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IN THE HIGH COURT OF ORISSA AT CUTTACK

W.P.(C) No. 20499 of 2022

Padma Charan Patro

...

Petitioner

Mr. Manoranjan Mishra,
Advocate

-versus-

M.D. & C.E.O. Central Office ...

Opposite Parties

***Union Bank of India
& others***

Mr. Bhaskar Chandra Panda,
Advocate

**CORAM:
JUSTICE JASWANT SINGH
JUSTICE M.S. RAMAN**

**ORDER
12.10.2022**

Order No.

03. This matter is taken up through virtual/physical mode.

- 1.* The petitioner, proprietor of Maa Bhagabati Store and borrower, availed cash credit loan to the tune of Rs.3,00,000/- in the year 2013 from Union Bank of India, Goshani Nuagaon Branch, Berhampur in the district of Ganjam. Due to indiscipline in repayment, notice dated 01.02.2022 was issued under Section 13(2) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short, "SARFAESI Act") recalling an amount of Rs.6,99,667/- outstanding as on 31.12.2021 together with interest thereon with contractual rate. Non-response of terms of such demand notice led

P.T.O.

to issue of notice dated 09.06.2022 under Section 13(4) read with Rule 8 of the Security Interest (Enforcement) Rules, 2002 indicating assumption of symbolic possession of the secured asset. Accordingly, the opposite parties-bank issued notice dated 20.07.2022 fixing date of auction sale of property on 30.08.2022. Challenging the said e-auction sale notice the petitioner came up before this Court in the present writ petition.

2. This Court while issuing notice, passed the following order on 24.08.2022:

- “2. Counsel for the Bank appearing on advance notice submits that the e-Auction of the mortgaged residential house is fixed for 30th August, 2022 for recovery of an outstanding liability of around Rs.7.00 lakhs as on today.*
- 3. Counsel for the Petitioner submits that his client is prepared to deposit substantial amount as upfront money with the remaining balance within next four months.*
- 4. Issue notice for 29th September, 2022.*
- 5. Mr. Rajesh Ranjan Sahoo, proxy counsel appearing on behalf of Mr. Bhaskar Chandra Panda, learned counsel appears and waives notice on behalf of the Opposite Parties-Bank. Let requisite number of copies of the writ petition be served on him during the next three working days.*
- 6. As an interim measure, subject to the Petitioner depositing a sum of Rs.3.5 lakhs with the Bank on or before 30th August, 2022, the successful bid, if any, shall not be confirmed without leave of the Court.*
- 7. The Petitioner shall also file an undertaking to clear the remaining balance in equated instalments within next four months.”*

3. Though it was conceded that aforesaid amount as directed has been deposited, the petitioner failed to furnish undertaking as required to do so in the above order dated 24.08.2022. Therefore, this Court passed further orders on 29.09.2022 which is to the following effect:

“1. *Learned counsel for the Bank concedes that the amount in terms of the previous order stands deposited, however, his undertaking has not been furnished. He prays for last opportunity to seek instructions.*

2. *List on 12.10.2022.”*

4. On the resumed hearing today, Sri Bhaskar Chandra Panda, learned Advocate for the opposite parties submitted that the e-auction sale of the secured property has failed due to lack of intending bidder, however, no further orders protecting the petitioner be passed inasmuch as the “undertaking” furnished before the bank is not in consonance with the order passed by this Court.

5. Sri Manoranjan Mishra, learned Advocate for the petitioner has supplied a copy of “UNDERTAKING” as furnished to the bank for perusal of this Court. Said so-called “undertaking” runs as follows:

“To

*The Authorised Officer
-cum-
Chief Manager
Union Bank of India
Berhampur, Ganjam*

UNDERTAKING

I, the undersigned do hereby undertake to clear the remaining balance in equated instalments within next four months as per the order of the Hon'ble Court in W.P.(C) No.20499 of 2022 subject to its final outcome w.e.f. my OTS proposal. A copy of Order dated 24.08.2022 is submitted herewith.

*Sd/-
Padma Charan Patro
30.08.2022”*

6. Neither Order dated 24.08.2022 nor Order dated 29.09.2022 passed by this Court in the instant case has whispered about One Time Settlement. Nonetheless, these orders specifically mentioned about filing of undertaking which is intended to bind the parties to the terms of payment schedule as conceded by the learned counsel for the respective parties. The interim orders are clear and loud that the petitioner, having deposited Rs.3,50,000/- as directed *vide* Order dated 24.08.2022, would clear up the balance outstanding amount “in equated instalments within four months”, but the said order never directed to be “subject to” final outcome of OTS proposal. This Court does not approve of such a conduct on the part of the petitioner. The petitioner apparently has tried to tinker with the observations of this Court.

6.1. The tenor of UNDERTAKING as reproduced herein above shows that the petitioner has not come to this court with clean hands and clear heart. Therefore, this Court feels it appropriate not to show any indulgence noticing the inappropriate conduct of the petitioner.

