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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

WRIT PETITION NO. 1543 OF 2010

1. Small Industries Development Bank of India

Having their Office at SIDBI Tower 15, Ashoka Marg, Lucknow – 226 001 and its branch office at 11-13, Atlanta, 20, V.K. Shah Marg, Nariman Point, Mumbai – 400 021.

2. India SME Asset Reconstruction Company Ltd.

Having its Registered Office at MSME Development Centre, C-11, “G” Block, Bandra Kurla Complex Bandra (East), Mumbai – 51.

...Petitioners

Versus

1. M/s. Aditya Diamonds

Having its Office at 7, Pratik Arcade, 1st Floor, Tata Road No.2, Opera House, Mumbai – 4.

2. Ashok Kumar Keshavlal Jogani

R/at. Flat No.61, 6th floor, Petit Hall, Tahnee Heights, Napeansea Road, Mumbai.

3. Smt. Kailash Ashokkumar Jogani

R/at. Flat No.61, 6th Floor, Petit Hall, Tahnee Heights, Napeansea Road, Mumbai.

...Respondents

Mr. Rahul Narichania, Senior Advocate, with Mr. Prathamesh Kamat I/b. Tanna Maulik Kirti for Petitioners.

Mr. Sharan Jagtiani with Surbhi Agarwal and Kushal Sawant I/b. Puneet Kundanmal Gogad for Respondent Nos. 1 to 3.

CORAM:

**A.A. SAYED &
R.I. CHAGLA, JJ.**

JUDGMENT RESERVED ON 2ND MAY, 2019

JUDGMENT PRONOUNCED ON 10TH JULY, 2019

J U D G M E N T :- (Per R.I. Chagla J.)

1. The Petitioners by the present Petition is challenging order dated 26th May, 2010 passed by the Debt Recovery Appellate Tribunal, Mumbai (“**DRAT**”). The impugned order had set aside the order dated 5th February, 2009 passed by the Debt Recovery Tribunal, Mumbai (“**DRT**”). By the impugned order, the Respondents were permitted to comply with the One Time Settlement (“**OTS**”) by depositing the amount payable under the OTS together with the component of interest which according to the Respondents came to Rs.29,79,658/-. Thus the DRT order dated 5th February, 2009 which had allowed the Original Application No.260 of 2004 filed by the Petitioners and the issue of recovery certificate was set aside.

A brief background of facts is necessary:-

2. The Petitioner No.1 had on 23rd February, 1999 sanctioned the pre-shipment credit in Foreign Currency and export bill facility to Respondent No.1. These facilities were renewed from time to time and Respondent No.1 in order to secure payment to

Petitioner No.1 executed various security documents. The Respondent Nos. 2 and 3 executed agreements of guarantee in favour of Petitioner No.1. The collateral security was also created by Respondent No.3 by way of equitable mortgage by deposit of title deeds pertaining to Flat No.61, 6th Floor, A-Wing, Tahnee Heights, Napeansea Road admeasuring 2820 Sq.ft. along with parking admeasuring 1719 Sq.ft. ("mortgage property"). The Petitioner No.1 having been specified that the securities created pursuant to the facilities sanctioned, disbursed an aggregate sum of Rs.16,04,67,373/- (principal amount after crystallisation of dollar limits) to Respondent No.1.

3. The Respondent No.1 thereafter defaulted in payment of its dues under the above facilities and its account with the Petitioner No.1 became irregular. The Petitioner No.1 in turn issued notices dated 25th September, 2003 and 29th September, 2003 to the Respondents recalling the above facilities and calling upon the Respondents to make payment of the dues amounting to Rs.19,55,68,905/- together with interest. Further notice was issued by the Petitioner No.1 on 15th October, 2003 to Respondent Nos.2 and 3 calling upon them to make payment of dues together with future interest. The Petitioner No.1 issued

demand notice dated 12th November, 2008 under Section 13(2) of the SARFAESI Act for an amount of Rs.19,85,80,509/- with further interest at contractual rate of 14.5% p.a. payable within 60 days from the date of notice. This Notice was challenged by Respondent No.3 by filing Writ Petition No.606 of 2004 in this Court. By an order dated 13th January, 2004, this Court permitted Petitioner No.1 to take symbolic possession of the mortgaged property provided that Petitioner No.1 will not sell or dispose of the same. The Petitioner No.1 accordingly took symbolic possession of the mortgaged property.

