IN THE DEBTS RECOVERY APPELLATE TRIBUNAL AT KOLKATA

Appl. No. 33 of 2018

(Arising out of S.A. 104 of 2014 – DRT- 3 Kolkata)

THE HON'BLE JUSTICE SHRI ANIL KUMAR SRIVASTAVA, CHAIRPERSON

12.10.2023

1. IDBI Bank Ltd., having its office at 44, Shakespeare Sarani, Kolkata – 700017, Videocon Tower, 1st floor, E1, Jhandewalan Extension, New Delhi – 110055 and IDBI Tower, WTC Complex, Cuffe Parade, Mumbai – 400005.
2. The Aurhorised Officer, IDBI Bank Ltd., having its office at 44, Shakespeare Sarani, Kolkata – 700017.

… Appellants

Vs.

Bangla Bijuli Power Technologies Pvt. Ltd, represented by its Managing Director Sri Asit Kumar Baisya, 4/1A, Ambica Mukherjee Road, Belgharia, Kolkata – 700056.

….. Respondent

For Appellant : Mr. A. K. Dhandhania, ld. Senior Counsel.
Mr. Debasish Chakraborty, Learned Counsel
Ms. Sarmistha Pal, ld. Counsel.

For Respondent : Mr. Rabindra Nath Bag, Learned Counsel
Mr. Rohan Raj, ld. Counsel.

JUDGEMENT

Instant appeal has arisen against the judgement and order dated 07.02.2018 (Bangla Bijuli Power Technologies Pvt. Ltd Vs. IDBI Bank Ltd. & Ors.) passed in S.A. 104 of 2014 by the learned DRT-3 Kolkata allowing the S.A. and quashed the demand notice dated 29.08.2012.

2. This appeal no. 33 of 2018 was decided by this Appellate Tribunal on 22.03.2023 whereby appeal was allowed and the matter was remanded back to learned DRT for deciding the

matter afresh in accordance with law. Feeling aggrieved by the judgement and order passed by this Appellate Tribunal, SARFAESI applicant i.e. respondent herein had preferred CO No. 1636 of 2023 (Bangla Bijuli Power Technologies Pvt. Ltd Vs. IDBI Bank Ltd. & Anr.) before the Hon'ble High Court at Calcutta which was decided on 20.06.2023 and order dated 22.03.2023 passed by this Appellate Tribunal was set aside with the direction for deciding the appeal afresh. Accordingly, appeal is heard afresh.

3. As per the pleadings of the parties, Respondent Bangla Bijuli Power Technologies Pvt. Ltd filed SARFAESI Application under Section 17 of the SARFAESI Act (hereinafter referred to as 'the Act') before the learned DRT stating therein that the Respondent being an SSI unit falling under SME applied for availing two financial accommodations from the Appellant Bank. Total financial accommodation was Rs. 210.00 lacs being Term Loan of Rs. 70 lacs and Cash Credit Loan of Rs. 140.00 lacs which was sanctioned by the Appellant Bank on 01.06.2009. Equitable mortgage of house situated at 4/1A, Ambica Mukherjee Road, Belgharia, Kolkata – 700056 was created. Disbursement of loan was delayed. An amount of Rs. 28,01,223/- was disbursed as Term Loan on 23.12.2009 and Cash Credit Limit for Rs. 140 lakhs were allowed from 06.10.2009. Due to sanction of less disbursement of the amount, respondent could not start their business. Despite their repeated request, full amount was not disbursed. EMI was not reduced in accordance with the disbursed

amount. Moratorium of nine month was mentioned in sanction letter dated 01.06.2009, but Bank started deducting quarterly EMI of Rs. 4.12 lakhs from 01.04.2010 i.e. just after three months from disbursing the part Term Loan of Rs. 28 lakhs. Cash Credit Account was not renewed despite request by the Respondent. It was frozen by the appellant bank without giving any information to the respondent.

