

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

CWP-7097-2022 (O&M)

Reserved on: 31.05.2022

Date of Decision: 12.07.2022

Hardyal Singh Cheema

. . . . Petitioner

Vs.

State Bank of India and another

. . . . Respondents

**CORAM: HON'BLE MR JUSTICE M.S. RAMACHANDRA RAO
HON'BLE MR JUSTICE H.S. MADAAN**

Present: - Ms.Munisha Gandhi, Sr. Advocate, assisted by
Mr.Vaibhav Sharma, Advocate, for the petitioner.

Ms.Madhu Dayal, Advocate,
for the respondent no.1/Bank-SBI.

Mr.A.P.S. Madaan, Advocate,
for the respondent No.2 Company.

M.S. RAMACHANDRA RAO, J.

The Background facts

Petitioner is a guarantor to the loan taken by the Cheema Spintex Limited (for short 'the Company') from the State Bank of India (for short 'the Bank').

In 1997, the Company had obtained certain facilities from the Bank and at that time the petitioner, who was also a Director of the Company, stood as a guarantor and pledged his assets in support of the loan.

According to the petitioner, on account of the reasons beyond the control of the Company, it could not meet its repayment

obligations and came to be classified as Non Performing Asset on 13.03.2016.

After the Covid-19 Pandemic started in 2020, the Bank floated an OTS scheme called 'SBI OTS Scheme 2020' and pursuant thereto the Bank itself issued a letter dt.26.10.2020 (P1) informing the Company that it is eligible for settlement under the said scheme. In that letter dt. 26.10.2020, OTS amount was fixed at ₹2,96,53,886.98. The Company had to deposit minimum of 5% of the OTS amount along with its application and on 21.11.2020 vide letter (P-2), the Company submitted a response agreeing to the terms set forth in (P1)letter dt. 26.10.2020 and also made the deposit of 5% of the OTS amount.

Thereafter the Bank issued a letter dt. 23.11.2020 (P-3) confirming the acceptance of OTS. The said OTS sanction letter dt. 23.11.2020 (P3) provided that balance amount should be paid within 8 months from the date of the letter.

The Company could make the following payment towards the OTS by way of RTGS before 22.7.2020, the last date of the payment as per the OTS: -

Date	Amount deposited (in ₹)
21.11.2020	14,82,700/-
23.11.2020	19,00,000/-
24.12.2020	10,65,400/-
22.01.2021	29,65,400/-
30.03.2021	37,00,000/-
30.04.2021	30,00,000/-

In the months of April-July 2021, according to the petitioner, there was a second wave of Covid-19 Pandemic which lead to huge disruptions in business and the ability of the Company to generate funds was severely diminished. Petitioner also claims to be actively following up with the Bank and was requesting for a short extension in the time frame granted for the OTS on account of the second wave of Covid-19 Pandemic prevalent at that time.

According to the petitioner, the Bank was orally promising the petitioner that an extension would be granted on account of the prevailing circumstances.

However, on 21.07.2021, the Company allegedly got a letter from the Bank stating that it had received only ₹1,41,13,500/- out of ₹2,96,53,886.98 and balance of ₹1,55,40,386.98 plus interest was yet to be paid and that the last date for payment was 22.07.2021.

Petitioner claims that he immediately got in touch with the officials of the Bank seeking a short extension since there was only one day left to make the balance payment. Thereafter, vide Annexure P5 dt.30.07.2021, a Whatsapp message communicated to the petitioner. It was informed that petitioner should deposit ₹1,61,05,000/-, that the said amount would remain in *Bank's Parking Account* and would be appropriated towards the OTS settlement only after they got confirmation from their controller.

Petitioner contends that he was also asked to deposit remaining amount with interest for the extra 7 days i.e. ₹1,61,05,000/- which had accrued from 23.07.2021 onwards.

Petitioner then transferred ₹41,05,000/- on 30.07.2021 and a further amount of ₹1,20,00,000/- on 30.07.2021 complying with the deposit of the entire OTS amount. After the amount was remitted, petitioner claims that he was asked to write a letter to the Bank stating that the Company was willing to enter into what was called a *compromise settlement* and because of the delay of 7 days, petitioner has to do so for the Bank to process the existing OTS.

Petitioner addressed a letter on 30.07.2021 (P6) informing about the deposit of the amount of ₹1,61,05,000/- specifically stating that the amount was paid against the 'SBI OTS Scheme 2020' and *as directed* they are submitting the compromise settlement as well so that the amount would be adjusted against the settlement.

Petitioner contends that he went to the Bank to request for issuance of a *No Due Certificate* on 02.08.2021 and at that time he was made to sign a document (P7) that he wished to offer a compromise proposal of ₹1,61,05,000/-. Petitioner claims that he was assured by the officials of the Bank that this amount would be considered as a full and final payment of the existing OTS and the account would be closed shortly and *No Due Certificate* would be issued.

Petitioner alleges that there was no further response by the Bank and he again sent a letter and email on 02.09.2021 vide Annexure P8 requesting the Bank to issue *No Due Certificate*, but the Bank vide Annexure P9 dt. 06.09.2021 informed the petitioner that the earlier OTS was cancelled on account of payment delay of 7 days, that it was

the petitioner, who made the fresh compromise proposal on 02.08.2021, which was under consideration.

