

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

CWP No. 32015 of 2019 (O&M)
Date of Decision: 19.01.2022

ASEEM GAIND

.....*Petitioner*

V/s.**AXIS BANK, RETAIL ASSETS CENTRE**

.....Respondent

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

Present: Mr. V.K. Sachdeva, Advocate,
for the petitioner.

Mr. D.K. Singal, Advocate with
Mr. Mukund Gupta, Advocate for the respondent.

M.S. RAMACHANDRA RAO, J.

This Writ Petition is filed by the petitioner for issuance of a Writ in the nature of *Certiorari* for quashing of the letter dated 12.07.2019 (Annexure P-1) issued by respondent-Bank whereby prayer of the petitioner vide its letter dated 09.06.2019(Annexure P-6)for extension of time by another six months for repayment of balance amount of ₹1.76 Crores, out of total One Time Settlement (hereinafter referred to as “OTS”) of ₹2.36 Crores vide letter dated 30.03.2018 (Annexure P-5),was rejected .

The background facts

The petitioner and his co-applicant had been sanctioned a home loan of ₹2,32,00,000/- on 18.02.2014 by the respondent-Bank which was to be repaid in 240 monthly installments on a floating rate of interest @ 0.25% above the base rate. Later, a home loan (against property) was also sanctioned for ₹1.74 Crores on 21.02.2014 to be repaid in 180 monthly installments on a floating rate of interest @ 1.75% above the base rate.

The petitioner contends that he and his co-applicant were doing business of the Furniture and Furnishing in Chandigarh, and on account of several unavoidable and unforeseen circumstances, they were forced to close their entire business in the year 2013. It is also stated that father of the petitioner, who is also a co-applicant for the loans, was not keeping good health, that his health condition deteriorated in the year 2015, and the petitioner was unable to revive and restart the business. According to the petitioner, he kept on paying installments towards the two loan accounts in spite of the above circumstances.

The first OTS dt.27.7.2017

On 27.07.2017, the respondent-Bank offered to settle both the loan accounts for ₹3.10 Crores as against an outstanding of ₹3,94,29,233/- if the amount is paid in two months, but the petitioner could not do so since the period offered was too less.

The Second OTS dt.31.3.2018

Again the respondent-Bank on 31.03.2018, offered to settle both the loan accounts for ₹2.63 Crores provided the amount was paid by 30.09.2018 (in six months).

The petitioner deposited only

- (i) ₹25.12 Lakhs by 31.03.2018;
- (ii) during the period 09.07.2018 to 30.09.2018, he could deposit only ₹12.56 Lakhs; and
- (iii) during the period 01.10.2018 to 09.06.2019, he could only deposit ₹41.87 Lakhs.

Petitioner's request dt.9.6.2019 for extension of time

Petitioner then made a request on 09.06.2019 to the respondent-Bank to grant extension of further period of six months for making the repayment of the balance OTS amount of ₹183.45 Lakhs and offered to pay ₹25 Lakhs as lump-sum. Thereafter, the petitioner deposited ₹4.18 lakhs on 09.07.2019 and ₹12,55,974/- in August, September and October 2019.

According to the petitioner, out of total amount of OTS of ₹2.63 Crores he, thus, deposited ₹96.29 Lakhs till 31.10.2019.

The rejection of the petitioner's request on 12.7.2019 by the Bank

The request of the petitioner for extension of the period for payment of the balance OTS amount was rejected by the respondent-Bank vide letter dated 12.07.2019 (Annexure P-1).

It stated that the said settlement was not permissible within the Policies of the respondent-Bank. It requested to come up with an appropriate OTS proposal and arrange for closure of the loan accounts.

The later events

Petitioner requested the respondent-Bank to supply the relevant copies of its OTS Policies on 14.07.2019, and also got issued the legal notice dt.23.09.2019, and asked the respondent-Bank to withdraw letter dated 12.07.2019 issued by it.

The petitioner contends that the action of the respondent-Bank in refusing to extend the period of OTS for the remaining amount of ₹1.79 Crores is unreasonable, harsh, and contrary to law and decisions of this

Court and in particular the decision in Anu Bhalla and Another Vs. District Magistrate, Pathankot and Another¹.

The stand of the respondent Bank

Reply-affidavit was filed by the respondent-Bank contending that it is not within the purview of this Court to grant the relief of extension of six months' period for making balance payments of OTS as per sanctioned letter dt.31.03.2018 issued by it.

