

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 20.02.2017

CORAM:

THE HONOURABLE MR.JUSTICE S.MANIKUMAR
AND
THE HONOURABLE MR.JUSTICE M.GOVINDARAJ

W.P.No.3323 of 2017
W.M.P.No.3291 of 2017

M/s.Southern Polypet Pvt. Ltd.,
rep., by its Managing Director,
P.Prabhuram ... Petitioner

versus

1. The Chief General Manager,
IDBI Bank Ltd.,
No.115, Anna Salai,
P.B.No.805, Saidapet,
Chennai 600 015.
2. The A.G.M., & Branch Head,
IDBI Bank Ltd.,
No.1, Car Street,
Next to Jaya Hospital,
Sriperumbudur 602 105. .. Respondents

Writ Petition filed under Article 226 of the Constitution of India, to issue a Writ of Certiorari, calling for the records of the 2nd respondent in classifying the account as NPA and issuance of Demand Notice, dated 13.08.2015, vide it Reference No.168/IDBI/322/SPPL/2015-16, pertaining to the loan account of the petitioner and quash the same.

For Petitioner : Mr.R.Krishnamurthy,
Senior Counsel
for Mr.R.Udhaya Kumar

ORDER

(Order of the Court was made by S.MANIKUMAR, J.)

Writ petition is filed seeking for a Certiorari to quash the action of the Assistant General Manager and Branch Head, IDBI Bank Ltd., Sriperumbudur, 2nd respondent herein, in classifying

the account as NPA and issuance of Demand Notice, dated 13.08.2015, vide it Reference No.168/IDBI/322/SPPL/2015-16, pertaining to the loan account of the petitioner.

2. The petitioner is a Small Medium Enterprise, involved in the manufacture of PET perform unit at SIDCO Industrial Estate. On 09.04.2010, the petitioner-Company has availed a term loan of Rs.17 Lakhs along with cash credit, to the tune of Rs.30 Lakhs. However, the said facilities were duly secured by both primary and collateral securities and necessary loan documents were also executed for the entire sanction. It is brought to their notice that the Chief General Manager, IDBI Bank Ltd., Chennai, 1st respondent has secured more than the sanctioned facilities.

3. As there was a sudden and abnormal increase in the prices of raw materials, the petitioner approached the 1st respondent to increase the term loan by 30 lakhs and cash credit facility by 50 lakhs, since it was a fully secured loan. They also sought coverage under the MSME Scheme to extend benefits to them for their growth. Since there was no reply and the petitioner company had just started operation, they approached "The National Small Industries Corporation Limited" (In short "NSIC") to avail assistance under the "Raw material assistance Scheme, against issuance of Bank Guarantee, which was duly approved by NSIC. According to the petitioner, financial assistance by NSIC was beneficial, as the rate of interest charged by NSIC, ie., 10.75%, was relatively less than the rate charged by the respondent.

4. As the sanction by NSIC was against bank guarantee, the petitioner has once again requested the 1st respondent to issue bank guarantee, for which, the first respondent, vide email, dated 30.11.2010, affirmed to issue the same with a "Notwithstanding" clause. The said arrangement was accepted by NSIC. However, the 1st respondent was silent over the issue, despite various requests and reminders to provide the bank guarantee, in order to avail the facility sanctioned by NSIC. However, after a delay of one month, i.e., on 31.12.2010, the 1st respondent issued a sanction order, wherein, they had sanctioned only a term loan and not the bank guarantee. The 1st Respondent also did not accord any reason for non-sanction of the same, even after affirming to sanction the Bank Guarantee as Sub-limit to the cash credit limit.

5. According to the petitioner, despite various efforts to stabilize their financial crunch, they had suffered loss of business and reputation in the market, due to ill intent act of the 1st respondent and due to which, they were constrained to borrow heavily from external sources with exorbitant rate of interest. Thereafter, the petitioner had to increase promoter's

contribution in the form of equity share capital from 75 Lakhs to 160 Lakhs, in order to meet the shortfalls and to make prompt payments to the 1st respondent-Bank.