4. The Petitioner No.1 filed Original Application No.260 of 2004 before the DRT – II, Mumbai against the Respondents for recovery of its dues with further interest and costs. An order dated 16th July, 2004 was passed by the CMM under Section 14 of the SARFAESI Act for taking physical possession of the mortgaged properties. This was challenged by Respondent No.1 by filing a Securitisation Application No.61 of 2004 before DRT-II. This Application came to be dismissed on 7th October, 2004 and Appeal was preferred by Respondent No.3 from the dismissal of the Securitisation Application being Appeal No.252 of 2004. This Appeal was also came to be dismissed on 28th January, 2005.

The Respondent No.3 accordingly filed Writ Petition (L) No.257 of 2005 in this Court. This Petition was also dismissed on 1st February, 2005. Thereafter, Respondent No.3 filed SLP (Civil No.6489 of 2005) and obtained an ad-interim stay subject to deposit of Rs.1 Crore to the Petitioner. The stay granted by the Supreme Court on 18th March, 2005 was vacated on 18th August, 2006 as Respondent No.3 failed to commit to payment of 25% of dues to the Petitioners and the Petitioners were directed to proceed in the matter in accordance with law. However, during the pendency of the SLP, the parties arrived at OTS on 15th March, 2007 under which an OTS of Rs.8.52 Crores as per terms and conditions set out in the Petitioner No.1's letter dated 15th March, 2007 was to be complied with.

5. The Respondent No.1 confirmed that it was agreeable to pay the OTS amount of Rs.8.52 Crores from 15th May, 2007 to 1st May, 2008 and submitted Post Dated Cheques. The Respondent No.1 in order to obtain a consent decree filed application on 24th April, 2007.

6. It is material to note that a letter dated 5th September, 2007 is alleged to have been subsequently sent by the Petitioner No.1

to Respondent No.1 for revocation of OTS as Respondent No.1 had only paid the first few instalments and failed to pay the balance instalments. This letter has been held by both DRT and DRAT to have not been served upon the Respondent No.1.

7. The Respondent No.1 made further payments of the first instalments on 13th September, 2007. On 11th October, 2007 a letter was addressed by Petitioner No.1 calling upon the Respondents to comply with OTS by paying the balance amount.

8. On 18th January, 2008, the Petitioner No.1 moved an Application before the CMM seeking extension of time for taking possession of the secured assets and the same came to be allowed. On 5th February, 2008, a notice was issued by Assistant Registrar based on the CMM's order. Thereafter, the Respondent No.1 paid a cheque of Rs.9.25 Crores under OTS in exchange of cheque of Rs.53.25 lacs and requested the Petitioner No.1 to return the said cheque of Rs.53.25 lacs. The Respondent No.1 also enclosed a cheque for the balance amount of Rs.44 lacs and requested the Petitioner not to deposit the cheque without prior information in writing to the Respondent No.1.

9. An order came to be passed by the DRT on 5th March, 2008 in another Application being S.A. No.14 of 2008 filed by Respondent No.3 before DRT by which the Petitioner was directed not to take physical possession of the mortgaged properties for one month if whole up-to-date instalments due under the OTS were deposited within one month from the date of the order. The issue of condonation of delay of three years and 350 days in filing the Application was kept open.

10. On the last date of payment of OTS, i.e. 30th April, 2008, the Respondent No.3 is stated to have personally visited the Petitioner No.1's office with entire balance payment of Rs.4.51 Crores which was not accepted by Petitioner No.1. The Respondents have also addressed letter dated 30th April, 2008 to the Petitioner No.1 expressing that they had kept the entire balance payment of OTS in readiness and giving particulars of pay orders and cheques expressing their desire to deposit these payment towards the OTS.

11. On 2nd May, 2008, the DRT rejected the Application for condonation of delay preferred by the Respondent No.3 in S.A. No.14 of 2008.

