Indian Bank vs M/S Blue Jaggers Estates Ltd on 9 August, 2010

Equivalent citations: AIR 2010 SUPREME COURT 2980, 2010 AIR SCW 4751, 2010 (4) AIR KANT HCR 128, (2011) 1 CIVLJ 242, (2011) 1 MAD LJ 132, (2010) 4 RECCIVR 403, (2010) 98 CORLA 424, (2010) 6 ALL WC 5663, (2010) 94 ALLINDCAS 102 (SC), 2010 (8) SCALE 8, 2010 (8) SCC 129, (2010) 6 ALLMR 468 (SC), (2010) 2 CLR 589 (SC), (2010) 82 ALL LR 786, (2010) 4 KCCR 238, (2010) 3 BANKCAS 694, (2010) 8 SCALE 8

Author: G.S. Singhvi

Bench: G.S. Singhvi, Asok Kumar Ganguly

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS. OF 2010.
(Arising out of SLP(C) NOS. 4981-4982 OF 2010)

Indian Bank ...Appellant

Versus

M/s. Blue Jaggers Estates Ltd. and others ...Respondents

JUDGMENT

G.S. Singhvi, J.

1. Leave granted.

2. These appeals filed for setting aside order dated 23.10.2009 passed by the Division Bench of Madras High Court are illustrative of how a defaulting borrower can use the court process for frustrating the action initiated by a bank under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short `the Act') for recovery of its dues.

3. The appellant-Bank sanctioned loan to M/s. N.S. Investments, a partnership firm in 1989 and again in 1991. After some time, the account of M/s. N.S. Investments was declared as

non-performing asset. In 1995, respondent No.1 M/s. Blue Jaggers Estate Ltd. took over the assets and liabilities of M/s. N.S. Investments. The respondents claim that this was done at the asking of the appellant who agreed to provide additional financial assistance to the tune of Rs.1 crore, but no tangible evidence has been produced in support of this assertion.

4. Since the respondents failed to clear the outstanding dues, the appellant filed an application under Section 19 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (for short, `the DRT Act') for recovery of Rs.2,15,38,158/- with interest. The same was registered as O.A. No. 1098 of 1998 and is pending before Debts Recovery Tribunal, Chennai (for short, `the Tribunal').

5. During the pendency of O.A. No. 1098 of 1998, the parties signed Joint Memo of Compromise dated 23.6.2004 whereby the appellant agreed to accept an amount of Rs.153.50 lakhs towards full and final settlement of its claim as against the outstanding dues of Rs.661.30 lakhs. The schedule of repayment was fixed by the parties and the appellant agreed for proportionate release of the mortgaged and non-mortgaged properties. The parties also agreed that in case of non-compliance of any of the conditions, O.A. No. 1098 of 1998 shall stand decreed. This is evinced from paragraph 4 of the Joint Memo of Compromise which reads as under:

> "In the event of Non-compliance of any one of the aforesaid conditions, the Original Application No. 1098 of 1998 shall stand decreed as prayed for and the Applicant bank shall be entitled to recover the full amount of Rs.2,15,38,158.00 as prayed in the Original Application with future interest at contract rate from the Application date till payment in full with costs and also proceed to bring the schedule mentioned properties in the Original Application for sale through public auction at the cost of the defendants."

6. Although, the respondents did not pay full amount in terms of compromise dated 23.6.2004 and as a result of that, the appellant acquired the right to recover all the dues, it signed another compromise with the respondents who undertook to pay the balance amount of Rs.63.50 lakhs on or before 31.3.2005 along with interest at the rate of 11.50% per annum. Notwithstanding this, the respondents defaulted in payment of the balance amount, which they finally paid on 28.3.2007.

7. In the meanwhile, the appellant issued two notices dated 19.2.2004 and 30.12.2006 under Section 13(2) of the Act. By the first notice, the respondents and some others were called upon to pay Rs.6,47,21,885/- together with interest at the rate of 19.89% per annum with quarterly rests. By the second notice, they were asked to pay Rs.9,86,25,736/- which, according to the appellant, became due as on 31.12.2006 together with interest at the rate of 19.89% per annum with quarterly rests. The respondents filed objections under Section 13(3-A) of the Act and claimed that during the pendency of the recovery proceedings instituted under the DRT Act, the appellant cannot invoke the provisions of the Act. They also claimed that the Tribunal has the discretion to decide the rate of interest payable after filing of an application under Section 19 of the DRT Act and requested that the proceedings initiated under the Act may be dropped. The appellant did not accede to the request of the respondents and issued notice dated 26.7.2007 under Section 13(4) of the Act for taking

possession of the mortgaged properties.