4. On repeated request made by the Respondent, e-mail message dated 01.01.2011 was sent by the appellant whereby it was informed that account shall slip into NPA. It was further informed that Cash Credit Account has become NPA on 31.12.2010 which was wrongly done. Respondent contended that account was never an NPA account. A cheque dated 05.06.2012 for Rs.1,25,000/-was deposited by the respondent on 05.06.2012 which was credited on 14.06.2012 but it was not adjusted.

5. Appellant Bank had issued Notice u/s 13(2) of the Act dated 29.08.2012 demanding Rs. 1,67,58,707/- towards Cash Credit account and Rs.12,95,266/- towards Term Loan Account as on 31.07.2012. A representation under Section 13(3-A) of the SARFAESI Act was made by the Respondent which was never replied. Possession notice was published in two news papers on 20.09.2014 which was not in accordance with Rules.

6. It is further alleged that full amount of loan was not disbursed despite several requests by the respondents, due to which respondent could not arrange workforce and other

facilities. Respondent could also not participate in various tenders floated during the period by different agencies due to shortage of money.

7. Appellant bank filed opposition and submitted that SARFAESI application filed u/s 17 of the Act is not maintainable. Admittedly, Term Loan and Cash Credit Limit was sanctioned. It is the duty of the borrower to avail the loan against the said account or otherwise withdrawing the money on one hand and repaying principal with interest on the other, so as to keep the quantum of transaction within the sanction limit.

8. Term Loan account was fully utilized by the Respondent. No prejudice was ever caused to them. Moratorium was started on and from 01.06.2009 and there was no illegality in deducting the amount for loan recovery in the said Term Loan. Notice under Section 13(2) of the Act was issued in accordance with law. Representation u/s 13 (3-A) of the Act was properly dealt with by the Bank. Procedure provided under Rule 8(1) and Rule 8(2) of the Security Interest (Enforcement) Rules, 2002 was duly complied with. Charge was created in favour of the Bank over immovable properties, movable property, book debts etc. of the respondent to secure the loan. It was the duty of the borrower to borrow from cash credit account within the sanction limit. Once the advance limit is crossed, it is the responsibility of the borrower to ensure that the entire outstanding is repaid. Account was classified as NPA in accordance with law.

9. Before issuing the possession notice on 20.09.2014, sufficient opportunity was given by the Bank to the Respondent to arrange for funds, but payment was not made. Accordingly, SARFAESI Application is liable to be dismissed.

10. Learned DRT has allowed the SARFAESI application on the ground that reasons for non-disbursement of full Term Loan, non-revision of repayment of instalments etc. are not mentioned in the notice issued u/s 13(2) of the Act which suggests that demand notice was illegally issued. It was further held that loan was not properly restructured. Classification of loan account as NPA was erroneous. Appellant bank had taken possession of the secured asset on 11.02.2016 while demand notice was issued on 29.08.2012. Hence, respondent could not run business properly. Accordingly, demand notice dated 29.08.2012 was quashed with consequential order.

11. I have heard learned counsel for the parties and perused the records.

12. Learned counsel for the appellant bank submits that impugned order passed by learned DRT is erroneous. Cash Credit account was rightly classified as NPA. The amount of Rs.28.00 lakh was disbursed as term loan to the respondent. Further they were required to submit certain documents for disbursing remaining amount, which was neither produced nor any demand was made. Request for disbursing term loan was made on 14.12.2009 and term loan was disbursed on 26.12.2009.

Accordingly, appellant bank asked the respondent as to whether further disbursement is required, but instead of asking fresh disbursement, request was made for bank guarantee which was not sanctioned in terms of the sanction letter.

13. Further, it is submitted that EMI was rightly deducted, but respondent has never sent letter to the effect that they did not require further amount of term loan. Hence, EMI was not reduced.

14. Nine months moratorium was rightly calculated. Moratorium period was starting from the day of sanction. Sanction letter is dated 01.09.2009.

15. It is further submitted that the amount of Rs.1.25 lakhs paid by the respondent was kept in suspense account which was deposited after classification of the loan account as NPA.

16. Possession notice was duly issued and served u/s 13(4) of the Act in accordance with law. There is no requirement for disclosing reasons for non-disbursal of the entire loan amount in the demand notice issued u/s 13(2).