12. The DRAT by order dated 6th June, 2008 in Appeal No.90 of 2008 recorded that Respondent No.3 would be allowed to deposit Rs.4.51 Crores with Petitioner No.1 without prejudice to the rights and contentions of both the parties. Accordingly, the Respondents filed Application being Exhibit 76 in Original Application seeking dismissal of the Original Application on payment of Rs.8.52 Crores which was the OTS amount. This was rejected by the DRT II who allowed Original Application No.2260 of 2014 for a sum of Rs.11,24,48,888/- after giving credit to the amount paid by the Respondents during the pendency of the Original Application. The Respondents challenged the order of the DRT-II dated 5th February, 2009 by filing Appeal No.59 of 2009 before the DRAT. The Respondents deposited a sum of Rs.1.25 Crores with DRAT towards the pre-deposit. The DRAT by the impugned order dated 26th May, 2010 allowed the Petitioners' Appeal and set aside the order of DRT-II dated 5th February, 2009 with directions to the Respondents to pay interest on the delayed payment of OTS to Petitioner No.1. Hence this Petition has been filed challenging this order of the DRAT.

13. After filing of this Petition, the Respondents filed an Application on 6th July, 2010 before DRAT seeking adjustment of

the interest portion of Rs.29,79,658/- payable by them to the Petitioner Bank under the impugned order from the pre deposit amount of Rs.1.25 Crores. However, the DRAT directed the Petitioner Bank to refund the sum of Rs.75 lacs with interest thereon to the Respondents whilst keeping the amount of Rs.50 lacs to remain deposited with the Petitioner Bank. This Court by order dated 23rd August, 2010, issued Rule in this Petition and during the pendency of the Petition directed both parties to maintain status quo prevailing on that date.

14. Mr. Rahul Narichania, learned Senior Counsel appearing for the Petitioners has submitted that the Petitioners by letter dated 5th September, 2007 revoked the OTS due to the breach committed by Respondent No.1 who had failed to pay instalments as and when due under the OTS. He has submitted that the withdrawal of the OTS by letter dated 5th September, 2007 has been served upon the Respondents as the withdrawal letter was returned "as unclaimed" indicating that the Respondents refused to accept the said letter. He has submitted that under clause 6 of the OTS it is provided that in case the Respondents default in payment of dues under the OTS and / or fails to comply with any of the terms and conditions thereof, the Petitioners reserve their

right of withdrawal of approval granted for OTS and initiate suitable action for recovery of the entire dues of the Petitioners. He has submitted that the due dates under the OTS were material and that breach of payment on the due date would attract clause 6 of the OTS and the approval accordingly would be withdrawn by the Petitioners. He has submitted that the clause which mentioned interest on unpaid OTS amount would be applicable on total OTS amount and would not come in the way of the Petitioners withdrawing the approval granted for the OTS upon the breaches committed by the Respondents by non-payment of the amount dues on the due date. He has submitted that irrespective of whether the letter dated 5th September, 2007 had been received by Respondent No.1, the Petitioners were entitled to their right of withdrawal of the OTS which would operate upon such breach committed by Respondent No.1 of non-payment of the instalments on the due date. He has submitted that the subsequent letter dated 11th October, 2007 addressed by Petitioner No.1 calling upon the Respondents to comply with the balance amount of OTS has been sent by expressly stating that it was on a "without prejudice basis". This letter could not have been relied upon by the parties and hence no mention is made of this letter in the Petition. He has submitted that the subsequent letters addressed

by Petitioner No.1 calling for payments under the OTS was also on a “without prejudice basis” and hence reliance on these letters by the Respondents are misplaced. He has submitted that assuming that the letter dated 5th September, 2007 had not been served upon the Respondents, the Petitioners by moving the CMM seeking extension of time for taking possession of the mortgaged property, which Application was allowed and notice issued by the Assistant Registrar based on the said order, would amount to acts revoking the OTS. He has submitted that Respondent No.1 was also put on notice that the OTS was withdrawn by notice issued by the Assistant Registrar based on the order of the CMM. The subsequent acceptance of a cheque of Rs.9.25 lacs under OTS on 21st February, 2008 was on a “without prejudice basis” and this is evident from the letter itself and he has accordingly submitted that acceptance of these payments by Petitioners will not constitute condonation of breach or waiver of revocation of the OTS.

