of the goods from India it was open for you or your Account/Bank negotiating Bank i.e. Oriental Bank of Commerce to have checked if at all the said BIC Code/name was indeed the code of the entity that was contemplated in the underlying contract, as well as it was incumbent upon you and the Negotiating Bank to check the LC before taking any action relying on the same."*

8. It is a matter of record that one of the petitioner's properties was sold

and the bank has already released Rs.1.4 crores. The residential property, being Noida property was the subject matter of the auction on 15.1.2015. Whilst the petitioner has been able to establish *prima facie* some merit in the submission and given that it also has substantial claim in the form of a counter claim against OBC and has further satisfied this Court as to the irreparable hardship suffered, at the same time, the Court is conscious that with the finalization of the sale is a forward step given that the OBC has accepted the final bid and thus confirmed it by accepting 25% of the bid amount, OBC too would be bound by the terms of contract to take over the property from the petitioners.

9. In these circumstances, while balancing the competing claims, equities and various interests of the parties this Court is of the opinion that the DRT should finally decide the merits of the MA 20/15 after considering all the documents and submissions of the parties; the ICICI and the OBC shall file written statements/replies along with supporting documents within two weeks from today before the DRT. DRT shall thereafter give such opportunity as is necessary having regard to the materials placed and decide the merits of MA within 6 weeks from today. During the pendency of the said matter, OBC shall intimate to the successful bidder its inability to hand over the possession and await final outcome of the proceedings before DRT. The OBC is directed not to realize payment of balance amount by the prospective buyers/successful bidders. It shall also keep the amounts received on account of the sale of the Noida property in an interest bearing fixed deposit account. In either event, the interest accruing on the said amount, shall accrue to the credit of the successful bidder. All rights and contentions of the parties on the merits of the case are expressly reserved.

Nothing stated in this order shall be considered as an expression on the merits of the rival submissions.

10. The writ petition is disposed of.

11. Order dasti under signature of the Court Master.

S. RAVINDRA BHAT
(JUDGE)

R.K.GAUBA
(JUDGE)

FEBRUARY 23, 2015
vld