

**IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELANGANA AND THE STATE OF
ANDHRA PRADESH**

Writ Petition Nos.28071 and 28106 of 2016

W.P.no.28071 of 2016:

M/s.Swetha Exports rep. by its Prop:Dr.B.Srinivasa Rao
.... Petitioner

v.

1. Bank of India & Anr.
.... Respondents

DATE OF JUDGMENT PRONOUNCED: 22.09.2017.

SUBMITTED FOR APPROVAL:

**THE HON'BLE THE ACTING CHIEF JUSTICE RAMESH RANGANATHAN
AND
THE HON'BLE MS. JUSTICE J.UMA DEVI**

1. Whether Reporters of Local newspapers may be allowed to see the Judgments? --
2. Whether the copies of judgment may be marked to Law Reports/Journals - Yes -
3. Whether Their Ladyship/Lordship wish to see the fair copy of the Judgment? - Yes -

RAMESH RANGANATHAN, ACJ

*** THE HON'BLE THE ACTING CHIEF JUSTICE RAMESH RANGANATHAN
AND
* THE HON'BLE MS. JUSTICE J.UMA DEVI**

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!Counsel for Petitioner: Sri P.S.Rajasekhar

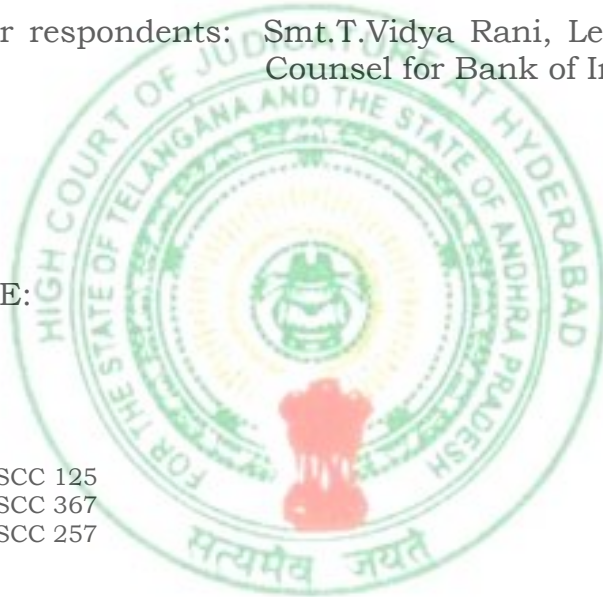
^ Counsel for respondents: Smt.T.Vidya Rani, Learned Standing
Counsel for Bank of India.

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> HEAD NOTE:

? Citations:

1. (2008) 1 SCC 125
2. (2002) 1 SCC 367
3. (2009) 8 SCC 257



THE HON'BLE THE ACTING CHIEF JUSTICE RAMESH RANGANATHAN

AND

THE HON'BLE MS. JUSTICE J.UMA DEVI

Writ Petition Nos.28071 and 28106 of 2016

COMMON ORDER: (Per the Hon'ble the Acting Chief Justice Ramesh Ranganathan)

In these two Writ Petitions, M/s. Swetha Exports and M/s. Swetha Exports India Pvt. Ltd have sought a mandamus to declare the action of the respondents, in taking recourse to the provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short the "SARFAESI Act") to execute the recovery certificate issued by the Debts Recovery Tribunal, Visakhapatnam ("DRT" for short) in O.A.Nos.46 and 50 of 2013 against the petitioners, as illegal and arbitrary; and to declare the action of the respondents, in issuing letter dated 08.08.2016 rejecting the petitioners' representation dated 24.06.2016 and cancelling the One Time Settlement (OTS) granted vide proceedings dated 19.01.2016, as arbitrary and illegal. The petitioners seek a direction to the respondents to adhere to the OTS granted by them to the petitioners vide proceedings dated 19.01.2016, and to co-operate with them by partially releasing the secured assets proportionate to the payment made by them.

The petitioners are carrying on business in the manufacture and export of buffalo and ox horn button blanks ever since 2001. The petitioner in W.P.No.28071 of 2016 obtained an Export Packing Credit and Rupee Advance against bills sent for collection, from the 1st respondent-bank, through the 2nd respondent for various limits which stood at Rs.7.10 Crores as on 09.04.2008. The debt, secured by creating equitable mortgage of 12 items of

immovable property owned by the proprietor of the petitioner and his family members, was declared a Non-Performing Asset on 31.03.2012. The 2nd respondent issued a notice, under Section 13(2) of the SARFAESI Act on 07.07.2012, demanding payment of Rs.7,27,93,768.64 ps. Thereafter, the 2nd respondent issued a demand notice dated 08.01.2013 calling upon the petitioners to pay the amount due of Rs.7,13,00,000/- as on 31.03.2012. The 1st respondent initiated recovery proceedings under Section 19 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (hereinafter called the "RDDB Act") filing O.A.No.46 of 2013 on the file of the DRT for recovery of Rs.8,33,10,044.37 ps. Certificate dated 02.05.2014 was issued for recovery of Rs.9,17,41,263.37 ps, and was forwarded to the Recovery Officer, for realisation of the amount due, under Sections 25 to 29 of the RDDB Act. The Recovery Officer issued notice dated 15.05.2014, in R.P.No.60 of 2014 in O.A.No.46 of 2013, demanding the amount due, and the petitioner was informed that, if they failed to make payment, the amount would be recovered under Sections 25 to 29 of the RDDB Act, the 2nd and 3rd Schedules to the Income Tax Act, 1961 and the Rules made thereunder.

Thereafter the 2nd respondent issued notice dated 15.07.2015, under Section 13(4) of the SARFAESI Act r/w Rules 8 and 9 of the Security Interest (Enforcement) Rules, 2002 (hereinafter referred to as the "Rules") with respect to 12 items of immovable property furnished as security by the petitioners. The said notice referred to the amount due as Rs.9,17,41,263.37 ps which the petitioners claim is exactly the same amount as is

referred to in the recovery certificate issued by the DRT. The 2nd respondent issued sale notice dated 09.10.2015, under Rule 8(6) of the Rules, stating that Rs.9,17,41,263.37 ps. was due. The date of sale was fixed as 23.11.2015, and the reserve price at Rs.529.39 Lakhs for the 12 items of immovable property. The petitioner claims to have informed the 2nd respondent to defer the sale as the reserve price was very low. Thereafter, the 2nd respondent issued another sale notice, under Rule 8(6) of the Rules, dated 26.10.2015 proposing to conduct a sale on 03.12.2015 and 04.12.2015. In the sale notice, the 2nd respondent stated that the amount due was as decreed by the DRT in O.A.No.46 of 2013 which was the subject matter of recovery in R.P.No.60 of 2014. The 2nd respondent fixed the reserve price at Rs.520.09 Lakhs for the 12 items of immovable property.

The sale notice dated 26.10.2015 was subjected to challenge by the petitioner in S.A.No.252 of 2015 filed before the DRT under Section 17 of the SARFAESI Act. The petitioner claims to have made a representation to the 2nd respondent on 04.11.2015 seeking to settle the amounts due, both by it and by its sister concern, on a one time payment of Rs.1205 Lakhs, and to have informed that 10% thereof i.e Rs.120 Lakhs would be paid upfront after receiving consent for the OTS. The petitioner's request was rejected by the 2nd respondent by their letter dated 06.11.2015 on the ground that the upfront amount of 10% was not paid along with the offer letter dated 04.11.2015.

By its order in S.A.No.252 of 2015 dated 18.11.2015, the DRT directed the petitioner to deposit Rs.60 Lakhs on or before 03.12.2015 and a further sum of Rs.60 Lakhs on or before

14.12.2015 (totalling to Rs.120 lakhs representing 10% of the OTS offer). Upon such deposit, the respondent-bank was directed to defer the proposed sale, consider the OTS proposal, and convey their decision on or before 17.12.2015. As the petitioner had expressed its willingness to make payment of the entire OTS offer of Rs.1205 lakhs on or before 31.03.2016, the respondent-bank was directed to grant them time and consider the OTS proposal. The DRT made it clear that, in the event of failure of the petitioner to deposit the upfront amount of Rs.120 Lakhs, the respondents were at liberty to proceed and take action in accordance with law. The petitioner complied with the order of the DRT, and deposited Rs.60 Lakhs on 02.12.2015, and the remaining Rs.60 Lakhs on 13.12.2015, totalling to Rs.120 Lakhs with the 2nd respondent. The 2nd respondent, vide letter dated 19.01.2016, accepted the petitioner's request for OTS on a one time payment of Rs.12.71 Crores on condition that the properties would be released only after full and final payment of the OTS amount.

