

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

CWP No. 26858 of 2018
Reserved on: 29.03.2022
Date of Decision: 19.04.2022

M/S. JINDEV SHUTTERING AND ANOTHERPetitioners
V/s.

***BANK OF BARODA, KALGIDHAR COMPLEX, ZIRAKPUR, DISTRICT SAS
NAGAR, MOHALI, PUNJAB AND ANOTHER***
...Respondents

CORAM: **HON'BLE MR. JUSTICE M.S. RAMACHANDRA RAO.**
HON'BLE MR. JUSTICE JASJIT SINGH BEDI

Present: Mr. Bhupinder Kumar, Advocate,
for the petitioners.

Mr. Gaurav Goel, Advocate,
for respondents-Bank.

M.S. RAMACHANDRA RAO, J.

In this Writ Petition, the petitioners have prayed for the issuance of a Writ in the nature of *Mandamus*, directing the respondents-Bank to accept the Demand Draft of ₹ 3.80 Lakhs for payment of the balance OTS amount and allow application dt.21.07.2018 (Annexure P-7) for extension of time upto 31.10.2018 for payment of balance amount of OTS along with interest for the delayed period.

The petitioner No.1 is a proprietary concern of which the petitioner No.2 is the proprietor.

The petitioner No.1 and was sanctioned a term loan of ₹ 98 Lakhs on 28.02.2011 by the respondent Bank for establishment of a shuttering material store.

The loan facility was secured by hypothecation of fixed asset, and the loan was repayable in 57 monthly installments of ₹ 1,71,930/- plus

interest w.e.f. 01.07.2011. According to the petitioners, the said loan was sanctioned as per the Self Employment Scheme of Government of India.

Initially, according to the petitioners, the business ran well and certain installments were paid by the petitioners towards the loan, but builders to whom the petitioners supplied the shuttering material did not pay the rentals, and did not also return the shuttering material. Consequently, the petitioners suffered huge losses in business, and could not repay the loan of the respondents-Bank.

The loan account of the petitioners was declared as Non Performing Asset (NPA) on 30.09.2013, and notice dt.21.10.2013 was issued under Section 13 (2) of the SARFAESI Act, 2002 (hereinafter referred to as “the Act”).

The respondent-Bank also filed OA No.1039 of 2013 before the DRT-II, Chandigarh.

On 04.09.2017, the respondents-Bank floated an OTS scheme called “SWABHIMAAN” and on 1.2.2018, another OTS called “SWABHIMAN-II”. The latter scheme was launched on 01.02.2018, and was valid upto 31.03.2018.

Petitioners were approached by the respondents-Bank to settle the loan and an OTS dt.15.03.2018 was sanctioned for a sum of ₹ 13.10 Lakhs.

As per the terms of the said OTS, ₹ 2 Lakhs was to be paid as an upfront fee on acceptance of OTS, ₹ 4.55 Lakhs was to be paid by 31.03.2018, ₹ 2.20 Lakhs was to be paid on 15.04.2018, ₹ 2.20 Lakhs was to be paid before 15.05.2018 and ₹ 2.15 Lakhs was to be paid before 15.06.2018.

It was mentioned in the sanction letter dt. 15.03.2018 that all the relief/concessions given under the OTS would be withdrawn if the borrower fails to honor any of the terms and conditions of the settlement whether fully or partially, and the entire contractual dues then became payable by the borrower.

Petitioners paid the upfront amount of ₹ 2 Lakhs on 15.03.2018.

They thereafter made payment totaling ₹ 8.30 Lakhs including the payment of the upfront amount by 14.06.2018, but were unable to pay the balance amount towards the OTS of ₹ 13.10 Lakhs before 15.06.2018 i.e. the last date for payment under OTS.

They in fact deposited ₹ 50,000/- on 14.06.2018, and requested the Branch Manager of the respondents-Bank to extend time for payment of the balance amount upto 31.10.2018.