Petitioner contends that there is a reference in the letter dt. 06.09.2021 (P9) to a letter of the Bank dt. 02.08.2021 allegedly issued to the petitioner on the basis of which the fresh proposal was to be made by the petitioner, but no such letter was issued to the petitioner or served on the petitioner; and only on the basis of oral direction of the officials of the Bank, petitioner had given the letter dt. 02.08.2021. Petitioner contends that 02.08.2021 cannot be construed as a request for a fresh compromise and the conduct of the Bank is *mala fide*.

Counsel for the petitioner contended that admittedly the Company/petitioner had already deposited not just the OTS amount agreed to between the parties, but also the extra amount of ₹5,64,614/- in order to compensate the Bank for small delay of 7 days which occurred in meeting the deadlines set by the Bank; during April-July 2021, the country was facing an unprecedented situation on account of the second wave brought on by Covid-19 Pandemic; the family of the petitioner also suffered during that time and there was also a medical emergency and they could not meet payment obligations to the Bank; that during the validity of the OTS i.e. from 23.11.2020 to 23.07.2021, the company had deposited ₹1,41,13,500/- out of the total amount of ₹2,96,53,886.98 and even balance amount with interest was paid on 30.07.2021 and in all fairness, the Bank should have granted the small extension for the OTS, issued a *No Due Certificate* and returned the security document to the Company.

It is also pointed out that after 30.07.2021, the Bank kept quiet till 06.09.2021 and for the first time raised the plea that the OTS stood cancelled. He also contends that the Bank had mislead him and made him sign the letter dt.02.08.2021 under false pretenses and is now attempting to use it to deny his legitimate right.

Reliance is placed on the judgments of this Court in *Anu Bhalla and another Vs. District Magistrate, Pathankot*¹ and *Hindustan Trading Company and others Vs. Indian Overseas Bank*², and it is contended that this Court in cases where parties had suffered on account of the Covid-19 Pandemic extended the OTS period even by a few months, and in the petitioner's case on account of a delay of a mere 7 days that too on account of the just cause for which the Bank was already compensated by payment of interest, the petitioner should be granted relief of extension of the OTS.

The stand of the Bank

Reply is filed by the Bank.

It is contended by the Bank that the Company in which the petitioner is a director had not made full payment within the stipulated date of 22.07.2021 and the Writ Petition was not maintainable as the terms and conditions of OTS had been accepted unconditionally and absolutely by the Company and non-adherence thereto constitutes breach of the OTS.

It is contended that the Company had paid ₹1,41,13,500/- out of ₹2,96,53,886.98 by 22.07.2021, and the balance amount of

¹Manu/PH/1689/2020

²Manu/PH/0411/2022

₹1,61,05,000/- which had to be paid by 22.07.2021 was remitted late on 30.07.2021 i.e. after the expiry of the stipulated period under the ‘SBI OTS Scheme 2020’.

It is contended that there is no violation of any fundamental right and so the Writ Petition itself is not maintainable.

It is also contended that the petitioner cannot invoke Writ jurisdiction of this Court in a contractual matter and reliance is placed on the decision of the Supreme Court in *Satish Chandra Anand Vs. Union of India*³ and *National Highways Authority of India Vs. Ganga Enterprises*⁴.

It is contended that the ‘SBI OTS Scheme 2020’ was non-discriminatory and non-discretionary and it does not give any room for discretion for the Bank with respect to the terms and conditions of the ‘SBI OTS Scheme 2020’ between the parties.

According to the Bank, the terms and conditions of the OTS make time of utmost essence, and a party, in order to avail benefits under the OTS had to make the payment in a time bound manner as prescribed by the OTS; any deviation from the same would render the OTS failed and infructuous; and this had also been informed to the petitioner/the Company on 26.10.2020 and the OTS was entered into the parties on 23.11.2020.

It is contended that the petitioner was informed under the said proceedings that if there is a failure to adhere to the terms qua

³1953 SCR 65

⁴AIR 2003 SC 3823

payment of amount, *the OTS sanction will be rendered infructuous and treated as failed.*

Reliance is placed on the judgment of the Supreme Court in *Citadel Fine Pharmaceuticals Vs. Ramaniyam Real Estates Private Limited and another*⁵ and it is stated that where time is essence of the contract, the failure to discharge obligation of paying balance OTS would render the OTS cancelled and unenforceable resulting the accrual of a right to avoid OTS in favour of the Bank in terms of Section 55 of the Contract Act.

It is contended that the petitioner, having accepted the terms of the OTS, is estopped from seeking extension of time by its conduct.

Reliance is placed on the decision of the Supreme Court in *Suptd. of Taxes Vs. Onkarmal Nathmal Trust*⁶ and *Rajasthan State Industrial Development & Investment Corp. Vs. Diamond and Gem Development Corpn. Ltd.*⁷.

It is contended that once OTS failed, petitioner has a liability of ₹26,04,89,757/- as on 31.10.2021 after deducting ₹1,41,13,500/- already paid under the OTS, and he should pay the said amount along with interest.

It is contended that the amount of ₹1,61,05,000/- was not accepted by the Bank as it was made after the validity of the OTS sanction which ended on 22.07.2021, and any remittance made

⁵(2011) 9 SCC 147

⁶(1976) 1 SCC 766

⁷(2013) 5 SCC 470

thereafter cannot be treated as part payment under ‘SBI OTS Scheme 2020’. It is stated that the said amount was parked by the Bank in its *No Lien Account*.