6. Thereafter, during August, 2012, the loan account was transferred from the Chief General Manager, IDBI Bank Ltd., Chennai, 1st respondent herein to the Assistant General Manager and Branch Head, IDBI Bank Ltd., Sriperumbudur, 2nd respondent herein. Facilities sanctioned earlier were consequently renewed and enhanced on 31.12.2010 and 30.07.2012 respectively, by the 2nd respondent, on the request of the petitioner, from time to time. Thereafter, the 1st respondent did not disburse the sanctioned facilities. The same was disbursed only in September 2012, i.e nearly 90 days, after the said sanction. Despite the delay in sanction, the respondent bank deducted a sum of Rs 12.5 lakhs towards overdues built during the delayed period, which resulted in further deficit to the petitioner's working capital requirement and fueled financial crunch, which continued as a vicious circle.

7. Thereafter, on 08.04.2013, the petitioner has sent a letter to the 1st respondent, requesting to reschedule their account and also to reduce the rate of interest by 1%, as they were unable to finance both the shortfalls in their business and the dues to the Bank. However, they received a letter, dated 4.06.2013 from the 1st respondent that their account has been classified as NPA and that they were directed to pay the overdues, within a period of 7 days, in order to avoid the account from being NPA, without informing the exact date of classification of the account as NPA.

8. According to the petitioner, as per the Master Circular on Lending to MSMEs, certain guidelines had been issued by RBI, directing the respondent-Bank, pursuant to the classifying of the account as NPA, especially of an SME account, with duty to assess the viability of the unit, not later than 3 months from the date of classification of the account as NPA and provide them with full rehabilitation package within 6 months thereon to make it potentially viable. However, no such steps were taken by the respondent-Bank on their own accord to assess the viability of the petitioner's unit.

9. The petitioner has further submitted that since their company was potentially viable at all times, except for the financial crunch, caused due to the aforementioned factors, on their own efforts, proved the viability of the company and further, pressed the respondent bank to consider their request to restructure, vide their letter, dated 11.07.2013, along with further enhancement to facilitate their business growth, seeking

shelter under the above stated RBI guideline. It was only after 6 months of their request to restructure and further follow ups, the respondent bank having satisfied with the same accepted their request to restructure the loan account along with additional funding. Finally, the account was restructured, vide sanction order, dated 10.10.2013. However, the same was disbursed once again with a delay of 60 days, with a deduction of Rs.13 lakhs towards the over due. The restructuring of the account and their terms, as per the sanction order, were as follows:

S.No.	Restructured Facility	Rate of Interest
1	RTL I - (Term loan of 104 lakhs)	BBR plus 550
2	RTL II - (Term Loan of 17.12)	BBR plus 550
3	RTL III - (Term Loan of 85 lakhs)	BBR plus 550
4	FITL for 37 lakhs	BBR plus 550

10. The petitioner has further submitted that the restructured account had a clause in the sanction order, which read that the rate of interest would be reset at the time of annual review. Therefore, pursuant to the restructuring, the petitioner-Company was paying an interest upto 17.5% approximately, which was higher than the rate of interest charged prior to the restructuring and are still paying this exorbitant rate. According to them, the respondent-bank has charged interest on Interest, under the guise of fresh Funded Interest Term Loan, which is violative of RBI guidelines, pertaining to "Interest Rate On Advances".

11. It is the contention of the petitioner-Company that the respondent had compounded penal interest of 2%, against the principles laid down by the Hon'ble Supreme Court. He further submitted that the classification of the account as NPA itself, is arbitrary and requires due consideration. Even assuming that petitioner's account had rightly been classified as NPA, the petitioner has questioned, as to why the respondent-Bank had compounded the penal interest, towards the due amount, which is also contrary to the Guidelines of RBI.

12. The petitioner has further submitted that the respondent bank, right from inception, was keen only in making them, transact with the bank and not opt for any other financial assistance anywhere. According to them, though it seemed that the Bank had at times considered their crisis and assisted them, like enhancement and restructuring, the Bank had only burdened them with exorbitant interest rates, with a tough repayment schedule, with intent to retain their account in the sub-standard NPA level itself. The respondent bank has failed to

consider the efforts taken by the petitioner with a lawful intent to repay their outstanding dues.

