IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 19.06.2018

CORAM

THE HON'BLE MR. JUSTICE S.MANIKUMAR
and
THE HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

W.P.No.1190 of 2018
and
W.M.P.No.1493 of 2018

1.M/s.Ghouss and Co
Rep. by its Partner
Mr.Nainar K.Makdoom
51/26, Perumal Sannathi Street,
Tirunelveli-627 001.

2.Nainar K.Makdoom

3.Rabiathul Basaria

4.M.Aumina Nasreen

5.Mohammed Goundhu Vava Sahib ... Petitioners

Vs.

The Authorised Officer,
State Bank of India,
Tirunelveli Branch,
S N High Road,
Tirunelveli. ... Respondent

PRAYER: Writ Petition filed under Article 226 of the Constitution of India praying for the issuance of a writ of Certiorarified Mandamus, calling for the records pertaining to the order dated 12.09.2017 passed by the learned Chair Person, DRAT, Chennai in RA.No.53/2015 in S.A.No.198/2009 and MA(SA) No.107/2015 in IA.No.1258/2010 in S.A.No.198/2009 and quash the same consequently directions may be issued to the respondent to consider the petitioners' OTS proposal.

For Petitioners : Mr.P.Raghunathan
for Mr.K.Rajesh

For Respondent : Mr.T.Ramasamy

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O R D E R

(Order of the Court was made by SUBRAMONIUM PRASAD, J.)

This Writ Petition is directed against the common order dated 12.09.2017 passed by the Debt Recovery Appellate Tribunal, Chennai in RA(SA) No.53 of 2015 and MA(SA) No.107 of 2015, by which, the Debt Recovery Appellate Tribunal has dismissed both the appeals by a common order.

2. The first writ petitioner is a partnership firm carrying on business as distributor of Pharmaceutical products. The other writ petitioners are partners of the firm.

3. The writ petitioners approached the respondent / State Bank of India, Tirunelveli Branch, S N High Road, Tirunelveli for availing financial assistance and also with an offer of taking over their earlier loan amount lying with ICICI Bank. The respondent Bank divided the loan facilitates under three heads.

a) Housing Loan - HTL A/C No - 01593 / 24141 on 24/12/2001
b) Ghousse & Co - C.C A/c No. - 01600 / 050193 on 29/12/2001
c) Vaccine World - C.C. A/c No - 01600 / 050215 on 28/02/2002

4. Since the writ petitioners were unable to fulfil their obligations and defaulted in repayment of loans, the respondent Bank issued a notice under Section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interests Act, 2002, (hereafter referred as "SARFAESI Act") calling upon the writ petitioners to repay a sum of Rs.18,69,910/- within 60 days from 30.09.2004. This was followed by a possession notice under Section 13(4) of the SARFAESI Act on 05.03.2005 and an auction notice.

5. Writ petitioners filed SA No.198 of 2009 challenging the possession notice under Section 13(4) of the SARFAESI Act and to set aside the tender / auction notice dated 14.08.2009 issued by the Bank. The said SA filed under Section 13(4) of the SARFAESI Act on the file of the Debt Recovery Tribunal, Madurai was numbered as S.A.No.198 of 2009. During the pendency of the applications, the writ petitioners deposited a sum of Rs.17.5 lakhs in the Debt Recovery Tribunal Madurai, against the total outstanding loan of Rs.57,48,413.03/- in compliance of conditional orders to stay auction pending the S.A During the pendency of the SA, OTS Scheme was introduced on 15.03.2010. The relevant clauses in the OTS Scheme are reproduced as under:

1.Coverage:

1.1 All NPAs in the SME sector, classified as doubtful or loss on or before 31st March 2009, with outstanding balance of Rs.1 crore and below on the date on which the account was classified as doubtful or loss:

1.2 Cases pending before Courts /DRTs /BIFR will be eligible, subject to consent decree being obtained from the Courts /DRTs /BIFR.

1.3 Cases where Bank has issued notice or taken action under section 13(4) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act (SARFAESI-2002) will be eligible.

1.4 Eligible accounts referred for Revenue Recovery action under State Recovery Laws will be eligible, subject to requisite charges, if any payable, being recovered separately and remitted to the State Authorities.

1.5 Eligible accounts written off either prior to or after 31.03.2009 will be covered under the scheme.

1.6 Decreed cases will not be eligible.

1.7 Cases of fraud, malfeasance and wilful defaults (except as given below under the head wilful default) will not be eligible.