Reliance is also placed on the submission of the application dt.02.08.2021 by the petitioner for fresh compromise settlement and it is alleged that the petitioner did not cooperate to obtain a fresh valuation and so the impugned proceeding dt. 06.09.2021 (P8) was issued cancelling the OTS and informing that the Bank would proceed with legal action for recovery of its dues.

It is further submitted that NCLT, Chandigarh vide order of admission on 06.10.2021 had ordered moratorium under Section 14 of the Insolvency and Bankruptcy Code, 2016 [for short ‘the IBC’], that the provisions of the IBC are in force after pronouncement of admission of CIRP and so the Directors of the suspended Board are not authorised to represent the corporate debtor before the High Court during the CIRP period or to make any commitment/decision/agreement on behalf of the corporate debtor.

Reliance is also placed on the decision of the Supreme Court in the *Bijnor Urban Cooperative Bank Ltd., Bijnor and others Vs. Meenal Agarwal and others*⁸ wherein, according to the Bank, it was held that no Mandamus under Article 226 of the Constitution of India can be issued directing the Bank to consider or grant benefit of OTS. It is contended that the Company did not comply with the repayment obligations after 2016 when it was declared as an NPA on

⁸Civil Appeal No.7411 of 2021 dt.15.12.2021 (SC)

13.03.2016 and the petitioner is only taking advantage of Covid-19 Pandemic which broke out in 2020 to justify non-payment of obligations by the Company from 2016 till 2020. It is denied that the Bank ever promised the petitioner that extension would be granted. According to the Bank, email sent by the Bank is dt.21.06.2021 and not 21.07.2021 and 30 days time was granted and not one day as is alleged by the petitioner.

Counsel for the respective parties reiterated the stand of their clients.

Points for consideration

From the respective pleadings and contentions of the parties, the following points arise for consideration: -

- (a) Whether the petitioner, in his capacity as a director/guarantor, can maintain this Writ Petition?*
- (b) Whether the Writ Petition under Article 226 of the Constitution of India is maintainable in contractual matters?*
- (c) Whether this Court, in exercise of its power under Article 226 of the Constitution of India, can extend the time granted for payment of amount under the OTS by a Bank/secured creditor and if so in what circumstances?*
- (d) Whether in the facts and circumstances of the case, the petitioner is entitled to relief in the instant case?*

Point (a)

We shall first consider the point:

“Whether the petitioner, in his capacity as a director/guarantor, can maintain this Writ Petition?”

It is the contention of the Bank that the Writ Petition is not maintainable at the instance of the petitioner because the NCLT, Chandigarh vide its order of CIRP admission dt. 16.10.2021 had ordered a moratorium under Section 14 of the Insolvency and Bankruptcy Code, 2016 [for short ‘the IBC’]; that provisions of the IBC are in force; that the directors of the suspended Board of the Company are not authorised to represent the corporate debtor before this Court during the CIRP period; and they are not authorised to undertake any commitment/decision/agreement on behalf of the corporate debtor.

But the Counsel for the petitioner has placed before us order dt.30.05.2022 passed by the NCLT, Chandigarh in IA No.510/2021, 527/2021, 591/2021 & 605/2021 in CP (IB) No.352/Chd/CHD/2018 wherein the IRP appointed for the Company/corporate debtor had filed IA 510/2021 under Section 12A of the IBC praying for approval of the withdrawal of the CP filed under Section 9 of the IBC by M/s Kotak Commodity Services Pvt. Ltd. and M/s Kotak Ginning and Pressing Industries against the Company, which had been admitted on 06.10.2021; for discharge of the IRP; for restoration of the suspended Board of Directors etc.

The said application was allowed on 30.05.2022 and the main CP under Section 9 was dismissed as withdrawn and the

Corporate-debtor/the Company was released from all the rigors of the IBC and regulations made thereunder subject to reimbursement of the expenses of the IRP, and the IRP was also discharged.

This is not disputed by counsel for the Bank.

It is not in dispute that the Company had filed CWP-18570-2021 before this Court challenging the action of the respondent No1-Bank in reneging from the OTS.

While the said Writ Petition was pending, the -Company was admitted to Corporate Insolvency Resolution Process (CIRP) under the IBC on 06.10.2021 by virtue of the order passed by the NCLT, Chandigarh Bench. The Resolution Professional then withdrew the said Writ Petition on 31.01.2022.

In that Writ Petition, the petitioner herein had also filed CM-17896-CWP-2021. But when the said Writ Petition was withdrawn, the said application was also withdrawn with liberty to take appropriate steps to protect his interest.

Thereafter, the instant Writ Petition was filed by the petitioner in his capacity as a guarantor of the loans given to the Company by the Bank.

In *Kedar Nath Agrawal v. Dhanraji Devi*⁹, the Supreme Court, after considering several of its earlier judgments, held that it is the power and duty of the Court to consider changed circumstances. It held:

⁹(2004) 8 SCC 76, at page 82

“16. In our opinion, by not taking into account the subsequent event, the High Court has committed an error of law and also an error of jurisdiction. In our judgment, the law is well settled on the point, and it is this: the basic rule is that the rights of the parties should be determined on the basis of the date of institution of the suit or proceeding and the suit/action should be tried at all stages on the cause of action as it existed at the commencement of the suit/action. This, however, does not mean that events happening after institution of a suit/proceeding, cannot be considered at all. It is the power and duty of the court to consider changed circumstances. A court of law may take into account subsequent events inter alia in the following circumstances:

- (i) the relief claimed originally has by reason of subsequent change of circumstances become inappropriate; or*
- (ii) it is necessary to take notice of subsequent events in order to shorten litigation; or*
- (iii) it is necessary to do so in order to do complete justice between the parties.*

(Re Shikharchand Jain v. Digamber Jain PrabandKarini Sabha¹⁰, SCC p. 681, para 10.)”