The petitioner informed the 2nd respondent, by their letter dated 20.01.2016, that their commitment under the OTS could be complied with only if their properties were released proportionate to the payments made; as they had already paid a sum of Rs.120 Lakhs as the upfront amount for OTS and, if the 2nd respondent released property worth 40% thereof i.e Rs.48 Lakhs, the petitioner would sell the same for a higher amount than the upset price fixed, and make payment to the respondents; and, in this manner, they would be able to liquidate the entire amount of OTS within the time fixed by the DRT i.e. 31.03.2016. The petitioner offered two cheques bearing Nos.092460/005151 dated 25.02.2016 for Rs.700

Lakhs and 092461/005152 dated 25.03.2016 for Rs.451 Lakhs along with their letter dated 28.01.2016 towards full payment of the OTS amount. They requested the respondents to release partial security, at least to the extent of 40% of the amount paid, to enable them to honour their commitment. The 2nd respondent, vide letter dated 25.02.2016, rejected the petitioner's request for partial release of the properties, and again issued a sale notice dated 05.04.2016, and an e-auction sale notice dated 16.04.2016, under Rule 8(6) of the Rules proposing to conduct sale of the 12 items of immovable property on 17.05.2016 fixing the reserve price at Rs.529.39 Lakhs.

The petitioner challenged the validity of the e-auction sale notice dated 16.04.2016 in W.P.No.16243 of 2016. They filed I.A.No.206 of 2016 in S.A.No.252 of 2015 before the DRT for restoration of the OTS proposal. The DRT, by its order dated 12.05.2016, directed the respondent-bank to allow inspection of the original title deeds to the probable buyers brought by the applicants, and to allow sale of property to the buyers arranged by the applicants. The DRT opined that, in this manner, the respondent-bank would be able to recover its dues directly from the petitioner which, in turn, would get more value for their properties. The petitioner was directed to pay Rs.10 Lakhs within one week from the date of the order, the respondent-bank was directed to allow inspection of the original title deeds to the probable buyers brought by the petitioner, accept the amount paid by the petitioner or by the probable buyers, and to co-operate with the petitioner in the sale of the secured assets to the buyers arranged by them. The OTS amount of Rs.12.71 Crores was

directed to be accepted on payment of interest thereon upto 30.06.2016. The petitioners were directed to arrange buyers, and pay the OTS amount along with interest upto 30.06.2016. The DRT directed that, on payment of Rs.10 Lakhs within one week, the respondent-bank should defer the sale to be held on 18.05.2016, and allow time to the applicants to clear the dues upto 30.06.2016 by sale of the properties themselves; and, if the petitioner failed to pay Rs.10 Lakhs within one week and in case the OTS amount along with interest, even after showing the original title deeds to the petitioners and their probable buyers, was not paid, the respondent-bank was at liberty to proceed with the sale of the properties after 30.06.2016. With these observations, S.A.No.262 of 2015 was finally disposed of.

The petitioner paid Rs.10 Lakhs on 15.05.2016 and, on the ground that the respondents were directed by the DRT to defer the sale, they withdrew W.P.No.16243 of 2016 on 19.05.2016. The 2nd respondent, vide letter dated 31.05.2016, informed the petitioner that it was not possible to show the original title deeds as the same had been deposited with the recovery officer in the recovery proceedings; and the petitioner may arrange for its inspection, by the prospective purchasers, at the DRT. By their representation dated 24.06.2016, the petitioner informed the 2nd respondent that, as the time fixed by the DRT was due to expire by 30.06.2016, they may be permitted to sell the properties one by one. They undertook to pay at least 50% more than the reserve price fixed for each property. The 2nd respondent, by its letter dated 08.08.2016, rejected the petitioner's request. The proceedings issued earlier, accepting their OTS offer, was also cancelled. The action of the

respondents, in taking recourse to the provisions of the SARFAESI Act, and in issuing letter dated 08.08.2016, are under challenge in these Writ Petitions.

The debt of the petitioner, in W.P. No.28106 of 2016, was declared a non-performing asset on 29.07.2011. The second respondent-bank issued notice dated 02.12.2011 under Section 13(2) of the SARFAESI Act demanding payment of Rs.12.86,85,448/-. A possession notice, under Section 13(4) of the SARFAESI Act, was issued on 20.10.2012. Thereafter the second respondent-bank issued a notice on 08.01.2013 demanding payment of Rs.12.88 crores due as on 27.07.2011. The first respondent initiated recovery proceedings under Section 19 of the RDDB Act filing O.A. No.50 of 2013 for recovery of Rs.15,98,44,277/-. The said O.A. was allowed by the DRT on 16.06.2014, and a certificate was issued on 23.07.2013 for recovery of a sum of Rs.18,59,29,683/-. The certificate was forwarded to the Recovery Officer, for realisation of the amount due, under Sections 25 to 29 of the RDDB Act. The Recovery Officer issued notice on 25.08.2014, in R.P. No.107 of 2014 in O.A. No.50 of 2013, demanding payment of the amount due, failing which recovery would be made under the provisions of Sections 25 to 29 of the RDDB Act, the II and III Schedules to the Income Tax Act, 1961, and the Rules made thereunder.

Thereafter the second respondent-bank issued a notice on 05.11.2015, under Section 13(4) of the SARFAESI Act, read with Section 8(6) of the Rules in respect of six items of immoveable property, proposing to conduct a sale on 14.12.2015. In the sale notice, the second respondent-bank stated that the amount due

was as decreed by the DRT in O.A. No.50 of 2013 which was the subject matter of recovery in R.P. No.107 of 2014. The second respondent-bank fixed the reserve price as Rs.161.64 lakhs for the six items of immovable property. The second respondent-bank again issued E-auction sale notice, under Section 8(6) of the Rules, on 09.11.2015. The petitioner claims that a representation was submitted by their sister concern to the second respondent-bank on 04.11.2015 to settle the amounts due by them, and for a one time payment of Rs.12.5 crores, and that 10% upfront amount of Rs.120 lakhs would be paid after receiving consent for OTS. The petitioners' OTS request was rejected by the second respondent-bank, by its letter dated 06.11.2015, on the ground that the upfront amount of 10% had not been paid along with the offer letter dated 04.11.2015. The DRT, by order in S.A. No.252 of 2015 dated 18.11.2015, directed the petitioner to deposit Rs.120 lakhs (Rs.60 lakhs on or before 03.12.2015 and the balance Rs.60 lakhs on or before 14.12.2015). On such deposit, the respondents were directed to defer the proposed sale, consider the one time settlement proposal, and convey their decision on or before 17.12.2015. Taking note of the petitioner's offer to settle the debt on or before 31.03.2016, the DRT directed the respondent-bank to grant them time, and to consider their one time settlement proposal. The DRT observed that, in the event of the petitioners failure to deposit the upfront amount, the respondents were at liberty to proceed in accordance with law. The petitioner deposited the said sum of Rs.120 lakhs within time. By its proceedings dated 19.01.2016, the second respondent-bank accepted the proposal, for a one time settlement, of Rs.1270 lakhs, on condition

that the mortgaged properties would be released after full and final payment of the OTS amount. The petitioner submitted its representation on 20.01.2016 informing the respondent-bank that the commitment, under OTS, could be complied with only if the second respondent released the properties proportionate to the payments made. They offered two cheques i.e cheque dated 25.02.2016 for Rs.700 lakhs and cheque dated 25.03.2016 for Rs.451 lakhs, under covering letter dated 28.01.2016, towards full payment of the OTS. They requested the respondents to release partial security to the extent of 40% of the amount paid. The second respondent-bank, by its letter dated 25.02.2016, rejected the petitioners' request for partial release of the properties.

The second respondent-bank again issued E-auction notice dated 13.04.2016, under Rule 8(6) of the Rules, proposing to conduct a sale of six items of immoveable property on 18.05.2016, fixing the reserve price at Rs.161.64 lakhs. While the petitioner filed W.P. No.16234 of 2016, its sister concern filed I.A. No.206 of 2016 in S.A. No.252 of 2015 before the DRT for restoration of the OTS proposal. By its order dated 12.05.2016, the DRT directed the respondent bank to allow inspection of the original title deeds to the probable buyers brought by the petitioners, and to allow sale of the property to the buyers arranged by them. The DRT observed that, in this way, the respondent bank would be able to recover its dues directly from the petitioners, and the applicants would also be able to get more value for their property. The DRT directed the petitioner to pay Rs.10 lakhs within one week from the date of the order, and directed the respondent bank to allow inspection of the original title deeds to the probable buyers brought by the

petitioners, and to accept the amount paid by the petitioners or paid by the probable buyers. The respondent bank was also directed to cooperate with the petitioner in the sale of the secured assets to the buyers arranged by them. The OTS amount of 1270 lakhs was directed to be accepted on payment of interest thereon upto 30.06.2016. The petitioners were directed to arrange buyers, and to pay the OTS amount along with interest upto 30.06.2016. On payment of Rs.10 lakhs within one week from the date of the order, the DRT directed the respondent-bank to defer the sale to be held on 18.05.2016, and to allow time to the petitioners to clear off the dues upto 30.06.2016, by sale of property themselves. The DRT made it clear that, in case the petitioners failed to pay Rs.10 lakhs within one week and in case the OTS amount along with interest, was not paid even after showing the original title deeds to the petitioner and the probable buyers, the respondent bank was at liberty to proceed with the sale of the said properties after 30.06.2016. S.A. No.252 of 2014 was, accordingly, disposed of.

