IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CWP-15579-2021
Reserved on: 08.03.2022
Date of Decision:15.03.2022

M/s Hindustan Trading Co. and another . . . . Petitioners

Vs.

Indian Overseas Bank . . . . Respondent

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

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Present: - Mr. Aalok Jagga, Advocate, and
Mr.H.S. Jagdev, Advocate, for the petitioners.

Mr.C.S. Pasricha, Advocate, for the respondent.

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M.S. RAMACHANDRA RAO, J.

The Background facts

The petitioners are proprietary concerns dealing in leather goods.

Prior to 2016, petitioner No.1 availed a cash credit limit of ₹2.9 crore and petitioner No.2 availed cash credit limit of ₹1.5 crore from the respondent-Bank.

Two plots bearing Nos.88 & 89, Leather Complex, Jalandhar, measuring 500 sq. yards each, and a factory, land & building at Plot No.63, Leather Complex, Jalandhar, Punjab were mortgaged with the respondent-Bank.

Petitioners alleged that certain restrictions had been imposed on Tanneries in Punjab on account of certain environmental concerns at that time; that the leather industry had also suffered on account of the demonetization introduced in the country by the Union of India in November 2016; and thus there were losses incurred in leather business disabling the petitioners to service the payment to the respondent-Bank.

The proceedings initiated under the SARFAESI Act, 2002 against petitioners

The loan account of petitioner No.1 was declared as NPA on 31.03.2017 and that of petitioner No.2 was declared as NPA on 04.04.2015.

On 17.05.2017 and 30.01.2016 respectively, notices (P1&2) under Section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 [for short 'the SARFAESI Act'] were issued to the petitioners asking them to pay ₹3,17,11,022.60 and ₹2,37,32,584/- respectively with applicable interest thereon.

Petitioners contend that while the petitioners were trying to rehabilitate themselves, an order dt. 18.12.2017 (P3) was passed by the National Green Tribunal, New Delhi [for short 'the NGT'] in OA-801-2017 *(Darshan Singh Vs. Punjab Pollution Control Board)* to close all Tanneries. This order of the NGT was later stayed by this Court on 24.01.2020 (P4) in CWP-9-2018.

The respondent-Bank issued notices on 06.4.2018 under Section 14 of the SARFAESI Act; and a sale notice on 04.05.2018 and another sale notice on 03.10.2018, but since no bids were received, the secured property could not be sold.

On 21.07.2018, the petitioner submitted a request for 'One Time Settlement' to the Bank for settlement of ₹1.40 crore but, the same was rejected by the respondent-Bank.

The respondent-Bank obtained an order dt. 07.12.2018 (P6) from the District Magistrate, Jalandhar to take possession of the property.

While things stood thus, the respondent-Bank came out with a 'One Time Settlement Scheme-2021'.

The OTS proposal of petitioners

Petitioners made a proposal on 15.02.2021 (P8) under the said scheme and offered to pay ₹3,06,92,580.07 towards both loans. They deposited 10% amount in a 'No Lien Account' as per the said OTS scheme.

CWP-2388-2021 & CWP-3913-2021

The Bank then filed CWP-2388-21 for direction to the District Magistrate, Jalandhar to implement the order dt.07.12.2018 passed under Section 14 of the SARFAESI Act. The petitioners also filed CWP-3913-2021.

Both the Writ Petitions were disposed of together by a common order on 05.04.2021 (P9) recording the statement of counsel for the respondent-Bank that OTS offer has been finalized and letters dt.31.03.2021 have been issued.

The terms of the OTS sanctioned to petitioners

As per the terms of letter dt.31.03.2021 (P11) issued to the petitioner No.1, the OTS amount of ₹191 lakh was to be repaid within 90 days from the date of the sanction subject to the condition that (i) the Bank would adjust the upfront amount of ₹18.10 lakh immediately after advising of the sanction, (ii) petitioner No.1 has to pay a sum of ₹25 lakh on or before 31.3.2021 and (iii) the remaining amount of ₹147.90 lakh has to be deposited within 90 days of the sanction.