Petitioners contend that the Branch Manager had advised them to apply in writing and deposit ₹ 1 Lakh more so that their application could be forwarded to the higher authorities for approval, and so the petitioners made an application on 21.07.2018, seeking time till 31.10.2018 for payment of the balance OTS amount of ₹ 4.80 Lakh. They also deposited ₹ 1 Lakh more on 23.07.2018.

Petitioners then approached this Court by filing the instant Writ Petition on 11.10.2018 contending that their application dt.21.07.2018 for extension of time for paying the amount under the OTS is pending with the competent authority of the respondents-Bank, that the OTS has not been cancelled or revoked by the respondents-Bank, and they

are ready with the Demand Drafts amounting to ₹ 3.8 Lakhs, and also ready to pay interest for the delayed period.

They prayed that the respondent be directed to accept the Demand Drafts of ₹ 3.8 Lakhs for payment of the balance OTS amount, and extend the time upto 31.10.2018 for payment of balance OTS amount along with interest for the delayed period.

They mentioned that they had obtained a demand draft dt. 31.08.2018 for ₹ 1 Lakh and another demand draft dt.09.10.2018 for ₹ 2.8 Lakhs to be deposited with the respondent-Bank for clearing the total OTS amount, and that they are also ready to pay interest for the delayed period.

Events after filing of the Writ Petition

On 17.10.2018, this Court issued notice of motion and after noting the contentions for the petitioners, directed the petitioners to deposit demand drafts of ₹ 3.80 Lakhs with the respondent-Bank within one week from that day which shall be encashed by the respondent-Bank without prejudice to its rights in the Writ Petition.

On 04.04.2019, when the matter was listed, this Court directed the petitioners to produce a demand draft for the agreed rate of interest i.e. 3.25% above base-rate of 9.5% making the rate of interest @ 12.75%.

On 23.05.2019, the petitioners produced a cheque for ₹ 31,042/- and the respondent-Bank was directed to received the same without prejudice to its right in the Writ Petition.

The matter underwent several adjournments on 24.07.2019, 27.09.2019, 16.10.2019, 21.11.2019, 05.12.2019, 24.02.2020, 04.03.2022

and thereafter it was listed on 29.03.2022, and the arguments were heard and orders were reserved.

Stand of the respondents-Bank

The respondent-Bank filed their reply on 26.02.2019.

The contention of the respondent-Bank was that as per the terms of the OTS sanction letter dated 15.03.2018, petitioners had to clear the total payment of ₹ 13.10 Lakhs by 15.06.2018, and since they did not do so, the OTS stands withdrawn, and the entire contractual dues became payable.

It contended that the petitioners were not entitled to the benefit of the OTS scheme and it stood cancelled.

It did not dispute the deposit of amounts of ₹ 8.3 Lakhs by the petitioners by 14.06.2018, ₹ 1 Lakh on 21.07.2018, and further payments of ₹ 1 Lakh on 31.08.2018 and ₹ 2.8 Lakhs on 09.10.2018.

The consideration by the Court

From the facts narrated above, it is clear that on 15.03.2018, OTS was sanctioned by the respondent Bank to the petitioners for ₹ 13.10 Lakhs which was to be paid by 15.06.2018; and the petitioners paid ₹ 8.3 Lakhs by 14.06.2018, and sought extension of OTS on 21.07.2018 till 31.10.2018 and agreed to pay the balance with applicable interest.

After filing the Writ Petition, the writ petitioner admittedly paid ₹ 1 Lakh on 31.10.2018, ₹ 2.8 Lakhs on 09.10.2018, and even paid the interest payable of 12.75% as on 04.04.2019 on 23.05.2019.

The petitioners contend that the delay in payment of the OTS was on account of financial crunch due to the death of father-in-law of Neepun Goyal (Petitioner No.2) on 08.06.2018, and he had made

substantial payments before the cut-off date i.e. 15.06.2018, and paid the entire principal amount due under the OTS by 09.10.2018 along with interest, and the time for the payment of the amount under OTS ought to have been extended by the respondent-Bank taking a sympathetic view of the matter since it did not suffer any prejudice on account being paid the interest due as well.