The petitioner paid Rs.10 lakhs on 15.05.2016 in compliance with the order of the DRT, and thereafter withdrew W.P. No.16234 of 2016 on 19.05.2016. The second respondent-bank, vide letter dated 31.05.2016, informed the petitioner that it was not possible to show the original deeds as they had been deposited with the Recovery Officer in the recovery proceedings, and the petitioner may arrange for inspection of the same, by the prospective purchasers, at the Tribunal. The petitioner informed the second respondent, by its letter 24.06.2016, that, as the time fixed by the DRT was due to expire by 30.06.2016, they may be permitted to sell the properties one by one. They undertook to pay 50% more

than the reserve price amount for each property. The respondent-bank, by its letter dated 08.08.2016, rejected the petitioner's request, and cancelled the OTS accepted by it earlier vide letter dated 19.01.2016. Aggrieved thereby, the petitioner filed W.P. No.28106 of 2016.

In the affidavit filed in support of the Writ Petition, the petitioners stated that the respondent-bank had lost sight of the fact that no person would be willing to go to the DRT for inspection of the original documents for fear of buying properties under litigation; as against the order of the DRT dated 18.11.2015, directing the second respondent-bank to consider the OTS proposal made by them within thirty days i.e., on or before 17.12.2015, the second respondent-bank had accepted the OTS proposal only on 19.01.2016; and the petitioner had lost valuable time of more than one month to meet the dead line of 31.03.2016 fixed by the Tribunal.

In his counter-affidavit, the Chief Manager of the respondent-bank submits that the petitioner was not entitled to seek plural remedies in a single Writ Petition; they did not challenge the specific order passed by the authorised officer of the respondent-bank; they had only challenged the letter dated 08.08.2016 rejecting their representation dated 24.06.2016, and in cancelling the OTS acceptance vide letter dated 19.01.2016; the OTS approval or rejection did not fall within the ambit of the SARFAESI Act; and since it did not contain a specific prayer and was vague, the Writ Petition as filed was not maintainable. The respondents contend that granting or rejecting OTS fell within the credit decision and discretionary power of the respondent-bank, for

which a writ of mandamus cannot be issued; the bank cannot be compelled to accept the OTS proposal of the petitioner; granting of OTS may fall within the purview of contractual obligations, and rejection of OTS may mean breach of the contract; contractual obligations are not, ordinarily, enforced in proceedings under Article 226 of the Constitution of India; the petitioner's loan account was classified as an NPA on 29.07.2011 because of non-payment of the dues; notices under Sections 13(2) and 13(4) were issued; the respondent-bank had filed O.A.Nos.46 and 50 of 2013, and had obtained recovery certificates dated 02.05.2014 and 23.07.2014 for Rs.9,17,41,263.37ps. and Rs.18,59,29,683/- respectively under Section 19 of the RDDB Act; the process of execution was pending before the Recovery Officer, DRT, Visakhapatnam; the respondent-bank was entitled to proceed under the SARFAESI Act without giving up the O.A or the recovery proceedings under the RDDB Act; and the Writ Petition, challenging the recovery proceedings pending before the DRT, was not maintainable.

It is further stated that, in response to the petitioner's request for grant of OTS for Rs.12.5 Crores, the petitioner was informed, by the respondent-bank, to deposit the upfront amount of 10% on the OTS offer for the purpose of processing the OTS proposal as per the norms prevailing in the Bank. On the ground that the upfront fee was not paid by the petitioner, along with their offer letter dated 04.11.2015, the respondent-bank had rejected the offer. Later, the respondent-bank had, by their letter dated 19.01.2016, conveyed its acceptance of OTS for Rs.11.51 Crores, and had informed the petitioner that the properties would be

released only after full and final payment of the OTS amount, and filing of full satisfaction memo before the DRT upon receipt of full OTS amount; as per the OTS terms, the petitioner was liable to pay the OTS amount, minus upfront amount of Rs.120 Lakhs deposited as per the order of the DRT dated 18.11.2015, in three monthly instalments in January, February and March, 2016; the OTS letter dated 19.01.2016 was acknowledged by the petitioner on 20.01.2016. They raised an objection, regarding the condition stipulated by the respondent-bank, that the OTS amount should be paid, and only thereafter would the properties be released; the petitioner's suggestion for release of the bank documents was not acceptable to the bank as its rules and procedure did not permit release the documents/properties in the custody of the DRT unless and until the recovery certificate was terminated by the Presiding Officer on a joint memo of compromise being filed under Section 26 of the RDDB Act; the respondents had conveyed their rejection for partial release of the properties by their letter dated 25.02.2016; the said letter dated 25.02.2016 reveals that the petitioner was not agreeable to the terms and conditions of the OTS; thereby the contractual obligations had ended; and the respondent-bank was entitled to proceed to recover the amount due in accordance with law.

It is also stated in the counter-affidavit that the petitioner had issued two cheques bearing Nos.581709 dated 25.02.2016 for Rs.5.00 Crores and 581707 dated 25.03.2016 for Rs.2.79 Crores drawn on ICICI Bank; when the cheques were presented for clearance, they bounced for want of funds; the respondent-bank was constrained to file criminal complaint Nos.816 of 2016 and

2340 of 2016 on 06.04.2016 and 27.05.2016 respectively; the petitioner had suppressed the fact that the cheques were dishonoured, only in order to secure an order from this Court; after issuing letter dated 25.02.2016, the respondent-bank had initiated proceedings under Rule 8(6) of the Rules to conduct e-auction; the petitioners had filed W.P. No.16234 of 2016 and W.P.No.16243 of 2016, both of which were dismissed as withdrawn; the petitioner filed I.A.No.206 of 2016 in S.A.No.252 of 2015 requesting the DRT to restore the OTS proposal; the DRT passed an order dated 12.05.2016 directing the petitioner to pay Rs.10 Lakhs within one week, and allow inspection of the title deeds to the probable buyers brought by the petitioner, without noticing that the original documents were marked as exhibits during the course of evidence of the respondent-bank, and were in the custody of the DRT; such orders were not enforceable against the bank; while deferring the sale, the DRT directed the petitioner to pay the OTS amount along with interest upto 30.06.2016; the petitioner never brought any probable buyers with a request for verification of the title deeds held in the custody of the DRT; until the recovery certificate is terminated by the DRT, by way of full and final settlement, the original documents cannot be parted with by the bank; consequently, letter dated 31.05.2016 was issued informing the petitioner that the original documents were in the custody of the DRT, and could not be withdrawn as the Suits were decreed and recovery proceedings were pending with the DRT; the petitioner was informed that they may inspect by paying the inspection fee to the DRT; for the purpose of inspection of records of the DRT, necessary application had to be made by any of the

parties to the OA proceedings under Rule 26 of the Debts Recovery Tribunal Regulations of Practice, 1996; Rule 23 of the Debts Recovery Tribunal (Procedure) Rules, 1993 empowered the Registrar of the DRT to grant leave to inspect the DRT records for which an application, by the parties to the Suit proceedings could be entertained; as the respondent-bank had no objection, for the DRT to allow inspection of the records and the same was conveyed to the petitioner vide letter dated 31.05.2016, nothing prevented them from requesting the DRT to permit them to inspect the records; there was no material on record to show that the petitioner had brought any probable buyers for inspection of the title deeds; the letter dated 08.08.2016, issued by the respondent-bank, is not a judicial or a quasi-judicial order; it is only a letter informing the petitioner of certain facts; the recovery certificate, issued by the DRT, has not been subjected to challenge; the petitioner did not bring any purchasers to the DRT for inspection of the documents, contending that no person would be willing to go to the DRT for fear of buying a property in litigation; and this clearly showed the petitioner's intention to suppress relevant facts.

Sri P.S. Rajasekhar, Learned Counsel for the petitioners, would submit that the respondent-bank had hitherto invoked the provisions of the SARFAESI Act, issuing a notice under Section 13(2) thereof on 07.07.2012; they had thereafter filed O.A. Nos.46 and 50 of 2013 before the DRT; as the respondent-bank had invoked the jurisdiction of the DRT under the RDDB Act, after having invoked the provisions of the SARFAESI Act, the first proviso to Section 19(1) of the RDDB Act disabled them either from withdrawing the applications filed in O.A. Nos.46 and 50 of 2013,

or from seeking to recover the very same amount under the SARFAESI Act; the remedy available to the respondent-bank is only to pursue their applications under the RDDB Act, and not to continue with the action initiated by them earlier under the SARFAESI Act; the directions issued by the RBI, in its circular dated 21.07.2016, are referable to Section 21 of the Banking Regulation Act; these guidelines are binding on the respondent-bank which should have given wide publicity for the One Time Settlement scheme offered by them; the respondent-bank has not furnished details, of the OTS scheme prevalent in its bank, even in the counter-affidavit filed by them before this Court; despite the directions of the DRT, the respondent-bank has also failed to co-operate with the petitioners in extending them the benefit of the OTS scheme; the respondent-bank ought to have permitted the petitioners to sell the properties by private treaty, and repay the entire amount due to the bank from the proceeds received on the sale of these immovable properties; the respondent bank had put these properties to sale at an abysmally low price as is reflected in the sale notice; this Court should direct the respondent-bank to grant the petitioners two months time to pay Rs.10.5 Crores for being extended the benefit of the OTS scheme, which they had offered to deposit vide their letter dated 03.05.2017; and, while agreeing to the petitioner's request, the respondent bank had imposed onerous conditions, vide their letter dated 03.05.2017, which were incapable of compliance. Learned Counsel would rely on **Transcore v. Union of India**¹, **Central Bank of India v.**

¹ (2008) 1 SCC 125

Ravindra², and Sardar Associates v. Punjab & Sind Bank³).