(emphasis supplied)”

Having regard to this legal position, though when this Writ Petition was filed in March 2022, the order dt.06.10.2021 of the NCLT under Section 14 of the IBC was in force, once the CP itself was withdrawn and the provisions of the IBC ceased to apply in view of the order dt. 30.05.2022 passed by the NCLT, there is no impediment to entertain and grant relief to the petitioner if he is otherwise entitled to it as per law.

¹⁰ (1974) 1 SCC 675

So we find no substance in the plea of the Bank regarding maintainability of the Writ Petition at the instance of the petitioner since this Court can take cognizance of subsequent events in exercise of its jurisdiction under Article 226 of the Constitution of India.

Point (b)

We shall now consider point (b) which is as under:

“Whether the Writ Petition under Article 226 of the Constitution of India is maintainable in contractual matters?”

Counsel for the Bank relied upon the decisions in ***Satish Chandra Anand (3 Supra)*** and in ***National Highways Authority of India (4 Supra)*** to contend that disputes relating to contracts cannot be agitated under Article 226 of the Constitution of India.

But there is no such absolute Rule. The Supreme Court in other cases has held that there is no absolute bar for entertaining a Writ Petition even if the same arises out of a contractual obligation and/or involves some disputed questions of fact.

In ***ABL International Ltd. v. Export Credit Guarantee Corpn. of India Ltd.***¹¹, the Supreme Court held:

*“19. Therefore, it is clear from the above enunciation of law that merely because one of the parties to the litigation raises a dispute in regard to the facts of the case, the court entertaining such petition under Article 226 of the Constitution is not always bound to relegate the parties to a suit. In the above case of **Gunwant Kaur**¹² this Court even went to the extent of holding that in a writ petition, if*

¹¹(2004) 3 SCC 553, at page 569

¹²1969(3) SCC 769

the facts require, even oral evidence can be taken. This clearly shows that in an appropriate case, the writ court has the jurisdiction to entertain a writ petition involving disputed questions of fact and there is no absolute bar for entertaining a writ petition even if the same arises out of a contractual obligation and/or involves some disputed questions of fact.

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23. It is clear from the above observations of this Court, once the State or an instrumentality of the State is a party of the contract, it has an obligation in law to act fairly, justly and reasonably which is the requirement of Article 14 of the Constitution of India. Therefore, if by the impugned repudiation of the claim of the appellants the first respondent as an instrumentality of the State has acted in contravention of the abovesaid requirement of Article 14, then we have no hesitation in holding that a writ court can issue suitable directions to set right the arbitrary actions of the first respondent.

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*28. However, while entertaining an objection as to the maintainability of a writ petition under Article 226 of the Constitution of India, the court should bear in mind the fact that the power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provisions of the Constitution. The High Court having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. The Court has imposed upon itself certain restrictions in the exercise of this power. (See **Whirlpool Corpn. v. Registrar of Trade Marks**¹³.) And this plenary right of the High Court to issue a prerogative writ will not normally be exercised by the Court to the exclusion of other*

¹³ (1998)8 SCC 1

available remedies unless such action of the State or its instrumentality is arbitrary and unreasonable so as to violate the constitutional mandate of Article 14 or for other valid and legitimate reasons, for which the Court thinks it necessary to exercise the said jurisdiction. (Emphasis Supplied)”

This principle was reiterated by 2 three judge Benches of the Supreme Court in ***State of UP Vs. Sudhir Kumar***¹⁴ and ***Popatrao Vynkatrao Patil Vs. State of Maharashtra***¹⁵ and also by a two Judge Bench of Supreme Court in ***Unitech Limited and others Vs. Telangana State Industrial Infrastructure Corporation (TSIIC) & Ors***¹⁶.

Therefore, the objection raised in this regard about maintainability of this Writ Petition with regard to contractual matters is also rejected.

Point (c)

We shall now consider the following point: -

“Whether this Court, in exercise of its power under Article 226 of the Constitution of India, can extend the time granted for payment of amount under the OTS by a Bank/secured creditor and if so in what circumstances?”