They placed reliance on decision in the case of Anu Bhalla and Another Vs. District Magistrate, Pathankot and Another¹ and contended that their case falls within the parameters fixed in the said judgment and so, the Writ Petition be allowed.

In the said judgement, the Division Bench of this Court held that the Courts in exercise of their equitable jurisdiction under Article 226 of the Constitution of India can extend time period of settlement originally provided for in the OTS sanction letter subject to the certain conditions.

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.

This decision is binding on this Bench in the instant case.

Therefore, the contention of the respondent-Bank that in no circumstance the Court can 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 this Court keeping in mind the above guidelines/principles.

Counsel for the respondent-Bank Counsel for the respondent-Bank then sought to contend that the Supreme Court recently in the case of

Bijnor Urban Cooperative Bank Ltd. Vs. Meenal Aggarwal² 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 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 **Bijnor Urban Cooperative Bank** (2 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 **Bijnore Urban Cooperative Bank** (2 Supra) had not taken note of the decision of the Supreme Court in the case of **Sardar Associates Vs. Punjab and Sind Bank**³ which had taken a diametrically opposite view.

In **Sardar Associates** (3 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** (3 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 is also governed by the Reserve Bank of India Act, 1934. It held that guidelines have been

² Civil Appeal No.7411 of 2021 dt. 15.02.2021 (SC)

SURESH KUMAR³ 2009 (8) SCC 257

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I attest to the accuracy and
integrity of this document

issued by the Reserve Bank of India through a 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 its decision in **Central Bank of India v. Ravindra**⁴, that the Board of Directors of the Bank in the said case could not have deviated from the said guidelines, and its 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**⁵, it was held that if there is direct conflict between the decisions of the Supreme 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

⁴ 2002 (1) SCC 367

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** (3 Supra) the Court had elaborately considered the issue of grant of OTS rather than in case of **Bijnore Urban Cooperative Bank** (2 Supra) and the decision in **Sardar Associates** (3 Supra) was not noticed by the Supreme Court in the **Bijnore Urban Cooperative Bank** (2 Supra) case. So we prefer to follow the decision in **Sardar Associates** (3 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 **Bijnor Urban Cooperative Bank** (2 Supra) cannot be interpreted to mean 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.

Now, we shall consider the question whether in the facts and circumstances of this case, it is permissible for this Court to grant to the petitioners extension of time for the payment of the balance amount of the OTS with interest?

The original time for payment of the OTS under the sanction letter dt.15.03.2018 was only three months and it expired on 15.06.2018 and by that date substantial payment of ₹ 8.3 Lakhs was made.

Because of the funds crunch, petitioners could not make the full payment, and sought for extension of time.

Before filing of the Writ Petition, the petitioners had deposited ₹ 1 Lakh on 21.07.2018, another sum of ₹ 1 Lakh on 31.10.2018 after the

filing of this Writ Petition, and the balance ₹ 2.8 Lakhs on 09.10.2018 thus indicating their *bona fide* intent. When the rate of interest payable was informed to him as 12.75% on 04.04.2019, they also paid it by 23.05.2019.

The delay in disposal of the Writ Petition should not be put against the parties, since it is a settled law that actions or inactions of the Court cannot prejudice any party; and time taken in legal proceedings cannot be put against a party.

In Essar Steel India Ltd. Committee of Creditors v. Satish Kumar Gupta⁶, the Supreme Court declared:

*“124. Given the fact that timely resolution of stressed assets is a key factor in the successful working of the Code, the only real argument against the amendment is that the time taken in legal proceedings cannot ever be put against the parties before NCLT and NCLAT based upon a Latin maxim which subserves the cause of justice, namely, **actus curiae neminem gravabit**.*

125. In Atma Ram Mittal v. Ishwar Singh⁷, this Court applied the maxim to time taken in legal proceedings under the Haryana Urban (Control of Rent and Eviction) Act, 1973, holding: (SCC pp. 288-89, para 8)