I. IS A SECURED CREDITOR DISABLED FROM CONTINUING TO TAKE ACTION UNDER THE SARFAESI ACT MERELY BECAUSE IT HAD LATER FILED AN APPLICATION UNDER SECTION 19(1) OF THE RDDB ACT FOR RECOVERY OF ITS DUES?

Before examining the question whether the 2nd respondent-bank can, after having initiated proceedings under the SARFAESI Act and thereafter under the RDDB Act, again resort to taking action under the SARFAESI Act, it is useful to refer to the relevant provisions of the SARFAESI Act and the RDDB Act. Section 2 (zc) of the SARFAESI Act defines “*secured asset*” to mean the property on which a security interest is created. Section 2(zf) defines “*security interest*” to mean the right, title or interest of any kind, other than those specified in Section 31, upon property created in favour of any secured creditor, and includes (i) any mortgage, charge, hypothecation, assignment or any right, title or interest of any kind, on tangible asset, retained by the secured creditor as the owner of the property, given on hire or financial lease or conditional sale or under any other contract which secures the obligation to pay any unpaid portion of the purchase price of the asset or an obligation incurred or credit provided to enable the borrower to acquire the tangible asset; or (ii) such right, title or interest in any intangible asset or assignment or licence of such intangible asset which secures the obligation to pay any unpaid portion of the purchase price of the intangible asset or the obligation incurred or any credit provided to enable the borrower to acquire the intangible asset or licence of intangible asset.

² (2002) 1 SCC 367

³ (2009) 8 SCC 257

Chapter III of the SARFAESI Act deals with enforcement of the security asset by the sale of the secured asset. Section 13(10) of the SARFAESI Act stipulates that, where the dues of the secured creditor are not fully satisfied with the sale proceeds of the secured assets, the secured creditor may file an application, in the form and manner as may be prescribed, to the Debts Recovery Tribunal ("DRT" for short) having jurisdiction or a competent court, as the case may be, for recovery of the balance amount from the borrower. Section 13(11) provides that, without prejudice to the rights conferred under or by Section 13, the secured creditor shall be entitled to proceed against the guarantors or sell the pledged assets without first taking any of the measures specified in Section 13(4) in relation to the secured assets under the SARFAESI Act. Section 37 of the SARFAESI Act stipulates that the provisions of the SARFAESI Act, and the Rules made thereunder, shall be in addition and not in derogation of, among others, the RDDB Act.

The RDDB Act is an Act to provide for the establishment of Tribunals for expeditious adjudication and recovery of debts due to banks and financial institutions. Section 19 of the RDDB Act relates to the application to be filed before the DRT and, under sub-section (1) thereof, where a bank or a financial institution has to recover any debt from any person, it may make an application to the DRT within the local limits of whose jurisdiction (a) the defendant voluntarily resides or carries on business or (b) any of the defendants, where there are more than one, voluntarily reside or carry on business or (c) the cause of action, wholly or in part, arises. Under the first proviso thereto the bank or financial institution may, with the permission of the DRT, on an application

made by it, withdraw the application, whether made before or after the enforcement of a security interest, and Recovery of Debts Laws (Amendment) Act, 2004 for the purpose of taking action under the SARFAESI Act, if no such action had been taken earlier under that Act. Section 24 of the RDDB Act stipulates that the provisions of the Limitation Act 1963 shall, as far as may be, apply to an application made to a Tribunal which, under Section 2(o) and Section 3(1) thereof, refers to the Debt Recovery Tribunal.

More than one obligation may arise on the same transaction, namely, to repay the debt or to discharge some other obligation. While the primary obligation is to repay the debt, the borrower also undertakes to keep the margin and the value of the securities hypothecated so that there is no mismatch between the asset-liability in the books of the bank/financial institution. It is the former obligation of the borrower which attracts the provisions of the SARFAESI Act which seeks to enforce it by the measures mentioned in Section 13(4) of the said Act, which measures are not contemplated by the RDDB Act. (**Transcore¹; Snell's Principles of Equity (31st Edn.) at p. 777**).

While the RDDB Act came into force on 24.06.1993, the SARFAESI Act came into force nearly nine years thereafter on 21.06.2002. However the first proviso to Section 19(1) of the RDDB Act was inserted, by Section 20 of Act 30 of 2004, with retrospective effect from 11.11.2004 i.e., from a date more than two years after the SARFAESI Act came into force on 21.06.2002. The first proviso to Section 19(1) of the RDDB Act is an enabling provision, and gives an option to the banks or financial institutions to seek withdrawal of the application made by them earlier under

Section 19(1) of the said Act. Permission of the DRT, to withdraw the application filed by it earlier under the RDDB Act, can be sought by the bank or financial institution for the purpose of taking action under the SARFAESI Act, if it had not taken any such action earlier under the SARFAESI Act.

In case it desires to take action under the SARFAESI Act, a bank/financial institution may, instead of prosecuting the application made by it earlier under Section 19(1) of the RDDB Act, withdraw the said application. The words "*that Act*", as used in the first proviso to Section 19(1) of the RDDB Act, refer to the SARFAESI Act. The words "*such action*", used in the first proviso, mean the action taken earlier under the SARFAESI Act. In cases where action was not taken by a bank/financial institution under the SARFAESI Act, before the first proviso was inserted to Section 19(1) of the RDDB Act with effect from 11.11.2004, and they had only filed an application under Section 19(1) of the RDDB Act for recovery of their dues, the first proviso enables them to seek permission of the DRT to withdraw the application made earlier under Section 19(1) of the RDDB Act, and take action, for recovery of its dues, by the sale of the secured assets under the SARFAESI Act.

Permission being granted by the DRT to withdraw the application made under Section 19(1) of the RDDB Act, and to take action under the SARFAESI Act, would enable the bank/financial institution, if need be, to invoke the jurisdiction of the DRT, under Section 19(1) of the RDDB Act, later. This can be easier explained by way of an illustration. If a bank/financial institution has made an application to the DRT for recovery of its dues of Rs.100 crores

it may, with the permission of the DRT, withdraw the said application, and take action under the SARFAESI Act for sale of the secured assets. If, on such sale, it is able to recover Rs.60 crores, it is open to the bank/financial institution to again make an application to the DRT (provided it is within limitation as stipulated under Section 24 of the RDDB Act) for recovery of the balance Rs.40 crores from the unsecured assets of the borrower and others.

The words “*if any such action had been taken earlier under that Act*”, used in the first proviso to Section 19(1), cannot be so read as to preclude the bank from taking recourse to Section 19(1) of the RDDB Act merely because it has initiated action earlier under the SARFAESI Act. It is only when the Bank/financial institution has made an application under Section 19(1) of the RDDB Act, without having taken recourse to the SARFAESI Act, would the question of the Bank/Financial Institution exercising its option to withdraw its application under Section 19(1) of the RDDB Act, and to proceed to take action under the SARFAESI Act, arise.

In **Transcore**¹, the Supreme Court held that the object behind introducing the first and the third provisos to Section 19(1) of the RDDB Act was to align the provisions of the RDDB Act, the SARFAESI Act and Order 23 CPC; for instance, after an OA is filed in the DRT for recovery of an amount on a term loan, on credit facility and on hypothecation account and the OA is not disposed of by the tribunal, in case the bank finds that one of the three accounts has become substandard/loss, it can invoke the SARFAESI Act with or without the permission of DRT; withdrawal of the OA, pending before the DRT under the RDDB Act, is not a

pre-condition for taking recourse to the SARFAESI Act; it is for the bank/financial institution to exercise its discretion as to cases in which it may apply for leave, and cases where they may not apply for leave to withdraw; and the first proviso to Section 19(1) is an enabling provision, which may deal with myriad circumstances.