13. Pursuant to the notice issued on 4.06.2013, after the alleged classification of the account as NPA, the petitioners had been making payments to the possible extent and parallelly, were also negotiating with the Bank to settle the dues by sale of assets, in order to repay the outstandings and to regularize the account. However, the respondent-Bank has sent another notice on 11.11.2014, as "Notice for recalling Loans", despite considerable reduction, in the outstanding, from 4.06.2013, due to the continuous repayments made by the petitioner.

14. The petitioner has issued a letter, requesting the respondent-Bank to issue a NOC for sale of the secured asset at Saligramam and the same was accepted by the Bank only on 20.03.2015. Thereafter, the sale proceeds were also duly credited to the loan accounts. They had also resorted to various rounds of discussions and representations to consider reduction of rate of interest charged, pursuant to restructuring considering them, to be a MSME. They had also offered to settle the dues with bonafide intent to repay the outstanding. But there was no positive response from the Bank.

15. While the matter stood thus, the respondent-Bank issued a demand notice on 13.08.2015, calling upon the petitioners to repay a sum of Rs.4,01,00,697.35/-, together with interest from 01.08.2015. Aggrieved by the same, the petitioner sent a representation on 22.10.2015, seeking clarification on the payments made by the petitioner and a reply was sent on 23.10.2015. However, till date, they had remitted a sum of Rs.202.25 Lakhs, to the various loan accounts, after the same was crystallised by respondent, vide their notice, dated 04.06.2013, subsequent to the alleged classification of the account as NPA.

16. The petitioner has further submitted that the respondent adjusted a sum of Rs.1,46,54,872/- towards the interest and a paltry sum of Rs.55,82,445/- towards principal, which is due to the illegal charge of exorbitant rate of interest after restructuring. Since the 2nd respondent-Bank had been claiming exorbitant out-standings, despite payment of Interest and Principal. Therefore, the petitioner has once again issued a detailed representation on 09.12.2016, setting out the various lapses and deficiencies, committed by the respondent-Bank, in discharge of their service and requested the 2nd respondent-Bank to accept their OTS proposal, under the OTS Scheme, formulated by RBI for the SMEs, to settle the outstanding dues, which would be arrived upon calculation of

reasonable rate of interest, without prejudice to the rights to challenge the deficiency before appropriate forum.

17. However, on 30.01.2017, the petitioner received an e-mail from the 2nd respondent-Bank, a reply to the representation, dated 9.12.2016, sent by the petitioner. In reply to the e-mail, dated 30.01.2017, the 2nd respondent Bank admitted the receipt of the notice on 21.12.2016, but replied to the same only on 30.01.2017. Despite the delay in responding to the petitioner's representation, the 2nd respondent-Bank has not established any valid reason, refuting the various laches and deficiencies pointed out by them. According to the petitioner, in para 5 of the reply, dated 30.01.2017, the 2nd Respondent Bank further stated that they are not agreeable for non charging of compounded penal interest, which is per se contra to the RBI Guidelines and principles laid down by the supreme court.

18. Assailing the correctness of the demand notice, issued under Section 13(2) of the SARFAESI Act, the petitioner has raised following grounds,

"1. The Respondent Bank had from the date of sanction of the loan account acted in an arbitrary manner and had not discharged its duty towards its customer as per the RBI Guidelines.

2. The Respondent Bank had committed deliberate violation of the rules laid down by the RBI and also the terms set out in the sanction order which is a gross violation of Principles of Natural justice. To substantiate, it is submitted that, the Respondent Bank had committed the following violations:-

(i) The Respondent Bank pursuant to the first sanction in 2010 had not reviewed the loan account as per the Terms set out in the sanction order.

(ii) The Respondent Bank had without any reason refused to issue Bank Guarantee against the sanction of facilities from the NSIC to the Petitioner herein.

(iii) The Respondent Bank without review of the loan account and without admitting to the fact that the account was a fully secured loan under -sanctioned the facility in December 2010.

(iv) The Respondent Bank had at this point violated the principles laid down by the RBI in their Master Circular on SME lending, dated 01.07.2006, that the Banks should assist in promoting the growth of MSMEs.

(v) The Respondent had not disclosed the rate of interest charged to the sanctioned facilities neither intimated the Petitioner of their revision from time to time.