1.8 Central Government / State Government guaranteed accounts will not be considered under this scheme.

2.Settlement Formula - Amount & Cut-off date:
2.1 NPAs classified as "doubtful" or "Loss" on or before 31st March 2009.
2.2 The minimum amount that should be recovered would be 100% of the outstanding balance in the eligible accounts as on the date on which the account was categorised as "doubtful" or "Loss" as per IRAC norms.

2.3 Depending upon the age of such assets some discount has been offered on the eligible amount as under:
Doubtful or loss NPAs > 10 years 60%

Doubtful or loss NPAs > 5 years to 10 years 25%

Doubtful or loss NPAs > 3 years to 5 years 15%

Doubtful or loss NPAs up to 3 years NIL

Further, to incentivise faster recovery, Incentive of additional 15% and 10% discount would be given to those borrowers who make full payment within one month and three months respectively from the date of approval of the OTS.

3.Payment:
3.1 The settled amount must be paid within 31.03.2011 (the validity period), failing which the OTS sanction will be rendered infructuous.

3.2 Processing of the applications will be done only after deposit of 5% of the eligible amount to indicate the borrower's willingness.

3.3 No interest will charged if the entire settled amount is paid within the stipulated period.

6. The writ petitioners approached the respondent Bank to avail the OTS facilitates. The writ petitioners requested the respondent Bank to adjust the sum of Rs.17.5 lakhs, which had been deposited by them in compliance of the conditional order passed by the Debt Recovery Tribunal. This request was not accepted.

7. The refusal of the Bank to adjust a sum of Rs.17.5 lakhs towards the OTS Scheme led to filing of I.A.No.1258 of 2010 in S.A.198 of 2009 before the Debt Recovery Tribunal, Maduari for a direction to the Bank to consider one time settlement proposal in terms of the offer by the writ petitioners.

8. The Debt Recovery Tribunal, Madurai dismissed S.A.No.198 of 2009 by its order dated 12.01.2011, holding that there has been no violation of the statutory provisions committed by the Bank. This order was challenged in RA(SA) No.109 of 2011, on the file of the Debt Recovery Appellate Tribunal, Chennai. The Debt Recovery Appellate Tribunal, Chennai by its order dated 21.12.2011, set aside the order dated 12.01.2011, directing the Debt Recovery Tribunal, Madurai to consider the OTS Scheme, the offer of the the writ petitioners herein dated 16.04.2010 and reply of the Bank dated 05.05.2010, in the order dated 05.05.2010, the Appellate Tribunal framed five issues namely:

Point No.1: What was the last date for submission of the applications for consideration under the SBI OTS-SME, 2010 Scheme?

Point No.2: What was the date of submission of the application by the applicants?

Point No.3: What was the date of the Bank's reply to the offer of OTS made by the applicants under the Scheme?

Point No.4: Whether the applicants were entitled to the benefits of the OTS, if they had submitted the application for consideration of their OTS within time limit specified in the Scheme?

Point No.5:Whether the Authorized Officer was entitled to continue the proceedings if the appellant prove that they were entitled to the OTS Scheme?

9. This order was confirmed by this Court in C.R.P.No.1201 of 2012, which was filed by the respondent / Bank against order dated 04.06.2012.

10. It is also important to note that the respondent / Bank had filed O.A.No.164 of 2004 before the Debt Recovery Tribunal-II, Chennai for recovery of a sum of Rs.33,35,174.06/-. This O.A. was transferred to D.R.T., Madurai, and was renumbered as T.A.No.107 of 2007. The Debt Recovery Tribunal, Maduari by its order dated 04.06.2012 declared an order the Writ Petitioners are personally / jointly / severally liable to pay the respondent / Bank a sum of Rs.33,35,174.06/- with interest at 12% per annum from the date of filing of the application i.e., 09.08.2004 till realisation. The Debt Recovery Tribunal held that in case of default, the respondent / Bank is at liberty to sell the mortgaged properties. In pursuance to the order of the Debt Recovery Tribunal, Madurai, a recovery certificate for a sum of Rs.65,47,913.06 (comprising of Rs.33,35,174.06 being towards the amount claimed in the O.A. and a sum of Rs.32,12,739/- towards interest) was drawn up.