It is not as if the bank/financial institution is precluded from instituting proceedings either under the SARFAESI Act or the RDDB Act merely because they had invoked the provisions of the other enactment earlier. There are three elements to the doctrine of election, namely, existence of two or more remedies; inconsistencies between such remedies; and a choice of one of them. If any one of the three elements does not exist, the doctrine will not apply. The doctrine of election of remedies is applicable only when there are two or more co-existent remedies, available to the litigants at the time of election, which are repugnant and inconsistent. As there is neither repugnancy nor inconsistency between the two remedies under the SARFAESI Act and the RDDB Act, the doctrine of election has no application. (**Transcore¹; Snell's Principles of Equity (31st Edn., p. 119).**

The RDDB and the SARFAESI Acts do not provide parallel remedies. The SARFAESI Act is treated as an additional remedy (Section 37) which is not inconsistent with the RDDB Act. Together they constitute one remedy and, therefore, the doctrine of election does not apply. (**Transcore¹**). As the remedy under the SARFAESI Act, in view of Section 37 thereof, is an additional remedy, it is open to the bank/financial institution to simultaneously take recourse to both the provisions of the RDDB and the SARFAESI Act, and it is not obligatory for them to elect

either one of the two remedies. Further, Section 13(10) of the SARFAESI Act enables the secured creditor, in cases where the dues are not fully satisfied with the sale proceeds of the secured asset, to file an application to the DRT in the form and manner prescribed. It is evident therefore that the secured creditor can invoke either of the two enactments i.e the SARFAESI Act or the RDDB Act or both.

The very purpose of seeking permission, to withdraw the application made earlier under Section 19(1) of the RDDB Act, is to enable the bank/financial institution, in case its debt is not wholly satisfied on the sale of the secured asset under the SARFAESI Act, to again approach the DRT for recovery of the balance amount, by instituting proceedings again under Section 19(1) of the RDDB Act. The mere fact the provisions of the SARFAESI Act was invoked earlier, before an application was filed under Section 19(1) of the RDDB Act, would not disable the bank/financial institution from either continuing with the action initiated by it earlier under the SARFAESI Act, or from simultaneously availing the remedies both under the SARFAESI Act and the RDDB Act.

As permission of the DRT would be sought only for the purpose of taking action under the SARFAESI Act, Parliament has, by use of the words *“if no such action had been taken earlier under the Securitisation Act”*, merely stated the obvious for, if the bank/financial institution had already initiated action under the SARFAESI Act before it filed an application under Section 19(1) of the RDDB Act, it would make no sense for it to withdraw its application under Section 19(1) of the RDDB Act to pursue its remedy under the SARFAESI Act which it had initiated earlier, as it

can simultaneously pursue both its remedies under the RDDB Act and the SARFAESI Act. Nothing prevents a bank/financial institution from continuing with the proceedings initiated by it earlier under the SARFAESI Act, even if it has subsequently invoked the jurisdiction of the DRT under Section 19(1) of the RDDB Act. This contention of bar of jurisdiction under the SARFAESI Act, merely because a secured creditor has instituted proceedings under the RDDB Act after having initiated proceedings under the SARFAESI Act earlier, does not merit acceptance.

II. HAS THE RESPONDENT-BANK VIOLATED RBI GUIDELINES REGARDING EXTENSION OF THE ONE-TIME SETTLEMENT SCHEME TO ITS BORROWERS?

Section 21 of the Banking Regulation Act, 1949 confers power on the Reserve Bank of India ("RBI" for short) to control advances by banking companies. Under sub-section (1) thereof, where the RBI is satisfied, that it is necessary or expedient in the public interest or in the interests of depositors or banking policy so to do, it may determine the policy in relation to advances to be followed by banking companies generally, or by any banking company in particular, and when the policy has been so determined all banking companies or the banking company concerned, as the case may be, shall be bound to follow the policy so determined.

The RBI is a statutory authority, and exercises supervisory power over the functioning of the scheduled banks. RBI is entitled to issue guidelines, from time to time, in matters relating to supervision of scheduled banks. (**Sardar Associates**³). The respondent Bank, a "State" within the meaning of Article 12 of the Constitution of India, is bound to follow the guidelines issued by

RBI. The power of the Board of Directors of the bank, to deviate from the broad policy decisions contained in the RBI guidelines, is confined only to minor matters which do not touch upon the broad aspects of the policy decision. (**Sardar Associates**³).

In **Sardar Associates**³, on which reliance is placed on behalf of the petitioner, the guidelines, which fell for consideration, were those issued by RBI by its letter dated 3-9-2005 addressed to the Chairman/Managing Director of all public sector banks. This letter, in turn, referred to the Circular dated 19-8-2005 issued by RBI formulating the One-Time Settlement Scheme for recovery of NPA below Rs 10 crores. The guidelines were issued to provide a simplified, non-discretionary and a non-discriminatory mechanism in the small and medium enterprises sector, and all public sector banks were directed to uniformly implement these guidelines. In **Sardar Associates**³, the Supreme Court held that the circular dated 19.08.2005 was binding on the banks.

As public sector banks are bound by the guidelines issued by RBI, such guidelines can be enforced, in terms of the provisions of the SARFAESI Act, by the Debts Recovery Tribunal, and consequently by the Appellate Tribunal. (**Sardar Associates**³). The Debt Recovery Tribunal and the Appellate Tribunal have the requisite jurisdiction to consider the prayer made by a debtor for a one-time settlement, particularly when it is within the purview of the One-Time Settlement Scheme of the RBI. (**Sardar Associates**³).

While the guidelines/directions issued by RBI would, undoubtedly, bind the respondent-bank, the question which necessitates examination is whether any policy guidelines/directions issued by RBI has been violated by the respondent-

bank. Reliance is placed by Sri P.S. Rajasekhar, Learned Counsel for the petitioner, on the directions of the RBI with respect to units governed by the Micro, Small & Medium Enterprises Development (MSMED) Act, as communicated to all scheduled commercial banks by RBI letter dated 21.07.2016. The petitioner claims to be a medium enterprise, and contends that the aforesaid directions issued by RBI are applicable both to them and the respondent-bank.

Clause 4.7 of the 2016 RBI directions relates to the debt restructuring mechanism for MSMEs, and clause 4.7(ii) refers to the earlier circular of the RBI dated 04.05.2009 which put in place loan policies governing extension of credit facilities, restructuring/rehabilitation policy for revival of potentially viable sick unit/enterprises, and a non-discretionary One Time Settlement Scheme for recovery of non-performing loans for the MSE sector, with the approval of the Board of Directors. Under clause 4.7 (iii) banks were advised to give wide publicity to the One Time Settlement Scheme implemented by them, placing it on the bank's website and through other possible modes of dissemination. In order to extend the benefits of the scheme to eligible borrowers, RBI directed the banks to allow reasonable time to the borrowers to submit the application, and to make payment of the dues.

Sri P.S. Rajasekhar, Learned Counsel for the petitioner, would submit that the respondent bank has not given adequate publicity to its One Time Settlement Scheme. While Smt.T.Vidya Rani, Learned Standing Counsel for the respondent bank, would submit that the petitioner does not fall within the ambit of the 2016 RBI Guidelines as it is not a Micro, Small or a Medium

Enterprise, it is wholly unnecessary for us to delve into this aspect as the petitioner has not even stated, in its affidavit filed in support of the Writ Petition, that the respondent bank had not given publicity to its One Time Settlement Scheme in terms of clause 4.7(iii) of the 2016 directions of the RBI. On the other hand the petitioners have taken advantage of the OTS benefit extended to them by the respondent bank, whereby they were called upon only to pay Rs.12.71 Crores in full and final settlement of their debt, with the respondent-bank agreeing to waive a part of the principal besides interest in its entirety. This submission, of lack of information of the OTS scheme, raised for the first time during the course of hearing of these Writ Petitions, is yet another attempt by the petitioners to avoid payment of the amounts due to the respondent-bank. While the DRT has the power to issue directions to scheduled banks to extend an RBI approved OTS scheme to the borrowers, the order passed by the DRT in S.A.No.252 of 2015 dated 18.11.2015, directing the 2nd respondent to consider the petitioner's OTS proposal, has not been shown to be based on any policy directions of the RBI.

It is no doubt true that if, in terms of the guidelines issued by RBI, a right is created in a borrower, a writ of mandamus can be issued. While exercising its power under Article 226 of the Constitution of India, the High Court may or may not issue such a direction, but it would not be justified in interfering with an order passed by the DRT/Appellate Tribunal considering the effect of a one-time settlement. (**Sardar Associates**³).

As they have not been able to show transgression, of the RBI guidelines relating to OTS scheme, by the respondent-bank, the

petitioners are not entitled to seek a mandamus from this Court directing the respondent-bank to extend them the OTS benefits, offered to them earlier, despite their having failed to adhere to the conditions stipulated therein. The petitioners have failed to avail the OTS benefit extended to them by the 2nd respondent-bank in its proceedings dated 19.01.2016, or to comply with the order of the DRT in I.A.No.206 of 2016 in S.A.No.252 of 2015 dated 12.05.2016 to pay the OTS amount with interest by 30.06.2016. It is unnecessary for us to dwell on this aspect any further as the OTS benefit, extended to the petitioners vide proceedings dated 19.01.2016, has been withdrawn by the 2nd respondent bank vide its proceedings dated 08.08.2016.

