

**In the High Court at Calcutta
Constitutional Writ Jurisdiction
Original Side**

The Hon'ble Justice Sabyasachi Bhattacharyya

W.P.O. No.539 of 2023

**Lords Bluetech Company Private Limited and Anr.
VS**

**The Authorised Officer,
Export-Import Bank of India and Anr.**

For the petitioners	:	Mr. Rajarshi Dutta, Adv. Mr. Pankaj Agarwal, Adv. Ms. Muskan Agarwal, Adv.
For the respondent no.1 (Via Video Conference)	:	Mr. Indradeep Basu, Adv.
For the respondent no.2	:	Mr. Subhankar Nag, Adv. Mr. Snehashis Sen, Adv. Mr. Danyal Ahmed, Adv.
Hearing concluded on	:	29.11.2023
Judgment on	:	06.12.2023

Sabyasachi Bhattacharyya, J:-

1. The petitioner no.1 is a company which took a loan from the respondent-Bank on January 13, 2014. Upon subsequent non-repayment, the Bank issued notice under Section 13(2) of the SARFAESI Act, 2002, followed by notices under Section 13(4) of the said Act.
2. In pursuance of the recovery proceeding, the respondent-Bank caused publication of an advertisement for sale of the mortgaged properties on January 22, 2020. The writ petitioners took out an application bearing SA No. 45 of 2020. The Debts Recovery Tribunal (DRT)-1, Kolkata *vide* order dated March 3, 2020 granted ten days' time to the

petitioners to bring a prospective buyer who could purchase the property at a better price and inform the same on the next date of hearing. It was directed that the respondent-Bank would go ahead with the sale process but would remain restrained from confirming the sale till the next date of hearing.

3. The sale took place. The respondent no.2 turned out to be a successful purchaser and deposited 10 per cent of the consideration amount of Rs.1.81 Cr. The payment of the amount was recorded *vide* order dated December 8, 2020, although it was erroneously recorded that the entire consideration had been received from the purchaser. It is undisputed that 10 per cent of the consideration was actually paid by the respondent no.2 prior to December 8, 2020, when the Tribunal extended the *status-quo* order till next date of hearing.
4. The petitioners gave a One-Time Settlement (OTS) proposal to the Bank. *Vide* order June 15, 2022, a Co-ordinate Bench recorded that the Bank was not willing for the offer of Rs. 2 Cr. made by the petitioners but directed the Bank to give a hearing to the petitioners and dispose of the request of the petitioners in writing.
5. The Bank, *vide* communication dated December 27, 2022, agreed to a One-Time Settlement. As per the terms of the said settlement, the petitioner was to pay a total amount of Rs.2.10 Cr., after deduction of Rs.5 lakh already paid on November 29, 2022, within 20 days from the date of the letter, that is, on or before January 16, 2023. There were other terms and conditions of the OTS.

6. Subsequently, the Bank, alleging that the petitioners did not comply with the terms of the OTS, wrote to the petitioners indicating that in view of the failure of the OTS, it reserved its right to take legal action for recovery of dues. The said communication was followed up by a similar communication dated February 28, 2023. The said communications and decisions of the Bank have been challenged herein.
7. Learned counsel for the petitioners, during pendency of the writ petition, submitted that the petitioners' offered to the Bank that the substantive terms of the OTS could be fulfilled if the sale was permitted to go ahead to the respondent no.2, upon which Rs.1.81 Cr. after deducting the amount already paid by the respondent no.2, would be received by the Bank from the purchaser-Respondent no. 2. The balance out of Rs.2.05 Cr, which was payable by the petitioners, would be cleared off by the petitioners.
8. Upon the request of Court, the Bank considered the said. The writ petition was dragged for some time, awaiting a draft agreed order to be filed by the parties, which never fructified.
9. At the conclusion of the hearing, learned counsel for the petitioners submitted that the petitioners are agreeable to arrange for payment of the entire balance amount of Rs.2.05 Cr. in terms of the OTS to the Bank, to which an objection was raised by the respondent no.2. It is required to be clarified here that such offer was never made before but only at the time when hearing was concluded and the judgment was about to be reserved.

- 10.** Learned counsel for the Bank opposes the prayer of the petitioners and submits that the petitioners failed to comply with the terms of the OTS. The bank, it is contended, in deference to the request of the Court, had been trying to resolve the issue amicably. However, the petitioners are now seeking to bring in a new purchaser in place of the respondent no.2. It is submitted that valuable rights have already accrued in favour of the respondent no.2 upon the Bank having accepted the earnest money deposit out of the total consideration. Moreover, it would be extremely cumbersome for the bank to negate the entire procedure and arrange for a new sale afresh.
- 11.** Learned counsel for the respondent no.2 places reliance on *Celir LLP v. Bafna Motors (Mumbai) Pvt. Ltd. and others* reported at 2023 SCC OnLine SC 1209 where it was held by the Supreme Court that the amended provisions of Section 13(8) of the SARFAESI Act make it clear that the right of the borrower to redeem the secured asset stands extinguished on the very date of publication of the notice for public auction under Rule 9(1) of the 2002 Rules. In effect, it was held, the right of redemption available to the borrower under the present statutory regime is drastically curtailed and would be available only till the date of publication of the notice under Rule 9(1) of the 2002 Rules and not till the completion of the sale or transfer of the secured asset in favour of the auction purchaser.
- 12.** In the present case, since the date of auction had long passed and the respondent no. 2 turned out successful in the auction sale and has already deposited earnest money to the tune of 10 per cent of the

consideration, the right of the petitioners to redeem the mortgage stands extinguished.