As per the letter dt.31.03.2021 issued to petitioner No.2, the OTS amount of ₹127 lakh to be repaid within 90 days from the date of the sanction subject to the condition that (i) the Bank would adjust the upfront amount of ₹13.7 lakh immediately after advising of the sanction, (ii) petitioner No.2 should deposit further sum of ₹25 lakh on or before 31.03.2021 and (iii) the remaining amount of ₹88.30 lakh should be deposited within 90 days of the sanction.

Both the letters contained a statement that the OTS sanction would automatically get lapsed/cancelled in case the entire OTS is not paid within the time frame.

The petitioners' contend that though when the OTS was sanctioned on 31.03.2021, the Covid-19 situation in the entire country had normalized and the life was slowly and steadily limping towards normalcy, in April 2021, the second wave of Covid-19 Pandemic severely impacted the entire country.

Petitioners' further contented that prior to April 2021, they had arranged that a person by name Afzal Ahmed Qureshi from Calcutta would purchase the mortgaged property and pay them the sale consideration so that they can clear the dues of the Bank by June 2021 but, the purchaser got infected with Covid-19 virus and fell seriously ill. This forced the petitioners to wait for recovery of the prospective purchaser and thus delay occurred in paying the amounts payable under the OTS.

Petitioners' request for extension of time to pay the OTS amount

On 21.06.2021, just before 30.06.2021 i.e. the last date of payment of the OTS, petitioners' gave a letter to the respondent to extend the time for payment of the OTS amount pointing out that the prospective purchaser had fallen sick which delayed the disposal of the properties, and time for payment of the OTS amount be extended for a period of six months. Reliance was placed by the petitioners on the decision of this Court in ***Anu Bhalla Vs. District Magistrate, Pathankot and another*[1].**

Petitioners contended that due to circumstances beyond their control, the prospective purchaser could not travel to Jalandhar from Calcutta due to his deteriorated health on account of Covid-19 infection suffered by him and, therefore, could not pay the balance amount and conclude the sale because of which petitioners were forced to seek the extension.

Reminder (P15) was also written on 06.07.2021.

The rejection by the Bank of request for OTS extension

Vide email dt. 27.07.2021, the respondent granted extension of time only to petitioner No.1 for paying the balance OTS amount, but denied the same to the petitioner No.2 vide letters dt.12.07.2021 and 27.07.2021.

Filing of Present Writ petition

Petitioners, therefore, filed this Writ Petition challenging the said action and praying that a further extension of three months be granted even in the case of petitioner No.1.

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[1] **2021(1) RCR (Civil) 30**

Petitioners contended that they have been making *bona fide* efforts to settle the dues under the OTS Scheme but, on account of reasons beyond their control such as the illness of the prospective purchaser on account of Covid-19 Pandemic, they could not comply with the terms of the OTS within the prescribed time; that not only in the case of ***Anu Bhalla (1 Supra)*** but also in many other cases this Court had considered and granted extension of time for complying with the terms of the OTS; and the action of the respondents in giving a very short time to the petitioner No.1 and denying it to petitioner no.2 is not sustainable.

They pointed out that the said Bank itself had granted extension as per SBI OTS-2019 dt. 30.07.2020 (P27), initially from 01.04.2020 till 30.06.2020 and thereafter from 30.06.2020 to 31.08.2020.

Reply by the respondent-Bank

A short reply has been filed by the respondent-Bank contending that the petitioners had been given huge concession by the respondent-Bank, and though notice under Section 13(2) of the SARFAESI Act issued on 17.05.2017 (P1) to the petitioner No.1 demanding ₹3,17,11,022/- and notice dt. 30.01.2016 (P2) demanding ₹2,37,32,584/- from petitioner No.2, OTS was sanctioned for a mere ₹1.91 crores for the petitioner No.1 and ₹1.27 cores for petitioner No.2.