8. Faced with the imminent threat of sale of the properties mortgaged by them, the respondents filed an application under Section 17 of the Act (S.A. No. 221 of 2007) for quashing the proceedings initiated by the appellant under Section 13 thereof. While doing so, the respondents must have been conscious of the fact that it will not be possible for them to avoid the inevitable for a long time. Therefore, with the sole object of delaying final adjudication of the application filed by them, the respondents filed three interlocutory applications. In the first application, they prayed that O.A. No. 1098 of 1998 may be heard and disposed of along with S.A. No. 221 of 2007. In the second and third applications, they prayed for summoning of NPA registers of the period between 1993 and 1997 and Board's notings recorded on the file of the appellant. Respondent No.2 also filed Writ Petition No. 7562 of 2008 for issue of a mandamus to the Tribunal to take up O.A. No. 1098 of 1998 and decide the same along with S.A. No. 221 of 2007. That petition was referred by the High Court to the Tamil Nadu Mediation and Conciliation Centre, which submitted report dated 4.9.1998 incorporating therein the offer made by respondent No.2 herein that he is ready to pay interest for the delayed payment of Rs.63.50 lakhs. It, however, appears that the appellant did not accept the offer because as a result of the respondents' failure to pay the agreed amount, the entire amount became payable in terms of paragraph 4 of the Memo of Compromise dated 23.6.2004.

9. By an order dated 9.6.2008, the Tribunal dismissed S.A. No. 221/2007. It held that the appellant herein had taken action under the Act because the borrower did not pay the outstanding dues. The Tribunal took cognizance of the compromise deeds signed by the parties and observed that the appellant is entitled to recover the outstanding dues because the borrower failed to fulfil its commitment in accordance with the terms of compromise.

10. The respondents challenged the aforementioned order of the Tribunal by filing an appeal under Section 18 of the Act. They also applied for restraining the appellant from taking action in furtherance of the notices issued under Section 13(2) and 13(4) of the Act. By an order dated 21.7.2008, the Debts Recovery Appellate Tribunal at Chennai (for short, `the Appellate Tribunal') granted interim stay subject to the condition of deposit of Rs.3 crores in two equal instalments of Rs.1.5 crores each. This did not satisfy the respondents, who filed Writ Petition No.20772 of 2008 for an absolute and unconditional stay of the recovery proceedings. The same was dismissed by the Division Bench of Madras High Court vide its order dated 26.8.2008, paragraphs 7 to 10 whereof read as under:

> "7. In the present case, we are not inclined to decide the question whether NPA account commenced in the year 1996 or 1998, which can be looked into by the Debts Recovery Tribunal-I, Chennai on the basis of record, if such plea is taken. In the original Application filed under Section 19 of the DRT Act, it is open to the parties to take such plea.
>
> 8. Insofar as the action taken under Section 13(4) of the SARFAESI Act is concerned, it is independent to the action that may be taken by the Bank under Section 19 of DRT Act, 1993. In such case, if an appeal is preferred even against an interim order or

refusal to grant interim order, under Section 18 of the SARFAESI Act, it is mandatory to deposit the statutory amount which has been ordered in the present case.

9. In the circumstances, while we are not inclined to interfere with the impugned order, we allow the borrowers to take all such plea before the Debt Recovery Tribunal-I, Chennai and may point out irregularity if any committed in taking action under Section 13(4) of the SARFAESI Act, in the application preferred under Section 17 of the SARFAESI Act.

10. In the meantime, if the borrowers fail to deposit the amount in terms of the impugned order of the Appellate Tribunal, it will be open to the Bank to auction sale the property in question, but may not confirm the sale without prior permission of the Debt Recovery Tribunal-I, Chennai."

11. Special Leave Petition (C) No. 24286 of 2008 filed by the respondents was dismissed by this Court on 17.10.2008.

12. Since the respondents did not comply with the order passed by the Appellate Tribunal, the authorised officer of the appellant auctioned some of the mortgaged properties for which bids of Rs.5 crores were received. Thereafter, the respondents filed three applications before the Appellate Tribunal for waiver of the requirement of pre-deposit enshrined in second proviso to Section 18(1) of the Act. While dealing with those applications, the Appellate Tribunal suo motu took cognizance of the fact that the notice had been issued to the respondents for recovery of Rs.9,86,25,736.95 and directed them to deposit Rs.4.50 crores in two equal instalments. This enabled the respondents to indulge in further litigation. They filed Writ Petition No. 19346 of 2009 for quashing order dated 15.5.2009 passed by the Appellate Tribunal and another Writ Petition bearing No. 19746 of 2009 for issue of a mandamus to the Tribunal to dispose of O.A. No. 1098 of 1998 along with I.A. No. 237 of 2008 within a fixed time frame. When those petitions were taken up for hearing, learned counsel appearing for the appellant fairly conceded that the Appellate Tribunal does not have suo motu power to increase the amount required to be deposited in terms of the mandate of second proviso to Section 18(1). After taking cognizance of his statement, the Division Bench of the High Court passed the impugned order whereby it not only set aside the second interim order passed by the Appellate Tribunal, but also nullified the earlier conditional interim order by declaring that as a result of sale of the property worth Rs.5 crores, the requirement of deposit of Rs.3 crores stands satisfied. The Division Bench also directed the Tribunal to dispose of O.A. No. 1098 of 1998 and I.A. No. 237 of 2008 within two months.