On a specific query from this Court regarding the amount repaid by the petitioners till date, in discharge of their debt to the 2nd respondent-bank, Sri P.S.Rajasekhar, Learned Counsel for the petitioners, stated that, as against the principal loan amount of Rs.19.10 Crores, the petitioners have paid Rs.3.8 Crores so far. This means that Rs.15.3 Crores, representing the principal amount due, remains unpaid till date. As against the principal amount then due of Rs.16.50 Crores, the petitioner made an an OTS offer for Rs.12.70 crores i.e. they wanted waiver of Rs.3.80 Crores towards the principal debt itself, besides the entire interest due on the loan extended to them, by the 2nd respondent-bank in the years 2008-2009, more than 8 years ago.

The 2nd respondent-bank, by its e-mail dated 19.01.2016, informed the petitioner that their OTS had been considered under the terms and conditions specified in the said letter. While the manner in which a one-time settlement scheme should be

formulated are all matters for the RBI and the concerned banks to decide, and this Court would, ordinarily, not interfere therewith as it lacks expertise, it is disconcerting that the 2nd respondent-bank was willing to receive only Rs.12.71 Crores towards OTS (Rs.432 lakhs from M/s.Swetha Exports and Rs.839 Lakhs from M/s.Swetha Exports India Pvt Ltd) though the principal debt then due, from both of them together, was Rs.16.50 Crores which means that, even if the petitioners had adhered to the OTS offer, the second respondent would have foregone around Rs.3.80 Crores towards the principal amount due plus the interest due thereon, for the past more than eight years i.e., 2008-09, in its entirety.

Section 34 of the Civil Procedure Code relates to interest and, under sub-section (1) thereof, where and in so far as a decree is for the payment of money, the Court may, in the decree, order interest at such rate as the Court deems reasonable to be paid on the principal sum adjudged, from the date of the suit to the date of the decree, in addition to pay interest adjudged on such principal sum for any period prior to the institution of the suit, with further interest at such rate not exceeding six per cent per annum as the Court deems reasonable on such principal sum, from the date of the decree to the date of payment, or to such earlier date as the Court thinks fit.

The scope of the words “*the principal sum adjudged*” and “*such principal sum*”, used in Section 34 CPC and the meaning to be assigned thereto, fell for consideration in **Ravindra**²; and it is in this context that the Supreme Court observed:

“.....Banking is an organised institution and most of the banks press into service long-running documents wherein the borrowers fill in the blanks, at times without caring to read what has been provided therein, and bind themselves by the stipulations articulated by the best of legal brains. **Borrowers other than those belonging to the corporate sector, find themselves having**

unwittingly fallen into a trap and rendered themselves liable and obliged to pay interest the quantum whereof may at the end prove to be ruinous. At times the interest charged and capitalised is manifold than the amount actually advanced. Rule of damdupat does not apply. Penal interest, service charges and other overheads are debited in the account of the borrower and capitalised of which debits the borrower may not even be aware. **If the practice of charging interest on quarterly rests is upheld and given a judicial recognition, unscrupulous banks may resort to charging interest even on monthly rests and capitalising the same. Statements of accounts supplied by banks to borrowers many a times do not contain particulars or details of debit entries and when written in hand are worse than medical prescriptions putting to test the eyes and wits of the borrowers. Instances of unscrupulous, unfair and unhealthy dealings can be multiplied though they cannot be generalised. Suffice it to observe that such issues shall have to be left open to be adjudicated upon in appropriate cases as and when actually arising for decision and we cannot venture into laying down law on such issues as do not arise for determination before us. However, we propose to place on record a few incidental observations, without which, we feel, our answer will not be complete and that we do as under:**

(1) “.....

(2)

(3)

(4)

(5) **The power conferred by Sections 21 and 35-A of the Banking Regulation Act, 1949 is coupled with duty to act. The Reserve Bank of India is the prime banking institution of the country entrusted with a supervisory role over banking and conferred with the authority of issuing binding directions, having statutory force, in the interest of the public in general and preventing banking affairs from deterioration and prejudice as also to secure the proper management of any banking company generally.** The Reserve Bank of India is one of the watchdogs of finance and economy of the nation. It is, and it ought to be, aware of all relevant factors, including credit conditions as prevailing, which would invite its policy decisions. **RBI has been issuing directions/circulars from time to time which, inter alia, deal with the rate of interest which can be charged and the periods at the end of which rests can be struck down, interest calculated thereon and charged and capitalised. It should continue to issue such directives. Its circulars shall bind those who fall within the net of such directives. For such transaction which are not squarely governed by such circulars, the RBI directives may be treated as standards for the purpose of deciding whether the interest charged is excessive, usurious or opposed to public policy.....** “ (emphasis supplied).

As noted hereinabove, while the petitioners herein had borrowed a total sum of Rs.19.10 crores from the respondent bank (Rs.7.10 crores in 2008 and Rs.12.00 crores in 2009) they have repaid, in all till date, only Rs.3.8 crores leaving the balance principal debt unpaid of Rs.15.3 crores . The OTS, which the petitioners sought, is for payment of only Rs.12.70 crores (Rs.4.30 crores towards the loan extended to them in 2008, and Rs.8.40 crores towards the loan extended to them in 2009). The respondent-bank had granted them OTS, waiving even a part of

the principal, apart from the interest due from them in its entirety. Reliance placed by the petitioners, on the observations of the Supreme Court, in **Ravindra**² which were made in the context of penal interest, service charges and other sums being debited in the account of the borrower, is misplaced.

As banks deal with public funds, waiver of even a part of the principal debt would endanger the financial viability of these banks. It would also put to risk the hard earned money of small depositors who park their life savings in these institutions, to ensure safety and security of their deposits, even if the interest offered thereon is far lower than in other forms of investment. We wish to say no more, as the petitioners have failed even to adhere to the OTS offered by the 2nd respondent-bank which is now seeking to recover the entire amount due to it from the petitioners herein.

III. IS FAILURE OF THE 2ND RESPONDENT-BANK TO SHOW THE TITLE DEEDS TO THE PETITIONER-BORROWER, ON THE GROUND THAT THEY ARE IN THE CUSTODY OF THE RECOVERY OFFICER OF THE DRT, FATAL?

It is not in dispute that the title deeds, deposited by the petitioners with the 2nd respondent-Bank as security for the loan, are in the custody of the DRT. Rule 23 of the Debt Recovery Tribunal (Procedure) Rules, 1993 relates to the additional powers and duties of the Registrar of the DRT. It stipulates that, in addition to the powers conferred elsewhere in the Rules, the Registrar shall have the powers and duties, subject to any general or special order of the Presiding Officer, as are specified in clauses (i) to (vii) thereunder which, under clause (vii) and (viii), include the power to order grant of copies of documents to the parties to the proceedings; and to grant leave to inspect other records of the

Tribunal.

Rule 26 of the Debts Recovery Tribunal Regulations of Practice, 1996 relates to inspection of the records. Under clause (a) thereof, subject to the provisions of Rule 17(1) of the D.R.T. (Procedure) Rules, inspection of the records in Form No.16, on any working day in a pending or decided case before the Tribunal, shall be allowed only under the order of the Presiding Officer or the Registrar as the case may be. Clause (b) stipulates that inspection of the records of a pending case shall not, ordinarily, be permitted on the date fixed for hearing of the case or on the preceding day. Clause (c) stipulates that, on grant of application for inspection of the records, the Section Officer or an Officer authorised in that behalf shall arrange to procure the records of the case, and allow inspection of such records on the date and time fixed by the Registrar; and such inspection shall preferably be between 2.30 p.m. and 4.30 p.m, in the presence of an officer authorised in that behalf by the Registrar. Clause (d) provides that the person, inspecting the records, shall not in any manner cause dislocation to, or mutilate, tamper or damage the records in the course of inspection; and shall not make any marking on any record or paper so inspected; and notes, if any of the documents or records inspected, may be done only in pencil. Clause (e) provides that the officer, supervising inspection, may, at any time, prohibit further inspection if, in his opinion, any of the records are likely to be damaged in the process of inspection; or the person inspecting the records is acting against the interest of parties or has violated the above provision; and shall, immediately, make a report of the matter to the Registrar, and seek his further orders.

The DRT, while passing the order in I.A.No.206 of 2016 in S.A.No.252 of 2015 dated 12.05.2016 (ie in the proceedings under the SARFAESI Act) appears to have overlooked the fact that the title deeds were in its custody in O.A.Nos.46 and 50 of 2013 filed by the 2nd respondent-bank under the RDDB Act; and, in R.P.No.60 of 2014, the Recovery Officer was proceeding to recover the amounts due. Nothing prevented the petitioners from making an application, in terms of the aforesaid statutory rules and regulations, either to the Presiding Officer of the DRT or the Registrar for permission to inspect the title deeds. Having chosen not to do so, the petitioners cannot now be heard to contend that the 2nd respondent bank has not showed them or the prospective buyers the title documents. The petitioners have neither disclosed the identity of the prospective buyer nor have they furnished his details in the Writ affidavit.