The decision of the Supreme court in P.Vijayakumari

We may point out that in ***P.Vijayakumariv. Indian Bank***¹⁷, there was a settlement which had taken place on 10.09.2004 between the appellants and the Indian Bank whereby the parties had

¹⁴2020 SCC Online SC 847

¹⁵ Civil Appeal No.1600 of 2000

¹⁶ Civil Appeal No.317 of 2021 dt.17.2.2021

¹⁷ AIR 2018 SC 759

agreed that an amount of ₹34.50 Lakhs was to be paid by the appellants within three months. There was also a clause in the settlement that the Bank had a right to recover the full amount due in the event of default on the part of the appellants. The appellants could not pay within the stipulated time period but paid ₹3 Lakhs on 08.02.2005 and a further sum of ₹35 Lakhs on 17.10.2006 in terms of a conditional order passed by the Debt Recovery Appellate Tribunal (DRAT) while staying the auction of the mortgaged property. Another sum of ₹3 Lakh was paid on 29.10.2006, with which the total amount paid by the appellant came to ₹41 Lakhs by 29.10.2006. **Thus, as against the original period of 3 months, the appellant therein had taken about 2 years to deposit the said amount.** Aggrieved by the conditional interim order of deposit passed by the DRAT, the Bank approached the High Court, which allowed the petition and set aside the order of the DRAT. The order passed by the High Court was challenged in the Supreme Court by the borrower and she prayed for condonation of delay for having paid the settlement amount with delay. The Supreme Court accepted her plea and set aside the order of the High Court subject to certain terms. The Supreme Court held :

“8. We have considered the matter. There was undoubtedly some delay in payment of the amount due as per the terms of the settlement reached in the Lok Adalat. It was also agreed by and between the parties that if the terms of payment including the time schedule of payment is not adhered to, the respondent Bank will be at liberty to recover the entire amount due. DRAT in the impugned order had considered the matter and had taken the view that even on the

face of the express terms between the parties that the bank would have a right to recover the full amount due in the event of default on the part of the appellants, the same was not the only course of action or the sole option and that on the grounds shown for the delay the same is liable to be understood in favour of the borrower. Accordingly, the matter was closed. In the writ petition filed by the Bank the position was reversed.

9. In the facts of the present case, the view taken by the learned Appellate Tribunal (DRAT), as noted above, cannot be said to be so wholly unreasonable or unsustainable so as to justify interference by the High Court. If the agreed amount stood paid though with some delay, condonation of the delay is a possible course of action, if the grounds for delay justified a departure from what was also agreed upon i.e. the right of a Bank to recover the entire dues. All would depend on the facts of each case. Having regard to the totality of the facts of the present case, we are of the view that the ends of justice would be met if for the delay that had occurred, the appellants are made liable to pay simple interest @ 24% p.a. on the amount of Rs 34.5 lakhs (as agreed to in the Lok Adalat) for the period from the date of the award of Lok Adalat i.e. 10-9-2004 to the date of last payment i.e. 29-10-2006. In addition, a further amount of Rs 10 lakhs to be paid by the appellants to the respondent Bank as compensation and costs.

10. The above amounts will be paid by the appellants to the respondent Bank within a period of 45 days from today failing which the respondent Bank may understand the present order to be recalled and the mortgaged property to be open for auction/disposal in accordance with law.

11. Consequently, the appeal shall stand allowed to the extent indicated above. The impugned order passed by the High Court¹ is set aside.”

(Emphasis supplied)

The decision of this Court in Anu Bhalla

A coordinate Bench of this Court in the case of *Anu Bhalla and Another* (1 *supra*) followed the decision in *P. Vijayakumari* (17 *supra*)..

In that the case, the Division Bench specifically held that in exercise of the jurisdiction under Article 226 of the Constitution of India, the High Courts would have the jurisdiction to extend the period of settlement as originally provided for in OTS letter, but laid down certain guidelines to be followed.

It held that One Time Settlement is not cloaked with rigorous principles which may not permit extension of period to pay the remaining/balance settlement amount; and in fact OTS policies of certain Banks themselves contain provisions for extension for the time period in their respective settlement Policies.

Once this is so, the Bench held that there is no reason to hold that the Courts, in exercise of their equitable jurisdiction under Article 226 of the Constitution of India, cannot extend such time period of settlement.

It held that the willful defaulters and fraudsters would not be entitled to such extension, and in the case of a deserving borrower, who has deposited substantial amount within the original stipulated period of settlement, and proved his bona fides, and is willing to clear the remaining amount in a reasonable period and also compensate the creditor with interest for the period of delay, the Court can consider

extending the period with some flexibility to achieve the ultimate aim of such settlement.

It laid down certain illustrative guidelines which are required to be considered cumulatively or individually on case to case basis to decide whether in a given case an applicant would be entitled for the extension of OTS.

They are as under:-

A. **The original time provided in the Settlement:-**

If the time period originally stipulated in the settlement letter to pay off the settlement amount is short or is not excessive, the case for extension could be considered, and reasonable time must be given to the borrower to arrange the funds to clear off the OTS.

B. **Extent of payments already deposited under the settlement or before filing of the petition:-**

If the borrower has already paid substantial amounts to the creditor under the OTS, and for some remaining amounts, is seeking a reasonable extension, such request can be considered favourably.

C. **Reasons which led to delay in payment –**

If the borrower was prevented by certain reasons or circumstances beyond his control, it could be a reason to consider an extension favourably. It would be imperative for the borrower to show that he made his best efforts to

ensure that the requisite amounts are arranged within the specified time, but in spite of all his best efforts, he could not arrange for the same.

D. **Payments having been accepted by the Bank/Financial Institution, after the stipulated date:-**

If some payments were accepted by the Bank even after the stipulated period of time, it would show that the time was not the essence of contract, and it would be apparent from such conduct, that certain amount of relaxation or flexibility in making the payment of OTS amount is reserved between the parties.

E. **Bona fide Intent of the borrower to pay the remaining amounts under the settlement –**

The bonafide intention of such an applicant could reasonably be tested by asking such an applicant to deposit some further amount, towards the balance amount before calling upon the Bank to consider the issue of extension. If such amounts are deposited under the orders of Court and the bonafides are established, such an applicant would be entitled for a favourable consideration of an application for extension.