(vi) The Respondent had caused inordinate delay in disbursing the sanctioned facilities and had also illegally deducted from the sanctioned amount as interest towards the delayed period.

(vii) The Respondent also charged exorbitant rate of interest for the restructured facilities.

3. The 1st Respondent Bank had violated the RBI Guideline dated 2.07.2012 in RBI/2012-13/70 DBOD.No.Dir.BC.5/13.03.00/2012-13 wherein pursuant to the sanction in April 2010, the Bank's were to charge interest based on the BBR which was introduced by the RBI w.e.f July 2010. However, the sanction orders did not specify the Rate which were to be charged by the Respondent Bank. The non mention of the same is in violation of Para 2.2.1 and 2.24 of the aforementioned Guideline under the head "Base Rate" which reads as follows:-

"2.2.1 The Base Rate system has replaced the BPLR system with effect from July 1, 2010. Base Rate shall include all those elements of the lending rates that are common across all categories of borrowers. Banks may choose any benchmark to arrive at the Base Rate for a specific tenor that may be disclosed transparently"

((2.2.4- There can be only one Base Rate for each Bank. Banks have the freedom to choose any benchmark to arrive at a single Base Rate which should be disclosed transparently.

4. The Respondent Bank's base rates are subject to period revision and it is the duty of the bank to inform its customers of their revised rate that would be charged to them based on the revision. This is mandatory as the revision automatically alters the payment schedules of the customers. However in the present case, the Respondent Bank had intimated only in 2011 about the said revision to the Petitioner In an email and thereafter the Petitioner was not in receipt of any intimation. However, the statement of accounts would elucidate that there had been a periodic revision in their rates which is violative of RBI notification on "Floating of Interest of Loans" under the head of "Guideline" dated 2.07.2012 In RBI/2012-13/70

DBOD.No.Dir.BC. 5 /13.03.00/2012-13,Para 2.4 which reads as:-

Banks have the freedom to offer all categories of loans on fixed or floating rates, subject to conformity to their Asset-Liability Management (ALM) guidelines. The methodology of computing the floating rates should be objective, transparent and mutually acceptable to counter parties. The Base Rate could also serve as the reference benchmark rate for floating rate loan products, apart from external market benchmark rates. The floating interest rate based on external benchmarks should, however, be equal to or above the Base Rate at the time of sanction or renewal. This methodology should be adopted for all new loans. In the case of existing loans of longer / fixed tenure, banks should reset the floating rates according to the above method at the time of review or renewal of loan accounts, after obtaining the consent of the concerned borrower / s."

Further, as mentioned in Guidelines on Fair Practices Code for Lenders issued by RBI in DBOD. Leg. No. BC. 104 /09.07.007/2002-03 dated May 5, 2003 under Clause (iii) of head "Guidelines" which reads as:

"Disbursement of loans including changes in terms and conditions:

Lenders should ensure timely disbursement of loans sanctioned in conformity with the terms and conditions governing such sanction. Lenders should give notice of any change in the terms and conditions including interest rates, service charges etc. Lenders should also ensure that changes in interest rates and charges are effected only prospectively. "

5. The Respondent Bank while advancing facilities to a SME ought to follow the guidelines issued by the RBI in order to facilitate smooth credit flow to minimize the incidence of sickness and enhance the competitiveness of the company. However, except the first sanction, the Respondent Bank had not ensured timely and smooth flow of credit for the enhancements on 30.07.2012 and 10.10.2013 to facilitate the growth but in turn had burdened the Petitioner by disbursing the under sanctioned facility with inordinate delay which crippled the growth from the start level.

6. The Respondent Bank had committed violation of the guidelines laid down on Fair Practices Code for Lenders issued by RBI by causing delay in disbursement. Moreover, the Respondent Bank had also deducted monies even before the disbursement from the sanctioned facilities for the delayed period.

7. That even after the restructuring, the Respondent had charged exorbitant rate of interest which is violative of Para 2.3.1.3 of Master Circular - Interest Rate on Advances dated July 1, 2011.