Reliance is placed on the recent judgment of the Hon'ble Supreme Court dated 15.12.2021 passed in titled as Bijnore Urban Cooperative Bank, Bijnore and Others Vs. Meenal Aggarwal and Others.²

It is stated that the Bank is not an instrumentality of the State in terms of Article 12 of the Constitution of India and is, therefore, not amenable to the Writ jurisdiction of this Court under Article 226 of the Constitution of India.

It is also alleged that the petitioner had an effective alternative remedy under Section 17 of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as "the Act of 2002") before the Debt Recovery Tribunal, and in view of the same, this Writ Petition cannot be entertained.

Reliance is placed on the decisions of the Hon'ble Supreme Court in the case of Union Bank of India Vs. Satyawati Tandon³ and in the

¹passed in CWP No. 5518 of 2020 decided by the Division Bench of this Court on 22.09.2020

²Civil Appeal No.7411 of 2011 dt.15.12.2021

³2010(3) RCR (Civil) 963

case of Authorized Officer, State Bank of Travancore and Another Vs. Matthew K.C⁴.

It is contended that as per the letter dt. 31.03.2018,OTS amount of ₹2.63 Crores was to be paid in both the loan accounts in installments specified therein by 30.09.2018, and that there was stipulation in the same letter that in the event of failure of the petitioner to comply with the payment schedule, the OTS will become null and void.

It is contended that in view of the same, and since the petitioner paid only ₹12,55,975/- upto 30.09.2018 out of the settlement amount of ₹2.63 Crores, the OTS offer to the petitioner came to an end. It is also alleged that the entire outstanding amount of ₹3,83,97,795/- as on 20.12.2021 became payable with upto date interest charges.

It is stated that the petitioner, after 30.09.2018, had made payment of ₹43,00,061/- and ₹36,54,440/-, but the same could not be considered as part of the amount deposited towards the OTS, and were adjusted towards the outstanding amount payable to the respondent-Bank.

It is the specific contention of the respondent-Bank that it did not have any standard OTS Policy and OTS is being offered or arrived at on a case to case basis keeping in view the exigency of the facts and circumstances of the particular case.

It is alleged that the petitioner is avoiding payment of outstanding amount to the respondent-Bank and that petitioner's conduct has not been *bonafide*.

⁴2018(3) SCC (85)

CM-16541-CWP-2021

The petitioner then filed an application bearing CM-16541-CWP-2021 in this Writ Petition for its early disposal by making an allegation that after filing of the Writ Petition, there were certain consultations with the officials of the respondent-Bank to settle the matter, that after such consultations, petitioner gave a request letter dt. 18.01.2021 to settle the entire outstanding loan amount by way of OTS by making a total of ₹1.46 Crores, and only formal acceptance of the same was awaited. It is alleged that the petitioner wrote reminders on 18.06.2021, 10.08.2021 and 04.10.2021 to the respondent-Bank for issuance of formal acceptance of letter so that the OTS amount can be paid by the petitioner, but no response was received from the respondent.

The petitioner contends that he made arrangement for making the payment of ₹1.46 Crores as full and final settlement towards all the pending loan amounts from the sale of his property, and is ready to make a down payment of ₹1 Crore in one go and pay the balance ₹46 Lakhs within one month thereafter. According to the petitioner, this fresh offer of the OTS is made *bonafide* to settle the loan accounts as was mutually agreed to *override all previous settlements* between the parties.

This agreement regarding OTS of ₹1.46 Crores as alleged by the petitioner is, however, denied by the respondent-Bank.

The consideration by the Court

As regards the maintainability of the Writ Petition against the respondent-Bank is concerned, we do not agree with the respondent-Bank that the Writ Petition is not maintainable against it.

The respondent is a Scheduled Bank mentioned in the Schedule to the Reserve Bank of India Act, 1934, and is governed by the Banking Regulation Act, 1949.

A Division Bench of this Court in the case of M/s A-One Mega Marg P. Ltd. Vs. HDFC Bank⁵, after reviewing the entire case law regarding maintainability of the Writ Petition against the Scheduled Banks like the respondent-Bank in the case in hand, in the context of the remedy available under the SARFAESI Act, 2002 (for short ‘the Act’) , held that where the respondent is a Scheduled Bank under the Reserve Bank of India Act, 1934 and is governed by the Banking Regulations Act, 1949, it would be amenable to the writ jurisdiction of the High Court where the Scheduled Bank takes recourse to the provisions of the Act of 2002.