15. He has relied upon the order dated 5th March, 2008 passed by the DRT in S.A. No.14 of 2008 which had been filed by Respondent No.3 to contend that the DRT had found that the Respondent No.1 defaulted in payment under the OTS and had

allowed the Respondent No.1 to pay the entire OTS amount within one month and restrained the Petitioner from taking physical possession of the mortgage property during that period. However, the Petitioner No.1 failed to make the payment of the entire OTS amount as per the order of the DRT and hence this clearly resulted in the OTS coming to an end. He has submitted that the order of the DRT dated 5th March, 2008 and the subsequent order of the DRAT dated 2nd May, 2008 rejecting the Application for condonation of delay as the Petitioner had failed to pay entire OTS amount within the period of one month as prescribed in the said order operated as issue estoppel. It was thereafter not open for the DRT and / or DRAT to reopen this issue based on the principles of *res judicata*. He has relied upon the judgment of this Court in ***Bhanu Kumar Jain Vs. Archana Kumar & Anr.***¹ in support of this submission. He has further relied upon the judgment of the Full Bench of this Court in ***Waman Vishwanath Bapat vs Yashwant & Ors.***² in support of his submission that a failure to pay the instalments provided for under the OTS would result in the entire dues of the Petitioners becoming payable as a consequence of default.

1 (2005) 1 SCC 787

2 (1948) ILR 654.

16. He has submitted that the findings of fact in the impugned order suffers from perversity. He has submitted that the letter dated 30th April, 2008 by which the Respondent No.3 offered payment of the entire balance sum under the OTS was a letter which was back dated as of 30th April, 2008 and had been sent much later. He has relied upon the first line of the letter which reads "on 1st May, 2008 there was a public holiday" to contend that the letter could not have been sent on 30th April, 2008 and could have only been sent thereafter as indicated therein. He has submitted that the offer by the Respondent No.1 of payment of Rs.4.51 Crores being the balance due under the OTS could not be regarded as payment of the entire amount under the OTS as there was no offer to pay interest on the amount of Rs.4,51,75,000/- due under the OTS. He has submitted that DRAT has arrived at the perverse finding in the impugned order that the letter of the Respondent dated 30th April, 2008 is in compliance with the OTS. He has submitted that there is no document relied upon by the Respondents to indicate that there was sufficient balance in its accounts on 30th April, 2008, particularly since apart from the pay orders which were issued along with a letter, there were cheque payments. He has submitted that had the Respondents made payment of the entire

amount under the OTS to the Petitioners this would have been mentioned in the order of the DRAT of 2nd May, 2008. This does not form part of the said order of the DRAT. The Application made to the DRAT seeking deposit of the amount under the OTS has been made after delay of more than one month of the expiry of the OTS. This was recorded in order dated 6th June, 2008 of DRAT in Appeal No.90 of 2008. He has relied upon the judgment of the Supreme Court in ***Shama Prashant Raje Vs. Ganpatrao & Ors.***³ to contend that perversity of facts in the impugned order warrants interference under Article 226 of the Constitution of India. He has submitted that the impugned order of the DRAT has re-written the OTS whilst holding that the payment was made within the OTS which is impermissible in law. In support of this submission he has relied upon the judgment of this Court in ***Sunil Mehra Vs. Rajinder Singh Gulati***⁴. He has submitted that the impugned order of the DRAT is perverse and requires to be set aside.

17. Mr. Sharan Jagtiani, the learned Counsel for the Respondents has raised the issue of maintainability of the Petition on the ground that there is a finding of fact recorded by the DRT and concurred with by the DRAT viz. that the letter dated 5th

3 (2000) 7 SCC 522

4 (2008) (1) Bom.C.R. 359.

September, 2007 addressed by the Petitioners which purportedly revoked the OTS was never served upon the Respondents. He has submitted that in fact the DRAT rendered a more than plausible finding on fact that Respondent No.1 had tendered the entire balance payment towards the OTS and that Respondent No.1 was willing to pay the said balance within the OTS period and therefore, interference of this Court under Writ Jurisdiction is absolutely unwarranted. He has further submitted that the DRAT had given a finding of fact that as per the OTS terms the defaulted payments were to be paid with interest for the defaulted period and that for each default the withdrawal of the OTS was not intended under its terms. He has submitted that this finding of fact read with the said concurrent finding of fact by the DRT and DRAT cannot be in any manner held to be perverse and hence this Court has no jurisdiction under Article 226 of the Constitution of India to entertain the present Petition. He relied upon the judgment of the Supreme Court in ***Bathutmal Raichand Oswal Vs. Laxmibai Raghunath Tarte***⁵ in support of this submission. He has submitted that the Petitioners by this Petition are seeking to re-appreciate the evidence for the purpose of allegedly correcting errors of fact supposed to have been committed by the DRAT which is

5 (1975) 1 SCC 858.

impermissible for this Court in exercise jurisdiction under Article 226 of the Constitution of India.