8. The Respondent Bank had not till date disclosed the date of classifying the account of the Petitioner as NPA except for the notice on 4.06.2013, wherein the Respondent Bank had only mentioned the overdue at that point as the account had become NPA to be paid in order to regularize the account.

9. The Respondent Bank failed to consider the representation of the Petitioner to restructure their loan account as on 8.04.2013 and thereby claimed to have fallen into NPA as on 4.06.2013. Had the Respondent Bank considered the request and accorded their sanction much earlier the account could not have slipped into NPA. The Respondent Bank deliberately caused the account to fall into NPA and approved the restructuring thereafter only on 10.10.2013.

10. The Respondent Bank had again violated the Guidelines issued by the RBI under the Master Circular - Lending to MSME, wherein it is mentioned that the Banks are duty bound to assess the viability of the units within three months of classifying of the account as NPA. However, the Respondent Bank had not submitted any papers to show that they have assessed the viability. It is only on further request sent by the Petitioner vide their letter dated 11.07.2013, the Respondent Bank has restructured with additional funding on October 2013.

11. The Respondent Bank had deliberately held the account at the substandard level itself despite the making of payments as and when demanded by the Respondent Bank. The Bank had demanded an overdue of Rs 65 lakhs as per the notice dated 4.06.2013. Thereafter, another recall notice was issued on 11.11.2014 wherein it has specified that the overdue is 57 lakhs which means that the Petitioner had made substantial payments to upgrade the loan account. However the same had not been done so far.

12. The Petitioner submits that pursuant to the Recall Notice, the Petitioner remitted a sum of Rs 34,70,000/- as on 8.01.2015. Moreover, the Petitioner also remitted another 30,00,000/- into the account as advance against sale of one the secured asset and

sought for NOC from the Respondent Bank. Fearing that the account would be upgraded the Respondent Bank gave their NOC for the sale only in March 2015. This proves to show that the Respondent Bank had been keen on maintaining the account of the Petitioner at the NPA level itself to earn profits.

13. The Respondent Bank failed to provide any reasonable grounds for the delay in issuing the Demand Notice dated 13.08.2015 which means to show that though the account was upgraded lot of occasions by the Petitioner, the Respondent Bank deliberately held it at the substandard level to earn profits.

14. The Respondent Bank erred in not considering the various requests of the Petitioner to reduce the rate of interests which ought to have been acceded as per Master Direction - Reserve Bank of India (Interest Rate on Advances) Directions, 2016 wherein Clause 5 reads as under:-

"Banks shall formulate a Board approved policy for charging penal interest on advances which shall be fair and transparent. The rate of penal interest shall be decided after taking into account incentive to service the debt and due regard to genuine difficulties of customers".

The Respondent Bank having been vested with the right to reduce or waive the penal interest had not considered despite the difficulty of the Petitioner".

15. The Respondent Bank had not considered the sum of Rs.2,02,26,825.00 remitted by the Petitioner after the alleged classification as NPA and had illegally adjusted the major portion of the payments only towards interest which ought not to have levied as per the RBI Circular.

16. The Respondent Bank having failed deliberately in its duty to consider the critical situations of the Petitioner and having harassed the Petitioner of their various laches and negligent act are liable to have the Petitioner compensated for the loss incurred due to such an act.

17. The 2nd respondent-Bank vide its reply dated 30.01.2017 erred in not considering the various laches and deficiencies committed by the 2nd respondent-Bank and had barely denied the averments mentioned in the

petitioner's representation dated 9.12.2016 without quoting any valid reason for such denial.

18. Moreover, In the reply dated 30.1.2017, the 2nd respondent-Bank had categorically admitted the commission of certain deficiencies such as delay in review of facilities and disbursement and also the compounding of penal interest, which proves to show that the 2nd respondent-Bank had indeed acted in an arbitrary and negligent manner in discharging its duties towards its customers.

19. The rejection of the OTS proposal by the 2nd respondent-Bank is high handed, arbitrary and violative of the Guidelines issued by the RBI under the OTS Scheme for SME Accounts, wherein the Respondent Bank ought to consider the proposal in order to facilitate simplified settlement mechanism for the SME accounts."

Heard Mr.R.Krishnamurthy, learned Senior Counsel appearing for the petitioner and perused the materials available on record.