13. Learned counsel next relies on *State Bank of India Vs. Arbindra Electronics Private Limited*, reported at (2023) 1 SCC 540 as well as *Bijnor Urban Cooperative Bank Limited, Bijnor and others Vs. Meenal Agarwal and others* reported at (2023) 2 SCC 805 to argue that a decision rejecting the claim for benefit of OTS cannot be said to be in violation of principle of natural justice and no judicial review under Article 226 lies for directing the Bank to reschedule the payment under OTS, which would tantamount to modification of the contract which can only be done by mutual consent under Section 62 of the Contract Act. The contract cannot, thus, be rewritten by the Court under Article 226 of the Constitution of India.
14. Lastly, learned counsel cites *Agarwal Tracom Private Limited Vs. Punjab National Bank and others*, reported at (2018) 1 SCC 626, arguing that a writ petition under Article 226 of the Constitution is not maintainable unless the alternative remedy has been exhausted.
15. It is argued that valuable rights have accrued in favour of the respondent no.2. The petitioners cannot, at their own whims, come up at any time and seek a restructuring of the OTS. The rights of the respondent no.2 cannot be defeated at this juncture.
16. Upon hearing learned counsel for the parties, the remedy sought by the petitioners transpires to be issuance of a rule of Mandamus against the Bank compelling the Bank to agree to the terms of OTS as made out by the petitioners.

- 17.** The Bank had, in deference to the order of the learned Co-ordinate Bench, agreed to the OTS proposal as per the terms mentioned therein. The settlement as per the said document was that the petitioners are to pay Rs. 2.05 Cr. within 20 days from the date of the letter, that is, on or before January 16, 2023. The petitioners, however, failed to make such payment. Instead, on January 6, 2023 the petitioners pleaded extreme financial difficulty and gave a fresh proposal beyond the terms of the OTS. Contrary to the submissions of the petitioners, the OTS proposal clearly mentioned that the petitioners were to pay the amount of Rs. 2.05 Cr. What the petitioners proposed in their letter dated January 6, 2023 was that the Bank would receive a total amount of Rs. 1.81 Cr. from the auction purchaser and only the remaining amount out of Rs. 2.05 Cr. would be paid by the petitioner no.1.
- 18.** Apart from such deviation, Clause 4(i)(a) of the Special Terms and Conditions of the OTS stipulated that the OTS sanction would stand terminated automatically upon non-acceptance of OTS sanction within seven days from the date of the letter. Since, the petitioners failed to accept the terms of the OTS as it is within seven days, the said clause also applied in full rigour and the OTS failed.
- 19.** A restructuring of the OTS or a proposal to repay the amount in some other manner by the petitioners is *de hors* the OTS. The petitioners now seek a direction from the court to rewrite the contract between the Bank and the petitioners by altering the entire terms of the OTS.

20. The Supreme Court in no uncertain terms in *Bijnor Urban Cooperative Bank Limited (supra)* and *State Bank of India (supra)* deprecated precisely such action by the Court.
21. Thus, a premium cannot be given to such conduct of the petitioners who have failed previously to honour the OTS.
22. The petitioners, in any event, do not have a right – legal, Constitutional or otherwise, to compel the Bank to agree to its terms for repayment, having turned defaulter in the first instance.
23. The proposition laid down in *Celir LLP (supra)* categorically closes the rights of the borrower to redeem the mortgage after the publication of the notice for public auction under Rule 9(1) of the 2002 Rules. In the present case, not only had the auction notice been given previously, the Bank had already received bids on March 3, 2020 when the Tribunal granted 10 days' time to the petitioners to bring a prospective buyer. There is nothing on record to show that the petitioners brought any prospective buyer, let alone within 10 days, who could purchase the property at a better price than 1.81 Cr. Thus, the petitioners also failed to avail such opportunity.
24. In the order dated December 8, 2020, it was clearly recorded that the respondent no.2 had already deposited the consideration amount (although 10 per cent of the same had been paid). Thus, the right of the petitioners to redeem the mortgage was already closed on the said date. Hence, the petitioners cannot, as a matter of right, claim to bring a purchaser now or pay up the amount. The offer made by the petitioners on the date when the matter was heard that is on

November 29, 2023, to pay the entire balance amount of Rs. 2.05 Cr., thus, came too late in the day, long after the right of the petitioners to redeem the mortgage was extinguished in terms of the *Celir LLP* judgment.

- 25.** Since valuable rights have already accrued in favour of the respondent no.2, the Bank rightly refused to enter into a fresh transaction which would involve negating such sale in favour of the respondent no.2. Hence, the petitioners have not made out a case for interference in any manner in the present case.
- 26.** In view of the above discussions, WPO No. 539 of 2023 is dismissed on contest, without any order as to costs.
- 27.** Urgent certified server copies, if applied for, be issued to the parties upon compliance of due formalities.

(Sabyasachi Bhattacharyya, J.)