18. He has submitted that the Petition should not be entertained as there is suppression of material facts by the Petitioners viz by suppressing letter dated 11th October 2007 by which letter the Petitioner No.1 asked for payments due towards OTS. Such suppression dis-entitles the Petitioners to obtain any discretionary relief under Article 226 Constitution of India. Reliance is placed on the judgment of the Supreme Court in ***Prestige Lights Ltd. Vs. State Bank of India***⁶ in support of this contention. He has submitted that by the said letter dated 11th October, 2007 addressed by the Petitioner No.1 to Respondent No.1 calling for payment of overdue OTS instalments at the earliest and thereafter acceptance of cheque payment under the OTS on 21st February, 2008 substantiates the case of the Respondents that there was no revocation of the OTS by the Petitioners.

19. He has submitted that the Petitioners have attempted to conflate two different set of proceedings which operated separately. The other proceeding being under the SARFAESI Act, in particular a challenge to taking of physical possession of the

⁶ (2007) 8 SCC 449.

mortgage properties by the Petitioners and which had been preferred by the Respondents. The present proceeding from which the Petition arises are proceedings before the DRT under the Recovery of Debts and Bankruptcy Act, 1993 and which the DRT had adjudicated that certain sum of money is due and payable to the Petitioners by the Respondents. From the order of the DRT, Appeal had been preferred by the Respondents and the impugned order came to be passed by the DRAT wherein it was held that, the Petitioners cannot recover the original amount under the Original Application because of the payment under OTS had been complied with by the Respondents. He has submitted that the order dated 5th March, 2008 passed by the DRT under SARFAESI proceedings was an order directing the Respondents to make upto date payment under OTS within one month in order to protect the physical possession of the residence of the Respondents. Thereafter, as the payment had not been made within the stipulated period the condonation of delay in taking out Securitisation Application was rejected by the DRT on 2nd May, 2008. These orders have no bearing on the order of the DRAT and cannot amount to an issue of estoppel as sought to be conducted by the Petitioners.

20. He has submitted that there is express finding of fact in the impugned order that on 30th April, 2008, the Respondent No.2 visited the Petitioner Bank to make payment under the OTS and this has been expressly stated by Respondent No.2 on Affidavit that he visited the office of the Petitioner No.1 and his visit is recorded in the visitors register of Petitioner No.1. It is also mentioned that the Respondent No.2 in person attempted to deliver the letter and cheque, the Officials of the Petitioner No.1 refused to issue an acknowledgement. This fact has not been denied by the Petitioner No.1 or his Advocate when this issue was raised by the Respondents. He has submitted that the Petitioner No.1 has falsely stated that Respondent No.1 never had any arrangement to pay the balance dues under the OTS on 30th April, 2008 and this is belied from the fact that the very same pay orders numbers mentioned in the letter dated 30th April, 2008 are those forwarded by letter dated 6th June, 2008 and which were directed by the DRAT to be accepted in compliance with the OTS are the same. He has submitted that this indicates that Respondent No.1 was not only within the OTS period but was very much in a position to pay the entire balance amount under the OTS. He has submitted that the DRAT in the impugned order after correctly rejecting the Petitioners contention that payment made

after 1st May, 2008 cannot be regarded as payment under the OTS reached a reasonable finding that delay in making payment would not *per se* result in revocation of the OTS. He has relied upon the judgment of the Supreme Court in ***State Bank of India Vs. Vijay Kumar***⁷ in support of his contention that the delay in making payment under the OTS would not result in revocation of OTS where the entire amount was paid along with interest for the defaulted period. In that case the delay was of 100 days whereas in the present case there is a delay of 36 days in making payment of OTS. He has submitted that there is no substance in the contention of the Petitioners that the OTS was revoked by the Petitioners. He has submitted that the letter dated 5th September, 2007 cannot be relied upon by the Petitioners as the Respondents were never in receipt of such letter which is the concurrent finding of fact recorded by DRT as well as DRAT. Further the subsequent letters including letter dated 11th October, 2007 substantiates the Petitioners case that the OTS is very much in operation and that the Respondents were always in the process of making payments towards the OTS from time to time. He has submitted that merely marking a letter “without prejudice” does not necessarily mean that the letter is privileged. In the present case, the Petitioners in

7 AIR 2007 SC 1689.

fact had accepted payment under the OTS *albeit* “without prejudice”. He has relied upon the judgment in the case of ***Oceanbulk Shipping & Trading S.A. Vs. TMT Asia Ltd. & Ors.***⁸ and the judgment in the case of ***Satyanarayananjee Vs. S.C. Chunder***⁹ in support of this contention.

