

IN THE HIGH COURT OF ORISSA AT CUTTACK

W.P.(C) No.33441 of 2021

(In the matter of an application under Articles 226 and 227
of the Constitution of India)

Dipti Prasad Das

....

Petitioner

-Versus-

***Chief Manager and Authorised
Officer, Punjab National Bank,
Circle Sastra Centre, Circle
Office, 4th Floor, Deen Dayal
Bhawan, Ashok Nagar,
Bhubaneswar***

....

Opposite Party

Advocates appeared in the case through Hybrid Mode:

For Petitioner

:

Mr. Alok Kumar Das and
Mr. R.B. Mishra, Advocates

For Opposite Party

:

Mr. Subrata Sadangi, Advocate
for the Bank
Mr. Milan Kanungo, Senior
Advocate & Mr. Siba Narayan
Biswal, Advocate for intervenor
(Auction Purchaser)

CORAM:

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

Date of Hearing: 26.04.2022 Date of Judgment: 28.06.2022

Jaswant Singh, J.

The petitioner has preferred this writ petition to challenge the notice dated 07.10.2021 issued under Section 13(4) of the SARFAESI Act, 2002 (for short “the Act, 2002”) whereby symbolic possession of the mortgaged property was undertaken, prayed for to keep the E-auction scheduled on 28.10.2021 in abeyance and to further direct the Opposite Party/Bank to consider the OTS proposal of the petitioner.

2. The brief facts of the case are that the petitioner, i.e., Mr. Dipti Prasad Das availed a Cash Credit limit loan of Rs.5 crores from the Opposite Party/Bank on 28.06.2013 by mortgaging his immovable property located at Plot No.166/2027, 166/2031/2205, 163/567/2030, 166/656/2029, Khata No.157/297/A at Mouza Bhagababatipur, Chandaka to secure the loan. Due to financial indiscipline, the loan account was classified as NPA on 10.02.2016. Further, a demand notice under Section 13(2) of the Act, 2002 was issued on 18.02.2016 recalling outstanding amount of Rs.5,60,48,436.80 as on 31.01.2016. It is the claim of the petitioner that a notice under Section 13(4) of the Act, 2002 was initially issued on 12.10.2017 taking symbolic possession of the mortgaged property. The petitioner had also sent an OTS proposal to the

Opposite Party/Bank on 29.12.2018 which was approved and the petitioner was asked to deposit Rs.4,03,10,401/- (Four Crores Three Lakhs Ten Thousand Four Hundred One Rupees) to settle the loan account. The said OTS Scheme also provided that the settled amount must be paid within 90 days of conveying the approval of OTS to the borrower (petitioner). Further if the whole payment is not made within 90 days, the borrower (petitioner) was required to pay interest at the rate 9.25% on reducing balance basis from the date of conveying approval till the date of final payment. The petitioner was only able to deposit Rs.40,50,000/- (Forty Lakhs Fifty Thousand Rupees) within the stipulated time. It is the claim of the petitioner that further proceedings only began on 07.10.2021 whereby the Opposite Party/Bank again issued a notice under Section 13(4) of the Act, 2002 demanding an outstanding amount of Rs.9,27,73,120.50 as 30.09.2021 and also fixing the auction date on 28.10.2021 with a reserve price of Rs.2,95,00,000/-.

3. The petitioner also claims that the Opposite Party/Bank has come up with a new OTS Scheme namely "SASTRA CIR NO 31", dated 30.06.2021 and he is eligible under such Scheme.

4. During the course of hearing, the Opposite Party/Bank filed a detailed counter affidavit dated 15.11.2021 in reply to the writ petition filed by the petitioner. The said affidavit revealed certain startling facts. It provided that the petitioner has suppressed the fact of his approaching this Court vide writ petitions bearing W.P.(C) No.13569 of 2016, W.P.(C) No.14143 of 2016, W.P.(C) No.23310 of 2017 and W.P.(C) No.18622 of 2019 seeking a similar remedy with respect to the same property. Further, it is submitted vide the same affidavit dated 15.11.2021 that the petitioner has failed to comply with any of the orders or directions passed in the above writ petitions by this Hon'ble Court.
5. It is pertinent to refer to each of the writ petitions separately in order to decide the case.
- (i) W.P.(C) No.14143 of 2016 and W.P.(C) No.13569 of 2016 were filed by the petitioner to challenge the earlier symbolic possession notice dated 26.07.2016 and the E-auction notice dated 09.08.2016 issued by the Opposite Party/Bank. The relevant order dated 22.06.2017 of this Court disposing of both the cases is produced below:

“Learned counsel for opp.party-Bank submits that in spite of paper publication of e-auction notice, because of

the pendency of the writ petition, no offer has been received by the Bank. Therefore, auction of the petitioner's mortgaged property could not be held on the date fixed. He also contends that no further action has yet been taken in the matter.