The order of the DRT, in I.A.Nos.206 and 207 of 2016 in S.A. No.252 of 2015 dated 12.05.2016, merely required the respondent-bank to allow inspection, of the original title deeds, by the probable buyers brought by the petitioners; and accept the amount paid by the petitioners or the probable buyers. By their letter dated 31.05.2016, the respondent-bank informed the petitioner that the original documents, in both the accounts, were lying with the DRT, Visakhapatnam in RP Nos.60 and 107 of 2014; the petitioner had xerox copies of the title deeds, and they could negotiate with the prospective buyers; the petitioner could arrange for inspection of the original documents, by the prospective buyers, with the DRT, Visakhapatnam on payment of the examination fee; and the original documents could not be withdrawn at this juncture, since

the Suits were decreed and the recovery proceedings were pending before the DRT.

The respondent-bank has pointed out, in our opinion rightly, that, since a decree was passed by the DRT and recovery proceedings were pending before the Recovery Officer, they could not withdraw the original documents from the DRT at that juncture. The petitioners have not even stated, in their writ affidavits, why they chose not to submit an application seeking permission of the DRT to have the title deeds inspected by the prospective buyers. On the other hand, they have specifically asserted in the writ affidavits that no person would be willing to go to the DRT for inspection of the original documents for fear of buying properties under litigation. It is evident, therefore, that no prospective buyer came forward to inspect the title deeds in the custody of the DRT. The ruse of a prospective buyer coming forward to purchase the property, and the 2nd respondent being blamed for not showing the documents, is only to avoid sale, of their mortgaged immovable properties, by the 2nd respondent-bank for recovery of its dues.

IV. IS THE RESPONDENT-BANK OBLIGATED TO RELEASE THE MORTGAGED PROPERTIES PROPORTIONATE TO REPAYMENT OF THE DEBT BY THE PETITIONERS?

In examining the petitioner's claim that the 2nd respondent-bank should be directed to release their mortgaged properties proportionate to repayment of the debt, it is necessary to take note of the periodic changes in the petitioner's stand from time to time. After depositing the upfront amount of Rs.1.20 Crores (ie Rs.60 Lakhs each, in two instalments, as per the DRT order in S.A.No.252 of 2015 dated 18.11.2015), the petitioners had agreed

to pay the balance OTS amount of Rs.1151 Lakhs by 31st March, 2016. (Rs.372 Lakhs and Rs.779 lakhs respectively i.e Rs.372 lakhs in three equal monthly instalments of Rs.124 Lakhs each commencing from January, 2016, and Rs.779 Lakhs in two monthly instalments of Rs.260 lakhs in January and February, 2016 and the last instalment of Rs.259 lakhs in March, 2016). The respondent-bank, while sanctioning OTS by its letter dated 19.01.2016, reserved its right to cancel the OTS at any time, if the petitioner defaulted in the payment schedule, and to proceed further under the SARFAESI Act to auction the secured assets. The petitioner was also informed that the mortgaged properties would be released only after full and final payment of the entire OTS amount, and on a full satisfaction memo being filed before the DRT; and, at the time of conveying the bank's approval, they should give post dated cheques for the amounts payable as per the payment schedule. The petitioners were asked to confirm having accepted these terms and conditions.

By their letter dated 20.01.2016, the petitioners informed the respondent-bank that they would endeavour to meet the commitments as per the conditions stipulated therein. Contending that there was very little time for mobilisation of the amount during January, 2016, the petitioners requested the respondent-bank to permit them to pay Rs.700 lakhs on or before 25.02.2016, the balance Rs.451 Lakhs on or before 25.03.2016, and assured that the entire OTS amount would be cleared before 31.03.2016. They requested the respondent-bank to release the securities, at least to the extent of 45% of the partial amounts deposited, to enable them to realise the necessary amounts to facilitate further

payments in the agreed manner. They requested the respondent-bank to consider the following: (1) approval for payment of OTS dues in two instalments i.e. Rs.700 Lakhs by 25.02.2016 and Rs.451 Lakhs by 25.03.2016; (2) release of securities of approximately 45% (Rs.305.89 lakhs security) on payment of Rs.700 Lakhs immediately; and (3) approval for submission of post dated cheques for Rs.700 Lakhs and Rs.451 Lakhs dated 25.02.2016 and 25.03.2016 respectively. They informed the respondent-bank that, upon confirmation, they would submit post dated cheques to the bank immediately.

By their letter dated 25.02.2016, the respondent-bank informed the petitioners that extension of the payment period of the OTS amount, and partial release of securities as requested by them by their letters dated 20.01.2016 and 28.01.2016, was declined by the competent authority; and the petitioners request for payment of the entire OTS amount, on both the accounts together, by 25.03.2016, as conveyed by them in their letter dated 25.02.2016, could also not be considered at this juncture. The petitioners were called upon to pay Rs.700 Lakhs by 25.02.2016, and the remaining Rs.451 Lakhs by 25.03.2016, as conveyed by them in their letters dated 20.01.2016 and 28.01.2016; the total amount payable, for the two accounts, was Rs.1151 lakhs as per the OTS; and if the amounts were not paid by 25.02.2016 and 25.03.2016, the respondent-bank would be constrained to present the two post dated cheques, submitted by the petitioner along with their letter dated 28.01.2016, for payment. Both the cheques issued by the petitioner (i.e cheque dated 25.2.2016 for Rs.5.00 crores and cheque dated 25.3.2016 for Rs.2.79 crores) were

dishonoured, on presentation, for insufficient funds.

As not a single rupee was paid after the OTS was sanctioned by the 2nd respondent-bank by its letter dated 19.01.2016, and as both the cheques were dishonoured on presentation, an e-auction notice dated 16.04.2016, proposing to conduct an auction on 17.05.2016, was issued questioning which one of the petitioners filed W.P.No.16243 of 2016 before this Court, and the other filed I.A.No.206 of 2016 in S.A.No.252 of 2015 before the DRT. In its order in I.A.No.206 of 2016 dated 12.05.2016, the DRT directed the petitioner to pay Rs.10 Lakhs, and extended the time for payment of the OTS amount, with interest, till 30.06.2016. While the petitioner paid Rs.10 Lakhs on 15.05.2016, they did not pay any amount thereafter. It is in such circumstances that the 2nd respondent-bank, by its letter dated 08.08.2016, cancelled the OTS offer extended to the petitioners earlier on 19.01.2016. The petitioners filed the present Writ Petitions, and an interim order directing the respondent-bank not to take coercive steps for recovery of the balance amount due from the petitioners was passed on 23.08.2016. Consequently the petitioners have not paid a single rupee to the 2nd respondent-bank for the past one year and four months ever since 15.05.2016.

Even after these Writ Petitions were filed before this Court on 19.08.2016, the petitioners have been in correspondence with the respondent-bank. Sri P.S. Rajasekhar, Learned Counsel for the petitioners, has placed before us copies of the letter addressed by the petitioners on 03.05.2017, and the reply of the respondent-bank thereto on the very same day. In their letter dated 03.05.2017, the petitioners informed the respondent-bank that

they were improving their OTS offer to Rs.10.50 Crores, to close the NPA accounts, from their present OTS offer of Rs.9.25 Crores. They requested the respondent-bank to consider and accept Rs.10.50 Crores as the OTS towards full and final settlement of all their NPA accounts. They referred to the terms and conditions of the OTS as (1) Rs.10.50 Crores being deposited in a no lien third party account till approval, and to appropriate the deposit on conveying approval; (2) release of all securities mortgaged in the bank upon payment of afore-said OTS amount of Rs.10.50 Crores; (3) withdrawal of cases filed by both the bank and by them; and (4) the entire amount of Rs.10.50 Crores to be adjusted in all the loan accounts of their entire group.

In reply thereto the Chief Manager of the respondent-bank, by his letter dated 03.05.2017, informed the petitioners that, with reference to their compromise offer, they should comply with the following (1) deposit Rs.10.50 Crores in a third party no lien account; (2) letter from the third party, in whose account the OTS amount is to be parked, stating that the amount would be appropriated towards closure of said accounts under OTS if the proposal is approved by the competent authority; and, if the proposal was not accepted by the competent authority, the amount deposited in the third party account would be returned. The petitioners were requested to arrange for deposit of Rs.10.5 crores, into the third party no lien account, to enable the respondent-bank to start the process of considering their request for a one-time settlement. The petitioners did not take up the 2nd respondent's offer. Let alone deposit of Rs.10.50 Crores in a third party no lien account, they have not paid a single rupee to the bank for the past

sixteen months and, under the protection of the unconditional interim order passed by this Court, have successfully prevented the 2nd respondent-bank from realising its debt on the sale of the secured assets.