13. Arguments in these cases were heard on 12.7.2010, on which date Shri Dharmendra Kumar Sinha, learned counsel for the respondents made a request for adjournment to enable him to seek instructions regarding the time within which his clients will deposit Rs.3 crores in terms of the first interim order passed by the Appellate Tribunal. Thereupon, the case was adjourned to 26.7.2010. On the next date, Shri Pallav Shishodia, senior counsel, appeared for the respondents and stated that his clients are not willing to deposit Rs.3 crores because the appellant has already recovered more than Rs.3 crores by selling the mortgaged properties. Shri Shishodia then argued that the

appellant is bound by the terms of one time settlement and it cannot recover the entire amount specified in the notices issued under Section 13(2) with interest at a wholly arbitrary rate of 19.89% per annum merely because there was some delay on the respondents' part to pay a fraction of the agreed amount i.e., Rs.63.50 lakhs, which was also paid on 28.3.2007. Learned senior counsel emphasized that as against the dues of Rs.169.49 lakhs, which were payable at the time of taking over the assets and liabilities of M/s N.S. Investments, a sum of Rs.2,32,71,480/- has already been paid by the respondents and an additional sum of Rs.5 crores has been realised by auctioning the mortgaged properties and submitted that the appellant cannot make fanciful claim for Rs.12 crores by computing interest at a rate, which is ex facie unconscionable, expropriatory and contrary to Section 34 of the Code of Civil Procedure. Learned senior counsel pointed out that the appellant had also auctioned flats No. B-15 and B-22 for an aggregate amount of Rs.96.75 lakhs and, as such, all the outstanding dues will be deemed to have been paid. With a view to convince this Court that his clients have been subjected to unfair treatment, Shri Shishodia referred to second proviso to Section 18(1) of the Act, which requires a person filing an appeal against the order of the Tribunal to deposit 50% of the debts due, as claimed by the secured creditors or as determined by the Tribunal, whichever is less and argued that in the absence of any determination by the Tribunal, the direction given by the Appellate Tribunal for deposit of Rs.3 crores was legally unsustainable and totally unwarranted.

14. Shri P.S. Patwalia, learned senior counsel appearing for the appellant argued that the impugned order is liable to be set aside because the Division Bench of the High Court did not have the jurisdiction to nullify the first conditional interim order passed by the Appellate Tribunal ignoring that the writ petition filed against that order was dismissed by the High Court and the special leave petition was dismissed by this Court. Learned senior counsel pointed out that even though the mortgaged properties were put to auction, the appellant has not been able to realise the amount because the sale is yet to be confirmed by the Appellate Tribunal. He then submitted that the High Court committed serious error by taking note of the bids given at the auction for the purpose of relieving the respondents of their statutory obligation to deposit 50% of the debts due. Shri Patwalia argued that the respondents cannot question the contractual rate of interest which they had agreed to pay at the time of availing the loan and other financial facilities and, in any case, this issue cannot be raised for the first time in a matter emanating from an interlocutory order passed by the Appellate Tribunal. Learned senior counsel invited our attention to order dated 9.6.2008 to show that after considering rival pleadings and documents, the Tribunal unequivocally approved the demand created vide notice dated 31.12.2006 issued under Section 13(2) and argued that this must be treated as determination made by the Tribunal for the purpose of second proviso to Section 18(1) and the respondents are not entitled to question the interlocutory order passed by the Tribunal on the ground that the amount payable by them was not determined by the Tribunal in terms of second proviso to Section 18(1).