Considering the submissions and in view of the fact that the auction could not be held due to lack of response, we dispose of the writ petitions directing that in case subsequent action for auction of the mortgaged property is taken by the Bank, the same shall be strictly in terms of the provisions of the SARFAESI Act and the Rules made thereunder. The Bank shall ensure that the reserve price of mortgaged property is fixed as per the existing market value.

The writ applications are accordingly disposed of.”

(ii) Thereafter, W.P.(C) No.23310 of 2017 was preferred by the petitioner challenging the subsequent E-auction Sale Notice dated 09.10.2017 with respect to the same property. The order dated 15.11.2017 of this Court is reproduced below:

“Learned counsel for the Bank on instruction submits that though the auction of the mortgaged property had been put to auction, but it did not yield any response and therefore the mortgaged property could not be sold.

Learned counsel for the petitioner prays for withdrawal of this writ petition with liberty to approach the Bank for settlement of the loan account by sale of the hypothecated goods.

Granting such liberty, the writ petition is disposed of as withdrawn.”

(iii) Further, the W.P.(C) No.18622 of 2019 was preferred by the petitioner challenging the E-auction Sale Notice dated 19.09.2019. This Court vide interim order dated 04.10.2019 asked the petitioner to deposit Rs.50,00,000/- with the

Opposite Party/Bank by 31.10.2019, and in failure to do so, allowed the Bank to take all consequential steps for realization of the outstanding dues. This Court also directed that the E-Auction may continue but the same shall not be confirmed till next hearing.

It transpires that due to non-compliance of the interim order dated 04.10.2019, the petitioner failed to prove/show his *bonafides* and consequently this Court vide order dated 03.03.2021, dismissed the writ petition and vacated the interim order.

6. The Opposite Party/Bank vide the same affidavit dated 15.11.2021 also provided that the mortgaged property/secured asset was sold to the highest bidder for Rs.2.96 crores in the E-Auction dated 28.10.2021. The auction purchaser has also deposited the entire amount in accordance with law and consequently the sale has been confirmed on 01.11.2021. Further, the relevant sale certificate has also been issued.
7. On the argument of the petitioner to consider the OTS Scheme 2021, the affidavit dated 15.11.2021 provided that in accordance with the said OTS Scheme, the petitioner should have approached the Bank by making a required initial deposit,

however the petitioner submitted a vague OTS offer of Rs.272.30 lac vide letter dated 28.10.2021 without any token/upfront amount and consequently on consideration, the said proposal was discarded by the Bank.

8. The petitioner filed a rejoinder affidavit dated 30.11.2021 in response to the affidavit filed by the Opposite Party/Bank raising a sole argument that the property was auctioned on much lesser amount than the market value of the said mortgaged property. He also relied on two judgments in the case of ***Pushpa Builder Ltd. v. Vaish Cooperative Adarsh Bank Ltd., 2021 SCC Online Del 4256*** and ***M/s. Sardar Associates & Ors. v. Punjab & Sind Bank & Ors in Civil Appeal No(s).4970-4971 of 2009.***
9. After analyzing the rival arguments and perusing the pleadings with the able assistance of the counsel for the parties, we find that the present writ petition is devoid of any merit and is liable to be dismissed.
10. First of all we would like to take up the question of concealment of the facts by the petitioner as pointed out by the Bank in their affidavit. The petitioners herein did not disclose about the previous litigations neither in their writ petition nor

in the rejoinder affidavit. Having filed repeated petitions before this Court, we find that least what could be expected from a litigant is to disclose the previous litigations and the orders obtained from the Courts pertaining the issue involved. Thus, the first reason as to why the present petition cannot be entertained is that the petitioner concealed material facts regarding the filing of the previous petitions against the Opposite Party as noticed above. The intent apparently was to conceal the facts that previously the petitioner failed to prove its *bona fide* which is *sine qua non* while examining a claim of a borrower to settle its account under One Time Settlement. We do not appreciate such approach of the petitioner. It is the solemn duty of every litigant who approaches the Court to disclose all material facts which even remotely may affect the controversy at issue. This is one of the pre-condition for seeking to invoke the equitable jurisdiction of a writ Court under Article 226/227 of the Constitution of India.

10.1. Hon'ble Supreme Court in **S.P. Changalvaraya Naidu (dead) V/s Jagannath 1994 (1) SCC 1** held as under :-

“7. The High Court, in our view, fell into patent error. The short question before the High Court was whether in the facts and circumstances of this case, Jagannath obtained the preliminary decree by playing fraud on the court. The High Court, however, went

haywire and made observations which are wholly perverse. We do not agree with the High Court that "there is no legal duty cast upon the plaintiff to come to Court with a true case and prove it by true evidence". The principle of "finality of litigation" cannot be pressed to the extent of such an absurdity that it becomes an engine of fraud in the hands of dishonest litigants. The courts of law are meant for imparting justice between the parties. One who comes to the court, must come with clean hands. We are constrained to say that more often than not, process of the court is being abused. Property-grabbers, tax-evaders, bank-loan-dodgers and other unscrupulous persons from all walks of life find the court process a convenient lever to retain the, illegal-gains indefinitely. We have no hesitation to say that a person whose case is based on falsehood, has no right to approach the Court. He can be summarily thrown out at any stage of the litigation."

