IN THE HIGH COURT AT CALCUTTA
CIVIL REVISIONAL JURISDICTION
APPELLATE SIDE

PRESENT:

THE HON'BLE JUSTICE AJOY KUMAR MUKHERJEE

C.O. 1246 of 2019
India SME Asset. Reconstruction Co. Ltd. & Anr.
Vs
M/S. Sofine Transformers Pvt. Ltd. & Anr.

For the petitioners	:	Mr. Jishnu Saha Mr. Zeeshan Haque Mr. Mayukh Roy Ms. Aasia Hasan
For the opposite party nos. 1-3	:	Mr. Jishnu Chowdhury Mr. Ratul Das Mr. S.S. Bhutoria
For the Opposite party no.4	:	Mr. Neil Basu Mr. Sankha Biswas
Heard on	:	09.08.2023
Judgment on	:	06.09.2023

Ajoy Kumar Mukherjee, J.

1. Order dated 9th January, 2019 passed by the Debts Recovery Appellate Tribunal, Kolkata in Appeal No. 168 of 2017 (Arising out of S.A. No. 191 of 2017 in Debts Recovery Tribunal-II, Kolkata) has been assailed by filing the present application under Article 227 of the Constitution of India. Petitioners contended that opposite party no. 1 M/S. Sofine Transformers Pvt. Ltd. had obtained a term loan of Rs. 86,00,000/- from Small Industrial Development Bank of India (SIDBI). The opposite party no.

2 and 3 had guaranteed the same and in order to secure repayment of such loan the opposite party no. 2 had mortgaged a property, measuring 2 Bighas, 8 Cottahs, 9 chittacks and building standing thereon at Chandmari, 2nd Bye Lane, Badamtala, Kalna Road, Burdwan (the mortgage property) in favour of SIDBI . Since the opposite party no. 1 failed to repay it's loan, SIDBI initiated proceedings under the provisions of Securitization and Reconstruction of Financial Assets and Enforcements of Securities Interest Act, 2002 (SARFAESI Act) by serving notice under section 13(2) of the said Act. The loan availed of by the opposite party no. 1 was subsequently assigned to the petitioner no. 1 along with a further Debt account of one sister concern of opposite party no. 1.

2. Upon assignment of the loan from SIDBI to the petitioner no. 1, a one time settlement (OTS) proposal was entered into and agreed upon between the petitioner no. 1, opposite party no.1 and its sister concern for settlement of the accounts of both the opposite party no. 1 and its sister concern. The terms of the OTS were reduced to writing and duly recorded in a letter dated 9th March, 2016, which obliged the opposite party no.1 to make payment strictly in terms thereof. However, clause 5 of the letter dated 9th March, 2016 gave the petitioner no.1 the right to withdraw the OTS at any point of time without assigning any reason therefor.

3. Though opposite party no. 1 was obliged to make the payment of a sum of Rs. 70,00,000/- by 15th June, 2016, the opposite party no. 1 could only pay an aggregate sum of Rs. 20,60,000/- till 28th April, 2017 and as such the petitioner no. 1 cancelled the OTS vide its letter dated 28th April, 2017 and proceeded to publish a sale notice for sell of the aforesaid mortgaged property. The opposite party no. 1 challenged the sale notice by filing an application under section 17 of the SARFAESI Act before the learned Debts Recovery Tribunal (II) (DRT–II) at Kolkata which was registered as SA No. 191 of 2017. Petitioner alleged that the said DRT in exceeding its jurisdiction modified the OTS by an order dated July 18, 2017 and was pleased to direct payment of the balance sum due under OTS in the following manner:-

"(2) respondent no. 2 has admitted that about Rs. 20,00,000/- have been paid. Hence, approx. 50,00000/- towards settlement amount are payble along with interest @ of 18% per annum from 09.03.2016 till the date of last payment. Applicants are directed to pay Rs. 10, 00000/- within 2 days from the date of this order i.e. Rs. 7,00000/- by today and Rs. 3,00000/- by tomorrow i.e. 19.07.2017. Applicants shall pay balance settled amount along with interest @ 18% (simple) as mentioned above within 30 days from the date of this order.

(3) on Payment of the above said amount by applicants, respondent F.I. is directed to cancel the sale which is being conducted today".

4. Mr. Jisnu Saha learned counsel appearing on behalf of the petitioner submits that the said order dated July 18th 2017, modifying the terms of the OTS could not have been passed under any circumstance and is a nullity since it is now well settled proposition of law, that the learned Tribunal has no jurisdiction to modify a contract between two parties. In this context he relied upon paragraph 23 of ***State Bank of India Vs. Aravinda Electronics Private Limited*** reported in **(2023) 1 SCC 540**.