21. He has submitted that the interest which is payable by the Respondents under the OTS and as directed by the DRAT in the impugned order is a calculation of interest after taking into account the delay by the Petitioners in accepting the pay orders / cheques. The interest which had initially been calculated by the Respondents due to delay in payment of instalments under the OTS was a sum of Rs.22,99,000/- and infact a higher interest has been directed to be paid by the Respondents to the Petitioners. Hence, the Petitioners cannot be aggrieved by the impugned order directing payment of interest on delayed payment. The DRAT in fact had granted an opportunity to the Petitioners to file their calculation of interest but the same had not been provided. Further, the DRAT in its order had directed that the sum of Rs.75 lacs along with agreed interest on the entire deposit of Rs.1.25 crores shall be refunded to the Respondents by keeping a balance

8 (2010) UKSC

9 ILR 1 Cal 23.

of Rs.50 lakhs which shall remain deposited. From the balance the sum of Rs.29,79,658/- will be adjusted towards the interest liability of the Respondents and the remainder amount shall remain in the DRAT awaiting the calculations of the Petitioners. The DRAT in the impugned order has correctly set aside the order of the DRT which had held that the filing of Consent Terms and obtaining a decree on the OTS was the essence of the OTS and there has been a failure to effect the same by the Respondents dis-entitling them from relying on the OTS and / or making payment under the OTS. He has submitted that no fault can be found with the findings of the DRAT and that the Petitioner bank has failed to revoke the OTS and hence the OTS is binding on them which dues stood paid on 6th June, 2008 after a reasonable delay. He has thus submitted that there is no merit in the Petition and the Petition is liable to be dismissed.

22. We have considered the rival submissions. There is a finding of fact by the DRT which has been concurred with by the DRAT in the impugned order viz. that the letter dated 5th September, 2007 by which the Petitioners claimed to have revoked the OTS was never served upon the Respondents. In fact from the material on record including the correspondence

addressed after 5th September, 2007, it is apparent that the Petitioners have from time to time acted on the OTS by calling upon the Respondents to pay the balance amount of OTS as well as exchanging cheques paid by the Respondents under the OTS.

23. Clause 6 of the OTS reads as under:-

Please note that in case the firm defaults in payment of dues under OTS and / or fails to comply with any of the terms and conditions thereof, SIDBI reserves the right to withdraw the approval granted for OTS as mentioned herein above or amend or vary the terms and conditions and initiate suitable action for recovery of the Bank's dues. In such an event, you shall be liable to pay all the dues in terms of the Loan Agreement or as per any specific schedule that may be fixed by SIDBI from time to time.

From a reading of this clause it is apparent that in the event of default in payment of dues under the OTS, the Petitioners have a right to withdraw the approval granted for OTS. Such withdrawal necessarily would have to be expressly made and communicated to the Respondents by calling upon the Respondents to pay the entire dues of the Petitioners as claimed in the Original Application with interest. Further, in the event of a breach of payment of the

instalment under the OTS, interest is payable on the unpaid amount as provided for in clause 4 of the terms and conditions of the OTS. The interest is provided at the rate of 12% p.a. during the period of payment of OTS amount and which shall be paid to the Petitioners by the Respondents on the unpaid OTS amount. Therefore, a breach of the payment schedule under the OTS would attract interest and would not result in automatic revocation of the OTS. We find favour in the interpretation of the OTS placed by the Respondents and accepted in the impugned order of the DRAT. In the impugned order it is recorded that the Petitioners are entitled to interest on the unpaid OTS amount and where the OTS amount was paid with interest *albeit* after a delay of 36 days in payment of the entire OTS dues, it cannot be held that the OTS had come to an end. The DRAT in the impugned order has correctly relied upon the judgment of the Supreme Court in **Vijay Kumar (Supra)**. In that case the delay was of more than 100 days in making payment of the entire amount of the OTS dues with interest for the defaulted period whereas in this case there is a delay of only 36 days. The Supreme Court in that case held that the delay in making payment would not *per se* result in revocation of the OTS. Hence, the Respondents have been directed that along with the payment of the entire dues under the OTS, they

shall pay appropriate interest to the Petitioners for the defaulted period. No fault can be found with such a findings and / or directions of the DRAT.