It is admitted that petitioner No.1 deposited ₹43,10,000/- and petitioner No.2 deposited ₹38,37,000/- within the time specified in the OTS. It is also admitted that a further sum of ₹10 lakh each was deposited by both the petitioners on 30.06.2021.

According to the respondent-Bank, a mere 27.8% of the sanctioned OTS was deposited till 30.06.2021 by petitioner No.1 and only 38.08% of the OTS amount was deposited by petitioner No.2 till 30.06.2021. It is also admitted that petitioner No.2 had deposited a further amount of ₹38,10,000/- in a 'No Lien Account' on 21.9.2021.

It is contended that the offer of OTS by giving such concessions to the petitioners was considered and accepted by the respondent-Bank as a commercial decision; that the offer of the petitioners for OTS was accepted on specific terms and conditions that the entire amount would be paid within 90 days; and even the extension sought in regard to petitioner No.1 was granted as per the wisdom of the competent authority who did not deem it fit to grant a similar extension to petitioner No.2. It is alleged that the only intention of the petitioners is to delay recovery and that the case of the petitioners is not covered by the judgment in case of ***Anu Bhalla (1 Supra)***.

It is contended that the extension of OTS is not a matter of right and the respondent-Bank cannot be forced to extend the said period indefinitely.

Consideration by the Court

We have noted the contentions of both sides.

Admittedly, the OTS was sanctioned on 31.03.2020 for ₹191 lakh to petitioner No.1 and for ₹127 lakh to petitioner No.2; and ₹18.10 lakh deposited by petitioner No.1 and ₹13.70 lakh deposited by petitioner No.2 were immediately adjusted by the respondent-Bank. Petitioner No.1 also paid a sum of ₹25 lakh by 31.03.2021 and so did the petitioner No.2.

Petitioner No.1 was, therefore, to pay ₹147.90 lakh by 30.06.2021 and petitioner No.2 was to pay ₹88.30 lakh by 30.06.2021. It is also admitted that a sum of ₹38.10,000/- was deposited in a 'No Lien Account' on 21.9.2021 by petitioner No.2.

Petitioners contend that in order to clear the OTS amounts sanctioned to both of them they had arranged for sale of the mortgaged property to a prospective purchaser Afzal Ahmed Qureshi from Calcutta who had agreed to purchase the assets of the petitioners and to deposit the sale consideration directly with the Bank to clear all the OTS amount; that the prospective purchaser was to travel down to Jalandhar for payment of the balance sale consideration and execution of the sale deed by 30.6.2021; but, in the second wave of Covid-19 Pandemic in April,2021, the prospective purchaser had got infected with Covid-19 virus and his medical condition deteriorated. In support of the said plea medical certificate (P12) relating to the prospective purchaser has also been placed on record. This fact is not disputed by the respondent-Bank.

Because of the illness of the prospective purchaser, petitioners had no alternative but to wait for the recovery of the prospective purchaser and, therefore, could not comply with the terms of the OTS.

The deposit of ₹38,10,000/- on 21.9.2021 by petitioner No.2 was pursuant to the order dt. 16.8.2021 passed by this Court. But no interim order was granted in the light of general order passed in CWP-PIL-77-2021 restraining coercive action against the residential properties by the Bench presided over by the Hon'ble the Chief Justice.

On 23.9.2021, this Court had directed that another sum of 30%, even as regards the petitioner No.1, be deposited and the same be kept in 'No Lien Account'. It extended, till the next date of hearing, the status quo as on that date. This was complied with.

When the matter was next listed on 01.11.2021, it was reported that the petitioners had deposited a sum of ₹57.30 lakh as per the order dt.23.9.2021 and the interim order was directed to be continued.

On 07.2.2022, when the matter was next listed, this Court directed petitioner No.1 to pay ₹80,60,000/- to the respondent by 08.3.2022 and continued the interim order. This amount of ₹80,60,000/- was deposited on 03.03.2022 by petitioner No.1.