> ***"23.*** *It is required to be noted that under the OTS Scheme which was originally sanctioned in the year 2017 the borrower was required to pay Rs 10,53,75,069.74 against the outstanding of Rs 13,99,89,273.99. Therefore, under the original sanctioned OTS Scheme the borrower was getting the substantial relief of approximately Rs 3 crores. The Bank agreed and accepted the OTS offer on the terms and conditions mentioned in the letter dated 21-11-2017. In the sanctioned letter dated 21-11-2017 it was specifically mentioned in Clause (iv) that the entire payment under the OTS Scheme was to be made by 21-5-2018, otherwise OTS would be rendered infructuous. Therefore, the borrowers were bound to make the payment as per the sanctioned OTS Scheme. Therefore, the High Court ought not to have granted further extension dehors the sanctioned OTS Scheme while exercising the powers under Article 226 of the Constitution of India."*

5. Mr. Saha further contended, although petitioners were aggrieved by the said order dated July, 18, 2017 modifying the OTS, but the petitioners were unable to immediately prefer an appeal from the said order as the same directed the opposite party no. 1 to pay Rs. 7,00000/- on the date of passing of the order itself and a further sum of Rs. 3,00000/- by the next date i.e. by July 19, 2017.

6. However, on July, 18, 2017 the respondent no. 1, deposited three cheques of the aggregate value of Rs. 7,000000/- and on July, 19th , 2017 the Respondent no. 1 deposited a sum of Rs. 3,00000/- despite the refusal on the part of the petitioner no. 1 to accept such payment under the aforesaid order of July, 18th 2017 modifying the OTS.

7. Other limb of arguments raised by Mr. Saha is that even though the aforesaid order dated July, 18,2017 was a nullity, even then, opposite party no. 1 did not make the payment in the manner directed by the said order. In such view of the matter the petitioner no. 1 proceeded to confirm the sale in favour of the opposite party no. 4 upon notice to the opposite party no. 1. This led to the opposite party no. 1 to file an application being MA No. 6 of 2017 before the DRT seeking compliance of the order dated 18th July, 2017 passed in aforesaid SA No. 191 of 2017.

8. Upon hearing the submission of the parties and noting the fact that the opposite party no. 1 had failed to comply with the directions for payment in the manner stipulated in the order dated July 18th, 2017, the Learned Tribunal vide its order dated 27th July, 2017 was pleased to dismiss MA No. 6 of 2017, after observing that the sell was rightly confirmed by the petitioner no. 1.

9. Being aggrieved by the said order passed by the DRT dated 27th July, 2017, an appeal was preferred by the opposite party no. 1-3 herein being Appeal no. 137 of 2017. By the impugned order learned Debt Recovery Appellate Tribunal (DRAT) allowed the appeal preferred by the opposite parties *interalia* holding that payment had been made by the respondent no. 1 in terms of the order dated 18th July, 2017 and as such the petitioner was bound to accept the cheques. While dealing with petitioner's contention that the Tribunal had no authority or jurisdiction to modify the terms of OTS, Tribunal below held that such contention is devoid of merit for the reason that the said order was not challenged by petitioner herein at the relevant point of time and as such it appears that the petitioner herein had no grievance from the said order at that time.

10. It is submitted on behalf of petitioner that learned DRAT in this context failed to appreciate that the order dated 18th July, 2017 did not leave the petitioner no. 1 with time to prefer an appeal before the initial payment of Rs. 7,00,000/- and Rs. 3,00,000/-. The Tribunal below also failed to consider that the petitioner no. 1 had refused to accept the cheques upon the same being offered to it and had manifested its intention that they never accepted the order dated 18th July, 2017. In fact the application being

MA 6 of 2017 by the respondent no. 1 herein seeking compliance of the order dated 18th July, 2017, which later stood dismissed, was in itself testimony to the fact that the petitioner had not accepted the order dated 18th July, 2017 Mr. Saha further argued that in any event, even acquiescence could not clothe the DRAT with jurisdiction to do something that it lacked the authority to do. In this context the petitioner relied upon following judgments

(i) **Official Trustee, West Bengal and Ors. Vs. Sachindra Nath Chatterjee and anr.** reported in **AIR 1969 SC 823 (paragraph 15).**

(ii) **Harshad Chiman Lal Modi Vs. DLF Universal Ltd and anr.** reported in **(2005) 7 SCC 791 (paragraph 30,32,37).**

(iii) **Chief Engineer, Hydel Project and Ors. Vs. Ravinder Nath and ors.** reported in **AIR 2008 SC 1315.**

