

THE HONOURABLE SRI JUSTICE SANJAY KUMAR
AND
THE HONOURABLE SRI JUSTICE P.KESHAVA RAO

WRIT PETITION NOS.5683, 5686, 5691 AND 5701 OF 2019

COMMON ORDER
(Per Sri Justice Sanjay Kumar)

Challenge in all these writ petitions is to the order dated 05.03.2019 passed by the Debts Recovery Appellate Tribunal, Kolkata, in Application Nos.427 and 430 of 2019 in Tender (Appeal) Nos.109 and 110 of 2018 respectively. By the said order, the Appellate Tribunal allowed the applications and condoned the delay in the presentation of the appeals by Abhishek Steel and Power Limited, Ranga Reddy District, the borrower, viz., 520 days in the filing of Tender (Appeal) No.109 of 2018 and 646 days in the filing of Tender (Appeal) No.110 of 2018.

W.P.No.5683 of 2019 was filed by Asset Reconstruction Company (India) Limited, Mumbai (ARCIL), an asset reconstruction company, assailing the order dated 05.03.2019 in so far as it pertained to Application No.430 of 2019 in Tender (Appeal) No.110 of 2018. W.P.No.5691 of 2019 was filed by ARCIL against the said order in so far as it related to Application No.427 of 2019 in Tender (Appeal) No.109 of 2018. W.P.No.5686 of 2019 was filed by Pragathi Leasing and Developers, Hyderabad, and its Managing Partner, P.Pundarikaksha Rao, the auction purchasers of the secured assets, against the order dated 05.03.2019 in so far as it pertained to Application No.427 of 2019 in Tender (Appeal) No.109 of 2018. W.P.No.5701 of 2019 was filed by them against the said order in so far as it related to Application No.430 of 2019 in Tender (Appeal) No.110 of 2018.

Heard Sri D.V.Sitarama Murthy, learned senior counsel representing M/s.Pillix Law Firm, learned counsel for the borrower; Sri Vedula Venkataramana, learned senior counsel appearing for Sri P.Sri Harsha Reddy,

learned counsel for ARCIL; Sri S.Niranjana Reddy, learned senior counsel appearing for Sri P.Pandu Ranga Reddy, learned counsel for the auction purchasers; and Sri Dishit Bhattacharjee, learned counsel for Canara Bank, the original secured creditor.

The admitted facts are as follows:

Abhishek Steel and Power Limited, Ranga Reddy District, the borrower, availed loans from Canara Bank and owing to default in repayment, the same came to be classified as non-performing assets on 29.03.2012. Demand notice dated 02.06.2012 was issued by the bank under Section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 (*for brevity*, 'the Act of 2002'), quantifying the amount due from the borrower at Rs.45,29,09,818.59 ps. The bank then initiated measures under Section 13(4) of the Act of 2002 by taking symbolic possession of the secured assets of the borrower on 21.09.2012. Thereafter, the bank assigned the debt of the borrower to ARCIL under Assignment Agreement dated 28.03.2014. Thereupon, ARCIL invoked the provisions of Section 14 of the Act of 2002, by way of Cr.I.P.No.416 of 2016, before the learned Chief Metropolitan Magistrate, Hyderabad, and took over physical possession of the secured assets under Panchanama and Inventory dated 16.04.2016.

The borrower approached the Debts Recovery Tribunal-I, Hyderabad, under Section 17 of the Act of 2002 by filing S.A.No.180 of 2016 aggrieved by the measure taken by ARCIL. The said securitization application was dismissed, *vide* order dated 17.10.2016. Review Application No.2 of 2016 was filed by the borrower in S.A.No.180 of 2016. ARCIL initiated steps under Rules 8(6) and 9(1) of the Security Interest (Enforcement) Rules, 2002 (*for brevity*, 'the Rules of 2002'), for bringing the secured assets of the borrower

to sale. Challenging the sale notice, the borrower filed W.P.No.44265 of 2016 before the High Court. The ground taken therein was that a review petition had been filed in S.A.No.180 of 2016 and that the same was still pending consideration. However, as the auction failed for want of bidders, ARCIL again issued sale notice dated 04.01.2017 proposing to conduct an auction sale on 01.02.2017. Aggrieved thereby, the borrower filed W.P.No.3032 of 2017 but the same came to be dismissed as infructuous on 01.02.2017, as a sale did not crystallize for want of bids. Review Application No.2 of 2016 filed by the borrower in S.A.No.180 of 2016 was dismissed by the Tribunal on 14.02.2017. ARCIL issued sale notice dated 31.08.2017 proposing to hold an auction sale of the secured assets on 22.09.2017. The reserve price was fixed at Rs.42.87 Crore. The total outstanding of the borrower as per this sale notice was Rs.99,63,46,211/- as on 31.10.2016. The borrower challenged this sale notice in W.P.No.30971 of 2017. During the pendency of the writ petition, the e-auction was held on the stipulated date and three bidders participated therein. Pragathi Leasing and Developers, Hyderabad, emerged the highest bidder at Rs.53,80,00,000/-. After completion of formalities after payment of the total sale consideration, ARCIL issued sale certificate dated 11.12.2017 in favour of the auction purchaser and the same was duly registered with the Sub-Registrar's Office at Medchal. Physical possession of the sold secured assets was handed over to the auction purchaser on 11.12.2017.