24. We find that there has been a suppression of letter dated 11th October, 2007 by the Petitioners in the Petition. By the said letter the Petitioner No.1 had acted contrary to the letter dated 5th September, 2007 of alleged revocation of the OTS. In the said letter, the Petitioner No.1 has asked for payments due towards the OTS and no mention was made therein of the prior letter dated 5th September, 2007. We find merit in the submission of the learned Counsel for the Respondents that the Petitioners had failed to candidly submit all relevant facts to this Court and that this Court exercising jurisdiction under Article 226 which is discretionary and extraordinary as well as equitable would take note of such suppression on the part of the Petitioners and may refuse to entertain the Petition and dismiss it on this ground alone. In this context the judgment of the Supreme Court in ***Prestige Lights Ltd. (Supra)*** is expressly applicable and paragraph 33 of that judgment reads as under:-

33. It is thus clear that though the appellant company had approached the High Court under

Article 226 of the Constitution, it had not candidly stated all the facts to the Court. The High Court is exercising discretionary and extraordinary jurisdiction under Article 226 of the Constitution. Over and above, a Court of law is also a Court of equity. It is, therefore, of utmost necessity that when a party approaches a High Court, he must place all the facts before the Court without any reservation. If there is suppression of material facts on the part of the applicant or twisted facts have been placed before the Court, the writ court may refuse to entertain the petition and dismiss it without entering into merits of the matter.”

25. The conduct of the Petitioners would also reveal that they have acted under the OTS at all times and that there has been no revocation of the OTS as contended by them. The reliance placed on the order dated 18th January, 2008 of the CMM for physical possession of the mortgage property pursuant to application of the Petitioners under Section 14 of SARFAESI Act as well as the notice issued by the Assistant Registrar pursuant to the order of the CMM cannot be considered as revocation of the OTS as subsequent to the order the Petitioners had accepted payment of cheque under the OTS. Further, we find that the order dated 5th March, 2008 passed by the DRT was in SARFAESI proceedings i.e. Securitisation Application No.14 of 2008 filed by Respondent

No.3 before the DRT challenging the order of the CMM directing physical possession to be taken of the mortgage property. There had been delay in the Securitisation Application and the DRT by order dated 5th March, 2008 had granted protection of one months' time during which the Petitioners were not to take physical possession provided the Respondents paid upto date instalments as due under the OTS. Having failed to do so, the DRT by subsequent order dated 2nd May, 2008 rejected the application for condonation of delay and the Securitisation Application accordingly came to be dismissed. These orders in our view would have no bearing on the Original Application proceedings which were for payment of the entire dues of the Petitioners which they had claimed. The DRT in its order dated 5th February, 2009 had allowed the Original Application No.260 of 2004 filed by the Petitioners on merits and issued recovery certificate thereby holding that the OTS was not to be acted upon. The impugned order sets aside the order of the DRT and in so doing that DRAT was in no way concerned with the order dated 5th March, 2008 passed by the DRT and / or the order of the DRAT dated 2nd May, 2008. These orders cannot be held to be in any way binding upon the DRAT as they had been passed in separate proceedings under the SARFAESI Act. Thus in our view

the two proceedings are in no way connected and the settlement of dues of the Petitioners under the Original Application is altogether a separate and distinct proceeding which cannot be conflated with the proceeding under the SARFAESI Act. We find that the DRAT has correctly approved the offer of the Respondents to make entire payment under the OTS on the due date i.e. 30th April, 2008, independently from the direction of the DRT to pay the entire dues under the OTS within one month period whilst exercising jurisdiction under the SARFAESI Act.