(iv) **State Bank Of India Vs. Arvindra Electronics Private Limited.** reported in **(2023) 1 SCC 540 (paragraph 23).**

11. Opposite party no. 4, who is the auction purchaser of the mortgaged property, has more or less supported the argument made by the petitioner. In addition said opposite party no. 4 contended that he is a *bonafide* purchaser and the said sale has become absolute, as sale certificate has been issued in his favour. He further contended, according to section 60 of the Transfer of Property Act 1882, once an absolute sale has been executed and effected, it cannot be redeemed. In this context he relied upon paragraph 23 of ***Allokam Peddabbayya & another Vs. Allahand Bank & others*** reported in **(2017) 8 SCC 272** Mr. Basu on behalf of the opposite party no. 4 further contended that the right of redemption in cases of mortgage is available only in a manner known to law. Such extinguishment of right can only take place by contract between the parties, by a merger or by a statutory provision which debars the mortgagor from redeeming the mortgage. Accordingly both the petitioner and the opposite party no. 4 prayed for setting aside the order dated 09.01.2019 passed by the DRAT in appeal No. 168 of 2017 and to affirm the order dated 18.07.2017 passed by DRT in SA no. 191 of 2017.

12. Mr. Jishnu Chowdhury learned counsel appearing on behalf of the respondent no. 1-3 herein, contended that order dated 18th July, 2017 containing terms of payment in respect of OTS was final and binding upon the parties since none of the parties, challenged the order and it reached its finality in terms of the said OTS dated 18th July, 2017. The petitioner deposited cheques of Rs. 7, 00000/- on 18th July, 2017 and the cheque of Rs. 3,00000/- was deposited on 19th July, 2017. When whole matter was pending for further payment in terms of aforesaid OTS, the petitioner wrongfully and illegally cancelled the OTS and recorded that it had confirmed the sale. The respondent no. 1-3 filed an application for compliance of order dated 18.07.2017 being MA No. 6 of 2017 and to restrain sale of the property but such application was dismissed by an order dated 27th July, 2017. In the said proceeding petitioner herein contended that there is non-compliance of the order dated 18th July, 2017 in as much as though the cheques were deposited on 18th July, 2017 but the same was cleared two days later and therefore there has been non-compliance of the order dated 18th July, 2017 by the opposite parties. In this context the respondents referred Judgments of ***Commissioners of Income Tax South Bombay Vs. Ogale Glass works Limited Ogale Wadi*** reported in **AIR 1954 SC 429** paragraph 11, ***K. Saraswathy @ K. Kalpana Vs. PSS. Somasundaram Chettiar*** reported in **(1989) 4 SCC 527** paragraph 5,6 and ***Director of Income Tax (exemption) New Delhi, Vs. Raunak Education Foundation*** reported in **(2013) 2 SCC 62** (paragraph 12,13) and contended that the cheque unless dishonoured takes effect from the date of delivery and payment supposed to have made on the date of delivery and when the cheque was ultimately cleared is not relevant. He further contended that this court while exercising jurisdiction under Article 227 of the Constitution of India is not supposed to act as an appellate court. In fact the scope of jurisdiction of this court under Article 227 of the Constitution of India is very narrow and in this context he relied upon paragraph 6 of judgment of ***Estralla Rubber Dass Estate (P) Ltd*** reported in **(2001) 8 SCC 97.**

13. Respondents no. 1-3 in support of the their case also relied upon following decisions.

- **(i)** **Food Corporation of India Vs. S.N. Nagarkar** reported in **(2002) 2 SCC 475.**
- **(ii)** **Satyadhyan Ghosal and Ors. Vs. Deorajin Debi (Smt) and anr.** reported in **AIR 1960 SC 941.**
- **(iii)** **Arjun Singh Vs. Mohindra Kumar and ors.,** reported in **AIR 1964 SC 993.**
- **(iv)** **Ajay Mohan and ors., Vs. H.N. Rai and ors.,** reported in **(2008) 2 SCC 507.**

(v) ***Rajkamal Kalamandir Private Limited Vs. Indian Motion Pictures employees Union and others*** ,1963 (S) FLR 400 WP No. 40 of 2007 passed by this court.

14. On perusal of the order impugned, it appears that the Appellant Tribunal has set aside the order passed by the Tribunal dated 27th July, 2017 and directed the Tribunal to decide the SARFAESI application afresh in accordance with law after affording an opportunity of hearing to the parties concerned and without being influenced by the observations made by DRAT. However, the DRAT being an Appellate Tribunal has made certain observations that the contention raised by opposite parties that DRT was not competent to revive the one time settlement vide order dated 18th July, 2017 is devoid of merit for the reason that the said order was not challenged by the respondent at the relevant time. DRAT further held that the order dated 18th July, 2017 had attained finality, hence cannot be pondered over in the appeal filed against the impugned order dated 27th July, 2017. He further held that since the payment was made in terms of order as observed above, Tribunal below has to decide the SARFAESI application afresh treating that payment of Rs. 10,00,000/- was made in time.