17. It is further submitted that respondent has not made any payment since 2016 or 2017. Only an amount of Rs.07.00 lakh was paid despite the fact that respondent has availed the loan disbursed to them.

18. Per contra, learned counsel for respondent submits that an amount of Rs.70.00 lakh sanctioned as term loan but on 01.06.2009 only Rs.28.00 lakh was disbursed on 20.12.2009

while request for disbursement was made by the respondent on 16.09.2009.

19. It is further submitted that cash credit account was wrongly classified as NPA as transaction was made after declaring the account as NPA. It shows that the account was never declared NPA. Moratorium period not allowed in accordance with the sanction letter.

20. It is also submitted that in the EMI message dated 01.01.2011 it was communicated to the respondent that the account will slip to NPA, but if the account has already been classified NPA on 31.12.2010, then why this fact was not mentioned in the EMI dated 01.01.2011. It shows that loan account was not classified as NPA on 31.12.2010.

21. As far as facts are concerned, admittedly term loan was sanctioned on 01.06.2009 wherein a request for disbursement of loan was made by the respondent on 14.12.2009 and Rs.20.00 lakhs was disbursed on 26.12.2009. Subsequently, no further request was made by the respondent for further disbursement of the amount. On 26.12.2010 appellant bank asked respondent as to whether they requir further disbursement of amount. Letter was also sent by the bank to the respondent asking them that EMI would be restructured subject to response submitting the confirmatory letter that respondent did not require further disbursement. But no such letter was submitted by the respondent rather a request was made for issuance of the bank

guarantee which was not in accordance with the term of sanction letter. Accordingly, no bank guarantee could have been issued by the appellant bank. Non-restructure of the EMI was on the ground that no confirmatory letter was sent by the respondent to the bank stating that they did not require further disbursement after Rs.28.00 lakh. Accordingly, EMI initially fixed could not be restructured by the appellant bank.

22. Learned counsel for the respondent vehemently argued that when the loan amount was disbursed only to the extent of Rs.28.00 lakh, hence, appellant bank was under obligation to reduce the EMI accordingly. As has been discussed earlier in the body of the judgement that no confirmatory letter was submitted by the respondent denying further disbursement of term loan amount.

23. Much emphasis has been laid on the issue that the loan account has been wrongly classified as NPA. Much emphasis has also been laid on the EMI message dated 01.01.2011 sent by the appellant bank. Relevant EMI message dated 01.01.2011 reads as under :

> "Please refer to our telecon with regard to renewal proposal of the facilities permitted to the company:
> Please be informed that the following information / details are still pending from the company.
> i) Sales and net profit earned till date during the CFY 2010-11
> ii) Net worth statements of directors and guarantors (C.A. certified copy enclosed format)
> iii) Projection till loan tenure in the CMA format as enclosed.
> iv) Details of CMS, salary accounts, tax collection accounts and others services availed (if applicable) the bank name, volume of figures etc.
> v) Form No. 32 for Sampa Baisya
> vi) List of directors as on date.
> vii) Brief profile of the Directors.

viii) Please specify whether the balance term loan is proposed to be availed
ix) The proposed machinery was installed. If yes, please specify the details of the same and if no, then please specific the changes and their status as on date.
x) Copies of the orders in hand
xi) C.A. Certificate specifying the utilisation of term loan till date and promotor's contribution brought in till date.

While analysing the ABS 2010, it is observed that the company has achieved sales values of Rs.108.77 lakhs vis-à-vis estimated sales turn over of Rs.713.65 lakhs which is very low is informed by you that in the CFY 2010-11 also, the company has achieved sales turn over of only Rs.80.00 lakhs (approx.) till current date. Further we observed that though out the sales level are very low, the CC limit is fully utilised from above, it is observed that funds released from CC limit have not been utilised for WC requirement and WC fund has been diverted.

In the backdrop of above, we find that company's performance have been unsatisfactory during Fy 2009-10 and FY 2010-11 also. Further, despite repeated follow ups from our side , the company has not yet submitted the total information / details required for renewal of the facilities which is long pending. The account shall slip to NPA if all the information required are not submitted to us immediately without any delay.

