IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO.260 OF 2022
IN
NOTICE OF MOTION NO. 3365 of 2021
IN
SHORT CAUSE SUIT NO. 2529 of 2021
IN
INTERIM APPLICATION NO. 1789 OF 2022
IN
APPEAL FROM ORDER NO. 260 OF 2022

Bank of Baroda .. Appellant

Versus

Manohar Satramdas Agicha and Anr .. Respondents

…

Dr.Birendra Saraf, Senior Advocate with Ms.Saloni Kapadia, Mr.Aniruddh Gambhir and Karan Sangani i/b Cyril Amarchand Mangaldas for the applicant/appellant.

Mr.Aashish Kamat with Shadab Jain i/b Ajay Bhise for the respondent.

CORAM : BHARATI DANGRE, J.

RESERVED ON : 26th APRIL, 2022
PRONOUNCED ON : 12th JULY, 2022

JUDGMENT:-

1 The present Appeal is filed by the appellant, the Bank of Baroda, being aggrieved by the order dated 11/2/2022 passed by the City Civil and Sessions Court, Greater Mumbai in S.C. Suit No.2529/2021 instituted by the respondent herein, allowing the Notice of Motion filed by the plaintiff, and restraining the defendant, its employees, agents, officers from implementation and operation of the notice dated 6/12/2021, qua Associate Decor Limited till finalization of the Suit.

2 I have heard Dr. Birendra Saraf, Advocate for the appellant and Advocate Ashish kamat for the respondent.

In order to appreciate the legality and correctness of the impugned order, it would be necessary to refer to the brief background in which the impugned order came to be passed.

3 Associate Decor Limited (ADL) availed facilities of INR 627.50 crores from consortium of Banks including the Appellant, Bank of Baroda (BOB) under the term loan agreement dated 15/2/2020 and vide supplementary agreement dated 12/10/2011, 16/6/2012 and 10/7/2014.

On 10/7/2014, the respondents Manohar Satramdas Agicha, Mohd.Farouk Suleman Darvesh and one Farooque Ali Khan executed a joint deed of guarantee in favour of the appellant, who secured repayment of amounts under the loan agreement as well as in respect of the facilities granted to ADL.

The said agreement contained a clause relating to Right of Assignment, Charge, novation or other succession or alienation expressly conferred by such document relating to credit facilities.

4 ADL defaulted in repayment and failed to discharge its obligation to the consortium of banks, including the appellant. The account of ADL was classified as Non Performing Asset (NPA) in accordance with the guidelines issued by the RBI. The efforts of restructuring the ADL failed and it is attributed primarily, on account of the non-co-operation by the Guarantors who caused obstacles in any successful resolution, by initiating litigation.

On account of the persisting default by ADL, the erstwhile Oriental Bank of Commerce (now, Punjab National Bank) initiated the Corporate Insolvency Resolution Process (CIRP) under the Insolvency and Bankrupt Code, 2016 before the NCLT, Bengaluru. Insolvency Application against ADL was admitted and the Committee of Creditors(COC) of ADL comprising of erstwhile Corporation Bank (Union Bank of India), Oriental Bank of Commerce Now (PNB) and the appellant was held as having 34.67% voting share in the committee of Creditors.

5 There was a delay in the CIRP of ADL on account of the proceedings being instituted by majority shareholders of ADL and the Hon'ble Apex Court, at one point of time, directed status quo to be maintained resulting in stay of the CIRP, since the proceedings challenged the validity of RBI Circular dated 12/2/2018. By order dated 2/4/2019, the circular itself being quashed, the stay was vacated. By virtue of Regulation 27(1) of the CIRP Regulation, it is imperative for the resolution professional to appoint two registered valuers to determine the fair value and liquidation value of the Corporate debt in accordance with Regulation 35 of CIRP Regulations. Accordingly, the two valuers came to be appointed and the liquidation value of ADL was derived on the basis of the valuation report submitted by the two registered valuers, (i) Sachin Garg and Vishnu Upadhyay, Rs.220.68 crores and (ii) Sujit Joglekar and Dharmesh Trivedi – Rs.247.51. The average liquidation value of ADL was worked out as 234.10 with the share of the Appellant (BOB), worked out as 81.16 crores.