In view of the aforesaid judgment, we do not feel that the petitioner qualifies for invoking the extra-ordinary equitable writ jurisdiction of this Court on the ground of concealment of material facts, which comprises of the previous litigation initiated by the petitioner regarding the same loan account.

- 11.** The Second reason for disentitling the petitioner to relief claimed is that petitioner previously has already been granted opportunity to settle the account but failed to do so. It has been noticed that offer of petitioner to settle the loan account was accepted by the Opposite Party Bank on 29.12.2018 for Rs. 4,03,10,401 but the petitioner could pay Rs. 40,50,000 only. The remaining amount since was not paid the settlement

became inoperative. Even thereafter, the petitioner approached this Court by filing WP (C) No. 18622 of 2019 vide which E-auction proposed to be conducted by the Bank vide sale notice dated 19.09.2019 was challenged. Vide order dated 04.10.2019 the petitioner was granted time to deposit Rs. 50 Lacs to avoid sale of the property at the hands of the bank. This amount admittedly was not deposited. Even now, when the property was put to sale the petitioner has approached this Court claiming similar relief of consideration of his case for settlement of the loan account under the Policy of the bank. We feel that since sufficient opportunity have already been granted to the petitioner to settle his account, no further directions can be issued to the bank compelling it to settle the account of the petitioner. This Court is conscious of the settled proposition of law that a borrower has a right of consideration and settlement of its loan account in terms of the One Time Settlement Policy of the Bank and no arbitrary or discriminatory action is permissible. However, the peculiar facts of this case disentitles the petitioner to claim such relief.

- 12.** Thirdly, now since sale certificate has been issued and third party rights have been created we feel that prayer for

settlement cannot now be considered at this belated stage, more-so when the bank has sold the property at a higher amount i.e. Rs.296 Lacs as compared to the offer of the petitioner for Rs. 272.30 Lacs. The petitioner if at all has any grievance, the same can be redressed by availing remedies in terms of Section 17 of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 by approaching DRT to challenge the sale proceedings. It is also not in dispute that the total outstanding amount as on 31.10.2021 is Rs.9,34,49,346.50 (Nine Crores Thirty Four Lacs Forty Nine Thousand Three Hundred Forty Six Rupees and Fifty Paise).

- 13.** Fourthly, the bank has already considered the proposal of the petitioner and has rejected the same on two counts. Firstly, the proposal itself was not within the ambit of the OTS Scheme as it did not append any upfront amount which is the requirement of the policy. Secondly, according to the bank the value of the available security (Rs.1247.76 Lacs) is much more than the amount offered by the petitioner i.e. Rs.272.30 lac. In these circumstances, we are of the considered opinion that no such direction can be issued to the bank to settle the account

where the bank can recover a better amount than what is being offered by the borrower. The bank is custodian of public funds. It is the duty of the bank to protect its right of recovery. If the bank considers that it has better prospects of recovery by putting the secured assets through the process of enforcement in accordance with law, we do not find such stand to be arbitrary or unreasonable.

13.1 Our aforesaid view finds support from a recent judgment of Hon'ble Supreme Court in ***Bijnor Urban Cooperative Bank Limited, Bijnor v. Meenal Agarwal 2021 AIR SC 56*** wherein it has been held as under :-

“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 realized 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? In the present case, it is noted that the original writ petitioner and her husband are making the payments regularly in two other loan accounts and those accounts are regularized. Meaning thereby, they have the capacity to make the payment even with respect to the present loan account and despite the said fact, not a single amount/installment has been paid in the present loan account for which original petitioner is praying for the benefit under the OTS Scheme.

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."

[Emphasis supplied]

14. The argument of the petitioner that the sale has been conducted in violation of the mandatory procedure as provided for under Rule 8 and 9 of the Security Interest (Enforcement) Security Interest Rules, 2002 and at much lower price than the market value, we find involves leading of credible evidence and it's evaluation and for that the petitioner is at liberty to challenge the sale process before the DRT under Section 17 of the Act, 2002 as noticed above.

15. For the reasons stated above, we are not inclined to further entertain the present writ petition. The same is accordingly dismissed. The petitioner shall be at liberty to avail alternative remedies as may be available to him in accordance with law.

(Jaswant Singh)
Judge

M.S. Raman, J. I agree.

(M. S. Raman)
Judge

Orissa High Court, Cuttack

The 28th June, 2022/Basudev