Further, considering the performance of the company we shall have to revisit the facilities permitted to the company and the limit shall have to be re-assessed based on the actual performance of the company; therefore, we request you to call on us at our Delhi office at Videocon Towers immediately along with the pending information from your side. Please inform your date of visit to our office

Further, term loan instalment of Rs. 4.12 lakhs has become due on 01.01.2011. We request you pay the instalment immediately."

A bare perusal of above EMI message will show that there is a recital that the account will slip to NPA if all the information required are not submitted immediately without any delay.

24. It is submitted by the learned counsel for the respondents that after the loan account has been classified NPA on 31.02.2010, why the same was not mentioned in the EMI message dated 01.01.2011? Per contra, learned counsel for the appellant submitted that account was declared NPA as per RBI circular.

25. RBI circular dated 01.07.2010 at Para 2.1 defines NPA. Paras 2.1.1 to 2.1.3 and 4.204 read as under :

"2.1.1 – An asset including lease asset becomes non-performing when it ceases to generate income for the bank.
2.1.2 – a NPA is a loan or any advance where;
i) interest and or instalment of principal remain over ndue for a period of more than 90 days in r/o of a term loan.
ii) the account remains 'out of order' as indicated at paragraph 2.2 below, in r/o an overdraft / cash credit (OD/CC)
iii) the bill remains overdue for a period of more than 90 days in the case of bills purchased and discounted.
iv) the instalment of principal or interest thereon remains overdue for two crop seasons for short duration crops
v) the instalment of principal or interest thereon remains over due for one crops season for long duration crops
vi) the amount of liquidity facility remains outstanding for more than 90 days in respect of securitization transaction undertaken in terms of guide lines on securitization dated 01.02.2006.
ii) in r/o derivative transaction, the over due receivables representing positive mark to market value of a derivative contract, if these remain unpaid for a period of 90 days from the specified due date for payment.
2.1.3 – Banks should classify an account as NPA only if the interest due and charged during any quarter is not serviced fully within 90 days from the ends of the quarter.
4.2.4 – The classification of an asset as NPA should be based on the record of recovery. Bank should not classify an advance account as NPA merely due to the existence of some deficiencies which are temporary in nature such as non-availability of adequate drawing power based on the latest available stock statement, balance outstanding exceeding the limit temporarily, non-submission of stock statements and non-renewal of the limits on the due date, etc. In the matter of classification of accounts with such deficiencies banks may follow the following guidelines :
i) Banks should ensure that drawings in the working capital accounts are first appropriated in times of distress. Drawing power is required to be arrived at based on the stock statement which is current. However, considering the difficulties of large borrowers, stock statements relied upon by the banks for determining drawing power should not be older than three months. The outstanding in the account based on drawing power calculated from stock statements older than three months, would be deemed as irregular.

A working capital borrowal account will become NPA if such irregular drawings are permitted in the account for a continuous period of 90 days even though the unit may be working or the borrower's financial position is satisfactory.

ii) Regular and ad hoc credit limits need to be reviewed/ regularised not later than three months from the due date/date of ad hoc sanction. In case of constraints such as non-availability of financial statements and other date from the borrowers, the branch should furnish evidence to show

> that renewal/review of credit limits is alr3eady on and would be completed soon. In any case, delay beyond six months is not considered desirable as a general discipline. Hence, an account where the regular/ad hoc credit limits have not been reviewed/renewed within 180 days from the due date/dat3e of ad hoc sanction will be treated as NPA."

26. Bare perusal of the RBI circular shows that discretion is given to the bank at sub-para (ii) of para 4.2.4 that an account where the regular / ad hoc credit limits have not been reviewed / renewed within 180 days from the due date / date of ad hoc sanction will be treated as NPA. Request was made by the respondent on 24.12.2010 for renewal of the loan account. In the sanction letter Tenor was one year, i.e., upto 31.05.2010 as the loan was sanctioned on 01.06.2009. Request for renewal was made on 24.12.2010 which was not permissible in accordance with RBI circular. Thereafter, certain documents were called from the respondent by EMI message 01.01.2011 with the condition that if the documents are received loan account may be renewed, but the same were not received. Ultimately, on 09.03.2012 it was communicated by the appellant to the respondent that the account has become NPA on 31.12.2010. As far as NPA is concerned RBI circular gives a discretionary power to the bank. That was exercised by the bank but despite granting sufficient time no payment was made. In the meantime, as would appear from the affidavit-in-opposition that outstanding was in excess of the sanction limit / drawing power for a period of more than 90 days.