While so, letter dated 10.07.2018 was addressed by the borrower to the Registry of the High Court, through its counsel, stating that it no longer wished to pursue W.P.No.30971 of 2017 and that it may be permitted to withdraw the writ petition reserving liberty to it to approach the Appellate Tribunal at Kolkata in accordance with law. The writ petition came to be

dismissed as withdrawn with the liberty aforesaid on 12.07.2018. The borrower then filed the subject appeals before the Appellate Tribunal. One appeal was filed against the dismissal of the review application in R.A.No.2 of 2016 filed in S.A.No.180 of 2016 on 14.02.2017 while the other appeal was preferred against the dismissal order dated 17.10.2016 in S.A.No.180 of 2016. As both the appeals were filed with delay, the borrower filed applications under Section 5 of the Limitation Act, 1963 (*for brevity*, 'the Act of 1963'), seeking condonation thereof. These applications came to be allowed by the Appellate Tribunal leading to the filing of these writ petitions.

Sri Vedula Venkataramana, learned senior counsel appearing for ARCIL, would contend that the progression of events clearly demonstrates that the litigation initiated by the borrower in S.A.No.180 of 2016 was dead for all practical purposes due to the developments after its dismissal, viz., issuance of sale notices, one after the other, and the eventual sale. The learned senior counsel would assert that mere filing of appeals against this dead litigation did not have the effect of breathing life into it. He would further assert that no cogent reasons were given by the borrower to explain the delay and as Section 14 of the Act of 1963 would not be applicable, the Appellate Tribunal erred in giving effect to its provisions while dealing with the delay. He would further point out that the proceedings under the Act of 2002 culminated in registration of a sale certificate and delivery of possession of the secured assets to the auction purchaser and therefore, it is too late in the day for the borrower to assert any right of redemption.

Supporting these arguments, Sri S.Niranjan Reddy, learned senior counsel for the auction purchaser, would state that even by the time writ petitions were filed before this Court by the borrower against the sale notices, the cause of action in relation to dismissal of the securitization

application and thereafter, the dismissal of the review application filed therein, had crystallized but despite the same, the borrower did not choose to include any challenge to those orders in the writ petitions. He would therefore assert that Order 2 Rule 2(3) CPC would bar any such challenge being reopened at this late stage by way of appeals. He would further assert that sufficient cause was not cited before the Appellate Tribunal for it to show any indulgence to the borrower, ignoring the attendant facts. He would point out that the review application in S.A.No.180 of 2016 was dismissed on 14.02.2017 and the borrower filed a writ petition challenging the sale notice on 12.09.2017 but the sale came to be held on 22.09.2017 and was confirmed in favour of the auction purchaser on 26.09.2017, whereupon the sale certificate was issued on 11.12.2017 and registered on 12.07.2018. The learned senior counsel would therefore contend that in the light of these facts, the Appellate Tribunal ought not to have been generous in dealing with the borrower's condone delay applications filed in the belated appeals.

Per contra, Sri D.V.Sitarama Murthy, learned senior counsel appearing for the borrower, would point out that these writ petitions only warrant judicial review of the discretionary order passed by the Appellate Tribunal condoning the delay and once such exercise of discretion is not shown to be injudicious, no cause would be made out for interference by this Court in exercise of its extraordinary jurisdiction. He would further state that Order 2 Rule 2(3) CPC has no application to filing of writ petitions as the statute provides the remedy of appeal against the orders passed in a securitization application. He would therefore contend that no interference is called for with the order dated 05.03.2019 passed by the Appellate Tribunal.

S.A.No.180 of 2016 was filed by the borrower assailing the action of ARCIL in taking physical possession of the secured assets on 16.04.2016

pursuant to the order dated 30.03.2016 passed by the learned Chief Metropolitan Magistrate, Hyderabad, in CrI.P.No.416 of 2016, in exercise of power under Section 14 of the Act of 2002. The said securitization application came to be dismissed by the Debts Recovery Tribunal-I, Hyderabad, *vide* order dated 17.10.2016. Review Application No.2 of 2016 was filed in S.A.No.180 of 2016 by the borrower asserting that there was an error apparent in the order dated 17.10.2016 as para 2 of the said order referred to an auction purchaser though the secured assets had not been sold by that date. Certain other grounds were also raised by the borrower in relation to the said order. However, the Tribunal opined that mentioning of the bank as the auction purchaser in para 2 of the order was only a typographical mistake and did not have any effect on the order. The other grounds urged by the borrower were not found to be meritorious. The Tribunal therefore held that there was no error apparent in the order under review and dismissed the review petition, *vide* order dated 14.02.2017.