F. **Time period being demanded by the applicant to clear the remaining / balance settlement amount.**

An applicant whose intention would be to clear the balance settlement amounts, would not claim an unreasonable period of time extension, as otherwise, the

intention would be to gain more time, without any actual intent to clear the settlement. In the facts and circumstances of each case, the Courts would therefore determine a reasonable period, to enable the borrower to clear the remaining settlement amount, subject of course, to payment of reasonable interest for the delayed period, to balance the equities.

G. **Attending factors and circumstances–**

Illustrations of such factors could be the situation created by COVID-19 pandemic, and the difficulties in arranging the amounts could be taken note of while determining the period of extension to be granted to an applicant. Likewise, losses suffered on account of natural calamities, unfortunate accidents, fire incidents, thefts, damage by floods, storms etc. could also be the factors to be taken into account for extension of time.

H. **Irreparable loss and injury to the applicant**

The Division Bench in *Anu Bhalla(1 Supra)* clarified that the guidelines/factors are not exhaustive but only illustrative for the guidance of the parties and the Courts, while considering the prayer by the borrower for extension of the time under OTS on case to case basis. It also held that the Courts would be free to consider the credentials of the borrower as well, being an equitable and discretionary relief.

Several decisions rendered by different High Courts and Supreme Court were considered by the said Division Bench while rendering the above judgment.

The decision in *Anu Bhalla (1 Supra)* is binding on this Bench.

Therefore, the contention of the respondent-Bank that in no circumstance can the Court grant extension of time for completion of the payment under the OTS, cannot be countenanced. Such a power undoubtedly exists, though not as a matter of right, and must be exercised by a High Court keeping in mind the above guidelines/principles.

Counsel for the respondent-Bank, however, sought to contend that the said judgment deals with only cases of settlement *other than* under the OTS scheme, and would have no application to settlement entered into *under* the OTS scheme, and sought to distinguish *Anu Bhalla (1 Supra)*.

We may point out that in *Anu Bhalla (1 Supra)*, the Court had framed the specific issue in Para 14 “*as to whether this Court, in exercise of its jurisdiction under Article 226 of the Constitution of India, has the jurisdiction to extend the period of OTS*”, and then said Bench answered the said issue in Para No.24 in the affirmative. So the plea raised by the Bank has no substance.

The Division Bench of this Court in *Anu Bhalla (1 Supra)* followed the decision of the Supreme Court in *State Bank of India Vs.*

***Vijay Kumar*¹⁸** wherein the Supreme Court dismissed the appeal filed by the State Bank of India, which had challenged an order of the High Court granting extension to the borrower to make payment of balance settlement amount. It also relied on decisions of the Division Benches of this Court in ***Sat Kartar Ice and General Mills Vs. Punjab Financial Corporation*¹⁹**, ***M/s Lord Budha Society and others Vs. State Bank of Patiala*²⁰**, ***M/s A-One Megamart Pvt. Ltd. Vs. HDF Bank and another*²¹** and ***M/s Malhan Industries Vs. Punjab National Bank*²²**.

Though counsel for the Bank relied on the decision in ***M/s MilkhiRam BhagwanDass Vs. District Magistrate and another*²³** of this Court taking a different view, we are not inclined to follow the same in view of the decisions cited supra. We are also of the view that the Bench which decided ***M/s Milkhi Ram Bhagwan Dass (23 supra)*** could not have taken a contrary view and if it disagreed with the principle laid down in ***Anu Bhalla (1 Supra)*** it should have referred the issue for consideration of a Full Bench, and cannot itself overrule it.

Counsel for the respondent-Bank then sought to contend that the Supreme Court recently in the case of ***The Bijnor Urban Cooperative Bank (8 Supra)*** had taken a view that the High Court under Article 226 of the Constitution of India cannot direct a Bank to positively consider or grant benefit of OTS to a borrower, and

¹⁸ AIR 2007 SC 1689

¹⁹ 2008 (1) ISJ Banking 248

²⁰ 2013 (3) PLR 146

²¹ 2013 (1) PLR 688

²² 2015 (67) RCR Civil 782

²³ CWP-327-2020 dt. 23.12.2020

therefore, even extension of time to comply with the OTS, cannot be granted to a borrower by this Court.

We may point out that in the case of *The Bijnor Urban Cooperative Bank (8 Supra)*, the Supreme Court was not concerned with the question of extension of time to comply with an OTS *already sanctioned* to a borrower by a Bank. It was dealing with the case of non-grant of OTS scheme benefit to a borrower. Therefore, the said decision has no application to the instant case.

In fact, the judgment in *The Bijnor Urban Cooperative Bank (8 Supra)* had not taken note of the decision of the Supreme Court in the case of *Sardar Associates Vs. Punjab and Sind Bank*²⁴ which had taken a diametrically opposite view.

In *Sardar Associates (24 Supra)*, a borrower of Punjab and Sind Bank, in terms of RBI guidelines for OTS offered a particular sum, but the Bank demanded more from the borrower as it had better security available with it, and defended its decision saying that it was a policy decision of its Board. The Supreme Court rejected the said plea.

