HONOURABLE SRI JUSTICE P.NAVEEN RAO

WRIT PETITION NO.6105 OF 2019

Date: 03.04.2019

Between:

M/s. Victory Transformers and Switchgears Limited,
Plot No.8, Survey No.855, Industrial Estate,
Medchal, rep.by its Managing Director, Sri
Vaddineni Mahindra.

.....Petitioner

and

Reserve Bank of India,
6, Sansad Marg, New Delhi,
Delhi, rep.by its General Manager
and two others.

.....Respondents

The Court made the following:

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ORDER:

State Bank of India provided financial assistance to the petitioner-company in the year 2005. Petitioner also entered into Multiple Banking Arrangement (MBA) with Bank of Baroda (BOB) and Bank of India (BOI). Petitioner-company and its guarantors extended collateral security to the loans obtained by the petitioner-company. The additional collateral security of certain properties was extended on pari-passu with first charge to BOB and second charge to BOI. The petitioner-company went into liquidity crisis and defaulted in making payments. It appears, the company applied under Section 15(1) of the SICA, 1985 to the Board for Industrial and Financial Reconstruction (BIFR) and Case No.16 of 2013 is pending in Bench-III of the BIFR. As loans were not repaid 2nd respondent-Bank initiated measures under the provisions of 'The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002' (Act, 2002). While so, the petitioner-company approached the 2nd respondent Bank for amicable settlement. Petitioner agreed for One Time Settlement (OTS) for clearing the debts. The 2nd respondent-Bank agreed for OTS offer of the petitioner and its subsidiary by way of sanction letter dated 06.10.2016. It has prescribed timeline to pay the amounts specified therein.

2. From the narration of facts in the affidavit filed in support of the writ petition, it appears that in terms of OTS, the amounts due as agreed upon were not cleared by the petitioner. On 03.05.2018, the 2nd respondent-Bank cancelled the OTS and petitioner was

advised to pay within one week the total dues of 161.44 crores as on 30.04.2018. Petitioner was warned that in case of failure to pay the amount due, the Bank will initiate further steps. Even before one time settlement was agreed, Bank filed O.A.No.925 of 2014 before the Debts Recovery Tribunal-I and it appears the said case is pending before the Debts Recovery Tribunal. Consequent to the cancellation of OTS, Bank initiated proceedings under Insolvency and Bankruptcy Code 2016 (Code 2016) in Company Petition (IB) No.1515/CB/2018 pending before the National Company Law Tribunal at Chennai. According to the averments, the case was heard and is pending for passing final orders.

3. To complete the narration, it appears petitioner also filed Second Appeal Nos.730 and 438 of 2018 pending in Debts Recovery Tribunal-I. Petitioner also filed O.S.No.137 of 2018 in the Court of Senior Civil Judge at Medchal. The issues raised in these cases and reliefs sought therein are not mentioned in the affidavit filed in support of the writ petition.

4. While so, this writ petition is filed praying to set aside the decision to cancel the OTS vide letter of the 2nd respondent Bank dated 03.05.2018 and to declare the filing of C.P.No.1515/ CB/2018 before the National Company Law Tribunal at Chennai as illegal.

5. Extensive submissions are made by learned counsel for petitioner. He would contend that as the Bank has not released the properties sought by petitioner, he could not mobilize the funds. The delay in repayment was not intentional. The Bank

could not have cancelled OTS and filed case in National Company Law Tribunal.

6. Learned senior counsel Sri M.Narender Reddy appearing for respondent-Bank would submit that as petitioner did not honour the commitments of OTS, respondent-Bank cancelled the OTS. He placed reliance on clause-(ix) of the proceedings dated 06.10.2016 approving of OTS, and this clause enables the Bank to cancel the OTS if terms of OTS are not complied. He submits that Writ Petition is not maintainable on cancellation of OTS. In support of the said contention, he placed reliance of two decisions of Division Bench of this Court in W.P.No.37229 of 2018 and in **Meragani Appa Rao v. Deputy General Manager-cum-Authorized Officer, IDBI Bank, West Godavari District**[1].

7. From the prayer of the Writ Petition, primary grievance of the petitioner is against cancellation of OTS and further grievance is initiation of proceedings under Insolvency and Bankruptcy Code 2016. As briefly noted above, several cases are pending before various forums initiated by the petitioner and the 2nd respondent-Bank respectively. It is not in dispute that there was OTS between the petitioner and the 2nd respondent Bank. The settlement required the petitioner to clear the dues as per the time schedule indicated therein and apparently, dues were not paid as agreed upon. The petitioner may have valid reasons for not honouring the time schedule. Once OTS is cancelled, it is permissible for the Bank to invoke provisions of the Code 2016 to recover the outstanding amounts due to the Bank. Section 7 of the Code 2016 enables the financial creditor to file application for initiating

[1] 2018 (3) ALD 206 (DB)

corporate insolvency resolution process against a corporate debtor before Adjudicating Authority i.e., National Company Law Tribunal.