15. We have considered the respective submissions. In our view, there is no merit in the argument of Shri Shidhodia that the direction given by the Appellate Tribunal to deposit Rs.3 crores was nullity because the Tribunal had not determined the amount due. Undisputedly, interlocutory conditional order dated 21.7.2008 passed by the Appellate Tribunal had become final because the respondents' challenge to that order was negatived by the High Court and this Court. Therefore, the respondents

cannot be allowed to indirectly question correctness of that order in the appeal preferred by the appellant against the order passed by the High Court in the subsequent writ petition. We are convinced that the order impugned in this appeal cannot be sustained on the premise that the Tribunal had not determined the amount required to be deposited by the respondent under Section 18(1) of the Act. A reading of order dated 9.6.2008 passed in S.A. No.221 of 2007 makes it clear that the Tribunal had recorded a specific finding that the appellant-Bank is entitled to claim the entire amount of Rs.11,59,08,727/-, which was due as on 30.9.2007 with future interest. This is clearly borne out from the following portion of that order:

> "Further in the written arguments dated 08.02.2008, the Respondent-Bank has clearly and also rightly pointed out that the Appellants having committed default in making the payments in accordance with Joint Memo of Compromise dated 08.02.2008, the Respondent-Bank has clearly and also rightly pointed out that the Appellants having committed default in making the payments in accordance with Joint Memo of Compromise dated 23.03.2005, now they cannot claim that they are liable to pay only a balance amount with interest and the Respondent-Bank is entitled to claim entire amount of Rs.11,59,08,727/- as on 30.9.2007 with further interest."

16. The argument of the learned counsel for the respondents that the rate of interest is unconscionable, expropriatory and contrary to law also merits rejection because at no stage the respondents had questioned the terms on which loan and other financial facilities were extended by the appellant. That apart, after having enjoyed those facilities for more than one decade, the respondents cannot turn around and raise an argument based on the judgments of this Court in Central Inland Water Transport Corporation v. Brojo Nath Ganguly (1986) 3 SCC 156 and Delhi Transport Corporation v. D.T.C. Mazdoor Congress and others 1991 Supp. (1) SCC 600. It must be remembered that the respondents were not in a position of disadvantage vis-`-vis the appellant. If they so wanted, the respondents could have declined to avail loan and other financial facilities made available by the appellant. However, the fact of the matter is that they had signed the agreement with open eyes and agreed to abide by the terms on which the loan, etc. was offered by the appellant. Therefore, the doctrine of unconscionable contract cannot be invoked for frustrating the action initiated by the appellant for recovery of its dues.

17. The respondents' accusation that the appellant had not treated them fairly sans credibility. It is they who had failed to repay the outstanding dues. Not only this, after signing two compromise deeds, they failed to fulfil their commitment and delayed the payment of Rs.63.5 lakhs by almost three years. We have not felt impressed by the submission of the learned senior counsel appearing for the respondents that the default amount was too small to warrant initiation of proceedings under Section 13 of the Act. The Court cannot lose sight of the fact that the bank is a trustee of public funds. It cannot compromise the public interest for benefitting private individuals. Those who take loan and avail financial facilities from the bank are duty bound to repay the amount strictly in accordance with the terms of the contract. Any lapse in such matters has to be viewed seriously and the bank is not only entitled but duty bound to recover the amount by adopting all legally permissible methods. The Parliament enacted the Act because it was found that legal mechanism

available till then was wholly insufficient for recovery of the outstanding dues of banks and financial institutions. Reference in this connection deserves to be made to the judgments of this Court in Delhi Transport Corporation v. D.T.C. Mazdoor Congress and others (supra), Central Bank of India v. State of Kerala and others (2009) 4 SCC 94 and United Bank of India v. Satyawati Tondon and others [Civil Appeal arising out of SLP(C) No. 10145 of 2010 - decided on 26.7.2010].

18. The reasons assigned by the High Court for declaring that the requirement of pre-deposit will be deemed to have been satisfied do not stand scrutiny. The High Court failed to notice that in terms of the order passed in Writ Petition No. 20772 of 2008, the auction of the mortgaged properties was subject to confirmation by the Appellate Tribunal, which had not passed any order in that regard.

19. In the result the civil appeal arising out of SLP(C) No. 4981 of 2010 is allowed. The impugned order of the High Court is set aside insofar as it declares that the direction given by the Appellate Tribunal to the respondents to deposit Rs.3 crores stands complied. The respondents are given four weeks' time to deposit Rs.3 crores in terms of conditional interim order dated 21.7.2008 passed by the Appellate Tribunal, failing which the appeal filed by them against the order passed by the Tribunal in S.A. No. 221 of 2008 shall stand dismissed and the appellant shall be free to recover all the outstanding dues.

20. The civil appeal arising out of SLP(C) No. 4982 of 2010 is dismissed because we do not find any valid ground to interfere with the direction given by the High Court for time bound disposal of O.A. No.1098 of 1998 and I.A. No. 237 of 2008.

.....J. (G.S. Singhvi) .....J. (Asok Kumar Gunguly) New Delhi, August 09, 2010