6.2. It has been succinctly stated in *Canara Bank and Ors. Vrs. Debasis Das and Ors.*, AIR 2003 SCW 1561 as:

“A person who seeks equity must come with clean hands. He, who comes to the Court with false claims, cannot plead equity nor the Court would be justified to exercise equity jurisdiction in his favour. A person who seeks equity must act in a fair and equitable manner.”

- 6.3. The Hon’ble High Court of Delhi *C.B. Aggarwal Vrs. P. Krishna Kapoor*, AIR 1995 Delhi 154, observed:

“It is true that in a civilised society, legal process is the machinery for keeping order and doing justice. It can be used properly or it can be abused. It is used properly when it is invoked for vindication for men’s right and enforcement of just claims. It is abused when it is diverted from its true course so as to serve extortion or oppression; or to exert pressure so as to achieve an improper end.”

- 6.4. It is apt to refer to *Suman Chadha & Another Vrs. Central Bank of India*, 2021 SCC OnLine SC 564 wherein it has been said by the Hon’ble Supreme Court in no unambiguous words as:

“16. It is true that this Court has held in a series of decisions that the wilful breach of the undertaking given to the Court amounts to contempt of Court under Section 2(b) of the Act. But the Court has always seen (i) the nature of the undertaking made; (ii) the benefit if any, reaped by the party giving the undertaking; and (iii) whether the filing of the undertaking was with a view to play fraud upon the court or to hoodwink the opposite party.”

- 6.5. Taking serious view of the matter, suffice it to say that in the instant case, after conceding before this Court to file undertaking unconditionally to the effect that the petitioner would clear up balance outstanding in four months in equated monthly instalments, there was no scope for the petitioner to furnish the undertaking hedging with “CONDITION” which is not only unacceptable by this Court, but also held to be contemptuous.

7. In the present case, knowing fully well that no directions can be issued for setting the matter under OTS Scheme, the petitioner made prayer to this effect in the writ petition. It is well-established that this Court is powerless to invoke jurisdiction under Article 226 of the Constitution of India to direct the bank authorities to consider One Time Settlement proposal. It may be worthwhile to have reference to *Bijnor Urban Cooperative Bank Limited, Bijnor & others Vrs. Meenal Agarwal & others*, AIR 2022 SC 56 = AIROnline 2021 SC 1210 = 2021 SCC OnLine SC 1255 wherein the Hon'ble Supreme Court has been pleased to lay down as follows:

“2.3 *** At this stage, it is required to be noted that in the said writ petition, the original writ petitioner also prayed for a writ of mandamus directing the Bank to give the benefit of OTS so that the original writ petitioner may deposit the entire amount at once so as to clear her dues for the loan which she had taken in the year 2013, which prayer was not granted by the High Court and the High Court only directed the Bank to consider her grievance and decide her representation dated 22.07.2019.

- 2.4 Thereafter, the original writ petitioner again submitted an application dated 06.02.2021 to the Bank to grant the benefit under the OTS, which again was rejected by the Bank vide communication dated 08.01.2021 and 25.02.2021. The original writ petitioner filed a fresh writ petition before the High Court being Writ Petition No. 15194 of 2021 with a prayer to quash the aforesaid impugned orders dated 08.01.2021 and 25.02.2021 rejecting her application for grant of benefit of OTS and also prayed for a writ of mandamus to direct the Bank to give the benefit of OTS issued vide Circular Nos. C-108 and C-121.

- 5.2 *Therefore, as per the guidelines issued, the grant of benefit of OTS Scheme cannot be prayed as a matter of right and the same is subject to fulfilling the eligibility criteria mentioned in the scheme. The defaulters who are ineligible under the OTS Scheme are mentioned in clause 2, reproduced hereinabove. A wilful defaulter in repayment of loan and a person who has not paid even a single installment after taking the loan and will not be able to pay the loan will be considered in the category of “defaulter” and shall not be eligible for grant of benefit under the OTS Scheme. **Similarly, a person whose account is declared as “NPA” shall also not be eligible.** As per the guidelines, the Bank is required to constitute a Settlement Advisory Committee for the purpose of examining the applications received and thereafter the said Committee has to take a decision after considering whether a defaulter is entitled to the benefit of OTS or not after considering the eligibility as per the OTS Scheme. While making recommendations, the Settlement Advisory Committee has to consider whether efforts have been made to recover the loan amount and the possibility of recovery has been minimized, meaning thereby if there is possibility of recovery of the amount, either by initiating appropriate proceedings or by auctioning the property mortgaged and/or the properties given as a security either by the borrower and/or by guarantor, the application submitted by the borrower for grant of benefit under the OTS Scheme can be rejected.*

8. **** What is required to be considered is a conscious decision by the Bank that the Bank will be able to recover the entire loan amount by auctioning the mortgaged property and a due application of mind by the Bank that there are all possibilities to recover the entire loan amount, instead of granting the benefit under the OTS Scheme and to recover a lesser amount. It is ultimately for the Bank to take a conscious decision in its own interest and to secure/recover the outstanding debt. No bank can be compelled to accept a lesser amount under the OTS Scheme despite the fact that the Bank is able to recover the entire*

loan amount by auctioning the secured property/mortgaged property. When the loan is disbursed by the bank and the outstanding amount is due and payable to the bank, it will always take a conscious decision in the interest of the bank and in its commercial wisdom.