19. Question as to the manner of classification of the account as Non-Performing Asset, has been challenged in this writ petition. When Section 13(2) notice has been issued, it is always open to the petitioner to send a reply, under Section 13 (3) of the Act. Notice under Section 13(2) is only a demand made by the Bank and the Hon'ble Supreme Court in *Mardia Chemicals v. Union of India* reported in AIR 2004 SC 2371 : 2004(4) SCC 311 has held that notice under Section 13(2) would not give rise to a cause to challenge. However, as per Section 13(3A) of the SARFAESI Act, 2002, if, on receipt of the notice under sub-section (2), the borrower makes any representation or raises any objection, the secured creditor shall consider such representation or objection and if the secured creditor comes to the conclusion that such representation or objection is not acceptable or tenable, he shall communicate within one week of receipt of such representation or objection the reasons for non-acceptance of the representation or objection to the borrower. Proviso to the said Section states that the reasons so communicated or the likely action of the secured creditor at the stage of communication of reasons shall not confer any right upon the borrower to prefer an application to the Debts Recovery Tribunal under section 17 or the Court of District Judge under section 17A.

20. In the light of the above decision and the statutory provision, writ of certiorari, cannot be issued.

21. Hence, the writ petition is dismissed, giving liberty to the petitioner to challenge the sale notice, in the manner known to law. No costs. Consequently, the connected Writ Miscellaneous Petitions are closed.

Sd/-
Asst.Registrar (CS II)

/true copy/

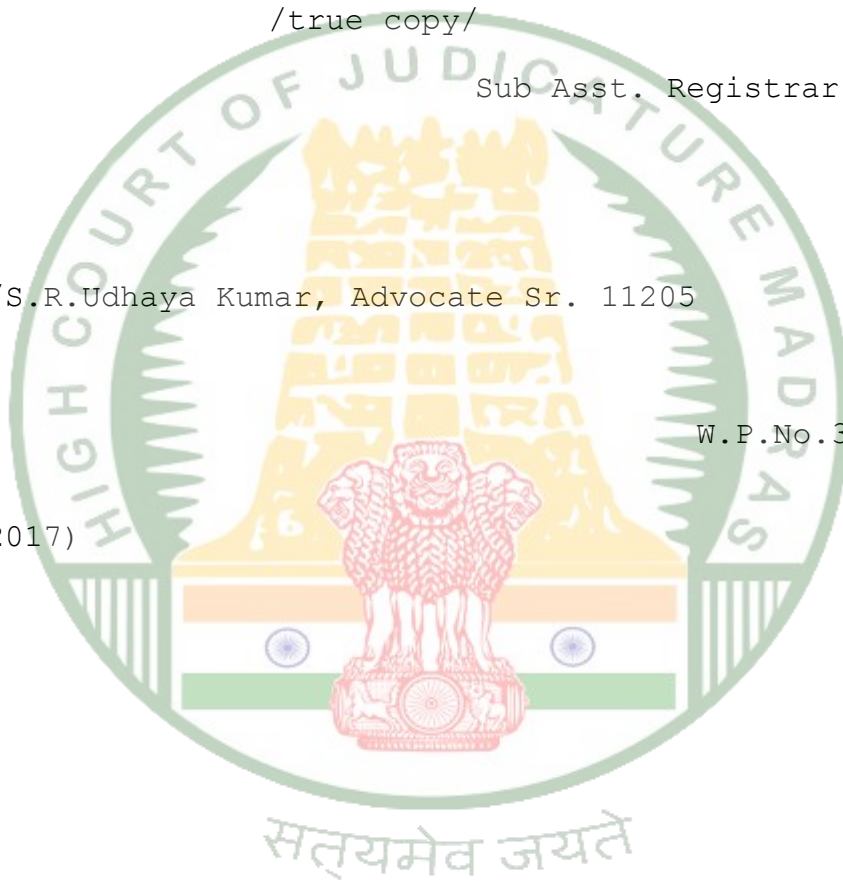
Sub Asst. Registrar

skm

+1cc to M/S.R.Udhaya Kumar, Advocate Sr. 11205

W.P.No.3323 of 2016

GMI (CO)
VR(19/09/2017)



WEB COPY