IN THE HIGH COURT AT CALCUTTA
Civil Appellate Jurisdiction
Appellate Side

Present:
The Hon'ble Justice Harish Tandon
And
The Hon'ble Justice Hiranmay Bhattacharyya.

MAT 2087 of 2024
IA No. CAN 1 of 2024

Shankar Saw Mills Pvt. Ltd.
Vs.
State Bank of India and another.

For the Appellant : **Mr. Dulal Dey.**

For the Respondents : **Mr. Pijush Kanti Ray,**
Mr. Avijit Belel.

Heard on : 10.12.2024

Judgment on : 10th December 2024.

The Court:

By the impugned order, the Single Bench dismissed the writ petition filed by the appellant on the premise that the Writ Court cannot issue Mandamus upon the bank to extend the time to pay the amount in terms of the first one time settlement nor can compel the bank to enter into the compromise with the borrower.

The writ petition was filed by the appellant challenging the letter dated 16th June 2022 issued by the respondent-bank whereby and whereunder the prayer for extension of time to liquidate the entire amount in terms of the compromise/settlement entered into between the parties on 14th July 2020 was refused by the bank. Several pleas have been taken in the writ petition impinging upon the conduct and the manner in which the bank has proceeded in the matter; above all, the shelter under the pandemic struck globally was also taken. According to the appellant, the pandemic has impeded the economic growth of the entire world and, therefore, the bank ought to have taken such aspect while refusing the prayer to extend the time under the said compromise/settlement.

The Counsel for the appellant vociferously submits that a substantial amount spanning over to Rs. 67,00,000/- and odd were deposited with the bank after the said compromise/settlement dated 14th July 2020, but suddenly the bank refused to accept further payment and issued a letter dated 16th June 2022 without any plausible explanation having offered in this regard. It is further submitted that the Apex Court in several judgments have directed the borrower to pay the amount with interest despite having failed to liquidate the amount within the stipulated time and, therefore, the same remedy should be extended to the appellant. In support of the aforesaid contention, the reliance is placed on a judgment of the Apex Court rendered in case of **P. Vijayakumari and another vs. Indian Bank**, reported in **(2018) 14 SCC 735** and the Division Bench of the Punjab and Haryana High Court in case of **Hardyal Singh Cheema vs. State Bank of India and another** (CWP No. 7097/2022) decided on 12th July 2022.

Before we proceed to deal with the matter on its factual matrix, it would be apposite to consider the ratio of the above mentioned judgments relied upon by the appellant.

In **P. Vijayakumari and another (Supra)**, the Madras High Court set aside the order of the Debt Recovery Appellate Tribunal and proceeded to grant extension of time by condoning the delay in making the payment of an agreed amount under the settlement. The Apex Court in an unequivocal terms held that the decision of the Debt Recovery Appellate Tribunal in refusing to extend the time stipulated in the settlement cannot be said to be unreasonable or unsustainable in law. The Apex Court was also of the view that the High Court ought not to have interfered with such order by granting extension, but thereafter exercise the extra ordinary powers reserved upon the Supreme Court under Article 142 of the Constitution of India in passing an ultimate direction in pursuit of securing justice between the parties.

So far as the Division Bench judgment of the Punjab and Haryana High Court in **Hardyal Singh Cheema (supra)** is concerned, the decision rendered by the Apex Court in **P. Vijayakumari and another (Supra)** was followed as if it is a law declared by the Supreme Court and proceeded to extend the same benefits.

A distinction has to be drawn between a judgment rendered by the Supreme Court under Article 141 with a judgment rendered in exercise of extra ordinary power conferred under Article 142 of the Constitution of India. In former case, the law declared by the Supreme Court is binding on all the Courts of the country including the High Court, but in later case, the same cannot be treated as a binding precedent. The power under Article 142 of the Constitution is conferred upon the Supreme Court, which has not been extended to the High Court or the other Courts of the country and, therefore, the decision rendered in exercise of such powers cannot be regarded as a binding precedent to be followed in all conceivable situations.

While applying the test of law laid down by the Apex Court, the Court must look into the facts involved in the said case and the observations made therein in relation to such context. A decision taken by a Court is what is decided on the basis of the facts of the case and it would not be safe to cull out one sentence from the context and treat the same as a ratio laid down therein. A little difference or an additional fact may invite a different decision and, therefore, the Court while embarking on its journey on the peripheral of the ratio laid down in the judgment of the Supreme Court must also see the factual parity. The above judgments, cited by the appellant, do not appear to have any application in the given facts and circumstances involved in the instant proceeding.

However, in course of hearing of the instant appeal, we noticed the startling facts emerged from the records. Undeniably, the appellant approached the bank for a loan facility and obviously upon taking into account the credentials and the financial stability of the appellant, the loan was sanctioned after recording the satisfaction over the value of the securities offered by the appellant. Admittedly, there was a default in serving the interest and the bank raised a demand, which also could not be adhered to.

An approach is made to the Debt Recovery Tribunal and we are given to understand that such proceeding is still pending therein. Since the default has occurred, the account was declared non-performing asset and the steps under Section 13 of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (in short 'said Act') was taken. Assailing the same, the appellant has approached the Debt Recovery Tribunal under Section 17 of the said Act and the said proceeding is pending before the Debt Recovery Tribunal.

Amidst the pendency of the aforesaid proceedings, the letter dated 16th June 2022 is challenged in the writ petition and the Mandamus was sought on the grounds enumerated and/or adumbrated herein above.