As neither the SARFAESI Act nor the Rules made thereunder so obligate the Bank, it is not for this Court, in proceedings under Article 226 of the Constitution of India, to take upon itself the task of determining whether the Bank should or should not release the mortgaged property in proportion to the debt repaid by the petitioners, for these are all matters for the bank, in its wisdom, to decide. The 2nd respondent had earlier, by its letter dated 25.02.2016, declined the petitioners' request in this regard, and this Court, in judicial review proceedings under Article 226 of the Constitution of India, would neither sit in judgment over such a decision nor would it substitute its views for that of the bank.

Even otherwise, the petitioners have chosen not to pursue this request for, in their letter dated 03.05.2017, they have sought for release of the mortgaged securities only on payment of the OTS amount of Rs.10.50 Crores, and have not requested proportionate release of their properties on part payment of the OTS amount. Despite the respondent-bank's request that they should deposit Rs.10.50 Crores in a third party no lien account to show their bonafides, (for the said amount to be appropriated towards their loan in case their proposal was accepted and, in case the proposal was not accepted, for return of the said sum of Rs.10.50 Crores to them), the petitioners have not taken up the offer of the respondent-bank to pay the said amount; and, under the protection of the interim order dated 23.08.2016, (which precluded

the respondent-bank from taking coercive steps for recovery of the balance amount due from the petitioners account), have chosen not to pay even a single rupee towards the amounts due from them to the respondent bank. It is evident, therefore, that there are no bonafides in these Writ Petitions, and the petitioners are merely seeking to drag on proceedings and thwart all attempts of the respondent-bank to recover the amounts due to it.

V. OTHER CONTENTIONS:

The contention that the respondent bank had failed to co-operate with the petitioners in extending them the benefit of the OTS, despite the directions of the DRT, is only to be noted to be rejected. As noted hereinabove, both the DRT and the respondent bank have been extremely indulgent in extending to the petitioner the benefit of a one time settlement, waiving even a part of the principal apart from the interest thereon in its entirety. It is the petitioners who failed to make payment under the OTS scheme resulting in its cancellation, vide proceedings dated 08.08.2016, by the respondent-bank.

With regards the petitioners' claim that they should be permitted to sell the immovable properties by private treaty, it is necessary to note that Section 13(8) of the SARFAESI Act, after its substitution by Act 44 of 2016 with effect from 01.09.2016, provides that, where the amount of dues, together with all costs, charges and expenses incurred by him, is tendered to the secured creditor at any time before the date of publication of the notice for public auction or inviting quotations or tender from public or private treaty, for transfer by way of sale of the secured assets, the secured asset shall not be transferred for sale by the secured

creditor. Prior to its substitution by Act 44 of 2016, Section 13(8) stipulated that if the dues of the secured creditor, together with all costs, charges and expenses incurred by him, are tendered to the secured creditor at any time before the date fixed for sale or transfer, the secured assets shall not be sold or transferred by the secured creditor, and no further steps shall be taken by him for transfer or sale of that secured asset.

After its substitution, Section 13(8) of the SARFAESI Act recognises the respondent bank's right to tender, from public or private treaty, for the transfer by way of sale of the secured asset. The decision whether or not to tender the secured asset by way of private treaty, for its transfer by way of sale, is at the discretion of the bank/financial institution. The right conferred on the borrower is to redeem the property at any time before such an exercise is undertaken by the bank/financial institution. Section 13(8) does not obligate the respondent-bank to sell the subject property by private treaty, even for receipt of the OTS amount which is far less than the total amount due from the petitioners. Even otherwise, the petitioners have not been able to show that any person was willing to purchase the subject immoveable properties by private treaty, and to pay a price which would enable the respondent bank to recover its dues, along with interest thereon, in its entirety. While Section 13(8) of the SARFAESI Act acknowledges the power of the bank/financial institution to tender the secured asset, for sale by private treaty, it does not obligate the bank to release the property piecemeal as and when proportionate payment is made by the borrower. In any event, the petitioners have not been able to show that they found a buyer, who was

willing to pay a price far higher than the reserve price, for purchase of the subject properties, which would enable repayment of the entire amount due to the respondent-bank.

The contention that the respondent-bank had put the subject properties to auction for an abysmally low price does not also merit acceptance. If, as is contended by the petitioners, the price at which the subject properties are sought to be sold are so abysmally low, nothing prevented them for finding a buyer who would offer a far higher price, than the reserve price fixed by the respondent bank and thereby repay the entire debt due, or from finding a person to participate in the auction and submit a bid for an amount far higher than the reserve price.

We see no reason to accede to the petitioners request for grant of two months time to pay the OTS amount of Rs.10.5 crores. It is because of the petitioners failure to adhere to the repayment schedule, stipulated by the respondent bank and the DRT, initially by 31.03.2016 and later by 30.06.2016, was the bank constrained to cancel the OTS offer, made by them earlier on 19.01.2016, vide their letter dated 08.08.2016. As noted hereinabove after the OTS offer dated 19.01.2016, for payment of 11.51 crores (12.71 crores minus 1.20 crores paid by them), the petitioners did not pay any amount apart from Rs.10 lakhs on 15.05.2016 that too only because the DRT had, by its order in I.A. No. 206 and 207 of 2016 in SA No.252 of 2015 dated 12.05.2016, directed them to do so. For the past more than 16 months (i.e., from 15.05.2016 till date), the petitioners have not paid a single rupee in discharge of the debt due to the respondent-bank, and their request for grant of further time of two months is only to avoid sale of the secured

assets without having to repay the debt.

VI. REPEATED EFFORTS OF THE RESPONDENT TO PUT THE SUBJECT PROPERTIES TO SALE AND RECOVER ITS DUES HAVE BEEN THWARTED BY THE PETITIONERS ON ONE PRETEXT OR THE OTHER:

The petitioners have resorted to every trick in the book to prevent the 2nd respondent-bank from putting the subject properties to sale, and at the same time avoid payment of the amounts due to the bank. In these Writ Petitions they seek a direction to the respondent bank to permit them to sell the mortgaged properties one after the other, and pay 50% more than the reserve price fixed for each of the mortgaged properties. A similar offer made by the petitioner was rejected by the respondent-bank by its letter dated 25.02.2016 itself. As noted hereinabove, the OTS offer made by the respondent-bank, vide its proceedings dated 19.01.2016, was for payment of Rs.1271 Lakhs (Rs.432 lakhs towards the loan accounts of M/s.Swetha Exports and Rs.839 lakhs towards the loan accounts of M/s.Swetha Exports India Pvt. Ltd). As they had already paid Rs.120 Lakhs in December, 2015, the petitioners were asked to pay the balance Rs.1151 lakhs (Rs.11.51 Crores) in three monthly instalments in the months of January, February and March, 2016.

After the OTS offer was made by the respondent-bank on 19.01.2016, the petitioners have paid only Rs.10 Lakhs on 15.05.2016, in compliance with the order of the DRT in I.A.Nos.206 and 207 of 2016 in S.A.No.252 of 2015 dated 12.05.2016. As they have not paid the OTS offer amount of Rs.12.71 Crores, within the time stipulated i.e., by 31st March, 2016, or even by the extended time granted by the DRT till

30.06.2016, the respondent-bank was justified in cancelling the OTS offer by its letter dated 08.08.2016. As against the OTS offer of Rs.12.71 Crores, the petitioners have paid only Rs.1.30 Crores and, even in terms of the said OTS offer, they were still due Rs.11.41 Crores to the respondent-bank.

The repeated indulgence shown to them by the DRT has, evidently, emboldened the petitioners to reduce the OTS offer to Rs.9.35 Crores, and to subsequently marginally increase it to Rs.10.50 Crores as is evident from their letter dated 03.05.2017, though the balance amount due, even in terms of the earlier OTS offer dated 19.01.2016, is Rs.11.41 Crores. The petitioners have successfully thwarted all legitimate attempts of the respondent-bank to recover its dues. It is not even contended before us, by the petitioners herein, that they have identifiable buyers ready and willing to purchase the secured assets, nor have they furnished any information of the price which the so called prospective buyers are willing to pay for the mortgaged properties. The present Writ Petitions are a last ditch effort to prevent the respondent-bank from putting the subject properties to sale for recovery of its dues.

VII. CONCLUSION:

Viewed from any angle the Writ Petitions, as filed, are devoid of merits and are, accordingly, dismissed. As the efforts of the respondent-bank, to put the subject properties to sale, have been scuttled by the petitioners, (repeatedly approaching either the DRT or this Court), on wholly untenable grounds, exemplary costs of Rs.25,000/- are imposed in each of these Writ Petitions, which the petitioners shall pay the respondent-bank within four weeks from today failing which it is open to the 2nd respondent-bank to recover

the same in accordance with law. Miscellaneous Petitions, if any pending, shall also stand dismissed.

RAMESH RANGANATHAN, ACJ

J. UMA DEVI, J.

Date:22.09.2017.

Note: L.R. copy to be marked.
B/O
MRKR/CS