Thus, it is clear that the subsequent sale notices issued by ARCIL after it took possession of the secured assets never fell for consideration before the jurisdictional Tribunal either in S.A.No.180 of 2016 or in the review application filed therein. The sale notices issued by ARCIL came to be challenged independently by way of separate writ petitions before the High Court by the borrower. Two writ petitions failed automatically consequent upon the fact that the proposed auction sales did not materialize. In so far as the third writ petition was concerned, despite the fact that the proposed auction sale crystallized in the sale of the secured assets, the borrower, in its wisdom, chose to withdraw the said writ petition on 12.07.2018 reserving liberty to approach the Appellate Tribunal at Kolkata in accordance with law. This liberty was sought by way of letter dated 10.07.2018 addressed to the

Registry by the learned counsel for the borrower. It is therefore manifest that the only liberty sought by the borrower was to continue the challenge to the proceedings which were the subject matter of S.A.No.180 of 2016 and not the subsequent developments in the form of issuance of sale notices by ARCIL and the successful sale held thereafter. The question that falls for consideration is whether, having taken this conscious step, the borrower can now seek to turn back the clock and again challenge the taking over of possession by ARCIL pursuant to the order secured under Section 14 of the Act of 2002. The further question that would arise is, even if such a challenge can be successfully maintained by the borrower before the Appellate Tribunal, whether it would have any impact upon the auction sale held pursuant to the sale notice dated 31.08.2017, which was not subjected to challenge in S.A.No.180 of 2016.

Be it noted that in the light of the law laid down by the Supreme Court in ITC LIMITED V/ s. BLUE COAST HOTELS LIMITED¹, the act of the secured creditor in initiating sale proceedings in relation to the secured assets would stand apart and be independent of the proceedings for taking actual physical possession of the secured assets. The aforestated judgment makes it clear that taking over of physical possession can be done even after the successful sale of secured assets. In effect, the borrower cannot now seek to impact the unchallenged sale proceedings held by ARCIL in favour of the auction purchaser, even if it revives its challenge to the proceedings under Section 14 of the Act of 2002 by filing these belated appeals.

That apart, the Appellate Tribunal, when it considers an application filed for condonation of delay in the presentation of an appeal, necessarily has to exercise its discretion and such exercise must be as per judicious

¹ (2018) 15 SCC 99 = 2018 SCC OnLine SC 237

norms. The Appellate Tribunal must therefore take note of the conduct of the party seeking such indulgence and cannot ignore relevant factors. However, the manner in which the Appellate Tribunal chose to deal with the subject applications leaves a lot to be desired. Perusal of the impugned order dated 05.03.2019 demonstrates that the auction purchaser was also represented by learned counsel before the Appellate Tribunal. Despite the same, the Appellate Tribunal did not choose to advert to any of the later developments, viz., the successive sale notices issued by ARCIL and the final sale in favour of the auction purchaser. Surprisingly, the Appellate Tribunal treated W.P.No.30971 of 2017 filed against the sale notice dated 31.08.2017 as relevant for the purposes of Section 14 of the Act of 1963 and opined that delay in the filing of the appeals, after dismissal of the said writ petition on 12.07.2018, would be a mere 13 days. This is clear from the following observation of the Appellate Tribunal:

‘Since the Appellant was pursuing the matter bona-fidely before the Hon’ble High Court from 12.9.2017 to 12.7.2018 and in that writ petition objection was also taken by the Bank that the borrower had not challenged the findings of the Tribunal below recorded in S.A. So the time spent before the Hon’ble High Court also deserves condonation. After disposal of the writ petition, the appeal was filed on 25.7.2018, i.e. just after 13 days.’

Unfortunately, the Appellate Tribunal completely lost sight of the fact that the subject matter of W.P.No.30971 of 2017 was altogether different from the subject matter of S.A.No.180 of 2016 and the review filed therein and therefore, the time consumed in pursuing the said writ petition was not liable to be excluded. To compound matters further, the Appellate Tribunal observed that no prejudice would be caused to the respondents if the delay was condoned and the appeals were heard on merit. This observation was made by the Appellate Tribunal despite being made aware of the later

developments culminating in the successful sale of the secured assets in favour of the auction purchaser. It is now well settled that the right of redemption available to a borrower would cease to survive after registration of the sale certificate in favour of the auction purchaser. (See DWARIKA PRASAD V/ s. STATE OF UTTAR PRADESH²).