It is an admitted position that subsequently the parties entered into a compromise/settlement on 14th July 2020 where the offer of the appellant to pay the entire dues to the tune of Rs. 2.90 crores was accepted and the schedule for payment was incorporated in the said compromise/settlement. Two letters of the even date are annexed to the instant proceeding touching upon the compromise/settlement, where we noticed a significant variation therein. The compromise/settlement dated 14th July 2020 annexed at page 70 of the stay application is signed by both the parties whereas the letter annexed at page 20 is signed by the bank alone.

Going with the letter annexed at page 70 of the stay application being a concluded contract having been signed by both the parties, we find that in terms of such compromise/settlement the entire amount of Rs. 2.90 crores was agreed to be paid in installments within the time indicated therein. Clause (4) of the said compromise/settlement is indicative of the fact that in the event Rs. 40,00,000/- are paid, the properties mentioned in sub-clauses (a) and (b) thereof shall immediately be released and the remaining securities shall be released upon full and final payment of the rest amount within 30th September 2020.

At the first blush, the expression "remaining security would be released on or before 30th September 2020" created an impression in the mind that the payments, which are to be made affront, should be made within the said period for the simple reason that the moment the timeline is given in the contract for performance of a certain act, the time becomes an essence of contract. In order to arrive whether the time is essence of contract, not only express words used in the written contract but subsequent act or conduct of the parties is the relevant factors.

According to the appellant, prior to 16th June 2022, a sum of Rs. 67,00,000/- have been paid to the bank, which was received without putting any objection or demur and when further sum of Rs. 5,00,000/- was tendered, the bank returned the same and caused a letter dated 16th June 2022 indicating that the said compromise/settlement was cancelled and/or terminated.

Our attention is drawn to the affidavit-in-opposition used by the bank before the Single Bench wherein it is averred that the letter dated 13th June 2022 issued by the appellant was duly replied by the bank on 16th June 2022, rejecting the prayer for extension of time and returning the said sum of Rs. 5,00,000/- to the appellant. There is no disclosure by the bank with regard to the cancellation of the said compromise/settlement in terms of the right reserved under Clause (7) of the said contract.

What could be gathered from the conduct of the bank is that they received the payment prior to 16th June 2022 from the appellant without raising any objection or putting any demur and the prayer for extension of time was refused on 16th June 2022 meaning thereby till such date the time, which being the essence of contract, was extended. The bank cannot act whimsically or capriciously, more particularly, de hors the terms and conditions of the contract entered into with conscious mind. The conduct would lead to an inexplicable presumption that the time stipulated in the said contract was extended by the bank upon acceptance of the amount paid within or beyond the said stipulated time until a further extension was refused by a letter dated 16th June 2022.

Clause (4) of the said contract is explicit to the extent that in the event Rs. 40,00,000/- is paid under the said compromise/settlement, the two properties mentioned therein would be released in favour of the appellant, which, in fact, has not been done; rather it is communicated to the Court that one of such property has already been sold in auction. The appellant is raising several objections over the mode and the manner in which the sale was conducted including the right conferred under the said contract to which we feel that the writ forum is not an appropriate forum for the same. It is open to the appellant to ventilate such grievance before the appropriate forum, more particularly, the Debt Recovery Tribunal, where a proceeding is still pending.

However, a point of demur is taken whether a Writ of Mandamus can be issued in exercise of power under Article 226 of the Constitution of India in relation to an issue concerning the action of the secured creditor under the said Act. The Apex Court in **Kanaiyalal Lalchand Sachdev and others vs. State of Maharashtra and others**, reported in **(2011) 2 SCC 782** held that the High Court should not exercise the power conferred under Article 226 of the Constitution of India if the efficacious remedy is available under the statute.

We are conscious of the proposition of law that mere existence of an alternative remedy cannot create an absolute bar on the High Court in entertaining the petition under Article 226 of the Constitution of India. However, the Court has imposed self-restraint in refusing to entertain the writ petition in the event the alternative efficacious remedy is available in the statute. It is, thus, rule of discretion than of compulsion. The Single Bench refused to exercise such discretion and, therefore, the appellate Court should be slow and circumspect in interfering with the discretionary order unless such discretion so exercised is manifestly unreasonable and/or irrational. The Apex Court has further held that the Writ Court should not be used as a tool to incorporate any condition in the agreement nor extend the period of such contract if one of the parties to the contract is not agreeable thereto. The aforesaid notion can be fructified with the judgment of the Apex Court in case of **State Bank of India vs. Arvindra Electronics Private Limited**, reported in **(2023) 1 SCC 540** in the following:

> "The submissions on behalf of the borrower that in case of some other borrowers the time was extended is concerned, the same is neither here nor there. The Bank mutually can agree to extend the time which is permissible under Section 62 of the Contract Act. The borrower as a matter of right cannot claim that though it has not made the payment as per the sanctioned OTS Scheme still it be granted further extension as a matter of right. There cannot be any negative discrimination claimed. The borrower has to establish any right in their favour to claim the extension as a matter of right."

In view of the law as enunciated herein above, we do not find any infirmity and/or illegality in the judgment of the Single Bench in dismissing the writ petition. The appeal is, thus, dismissed. Consequently, the connected application being CAN 1 of 2024 is also dismissed.

However, dismissal of the appeal shall not preclude the appellant to agitate the points urged in the instant appeal before the Debt Recovery Tribunal and if such points are raised, it is open to the Debt Recovery Tribunal to take independent decision without being influenced by any other observations.

(Harish Tandon, J.)

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(Hiranmay Bhattacharyya, J.)