6 22 prospective Applicants submitted their expression of interest to acquire ADL, out of which Mohd. Enterprises (Tanzania Limited (MATL) and Archive Ply Decor Ltd submitted their resolution plans and on negotiations, MATL was declared as preferred bidder by COC and it was decided to have the bid placed for approval, in accordance with CIRP Regulation.

The resolution plan of MATL was approved by the COC with 100% vote and under the said resolution plan, BoB was to recover Rs.84.24 crore. In terms of the resolution plan of MATL, financial creditors i.e. the applicant was entitled to enforce their right and recover the balance amount from the guarantors in accordance with the loan agreement. Accordingly, on 11/8/2020, the applicant invoked the guarantee and called upon the respondents to pay Rs.2,44,26,84,068.11, which was due and payable by ADL as on 30/6/2022, along with the interest accrued, upto the date of payment. Despite the said notice, no payment was received from any of the guarantors as per the Bank.

7 The appellant filed Original Application before the Debt Recovery Tribunal (DRT) Bengaluru, for initiating recovery proceedings against the guarantors in relation to the loan facilities availed by ADL. A revised OTS proposal for Rs.25 crores as on full and final settlement due to the consortium was offered by the respondent.

As per the revised OTS, the share of BoB was estimated to be around Rs.Nine Crore. Application was thereafter filed by the resolution profession before NCLT for approval of the resolution plan of MATL before the NCLT. A consortium of firms lead by Swamitra Landmarks, filed an application before the NCLT for consideration of their resolution plan and NCLT directed the resolution professional to replace Swamitra's Resolution Plan along with the MATL's resolution plan for

COC's reconsideration. On an Appeal being filed by the COC, the NCLT, Chennai stayed the order of the Tribunal.

8 The appellant explored the possibility of assigning it's debt exposure in ADL and was to be governed by the master direction issued by the RBI on 24/9/2021, which according to the appellant, expressly revealed the existing RBI Circular. OA No.629/2021 came to be filed by the appellant Bank before the DRT, Bengaluru for recovery against the guarantors.

9 An Asset Reconstruction Company India Ltd, (ASREC) approached the appellant for acquiring its debts exposure in ADL and the appellant claim that in accordance with the master direction, it entered into bilateral negotiations with ASREC, which made binding offer of Rs.90 crore to acquire the financial asset of the ADL.

10 In accordance with the applicable master direction, the Bank published the auction notice on its website, inviting expression of interest for sale of financial asset of ADL at the reserve price of INR 95 crores. Bids were invited from all eligible reconstruction companies, Banks, Non Banking Financial Institution (NBF) and Financial Institution. The auction notice so issued fixed the time line for the auction and 21st December 2021 was fixed as the date for rebidding. Bank of Baroda received the letter from the respondents raising their concern about the auction notice and calling upon them to furnish the details of (a)

Board Approved Policy for sale of stressed assets; (b) recent external valuation conducted for the financial assets; (c) inspection of office memorandum/notes for ADL and (d) particulars of bidders.

11 On 18/12/2021, the respondent instituted a Suit in the City Civil Court, seeking a declaration that the auction notice is malafide, fraudulent and illegal and seeking a permanent perpetual injunction restraining Bank of Baroda from acting in furtherance of the auction notice, on the ground that they have not complied with the rescinded RBI circular and bilateral negotiations with ASREC amounted to collusion. In the said Suit, a Notice of Motion was filed, inter alia, seeking stay of the auction notice.

On 20/12/2021, the parties were directed to maintain status quo and on 11/2/2022, the City Civil Court passed the impugned order allowing the Notice of Motion and restraining the BoB from implementing the auction notice till final disposal of the Suit.