By 08.03.2022, the entire OTS amount sanctioned to both the petitioners stood paid as under: -

I. <u>RE: PETITIONER NO.1</u>

Date	**Deposited Amount (INR)**
31.03.2021	43,10,000/-
30.06.2021	10,00,000/-
29.10.2021	57,30,000/-
02.03.2022	80,60,000/-
Total	**1,91,00,000/-**

II. <u>RE: PETITIONER NO.II</u>

Date	**Deposited Amount (INR)**
31.03.2021	38,70,000/-
30.06.2021	10,00,000/-
21.09.2021	38,10,000/-
19.01.2022	40,20,000/-
Total	**1,27,00,000/-**

We shall now consider the question:

"Whether an OTS scheme can be extended by the High Court and if so, in what circumstances?"

This issue had been considered by a coordinate Bench of this Court in the case of ***Anu Bhalla and Another (1 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 *bona fide* 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.

Thus in the case of ***Anu Bhalla (1 Supra)***, this Court has held that the High Court in certain circumstances can grant extension of time for complying the terms of the OTS subject to compensating the financier/creditor with an appropriate rate of interest for the delay in making the payments of the OTS.

In the facts and circumstances of this case, we are of the opinion that the petitioners fall within the ambit of the guidelines laid down in the decision in ***Anu Bhalla (1 Supra)***.

In the instant case, there is no doubt that there has been some delay in the payment of sanctioned OTS but, we are satisfied that such delay occurred on account of circumstances beyond the control of the petitioners and in particular because of Covid-19 Pandemic after effects, and the prospective purchaser of the property suffering serious Covid-19 infection which prevented him from travelling to Jalandhar from Calcutta for completion of sale of the property of the petitioners.

Substantial payments of ₹53,10,000/- and ₹48,70,000/- had been made by the petitioners No.1 & 2 before 30.06.2021, the date fixed for completion of the OTS. The petitioners have also complied with the directions issued by this Court from time to time for making deposit indicating their *bona fides.*

They have even cleared the entire OTS amount as on date.

The respondent-Bank merely stated that it was a commercial decision to grant an extension upto 30.9.2021 to petitioner No.1 and denied the same to petitioner No.2.

When the same reason is assigned by both the petitioners for delay in making the payments, the respondent-Bank cannot say that some extension can be granted to petitioner No.1 but denied to petitioner No.2. This appears to be arbitrary and unreasonable.

The period of pendency of this Writ Petition also cannot be put against the petitioners because it is settled law that pendency of legal proceedings cannot be put against any party. In ***Essar Steel (India Limited) Committee of Creditors Vs. Satish Kumar Gupta[2],*** the Supreme Court has held that the time taken in legal proceedings cannot ever be put against the parties. The basis of the said principle is the Latin Maxim "*Actus Curiae Neminem Gravabit*", i.e. "An act of the Court shall prejudice no man".

Therefore, we are of the opinion that it is a fit case to grant extension of time to the petitioners for making the payment as per the sanctioned OTS.

[2] **2020 (8) SCC 531**

Therefore, for all the above reasons, the Writ Petition is allowed; the impugned letters dt.12.7.2021 (P16) and 27.07.2021 (P19) issued by the respondent Bank are set aside; the respondent is also permitted to adjust the amount, if any, deposited in 'No Lien Account' by any of the petitioners towards OTS amount sanctioned to them; and the petitioners are granted time upto 31.3.2022 to pay the interest as per the terms of the sanction letter on reducing balance basis. It is made clear that in default of compliance of this order, the Writ Petition stands dismissed. No costs.

(M.S. Ramachandra Rao)
Judge

15.03.2022
Vivek

(H.S. Madaan)
Judge

1. Whether speaking/reasoned? ***Yes****/No*
2. Whether reportable? ***Yes****/No*