*“8. It is well settled that no man should suffer because of the fault of the court or delay in the procedure. Broom has stated the maxim **actus curiae neminem gravabit** — an act of court shall prejudice no man. Therefore, having regard to the time normally consumed for adjudication, the ten years’ exemption or holiday from the application of the Rent Act would become illusory, if the suit has to be filed within that time and be disposed of finally. It is common knowledge that unless a suit is instituted soon after the date of letting it would never be disposed of within ten years and even then within that time it may not be disposed of. That will make the ten years holiday from the Rent Act illusory and provide no incentive to the landlords to build new houses to solve problem of shortages of houses. The purpose of legislation would thus be defeated. Purposive interpretation in a social amelioration legislation is an imperative irrespective of anything else.”*

⁶ (2020) 8 SCC 531, at page 626

127. Given the fact that the time taken in legal proceedings cannot possibly harm a litigant if the Tribunal itself cannot take up the litigant's case within the requisite period for no fault of the litigant, a provision which mandatorily requires the CIRP to end by a certain date — without any exception thereto — may well be an excessive interference with a litigant's fundamental right to non-arbitrary treatment under Article 14 and an excessive, arbitrary and therefore unreasonable restriction on a litigant's fundamental right to carry on business under Article 19(1)(g) of the Constitution of India. This being the case, we would ordinarily have struck down the provision in its entirety. However, that would then throw the baby out with the bath water, inasmuch as the time taken in legal proceedings is certainly an important factor which causes delay, and which has made previous statutory experiments fail as we have seen from Madras Petrochem³¹. Thus, while leaving the provision otherwise intact, we strike down the word “mandatorily” as being manifestly arbitrary under Article 14 of the Constitution of India and as being an excessive and unreasonable restriction on the litigant's right to carry on business under Article 19(1)(g) of the Constitution. The effect of this declaration is that ordinarily the time taken in relation to the corporate resolution process of the corporate debtor must be completed within the outer limit of 330 days from the insolvency commencement date, including extensions and the time taken in legal proceedings. However, on the facts of a given case, if it can be shown to the Adjudicating Authority and/or Appellate Tribunal under the Code that only a short period is left for completion of the insolvency resolution process beyond 330 days, and that it would be in the interest of all stakeholders that the corporate debtor be put back on its feet instead of being sent into liquidation and that the time taken in legal proceedings is largely due to factors owing to which the fault cannot be ascribed to the litigants before the Adjudicating Authority and/or Appellate Tribunal, the delay or a large part thereof being attributable to the tardy process of the Adjudicating Authority and/or the Appellate Tribunal itself, it may be open in such cases for the Adjudicating Authority and/or Appellate Tribunal to extend time beyond 330 days. Likewise, even under the newly added proviso to Section 12, if by reason of all the aforesaid factors the grace period of 90 days from the date of commencement of the Amending Act of 2019 is exceeded, there again a discretion can be exercised by the Adjudicating Authority and/or Appellate Tribunal to further extend time keeping the aforesaid parameters in mind. It is only in such exceptional cases that time can be extended, the general rule being that 330 days is

the outer limit within which resolution of the stressed assets of the corporate debtor must take place beyond which the corporate debtor is to be driven into liquidation.” (emphasis supplied)

In these facts and circumstances, we are of the opinion that the petitioners have made out the case for grant of relief in the Writ Petition.

Accordingly, the Writ Petition is allowed and the prayer of the petitioners for extension of time for payment of the amount due under the OTS sanctioned on 15.03.2018 is allowed and the said time is extended till payment of interest on 23.05.2019. The respondent Bank is directed to treat the petitioners as having complied with the OTS within the extended time, close the loan account and return the documents relating to any security in it’s possession to the petitioners within 4 weeks from the date of receipt of copy of this order.

No costs.

(M.S. RAMACHANDRA RAO)
JUDGE

(JASJIT SINGH BEDI)
JUDGE

April 19, 2022
Ess Kay

<i>Whether speaking / reasoned</i>	:	<i>Yes</i>
<i>Whether Reportable</i>	:	<i>Yes</i>