15. If on the basis of aforesaid observations, DRT has to decide the issue afresh then practically there is no scope for the DRT to make a fresh look upon the issues, since issues have already been decided by an appellate authority, without examination of evidence and appreciation of the fact and there cannot be any further question of remanding the case before the DRT to decide anything afresh. In the present case, the petitioner has raised a challenge that the tribunal had no jurisdiction to modify a contract between the parties by the order dated 18th July, 2017. Moreover, the petitioner strenuously argued that they never accepted the order dated 18th July, 2017 but they could not prefer appeal, since the direction upon the opposite party no. 1 was to pay Rs. 7,00,000/- on the date of passing of the order itself and a further sum of Rs. 3,00,000/- by the next date i.e. 19th July, 2017. His further contention is that when the respondent no. 1 deposited the said sum by way of cheque, they have refused to accept the same and as such, such refusal shows that they never accepted the said one time settlement. Their further contention is that the petitioner herein did not comply the order dated 18th July, 2017 and they had not made payment in any manner stipulated in the said order.

16. Now all the aforesaid issues raised certain points which need to be discussed and decided by the DRT as first Forum. In the order passed by DRT such issues were never dealt with nor has been decided by the Tribunal. Since the petitioner has raised a serious dispute that the one time settlement was not made as per guidelines of the Reserve Bank of India and the SARFAESI application was disposed of in utter disregard to the established procedure of law and without appreciating the point of law and point of fact on merit, the Appellate tribunal was only justified in remanding the entire SARFAESI application giving, equal opportunity to both the parties to contend their respective cases. In fact, the issue as to whether the one time settlement was made in accordance with law or not and whether the petitioner had accepted the said modifying one time settlement or whether petitioner's inability to prefer appeal is justified or not, cannot be adjudicated by this High Court as first Forum. practically, there was no adjudication of such issues on merit and unless the case is sent back on remand, the disputed questions as stated herein ought not to be adjudicated by the DRAT or by the High Court, because in such event, either of the parties would have lost a forum.

17. This court in exercising jurisdiction under Article 227 of the Constitution of India, in essence, cannot sit to hear second appeal and cannot act as first forum to adjudicate on the said issues in absence of proper evidence and materials before this court. In fact, examination of evidence and appreciation of facts to answer those disputed questions is the task entrusted upon the DRT, which has not been done at all in the present context as appearing from the order passed by DRT.

18. In view of above, since this court while exercising supervisory jurisdiction cannot determine the legality and validity of the aforesaid issues without appreciation of evidence and examination of fact like an appellate court specially in the absence of relevant document and evidence, this court exercising supervisory jurisdiction finds, no other alternative but to support the order of remand for adjudication of unsettled issues.

19. In such view of the matter, the observations of the Appellate Tribunal (DRAT) made in paragraphs 8 to 12 in the judgment dated 09.01.2019 in Appeal No. 168 of 2017 are hereby set aside. However, this court is agreeable with the observation made in paragraph 13 of the impugned judgment, wherein the Tribunal below has directed to decide the SA afresh in accordance with law after affording opportunity of hearing to the parties concerned and without being influenced by the observations made by the DRAT. In this context, this court adds further that while deciding the

SARFAESI application afresh, the Tribunal will also decide the following issues along with other issues raised by the parties, without being influence by any observation made by this High Court.

i) whether the order dated 18th July, 2017 modifying the terms of one time settlement is a nullity.

ii) whether debt recovery tribunal has jurisdiction to modify a contract arrived at between two private parties.

iii) whether bank's plea that they were unable to immediately prefer an appeal from order dated 18th July, 2017, is sustainable in law and fact.

iv) whether banks conduct otherwise, amounts to non-acceptance of order dated 18th July, 2017.

v) whether loanee made the payment to the bank in time by delivering cheques in compliance with order dated 18th July, 2017.

vi) whether bank was justified in proceeding to confirm the sale in favour of the respondent no. 4 herein.

20. C.O. 1246 of 2019 along with connected applications are accordingly disposed of.

There will be no order as to costs.

Urgent photostat certified copy of this order, if applied for, be given to the parties upon compliance of all requisite formalities.

(AJOY KUMAR MUKHERJEE, J.)