11. On remand, the Debt Recovery Tribunal by its order dated 22.09.2014, considered both the, SA No.198 of 2009 and I.A.No.1258 of 2010. The Debt Recovery Tribunal held that a sum of Rs.17.5 lakhs, which had been paid under the orders of the tribunal to stall further SARFAESI auction cannot be considered as payment towards the scheme. The Tribunal held that the sum of Rs.17.5 lakhs paid under the order of Debt Recovery Tribunal had nothing to do with the OTS proposal or the OTS Scheme as the scheme was introduced only in the month of March 2010, whereas, the payment had been made in September - October, 2009. The Tribunal held that the scheme never stipulated that the payment made prior to the introduction of the scheme would be taken into

consideration and deducted out from the total eligible amount offered under the OTS Scheme. The Tribunal also held that on equity also demand the applicants (writ petitioners) herein cannot be allowed to adjust payments as prior to the introduction of the OTS Scheme and the payments had been made against the total outstanding amount, which was 57,48,413.03/-. The Tribunal held that the proposal given by the writ petitioners herein was not in tune with the OTS Scheme and the payment of 17.5 lakhs could not be adjusted against the OTS Scheme. The Tribunal dismissed S.A.No.198 of 2009 and I.A.No.1258 of 2010.

12. The writ petitioners challenged the orders of the Debt Recovery Tribunal by filing RA(SA) No.53 of 2015, (which was directed against the S.A.No.198 of 2009) and RA(SA) No.109 of 2011, (against the order in I.A.No.1258 of 2010). Both the appeals have been dismissed by the Debt Recovery Appellate Tribunal by the impugned order. The Tribunal dismissed the appeals on the ground that the offers made by the writ petitioners were not in confirmity with the requirements of the OTS Scheme. The Tribunal held that the deposits of Rs.17.5 lakhs in September - October, 2009 cannot be treated as compliance on the part of the borrower, who intend to avail the facility of the OTS Scheme of 2010. The Debt Recovery Appellate Tribunal held that the offers dated 16.04.2010 and 05.05.2010 were also considered by the respondent / Bank and had been properly attended too. Challenging the common impugned order of the Debt Recovery Tribunal, Madurai, the present writ petition has been filed.

13. Heard Sri P.Raghunathan, learned counsel for the petitioners and Sri T.Ramasamy, learned counsel for the respondent.

14. The learned counsel appearing for the writ petitioners contended that the refusal of the Bank to adjust a sum of Rs.17.5 lakhs against the amount payable under OTS Scheme is wrong. He contended that the said amount of 17.5 lakhs could be adjusted against the deposit of 5% of the eligible amount to indicate the borrowers willingness. He further contended that the amount should be taken into account and that the writ petitioners request for OTS Scheme ought not have been rejected. The learned counsel for the writ petitioners did not press RA (SA) No.53 of 2015, which had been filed against S.A.No.198 of 2009. On the other hand the learned counsel for the bank suppressed the judgments of the authorities below.

15. The writ petitioners had paid a sum of Rs.17.5 lakhs in compliance of conditional order passed by the Debt Recovery Tribual, Madurai to stall the auction. A perusal of the

proceedings dated 13.01.2009 under which, the said sum of Rs.17.5 lakhs was paid indicate that the said sum of Rs.17.5 lakhs, had been paid to stall the auction proceedings against the due of Rs.57,48,413.03/- The said amount was paid in September - October, 2009. The OTS Scheme was introduced on 15.03.2010 after the payment were made. The said scheme had various conditions, which would had to be complied within order to avail the OTS Scheme. The OTS Scheme did not indicate that the amount paid prior to the introduction of OTS Scheme would be taken into account in the one time settlement Scheme. The proposal of the writ petitioners to consider the said amount as part of their proposal would amount to rewriting of the Scheme.

16. The one time Scheme is a contract entered into between the Bank and the borrower. The terms of the contract cannot be re-written by the Court. A Writ of Mandamus cannot be issued to direct a Bank to consider the representation of a borrower and to force the Bank to accept the representations. The Division Bench of this Court in Tamilnadu Industrial Corporation Vs. Millenium Business Solutions Private Limited, reported in 2004 (5) CTC 689 at Paragraph Nos.7, 8, 16 and 18, held as follows:

> "7.In our considered opinion it is not proper for the Court to interfere in such matters relating to recovery of loans. Such matters are contractual in nature and writ jurisdiction is not the proper remedy for this. A writ lies when there is an error of law apparent on the face of the record, or there is violation of law. No writ lies merely for directing one time settlement or for directing re-scheduling of the loan or for fixing instalments in connection with the loan. It is only the bank or the financial institution which granted the loan which can re-schedule it or fix one time settlement or grant instalments. The Court has no right under Article 226 of the Constitution to direct grant of one time settlement or for re-scheduling of the loan, or to fix instalments.
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> 8. No doubt Article 226 on its plain language states that a writ can be used by the High Court for enforcing a fundamental right or for 'any other purpose'. However, by judician interpretation the words 'any other purpose' have been interpreted to mean the enforcement of any legal right or performance of any legal duty, vide Calcutta Gas Co. v. State of West Bengal, AIR 1963 SC 1044. In the present case, the writ petitioner has really prayed for a Mandamus to the Corporation to grant it a one time settlement, but no violation of any law has been pointed out. In our opinion, no such mandamus

can be issued in this case, and hence the writ petition should not have been entertained. A mandamus is issued only when the petitioner can show that he has a legal right to the performance of a public duty by the party against whom the mandamus is sought.

16. A loan is granted in terms of the contract, and grant of one time settlement or re-scheduling of the loan amount is really a modification of the contract, which can only be done by mutual consent of the parties, vide Section 62 of the Contract Act, 1872. The Court cannot alter the terms of the contract.

18. Before parting with the case we would like to mention that recovery of tens of thousands of crore rupees of loans of banks and financial institutions has been held up by Court orders under Article 226 proceedings which were really unwarranted. However, much sympathy a Court may have for a party, a writ Court must exercise its jurisdiction on well settled principles, and not a mere sympathy or compassion. No doubt, there be hardship to a party, but unless violation of law is shown the Court cannot interfere. Holding up recoveries of loans by unwarranted Court orders is causing incalculable harm to our economy, since unless the loan is recovered a fresh loan cannot be granted to needy persons. The Courts must keep these considerations in mind."

17. Another Division Bench of this Court in M/s.Digivision Electronics Ltd., Registered Office at No.A5 & 6, Industrial estate, Guindy, Chennai-32 Vs. Indian Bank, Rep. by its Deputy General Manager, Head Office, 31, Rajaji Salali, Chennai-1, and another reported in 2005 (3) LW 269, at paragraph Nos.42 and 46, held as follows:

"42. Some of the learned counsel submitted that the Court should direct one time settlement or fixing of installment or rescheduling the loan. In Tamilnadu Industrial Investment Corporation Vs. Millenium Business Solutions Private Limited, 2004 (5) CTC 689, it has been held that this Court cannot pass any such order in writ jurisdiction, since directing one time settlement or granting installments is really re-scheduling the loan, which can only be done by the bank or financial institution which granted the loan. This Court under Article 226 of the Constitution cannot reschedule a loan. A writ is issued when there is violation of law or error of law apparent on the face of the record, and not for rescheduling loans. The Court must exercise restraint in such matters, and not depart from well settled legal principles".

"46. Writ is a discretionary remedy, and hence this Court under Article 226 is not bound to interfere even if there is a technical violation of law, vide R.Nanjappan Vs. The District Collector, Coimbatore, 2005 WLR 47, Chandra Singh Vs. State of Rajasthan, JT 2003 (6) SC 20. The Managing Director, Tamil Nadu State Transport Corporation (Madurai Division-IV) Ltd., Dindigul Vs. P.Ellappan, 2005 (1) MLJ 639, Ramniklal N.Bhutta and Another Vs. State of Maharashtra, 1997 (1) SCC 134, etc."

18. The Writ Petition therefore cannot be entertained in the light of the above mentioned judgments. In any event, when I.A.No.1258 of 2010 had been filed in S.A.No.198 of 2009. On the dismissal of S.A.No.198 of 2009, which is not sought to be pressed, I.A.No.1258 of 2010 alone cannot be challenged. The order in I.A.No.1258 of 2010 would merge in the final decision in S.A.No.198 of 2009. It is a settled position of law that all interim orders get merged into final orders and the interim orders alone cannot be challenged when the final order is not pressed. We deem it fit to consider few decisions. Refer, (i) Prem Chandra Agarwal and Another Vs. Uttar Pradesh Financial Corporation and Others reported in (2209) 11 SCC 479, (ii) State of West Bengal and Others Vs. Banibrate Ghosh and Others reported in (2009) 3 SCC 250 and (iii) South Eastern Coalfields Ltd Vs. State of MP and Others reported in (2003) 8 SCC 648.

19. In view of the above, the Writ Petition stands dismissed. However, no order as to costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-
Assistant Registrar(CS-VII)

//True Copy//

Sub Assistant Registrar

asi/ia

+1cc to Mr.K.RAJESH, Advocate, S.R.No.38471

W.P.No.1190 of 2018 and
W.M.P.No.1493 of 2018

CP(CO)
TR(16/07/2018)