Since, it is not the case of the respondent-Bank that it will not take recourse to the said procedure under the Act for recovery of the loan dues of the petitioner, it cannot say that the Writ Petition against it is not maintainable.

Now we shall consider the issue whether this Court has power to grant extension of time to make balance payment of OTS as per the sanctioned letter dt. 31.03.2018.

⁵2013 (1) PLR 688

In the decision of *Bijnore Urban Co-operative Bank Pvt. Ltd.* (2 Supra), the High Court of Allahabad had rejected the plea of the Bank that the case of the respondent did not come under the eligible category for OTS and had disposed of the Writ Petition by issuing the writ of *Mandamus* directing Bank to positively consider the petitioner's application for OTS. The Bank challenged it in the Supreme Court.

The Supreme Court held that :

- (i) benefit under the OTS scheme cannot be prayed as a matter of right and the High Court was not correct in directing the Bank to positively consider grant of benefit under the OTS that too *dehors* the eligibility criteria mentioned under the OTS scheme.
- (ii) grant of benefit of OTS would be subject to fulfilling the eligibility criteria mentioned in the scheme, that certain categories of the borrowers like willful defaulters or whose account was declared as NPA would not be eligible, and if there is a possibility of the recovery of the loan amount either by initiating appropriate proceedings or by auctioning the property mortgaged by the borrower or the guarantor, the application of the borrower for grant of benefit under the OTS scheme can be rejected.

The Supreme Court held in the said case that the Bank and its Settlement Advisory Committee had both rejected the respondents claim for the OTS, and if there is a conscious decision by the Bank that it would be able to recover the entire loan amount by auctioning the mortgaged property, it can deny the benefit under the OTS scheme whereby only a

lesser amount would be recovered. The Court held that no Bank can be compelled to accept the lesser amount under the OTS scheme in such circumstances, and no Borrower can as a matter of right pray for grant of benefit of OTS.

It is not in dispute that if the denial of the OTS by a Financial Institution is not in terms of the OTS Policy framed by it or as per guidelines framed by the Reserve Bank of India, certainly a Writ Petition could be maintained challenging such action as arbitrary and illegal.

In fact, the Supreme Court in Sardar Associates Vs. Punjab and Sind Bank⁶ considered the said aspect and 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 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 and the Board of Directors of the Bank in the said case cannot deviate from the said

⁶2009(8) SCC 257

guidelines. It held that the action of the Bank was violative of the equality Clause contained in the RBI guidelines and also Article 14 of the Constitution of India, and when the Bank had made an offer to accept the proposal of the appellant in regard to enforcement of OTS pursuant to the RBI guidelines, it was certainly aware of the amount of securities lying with it, and 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.

This decision in *Sardar Associates* (6 Supra) was not noticed by the Hon'ble Supreme Court while deciding the case of *Bijnore Urban Cooperative Bank, Bijnore and Others* (5 Supra).

A Full Bench of this Court in *M/s Indo Swiss Time Ltd. Vs. Umaraao and Others*⁷ considered the question as to what is to be done when there is a direct conflict between two decisions of the Supreme Court rendered by co-equal Benches. *It held that the High Court must follow the judgement which appears to lay down the law more elaborately and accurately. It held that mere incidence of time- whether judgment earlier or later, could hardly relevant.*

In view of the decision in *Sardar Associates* (6 Supra), whose discussion of law is elaborate, and in our opinion, it would not be open to Public Sector Banks or Private Sector Banks to decline OTS sought by a borrower provided he falls within the OTS Policy being followed by the said Bank.

⁷AIR 1981 (Punjab) 213

We are of the opinion that the decision in the case of Bijnore Urban Cooperative Bank, Bijnore and Others (5 Supra) cannot be interpreted to the extent that in all circumstances, the High Court is helpless to extend an OTS scheme offered by a Scheduled Bank.

The decision in Anu Bhalla (1 supra)

In what circumstances an OTS scheme can be extended by the High Court has been considered by a coordinate Bench of this Court in the case of Anu Bhalla and Another(1 supra) referred to above.

In that the case, the Division Bench specifically held that in exercising 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 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 *bonafides*, and is willing to clear the remaining

in a reasonable period and also compensate the creditor with interest for the period of delay, the Court can consider in 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 cases 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 arranged the funds to clear off the OTS.