9. *Even otherwise, as observed hereinabove, no borrower can, as a matter of right, pray for grant of benefit of One Time Settlement Scheme. In a given case, it may happen that a person would borrow a huge amount, for example Rs. 100 crores. After availing the loan, he may deliberately not pay any amount towards installments, though able to make the payment. He would wait for the OTS Scheme and then pray for grant of benefit under the OTS Scheme under which, always a lesser amount than the amount due and payable under the loan account will have to be paid. This, despite there being all possibility for recovery of the entire loan amount which can be realised by selling the mortgaged/secured properties. If it is held that the borrower can still, as a matter of right, pray for benefit under the OTS Scheme, in that case, it would be giving a premium to a dishonest borrower, who, despite the fact that he is able to make the payment and the fact that the bank is able to recover the entire loan amount even by selling the mortgaged/secured properties, either from the borrower and/or guarantor. This is because under the OTS Scheme a debtor has to pay a lesser amount than the actual amount due and payable under the loan account. Such cannot be the intention of the bank while offering OTS Scheme and that cannot be purpose of the Scheme which may encourage such a dishonesty.*
10. *If a prayer is entertained on the part of the defaulting unit/person to compel or direct the financial corporation/bank to enter into a one-time settlement on the terms proposed by it/him, then every defaulting unit/person which/who is capable of paying its/his dues as per the terms of the agreement entered into by it/him would like to get one time settlement in its/his favour. Who would not like to get his liability reduced and pay lesser amount than the amount he/she is liable to pay under the loan account? ****

11. ***The sum and substance of the aforesaid discussion would be that no writ of mandamus can be issued by the High Court in exercise of powers under Article 226 of the Constitution of India, directing a financial institution/bank to positively grant the benefit of OTS to a borrower. The grant of benefit under the OTS is always subject to the eligibility criteria mentioned under the OTS Scheme and the guidelines issued from time to time. If the bank/financial institution is of the opinion that the loanee has the capacity to make the payment and/or that the bank/financial institution is able to recover the entire loan amount even by auctioning the mortgaged property/secured property, either from the loanee and/or guarantor, the bank would be justified in refusing to grant the benefit under the OTS Scheme. Ultimately, such a decision should be left to the commercial wisdom of the bank whose amount is involved and it is always to be presumed that the financial institution/bank shall take a prudent decision whether to grant the benefit or not under the OTS Scheme, having regard to the public interest involved and having regard to the factors which are narrated hereinabove.***
12. ***In view of the aforesaid discussion and for the reasons stated above, we are of the firm opinion that the High Court, in the present case, has materially erred and has exceeded in its jurisdiction in issuing a writ of mandamus in exercise of its powers under Article 226 of the Constitution of India by directing the appellant-Bank to positively consider/grant the benefit of OTS to the original writ petitioner.”***

[Emphasis supplied]

7.1. In *Dwarikesh Sugar Industries Ltd. Vrs. Prem Heavy Engineering Works (P) Ltd. and Another*, (1997) 6 SCC 450, it has been observed as follows:

- “32. When a position, in law, is well settled as a result of judicial pronouncement of this Court, it would amount to judicial impropriety to say the least, for the subordinate courts

including the High Courts to ignore the settled decisions and then to pass a judicial order which is clearly contrary to the settled legal position. Such judicial adventurism cannot be permitted and we strongly deprecate the tendency of the subordinate courts in not applying the settled principles and in passing whimsical orders which necessarily has the effect of granting wrongful and unwarranted relief to one of the parties. It is time that this tendency stops.”

8. It is noteworthy that the Hon'ble Supreme Court has strongly deprecated the tendency of the High Courts in entertaining the writ petitions filed under Article 226 of the Constitution of India. The aforesaid being the position of law as enunciated by the Hon'ble Supreme Court laying down restrictions as to exercising power under Article 226 of the Constitution of India save and except exceptions carved out, this Court, while condemning the conduct of the petitioner, is of the considered view that the petitioner is not liable to be shown benevolence any further.
9. This Court, therefore, ceases to have inclination to exercise its extraordinary jurisdiction invoking provisions of Article 226 of the Constitution of India in favour of unscrupulous loanee. Accordingly, the writ petition is dismissed and consequently, the interim order(s) is vacated.

(Jaswant Singh)
Judge

(M.S. Raman)
Judge

Laxmikant

October 12, 2022
Cuttack