8. The National Company Law Tribunal is competent to decide the claim set up before it under the Insolvency and Bankruptcy Code, 2016. It is also competent to decide the issue of whether the proceedings under the Insolvency and Bankruptcy Code, 2016 are validly initiated and what relief can be granted to the secured creditor. The relief sought in the present writ petition is nothing but stalling the proceedings pending before the National Company Law Tribunal, more so when it is at the stage of passing final orders. The plea urged by the petitioner herein ought to have been raised before the Tribunal. It is for the National Company Law Tribunal to consider the points urged and to take a decision. Once a decision is made, the aggrieved party can avail appropriate remedy as available in law. Thus, petitioner cannot seek to stall the proceedings pending before the competent Tribunal by invoking jurisdiction of writ Court under Article 226 of the Constitution of India.

9. OTS is an agreement arrived at by lender and borrower to resolve pending claims. It is a contract which binds both parties. The offer of petitioner for One Time Settlement was accepted by the Bank. While accepting the said offer, in the letter dated 06.10.2016 Bank prescribed time schedule for payment and terms of acceptance. To consider the issue in this Writ Petition, it is relevant to note clause (ix). It reads as under:

> " (ix) If the entire compromise amount is not paid by the Company as stipulated above or/and do not comply with the terms mentioned as above, Bank will treat the offer as cancelled/ withdrawn and the Bank would initiate legal action including action under SARFAESI Act for recovery of entire dues together with expenses, after appropriating the amounts paid by you."

10. It is to be noted that under compulsion of Reserve Bank of India Orders and though huge amount is due from petitioner, State Bank of India has agreed to close the loan account if petitioner pays 17 crores within the time agreed upon. This sum was just about 10% of total dues as on that date. Petitioner ought to have latched onto said offer of Bank and paid the amounts agreed upon, but failed to do so. As terms of OTS were not complied, the Bank annulled the settlement process.

11. The decision of lender Bank to cancel the OTS alleging failure of borrower to pay the amounts as per the schedule cannot be held as amounting to arbitrary exercise of power. More so, clause (ix), extracted above, vests such power in the State Bank of India. Such decisions flowing out of a contract are not amenable to judicial review under Article 226 of the Constitution of India, even if a party to the contract is 'State' under Article 12 of the Constitution of India. Further, in matters of this nature, there is no public law element. It is a pure and simple contractual relationship. An aggrieved party has to avail common law remedy.

12. The scope of such annulment was considered by Division Bench of this Court in **Meragani Appa Rao** (supra). Division Bench observed,

"18. ……. However, when banks approve such reduced One Time Settlement offers to defaulting borrowers, it cannot be doubted that an indulgence is being shown to such borrowers and they cannot, as a matter of right, demand that they should be given sufficient time, as per their own convenience, to pay even such reduced dues. The very scheme and thrust of a One time Settlement is aimed at enabling the bank to make recovery of the reduced dues, at least, within the stipulated time. If the borrower fails to comply with this time stipulation, he would no longer be entitled to the benefit of reduction in his dues as per such One Time Settlement."

13. In **Joshi Technologies International INC.** Vs. **Union of India**[2]**,** on review of precedent decisions, Hon'ble Supreme Court codified the principles on the scope of judicial review in contractual matters. In this context, it is appropriate to note the relevant paragraphs. Paragraphs 70, 70.3, 70.4 and 70.5 read as under:

"70. Further, the legal position which emerges from various judgments of this Court dealing with different situations/aspects relating to contracts entered into by the State/public authority with private parties, can be summarised as under:

xxxx

70.3. Even in cases where question is of choice or consideration of competing claims before entering into the field of contract, facts have to be investigated and found before the question of a violation of Article 14 of the Constitution could arise. If those facts are disputed and require assessment of evidence the correctness of which can only be tested satisfactorily by taking detailed evidence, involving examination and cross-examination of witnesses, the case could not be conveniently or satisfactorily decided in proceedings under Article 226 of the Constitution. In such cases the Court can direct the aggrieved party to resort to alternate remedy of civil suit, etc.

70.4. Writ jurisdiction of the High Court under Article 226 of the Constitution was not intended to facilitate avoidance of obligation voluntarily incurred.

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2 (2015) 7 SCC 728

> 70.5. Writ petition was not maintainable to avoid contractual obligation. Occurrence of commercial difficulty, inconvenience or hardship in performance of the conditions agreed to in the contract can provide no justification in not complying with the terms of contract which the parties had accepted with open eyes. It cannot ever be that a licensee can work out the licence if he finds it profitable to do so: and he can challenge the conditions under which he agreed to take the licence, if he finds it commercially inexpedient to conduct his business."

14. For the aforesaid reasons, the Court is not inclined to entertain the Writ Petition filed under Article 226 of the Constitution of India. It is accordingly dismissed. However, it is suffice to note that the issues discussed in the preceding paragraphs are only to consider the maintainability of the Writ Petition. Pending miscellaneous petitions shall stand closed.

JUSTICE P.NAVEEN RAO

Date: 03.04.2019
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