12 The learned senior counsel Mr.Birendra Saraf for the appellant, would mount his attack on the impugned order, by submitting that the Civil Court has failed to appreciate the nature of transaction involved and what is sought to be done is only assigning of the assets. He would submit that the City Civil Court has erred in recording that the personal assets of the

respondents, who were the guarantors, were being assigned by the appellant, vide the auction notice and they would cause prejudice to the respondents. He would submit that the personal assets of the respondents are not being assigned, but the loan exposure of ADL is sought to be assigned to a third party. In any case, he would submit that even the case of the respondent is not to the effect that the personal assets are being assigned by way of auction, and hence, the respondent does not have any right to challenge the said assignment to a third party, as they are mere guarantors to the Deal and are not competent to stall process of sale of Assets of the Borrower.

13 The learned counsel Dr.Saraf would also raise an objection to the locus of the respondents in assailing the said action by instituting the suit and the Notice of Motion, as they are personal guarantors and remain unaffected by the assignment. He would submit that the City Civil Court has failed to appreciate that no action can be initiated to prevent the appellant from exercising it's right under the contract with ADL and in consonance with the applicable master direction. The submission is, in the light of the applicable RBI Circular and the express terms of the contract entered into between the parties, the appellant possess an express right to assign the unpaid loan of ADL and the respondents have no right to prevent the same. Arguments are also advanced upon the applicable master direction which permit the Bank to enter into bilateral

negotiations for the sale of stressed assets and, it is submitted that there is no substance in the submission which allege that the entire action of the BoB is in collusion with ASREC. Objection is also raised on the City Civil Court exercising it's jurisdiction over the subject matter, since the Original Application filed by the respondents for recovery of guarantee is pending before the trial Court at Bengaluru. It is sought to be contended that the City Civil Court by recognizing the rights of the respondent arising from the guarantee and not recognizing the rights between the parties, qua the guarantee being under consideration of DRT, has permitted two parallel proceedings.

In short, the submission is the impugned order is illegal and perverse and since it has failed to consider the real exposition of the rights between the parties.

14 Per contra, the learned counsel Mr.Kamat has submitted that he is not aggrieved by the decision of auction the assets, but his grievance is about the process that has been followed. He would submit that the notice, when carefully perused, do not refer to the offer of ASREC and it is based on sale valuation of 2019, for a sale to be conducted in the year 2021. He would make serious grievance of the non-compliance of the RBI circular and Mr.Kamat state that with great responsibility, he has instructions to make the statement that the whole object of the Bank was to sell the property to ASCREC, without adhering to the guidelines of RBI. Mr.Kamat would vehemently submit that

in terms of clause 53 of the circular dated 24/9/2021 issued by the RBI, the appellant has failed to obtain external valuation report and has failed to conduct the process of auction in terms of clause no.85 of the 2021 circular. He denied that the appellant deserve any relief and that too, at the stage when the suit is pending and ultimately, his submission is that no prejudice would be caused if the process is postponed till the decision of the Suit.

Mr.Kamat has placed on record the Insolvency and Bankruptcy Board of India (Insolvency Resolution process for Corporate persons) Regulation 2016 as well as the RBI Guidelines on purchase/sale on Non Performing Assets dated 13/7/2005. The modified guidelines are also placed on record.

15 The respondents are the Promoters and Directors of Associate Decor Limited, a Company incorporated under the Companies Act, engaged in the manufacturing/processing and supply of Indian wood panels. The said company had availed various credit facility in nature of term loan, cash credit and working capital demand loan etc. under consortium banking from the consortium of banks comprising the Bank of Baroda and with the Corporation Bank as the lead Bank. A loan facility of 626.50 crore was sanctioned in favour of the Company by consortium of banks and the respondents, being promoters of the Company, stood as personal guarantors for the financial facilities granted in favour of the Company. The Company entered into term loan agreements with the consortium, which included the appellant

Bank. The guarantors stood surety for the Company and assured repayment of the loan amount. The deed of guarantee executed by the respondent nos.1 and 2 on 10/7/2014 in favour of the Bank, ensured the repayments of the amounts under the loan amount. The said guarantees are irrevocable, continuing and co-extensive in nature with the right of subrogation secured in favour of the respondents.