B. Extent of payments already deposited under the settlement or before filing of the petition –

It held that 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 –

In order to test the *bonafide* intention of such an applicant, it could be reasonably be tested while 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 ofcourse, 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 –

It clarified that the guidelines/factors are not exhaustive but only illustrative for the guidance of the parties and the Courts while considering the prayer for extension of the time under by OTS by the borrower 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.

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, but it must be exercised by a High Court keeping in mind the above guidelines/principles.

Now we shall consider whether in the facts and circumstances of the instant case the petitioner is entitled to extension of time.

We have to see whether the petitioner falls within the guidelines framed in the case of Anu Bhalla and Another (1 Supra) for grant of extension of time for completion of the OTS sanctioned by the respondent-Bank on 31.03.2018.

We may point out that the petitioner and his co-applicant had been granted initially a loan of 18.02.2014 for a sum of ₹2.34 Crore, and again on 21.02.2014, were granted another loan for ₹1.74 Crores.

On 27.07.2017, the respondent offered the first OTS for ₹3.1 Crores but only gave two months' time which was too short, and so could not be fulfilled by the petitioner.

Subsequently, on 31.03.2018, second OTS was offered to the petitioner for ₹2.63 Crores, separately for both the loan accounts, to be paid on 30.09.2018.

Admittedly, the petitioner, during the period between 31.03.2018 and 30.09.2018, made initial payment of ₹25,11,573/- in respect of both the loan accounts, but later paid only ₹12.56 Lakhs. Thus, *within the period of OTS*, as against ₹2.63Crores, the petitioner paid only ₹37,67,573/-. This figure is too low to be considered as payment of substantial amount.

Even subsequent thereto between 01.10.2018 and 09.06.2019, the petitioner paid only ₹41.87 Lakhs, and on 09.06.2019, made the request for extension of six months' time for paying the balance of ₹183.45 Lakhs.

In our opinion even the payments between 01.10.2018 and 09.06.2019 of ₹41.87 Lakhs do not appear to be much since what was to be paid was ₹2.63 Crores by 30.09.2018 itself.

By giving letter dt. 09.06.2019 and seeking an extension of six months' time in repayment of ₹183.45 Lakhs, the petitioner is ineffect seeking extension of the OTS *from 01.10.2018 to 31.12.2019*, but even in the period from 01.07.2019 to 31.10.2019, the petitioner paid only ₹16,74,632/-.

With such slow pace of payment, in our opinion, the petitioner cannot claim that his case would fall within the guidelines framed in the case of Anu Bhalla and Another(1 Supra).

Admittedly, even according to the petitioner, his business has been closed since 2015. The reason for closure of the petitioner's business is only indicated as 'unavoidable and unforeseen circumstances', and no particulars are forthcoming.

The illness of petitioner's father is also admittedly during the period 2015-16. That cannot be given as a reason for non-compliance of the OTS, offered much later vide letter dt. 31.03.2018.

Even according to the decision in the case of Anu Bhalla and Another (1 Supra), the borrower cannot seek extension of time for making payment of the balance OTS amount, as a matter of right.

In our opinion, the extent of payments made by the petitioner during the period between 31.03.2018 to 30.09.2018 cannot be said to be substantial and the reasons offered for the delay in payment are not anything new but those which existed even prior thereto.

The Bank has categorically stated that the payments made subsequent to 30.09.2018 have been adjusted towards by it towards the loan dues and cannot be treated as payments made towards the OTS.

At this point of time, it would be unreasonable on the part of the petitioner to insist that the OTS offer made by the respondents on 31.03.2018 be maintained at the same figure although 3 years and 9 months have elapsed since then.

In view of these facts and circumstances, we are of the opinion that the respondent-Bank cannot be said to have acted arbitrarily or unreasonably in refusing to accede to the petitioner's request for extension of time for making the payment under the OTS letter dt. 31.03.2018 issued by it for ₹2.63 Crores.

Accordingly, the Writ Petition is dismissed as such.

No costs.

19.01.2022

Ess Kay

**[M.S. RAMACHANDRA RAO]
JUDGE**

**[JASJIT SINGH BEDI]
JUDGE**

<i>Whether speaking / reasoned</i>	:	<i>No.</i>
<i>Whether Reportable</i>	:	<i>No</i>