In RAMLAL, MOTILAL AND CHHOTELAL V/ s. REWA COALFIELDS LTD.³, the Supreme Court observed as under:

‘7. In construing Section 5 it is relevant to bear in mind two important considerations. The first consideration is that the expiration of the period of limitation prescribed for making an appeal gives rise to a right in favour of the decree-holder to treat the decree as binding between the parties. In other words, when the period of limitation prescribed has expired the decree-holder has obtained a benefit under the law of limitation to treat the decree as beyond challenge, and this legal right which has accrued to the decree-holder by lapse of time should not be lightly disturbed. The other consideration which cannot be ignored is that if sufficient cause for excusing delay is shown discretion is given to the court to condone delay and admit the appeal. This discretion has been deliberately conferred on the court in order that judicial power and discretion in that behalf should be exercised to advance substantial justice. As has been observed by the Madras High Court in *Krishna v. Chathappan*⁴.

12. It is, however, necessary to emphasise that even after sufficient cause has been shown a party is not entitled to the condonation of delay in question as a matter of right. The proof of a sufficient cause is a condition precedent for the exercise of the discretionary jurisdiction vested in the court by Section 5. If sufficient cause is not proved nothing further has to be done; the application for condoning delay has to be dismissed on that ground alone. If sufficient cause is shown then the court has to enquire whether in its discretion it should condone the delay. This aspect of the matter naturally introduces the consideration of all relevant facts and it is at this stage that diligence of the party or its bona fides may fall for consideration;’

The above principles were affirmed and applied by the Supreme Court in BALWANT SINGH V/ s. JAGDISH SINGH⁵. Reference may also be made to the observations of a Division Bench of the Bombay High Court in

² (2018) 5 SCC 491 = 2018 SCC OnLine SC 183

³ AIR 1962 SC 361

⁴ ILR (1890) 13 Mad 269

⁵ (2010) 8 SCC 685

MANILAL GOVINDJI KHONA V/ s. INDIAN BANK⁶ to the effect that where the delay is inordinate, unreasonable and totally unexplained, the Court is entitled to pass an appropriate order in the facts and circumstances of such case since condonation of delay is not an empty formality. Applying these principles to the case on hand, it is clear that though the borrower was active in challenging the successive sale notices issued by ARCIL before the High Court, it consciously chose not to lay any challenge, be it by way of an appeal or by way of a writ petition, to either the order dated 17.10.2016 dismissing the securitization application or the order dated 14.02.2017 dismissing the review application filed therein. In effect, there is no explanation as to why the borrower, when it was diligent in the context of the sale notices, did not show the same diligence in the context of the dismissal of its securitization application and the review petition filed therein.

The Appellate Tribunal therefore ought not to have brushed aside the crucial developments after the dismissal of the securitization application and the review application filed therein. Permitting this litigation to be reopened only for the purpose of testing the validity of the delivery of possession pursuant to the order secured by ARCIL under Section 14 of the Act of 2002 at this late point of time therefore served no purpose whatsoever, as it would anyhow be open to ARCIL to initiate proceedings afresh for doing so, even if the appeals were allowed.

Further, as stated *supra*, the very fact that the borrower all along chose to accept and abide by the decision of the jurisdictional Tribunal in dismissing S.A.No.180 of 2016 and thereafter, the review application filed therein, clearly showed that it had no interest in pursuing its challenge in that regard. Significantly, the borrower chose to litigate about later

⁶ 11(2013) BC 444

developments in the form of sale notices ignoring the adverse orders suffered by it, implying that it had no continuing grievance therewith. Having allowed the taking over of possession by ARCIL to attain finality by its own inaction in maintaining the challenge laid in S.A.No.180 of 2016, the borrower is deemed to have waived its right to challenge the taking over of possession by ARCIL. The borrower therefore could not have maintained appeals against the orders in the securitization application with such substantial delay, brushing aside the later developments culminating in the successful sale of the secured assets. The Appellate Tribunal grievously erred in overlooking all these relevant aspects and showing indulgence to the borrower by condoning the delay in the filing of the appeals.

The writ petitions are accordingly allowed setting aside the order dated 05.03.2019 passed by the Debts Recovery Appellate Tribunal, Kolkata, in Application Nos.427 and 430 of 2019 in Tender (Appeal) Nos.109 and 110 of 2018 respectively. Pending miscellaneous petitions shall stand closed in the light of this final order. In the circumstances, there shall be no order as to costs.

SANJAY KUMAR, J

P.KESHAVA RAO, J

16th JULY, 2019

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