16 The financial performance of the Company dwindled and it resulted in a Corporate Insolvency Resolution Process being initiated by the NCLT, Bengaluru, by order dated 26/10/2018. As a consequence, the appellant Bank invoked the guarantees by their letter dated 11/8/2020, demanding repayment of Rs.2,44,26,84,068.11 due and payable by the Company as on 30/6/2020 along with further interest until realization.

The respondents offered an OTS proposal to the lenders which included the appellant Bank vide their letter dated 14/2/2020. The said proposal is still pending as it would depend upon the ultimate obligation of the Company and also on the valuation of the financial assets of the Company. Thus, the valuation of the assets is a significant factor which would affect the liability of the respondent and would determine the value of the bids that may be called for, when the appellant offered it's financial assets for sale.

17 The MATL, who had submitted a resolution plan which was approved by the COC was, however, directed to be considered along with the plan of Swamitra landMarks, Sankeshwar landmarks and Sakeshwar Marks LLP and the NCLT by order dated 20/5/2021, directed the COC to consider the plan of MATL along with new resolution plan given by Swamitra. The resolution process of the Company was stalled and the matter was remanded back for decision of the COC and subsequent to the said events, the Asset Reconstruction Co, ASREC India Ltd, made a proposal to the appellant Bank to purchase it's debt for an amount of Rs.85.42 crore.

The apprehension expressed by the respondents is once the proposal is accepted, financial assets of the company coupled with the security interest and rights under the guarantees would be assigned to the Asset Reconstruction Company, and by virtue of such assignment, ARC would not only assume the rights qua the guarantees, but also assume veto power in the Committee of creditors.

18 In the Notice of Motion taken out by the respondent, (plaintiffs) temporarily restraining the defendant Bank from implementing the notice issued by them, it was specifically pleaded that a Non-binding offer of Rs.90 crores was made by ARC on 15/11/2021 to acquire financial asset in the Company

and the ARC visited the office of the Company for due diligence, indicating that the Company was in principle, agreeable to the non-binding proposal and intended to facilitate sale of the financial assets by sharing documents, commercially sensitive information relating to the asset portfolio of the Company, and thereafter made a binding offer of Rs.90 crores vide their letter dated 24/12/2021 for acquiring the assets of the Company.

19 The plaintiffs by the Notice of Motion prayed for a direction, restraining the Bank from proceeding further and the apprehension expressed is, that the sale of financial assets at a critical stage of resolution, without conducting valuation would severely jeopardize the plaintiff's interest. The plaintiffs being the guarantors, directly being affected by the decision of the Bank, addressed a letter on 4/12/2021 to the top management as well as the Branch officials raising it's concern, but in disregard to the same, it is pleaded that the impugned notice dated 6/12/2021 was published, on the website purporting to invite expressions of interest from Asset Reconstruction Companies, for the sale of financial assets of the Company with the reserve price of Rs.95 Crore.

The Notice of Motion supported by an affidavit, therefore, sought a relief against the Bank to stay the effect, implementation and operation of the notice, qua Associate Decor Ltd. The Notice of Motion was urgently moved since the auction was scheduled to be held on 22/12/2021 and it was specifically pleaded that the Bank had colluded and committed breach of the directives of RBI and therefore, if the further action is not stalled, it would cause grave prejudice to the plaintiff. An apprehension was expressed that if the auction is held, and the defendant is allowed to proceed with the same, third party rights would be created on financial assets of the company and it would result in an irreversible situation rendering the Suit filed by them, infructuous.

20 The policy of the RBI dated 24/9/2021 in form of Master directions is placed on record and the directions are referred to as the RBI (Transfer of loan exposures) Directions 2021. The said directives are issued in exercise of the powers conferred on the RBI by Section 21 and 35A of the Banking Regulation Act, 1949 r/w Section 56. The said guidelines are issued, upon the RBI being satisfied that it is necessary and expedient in the public interest to issue the said guidelines. It has come into force from 24/9/2021.

21 When the said guidelines are carefully perused, it has imposed fetters upon the loan transfers or acquisitions and it direct that no lender shall undertake any loan transfer or acquisitions permitted under the directions and it shall be only done in the manner prescribed and the directions are applicable to all loan transfers, including sale of loans through novation or assignment and loan participation. The term 'transfer' has been defined as a transfer of economic interest of loan, exposures by

the transferor to the transferee, with or without the transfer of the underlying loan contract.