26. We find from the impugned order that the DRAT had arrived at a finding of fact that Respondent No.1 had offered to tender the entire balance payment towards the OTS on the due date i.e. on 30th April, 2008 and that Respondent No.1 by offering to pay the balance dues during the OTS period has shown its readiness and willingness to comply with the OTS. The DRAT has further recorded that the visit of Respondent No.2 is duly recorded in the visitors register of the Petitioner bank on 30th April, 2008. This visit has not been disputed by the Petitioner bank. This finding of fact by the DRAT cannot be interfered with particularly since there is no perversity in such finding. We find merit in the submissions of the learned Counsel for the Respondents that this Court would

not interfere with a finding of fact unless it is shown to be perverse and in the present case interference by this Court in exercising its writ jurisdiction is not warranted. The judgment of the ***Bathutmal Raichand Oswal (Supra)*** will be applicable in this context and that unless there is perversity, in a finding of a fact by the DRAT, this Court has no jurisdiction under Article 226 of the Constitution of India to interfere with such finding.

27. We do not accept the contention of the learned Senior Counsel on behalf of the Petitioners that the correspondence addressed by the Petitioners were expressly made “without prejudice” and as a result no reliance can be placed upon this correspondence in contending that the Petitioners had acted under the OTS even after its revocation. In this context the judgments relied upon by the learned Counsel for the Respondents are relevant viz. the judgments in ***Oceanbulk (Supra)*** and ***Satyanarayanjee (Supra)*** that “without prejudice” does not necessarily mean that such correspondence is privileged. In fact the Petitioners by their correspondence have accepted payment of cheques issued by the Respondents under the OTS and thus acted under the OTS.

28. The judgments relied upon by the Petitioners would not apply in the facts and circumstances of the present case. The judgment of Supreme Court in **Bhanu Kumar (Supra)** that sets out the principles of *res judicata* is inapplicable to the facts of the present case as the two proceedings were separate proceedings i.e. the proceedings under the Recovery of Debts and Bankruptcy Act and the proceedings under the SARFAESI Act and in no way connected to each other. The proceedings under the SARFAESI Act concerned only application for condonation of delay in a challenge to order Section 14 of SARFAESI Act and as such did not go in to the merits of the original application claiming debts due to the Petitioner bank. The judgment of the Supreme Court in **Shama Prashant Raje (Supra)** would also be inapplicable to the facts of the present case as there is no perversity in the findings of fact by the DRAT. Further, we do not find that the DRAT in the impugned order has rewritten the contract between the Petitioner bank and Respondents and hence the judgment of this Court in **Sunil Mehra (Supra)** would also be inapplicable in the present case. The judgment of this Court in **Waman Bapat (Supra)** would also be inapplicable as in that case the decree itself provided for payment of the entire amount in the event of failure to pay on instalment. In the present case, the OTS provided for the payment

of interest on unpaid OTS dues and hence the OTS cannot be automatically terminated.

29. We accordingly find no infirmity in the impugned order of the DRAT which has permitted the Respondents to complete the OTS by depositing the component of interest i.e. a sum of Rs.29,79,658/- which is computed by the Respondents after taking into account the delays on the part of the Petitioners in accepting payment of the OTS dues. We find that by order dated 6th July, 2010, the Chairperson of the DRAT had directed that the sum of Rs.75 lacs along with accrued interest out of the pre-deposit of Rs.1.25 Crores made by the Respondent to be refunded to the Respondents. The balance amount of Rs.50 lacs was to remain in deposit, out of which Rs.29,79,658/- was to be adjusted towards interest liability of the Respondents to the Petitioner Bank for the delay in OTS payment. We had made a query with the learned Counsel for the Respondents as to whether they were agreeable to make a statement that they are willing to withdraw only the sum of Rs. 75 lacs along with accrued interest and the balance amount of Rs.50 lacs with accrued interest would remain deposited for the benefit of the Petitioner Bank. The learned Counsel for the Respondents after taking instructions has

fairly stated that the Respondents are willing to withdraw only the sum of Rs.75 lacs with accrued interest and the balance amount of Rs.50 lacs with accrued interest would remain deposited for the benefit of the Petitioner Bank. We accept the statement.

30. In view of our findings, the Writ Petition is dismissed. There shall be no order as to costs.

31. At this stage, the learned Counsel for the Petitioner seeks continuation of the status quo order and particularly with regard to the withdrawal of the amount of pre-deposit. The prayer is opposed by the learned Counsel for the Respondents.

32. In the facts and circumstances of the case, we are not inclined to grant stay. The request for stay is rejected.

(R. I. CHAGLA J.)

(A.A. SAYED, J.)