The Supreme Court in *Sardar Associates (24 Supra)* held that the Reserve Bank of India is a statutory authority, that it exercises supervisory power in the matter of functioning of the Scheduled Banks, and that matters relating to supervision of the Scheduled Banks are also governed by the Reserve Bank of India Act, 1934. It held that guidelines have been issued by the Reserve Bank of India through a

²⁴2009 (8) SCC 257

letter dt.03.09.2005 addressed to the Chairman/Managing Director of all Public Sector Banks; that the said letter refers to circular dt.19.08.2005 issued by the Reserve Bank of India; in terms of the said circular, guidelines for grant of OTS scheme for recovery NPAs below ₹10 crore were laid down; and the letter dt.03.09.2005 categorically stated that such OTS scheme had to be implemented by all Public Sector Banks and the guidelines were non-discretionary and non-discriminatory in SME Sector.

It held that the Public Sector Banks have to implement the guidelines of the RBI relating to the OTS as per it's decision in ***Central Bank of India v. Ravindra***²⁵, that the Board of Directors of the Bank in the ***Sardar Associates (24 Supra)*** could not have deviated from the said guidelines, and it's conduct was violative of the equality Clause contained in the RBI guidelines and also Article 14 of the Constitution of India.

It held that the Bank itself had made an offer to accept the proposal of the appellant in regard to enforcement of OTS pursuant to the RBI guidelines, and it was certainly aware of the amount of securities lying with it. It declared that if in terms of the guidelines issued by the RBI, a right is created in a borrower, even a writ of Mandamus can be issued.

In the decision of the Full Bench of this Court in the case of ***M/s Indo Swiss Time Ltd. Vs. Umarao and Others***²⁶, it was held that if there is direct conflict between the decisions of the Supreme

²⁵2002 (1) SCC 367

²⁶AIR 1981 Punjab 213

Court rendered by two equal Benches, the High Court must follow the judgment which appears to lay down the law more elaborately and more accurately; and that mere incidence of time-whether judgment is earlier or later, could hardly be relevant.

We are of the view that in the case of *Sardar Associates (24 Supra)* the Court had elaborately considered the issue of grant of OTS rather than in case of *The Bijnor Urban Cooperative Bank (8 Supra)* and the decision in *Sardar Associates (24 Supra)* was not noticed by the Supreme Court in the *The Bijnor Urban Cooperative Bank (8 Supra)* case. So we prefer to follow the decision in *Sardar Associates (24 Supra)* and hold that it would not be open to a Bank to decline OTS sought by a borrower, provided he falls within the OTS policy being followed by the said Bank.

We also hold that the decision in the case of *The Bijnor Urban Cooperative Bank (8 Supra)* cannot be interpreted to the effect that in all circumstances the High Court is helpless to extend the OTS scheme offered by a schedule Bank, since the said issue did not arise for consideration in that case.

The reliance placed by the Bank on Section 55 of the Contract Act, 1872 and the decisions of the Supreme Court in *Citadel Fine Pharmaceuticals (5 Supra)* and *Gomathinayagam Pillai and Others Vs. Palaniswami Nadar*²⁷ is misplaced. Those were cases where relief of specific performance of agreements of sale relating to immovable property was sought and the Supreme Court therein dealt

²⁷AIR 1967 SC 868

with terms and conditions of agreements of sale and interpreted time was of essence in certain situations and non-compliance by a party to the agreement might deny him the relief of specific performance.

These decisions are rendered in a totally different context and have no application in the instant case.

In *P. Vijayakumari (17 supra)*, the Supreme Court did not take the view that ‘time is of essence’ in OTS agreements. On the contrary it took the view that condonation of delay in payment under the OTS is a possible course of action, if the grounds for delay justified a departure from what was agreed upon i.e the right of the bank to recover the entire dues.

Therefore, we answer Point (c) also in favour of the petitioner and hold that this Court, in exercise of its jurisdiction under Article 226 of the Constitution of India, would have the jurisdiction to extend the period of settlement as originally provided for in the OTS letter in view of the decision of the **Anu Bhalla (1 Supra)** and other decisions cited above.

Point (d)

Now we shall consider the Point (d) which is as under:

“Whether in the facts and circumstances of the case, the petitioner is entitled to relief in the instant case?”

The facts narrated above show that the Company was offered by the Bank an OTS as per the SBI-OTS-2020 on 26.10.2020

for ₹2,96,53,886.98 ps. which was to be paid in 8 months. It no doubt contained terms to the effect that if the payment is not made within the time mentioned for deposit of various installments, the OTS sanction will be rendered infructuous and the OTS would be treated as having failed.

There is no dispute that Company had accepted the said terms and had deposited on 21.11.2020, 5% of the OTS amounting to ₹14,82,700/-. Thereafter it also deposited further amounts and had in all deposited ₹1,41,13,500/- by 21.07.2021 leaving a balance of ₹1,55,40,386.98 ps. Thus, almost 50% of the OTS amount was paid by the Company to the Bank, *which is a substantial payment*.

No doubt the Bank sent an email dt.21.06.2021 (P-4) informing the petitioner to pay the balance by 22.07.2021 pointing out that the 8 month period would expire and the sanction would be rendered infructuous and treated as failed.

On 30.07.2021, petitioner deposited ₹1,61,05,000/- comprising of the balance payment of ₹1,55,40,386.98 ps. and also an additional amount ₹5,64,614/- comprising interest on the said amount of ₹1.55 Crores for a period of 7 days delay in paying the balance OTS amount.