Chapter IV of the directives deal with transfer of stressed loans (default loan) and this would include transfer to ARC.

My attention is invited to clause no.53 of the said guidelines which contemplate clear policies on part of the transferor with regard to valuation of loan exposures proposed to be transferred. It contemplate internal or external valuation and also make it imperative to spell out the discount rate used by the tranferor in the internal valuation exercise which may be either cost of equity or average cost of funds, or opportunity cost or other relevant rate. The said policy contemplate that in case of credit exposure of the transferor being transferred is Rs.100 crore or more, the transferor shall obtain two external valuation reports.

22 It also contemplate that lenders shall transfer stressed loans, including through bilateral sales, only to permitted transferees and ARCs.

Clause 56 of the said circular which is sought to be projected as an exception to clause 53 read thus :-

> *53 Transferors should have clear policies with regard to valuation of loan exposures proposed to be transferred. The basis or the grounds which will determine the type of valuation used - internal or external - must be clearly specified in the policy. The discount rate used by the*

transferor in the internal valuation exercise shall also be spelt out in the policy. This may be either cost of equity or average cost of funds or opportunity cost or some other relevant rate, subject to a floor of the contracted interest rate charged. However, in case the credit exposure of the transferor being transferred (without netting for provisions) is Rs.100 crore or more, the transferor shall obtain two external valuation reports. The cost of valuation exercise, external or otherwise, shall be borne by the transferor.

56. However, when negotiated on a bilateral basis, such a negotiations must necessarily be followed by an auction through swiss challenge method if the aggregate exposure (including investment exposure) of lenders to the borrowers whose loan is being transferred, is Rs.100 crores or more. In all other cases, the bilateral negotiations shall be subject to the price discovery and value maximisations approaches adopted by the transferor as a part of the Board approved policy described in clause 51, which may also include swiss challenge method. The Board guidelines to be followed for the swiss challenge methods are given in part D of this chapter.

23 The very said circular prescribe the mechanism for price discovery through swiss challenge method and provide for its broad contours as under :

(a) A prospective transferee interested in acquiring a specific stressed loan may offer a bid to the lender(s), which shall be termed as the base-bid.

(b) The lenders(s) shall then publicly all for counter bids from other prospective buyers, on comparable terms, by

disclosing the essential elements of the base-bid and also clearly specifying the minimum mark-up (as specified in Clause 82) that would be acceptable.

(c) If no counter bid crossed the minimum mark-up specified in the invitation, the base-bid becomes the winning bid.

(d) If counter bid(s) cross the minimum mark-up specified in the invitation, the highest counter bid becomes the challenger bid. The prospective transferee who provided the base-bid is then invited to match the challenger bid. If the prospective transferee who provided the base-bid either matches the challenger bid or bids higher than the challenger bid, such bid shall become the winning bid; else, the challenger bid shall be the winning bid.

(e) The lenders will then have the following two options:

I. Transfer the loan to winning bidder, as determined above;

II. If the lender decides not to transfer the loan to winning bidder, the lender will be required to make immediate provision on the account to the extent of the higher of the following.

The discount on the book value quoted in the challenger bid, and

The provisioning required as per extant asset classification and provisioning norms.

24 In the wake of the said policy, in order to ensure transparency and fairness, the appellant was called upon to furnish (1) board approved policy of sale of stressed assets; (2) resale external valuations conducted for financial assets of the Company as mandated by RBI and all communication with

regard to appointment of valuers and their complete communications from thereon (iii) inspection of office memorandum/notes for Associate Decor Ltd, (iv) particulars of the bidders received by e-mail for the financial assets of the Company prior to 6/12/2021.

However, it is admitted position that the same was not disclosed, which resulted in institution of a Suit by the plaintiffs by submitting that the RBI vide it's circular dated 1/9/2016 had issued guidelines relating to sale of NPAs to ARCs and the said police contemplated invitation of bids by publicly soliciting so, to enable participation of many prospective buyers as possible and in any case of exposure of 50 crores after obtaining external valuation report from two valuers. The plaintiffs/guarantors based their claim upon the circular of the RBI dated 1/9/2016 and sought the relief of restraining the Bank from proceeding with the proposed action. The appellant Bank took a stand that the said circular issued by the RBI is already rescinded and repealed by the applicable master direction, to which there is no reference made in the Suit or to the Notice of Motion. The amended directions are placed on record and it is argued on behalf of the appellant Bank that during the course of hearing of Notice of Motion, the appellant placed the same on record of the Civil Court, but it has failed to consider the said aspect and permitted the respondents to rely upon the applicable master direction.

25 The argument on behalf of the Bank is, it is a public sector bank and it has taken all actions in accordance with the RBI guidelines and while dealing with the objections raised, it is submitted that there is no prejudice caused to the respondent guarantors and the Court has failed to appreciate that the reserve price for 95 crores for sale of the financial assets is in accordance with the master direction and policy and reliance is placed on para 9.3(j) of the policy, which contemplate that in a case where resolution plan has been approved by COC/NCLT in the process of CIRP, the amount offered by the applicant be used as a value of financial asset and no separate valuation of underlying asset is required.

26 Considering this provision, since the COC approved resolution plan of MATL was of Rs.245 crores, which have been arrived at, by following an elaborate and transparent process for insolvency resolution, which included procuring of two valuation reports from the registered valuers to obtain from average fair value and liquidation, the price determined, is argued to be consonance with the Master Direction of RBI.

Apart from this, it is the case of the Bank that, para 54 and 56 of the applicable master direction permitted the Bank to enter into bilateral negotiations for sale of stressed asset and it is projected, as step justifying the action of the Bank. It is ultimately sought to be argued that the applicant had fixed a price of Rs.95 crores under the auction notice, whereas the appellant was to receive 84.24 crores under the COC approved resolution plan of MATL. Mr.Saraf would submit that even as per the valuation reports of ADL in the CIRP, its liquidation value is Rs.234.10 crores and the share of the appellant would be Rs.81.16 crores.

27 The stand of the Bank in opposing the Notice of Motion was considered in the impugned order, and recording that the Bank has issued the impugned notice for assignment of debts which are personal assets of the plaintiff, and, hence, they were held to have a locus to challenge action of Bank. The learned Judge has recorded that the impugned notice dated 6/12/2021 is in respect of the personal assets of the plaintiffs and they are not the assets of the Company.

I do not subscribe to the said observation, as it is not correct. However, the reasoning in the impugned order is, despite request made by the plaintiff by their letter dated 11/12/2021 to furnish certain documents i.e. Board Approved Policy of the Bank for sale of stressed assets and recent external valuation, the Bank is restrained from proceeding further.

Recording the balance of convenience and prima facie case in favour of the applicant, the Bank is restrained from proceeding further with the notice dated 6/12/2021 qua Associate Decor Ltd. The issue as to whether the proceedings are governed by the old circular of the Bank, or the master directions which has come into force, is a subject matter of trial. Furthermore, the RBI circular of 2021 contemplate the external valuation and the submission of the appellant that it is permissible for the Bank to enter into bilateral negotiations by following an auction through swiss challenge method will, ultimately be determined as the outcome of the trial. The question for determination is even whether the procedure prescribed for price discovery through swiss challenge method, has ultimately being adhered to. In any case, since the rights of the plaintiffs as the guarantors of the debt are involved, when the Bank is intending to assign it's debt, by permitting to transfer it's debt to the ASREC by following a method, which is doubted by the guarantors and a Suit has been filed for the said purpose, I do not think that the impugned order suffer from any perversity on recording a prima facie case in favour of the plaintiff. However, since the appellant is a public undertaking, the attempt on it's part to transfer it's interest to the Asset Reconstruction Company by following the procedure applicable in this regard, cannot be deferred for a long period of time.

28 The Short Cause Suit No.2529/2021 which is pending before the city Civil Court, therefore, is directed to be determined within a period of one year from today.

With the aforesaid direction, the Appeal is dismissed.

(SMT.BHARATI DANGRE, J)