The actual delay being in fact 9 days from 22.7.2021 to 30.7.2021, and not 7 days as believed *bonafidely* by petitioner, in fact a further sum of Rs.9219/- is payable by him to the bank to complete the full OTS payment.

But this fact was not informed by the Bank to the petitioner and only during the course of hearing of the Writ Petition on 31.5.2022, this was informed by the counsel for the bank on a query by the Court.

Undoubtedly during the months of April to July 2021, the COVID-19 pandemic was raging in the Country and it caused huge disruptions in business and would have diminished the ability of the Company to generate funds. So, on account of events beyond the control of the Company, it was disabled from complying with the terms of the OTS within the stipulated period i.e. by 22.07.2021. The petitioner however made *almost* full payment of OTS plus interest for the delay of 7 days to compensate the Bank. Thus, the Bank cannot claim that it had suffered on account of the delay in payment of the full amount of the OTS and cannot cancel the OTS raising untenable pleas. In our opinion, this conduct of the Bank is patently arbitrary and violative of Articles 14 and 300-A of the Constitution of India.

The petitioner even wrote a letter dt.30.07.2021(P-6) requesting the Bank that the payments made on that day were towards the OTS only, but the Bank kept the money in a no lien account saying that it did not get a confirmation from its Controller vide SMS (P-5).

Petitioner contends that when he visited the Bank on 02.08.2021, he was made to sign a document stating that he wished to offer a compromise proposal for ₹1,61,05,000/- and the officials of the Bank had assured that the amount deposited on 30.07.2021 would be considered as full and final payment of the OTS and the account would be closed shortly and the no due certificate issued.

In letter dt.06.09.2021 (P-9), the Bank claims to have issued a letter No.SAMB/T1/CSL/326 dt.02.08.2021 stating that it had advised the petitioner to give a fresh application for compromise settlement, and this corroborates the stand of the petitioner that he was forced to give the said letter on 02.08.2021.

But for the misleading advice given to the petitioner by the officials of the Bank, there would have been no occasion for the petitioner to ask for a fresh settlement, he, having paid *almost* the full OTS amount albeit with a small delay of 9 days. Obviously, the petitioner was arm twisted by officials of the Bank to give such a letter dt.02.08.2021 seeking a fresh settlement.

Such economic duress has to be presumed in view of the fact that the Bank could even refuse to receive ₹1,61,05,000/- just to harass the petitioner.

So the plea of estoppel raised by the Bank on the basis of the letter dt.02.08.2021 procured by it from the petitioner has no legs to stand. We hold that and the fact that petitioner gave the letter dt. 02.08.2021 in no way estops him from seeking relief in this Writ Petition.

We strongly deprecate the conduct of the Bank in arbitrarily and illegally refusing a short extension from 21.07.2021 to 30.07.2021 raising untenable pleas and hold that it's actions are violative of Articles 14 and 300-A of the Constitution of India.

The Bank cannot hide behind the plea that the SBI-OTS - 2020 is 'non-discriminatory and non-discretionary' and it is disabled

from granting extension to petitioner. The said terms indicate that all eligible borrowers should be given the benefit of the OTS and the Bank cannot pick and choose them as per their whims and fancies. This does not mean that it can deny a reasonable extension of time, if circumstances warrant, for paying the balance amount as per the OTS. In any event the said terms cannot prevent this Court in giving relief if the case of the petitioner falls within the parameters of *Anu Bhalla (1 Supra)*.

We also find no substance in the plea of the petitioner that there is no violation of a fundamental right and so the Writ Petition is not maintainable.

We are of the opinion that the petitioner and the Company had acted in a *bona fide* manner, made substantial payments within the time granted for payment of the full OTS amount and on account, of COVID-19 and attendant circumstances, there was a very small delay of 9 days in making the full payment. We hold that the refusal of the Bank to grant extension of time by 9 days to the petitioner to pay the balance OTS, in the facts and circumstances of the case, is arbitrary and unreasonable and violative of Art.14 and 300-A of the Constitution of India.

It is not proper for the Bank to say that petitioner is trying to take advantage of COVID-19 pandemic which broke out in 2020 to justify nonpayment of amounts by the Company from 2016 to 2020. The COVID-19 is a circumstance which caused the slight delay in

making payment of the full OTS to the Bank. The question of the petitioner paying the full dues to the Bank does not arise.

Point (d) is answered accordingly also in favor of the petitioner.

CONCLUSION

For the aforesaid reasons, the Writ Petition is allowed; letter dt.6.09.2021 (P9) issued by the Bank treating the OTS entered into by the Company with it as having failed is declared as arbitrary, illegal and violative of Articles 14 and 300-A of the Constitution of India; the petitioner shall pay ₹9,219/- to the Bank within two weeks from today towards compensation in the form of interest for the delay in payment of the OTS amount; immediately on receipt of the same, the Bank shall treat the entire OTS amount as having been paid and issue 'No due Certificate' to the Company and return the documents deposited as security with it to the Company. The Bank shall also pay costs of ₹50,000/- to the petitioner within 4 weeks from today.

(M.S. Ramachandra Rao)
Judge

12.07.2022

Vivek

(H.S. Madaan)
Judge

1. Whether speaking/reasoned?
2. Whether reportable?

Yes/No
Yes/No