Sl No.	date	Outstanding balance in Rs.

1	26.07.2011	1,44,26,922.08
2	31.07.2011	1,44,26,922.08
3	31.08.2011	1,48,88,027.00
4	30.09.2011	1,47,64,052.00
5	31.10.2011	1,44,58,151.00
6	24.11.2011	1,46,84,921.00
7	25.11.2011	1,49,17,283.00
8	31.12.2011	1,51,53,691.00
9	31.01.2012	1,53,89,982.00
10	29.02.2012	1,56,57,936.00
11	31.03.2012	1,59,21,761.00
12	30.04.2012	1,61,98,974.00
13	30.06.2012	1,64,71,915.00
14	31.07.2012	1,67,58,707.00

27. Above statement shows that on different dates the outstanding balance in the cash credit account was in excess of the sanction limit. Accordingly, the notice u/s 13(2) of the Act demanding the amount of Rs. 1,67,58,707/- was shown as outstanding on 31.07.2012.

28. Learned counsel for the respondent submits that payments were made after classifying the account as NPA. Hence, it cannot be accepted that account was rightly classified as NPA. The amount of Rs.1.25 lakhs was deposited by the respondent with the appellant bank, which could not said to be deposited in accordance with the sanction letter of the loan, rather that amount was kept in suspense account by the bank. Accordingly, no benefit can be extended in favour of the respondent for making deposit of Rs.1.25 lakhs.

29. It is also vehemently argued by the respondent that moratorium period was wrongly calculated. Moratorium period was not provided in accordance with the sanction letter. Sanction

letter was issued on 01.06.2009 wherein cash credit limit of Rs.140.00 lakh and term loan of Rs.70.00 lakh was sanctioned. As per Term Sheed for Working Capital the tenor was one year, next renewal date in the month of April, 2010. Validity six months from the date of sanction. Working capital : on demand. Admittedly, date of sanction was 01.06.2009 and renewal date was April, 2010, but request for renewal was made on 24.12.2010 as has been observed earlier.

30. As far as term loan is concerned tenor was five years including moratorium of nine months (with reset clause after 1 year from date of first disbursement). Repayment was to be made in 17 quarterly instalments starting from January, 2010 (16 instalments of Rs.4.12 lakh each and 17th instalment of Rs.4.08 lakh). Hence, period of 5 years including moratorium of nine months which should be received after one year from the date of first disbursement. It is clear from the bare reading of the provision that moratorium of nine months would be started with effect from the date of sanction. There is no clause that moratorium would start after one year from the date of first disbursement or from any subsequent date. The period of five years could have been re-scheduled after one year from the first disbursement. The purpose of 5 years including 9 months moratorium with reset clause after one year from the date of first disbursement nowhere corelate with the moratorium period of 9 months period. Moratorium period of nine months is an

independent provision which would relate back to the date of sanction of the amount. An additional leverage is given to the borrower for re-scheduling of the period after one year from the date of first disbursement. Accordingly, I do not find any force in the submission made by the learned counsel for the respondent that moratorium period was not granted in accordance with the sanction letter.

31. An argument is made that the full amount of term loan was not disbursed by the appellant bank. As has been discussed in the earlier part of the judgement. Request for disbursement was made by the respondent on 14.12.2009 on submission of the required documents, which amount was disbursed on 26.12.2009. Thereafter, appellant bank asked the respondent as to whether they require further disbursement of the loan, but the respondent in its letter to the bank requested for issuing bank guarantee instead of sanction of additional amount which was not in accordance with the sanction letter. Accordingly, bank guarantee could not be issued. It could not be accepted that sanction amount was not disbursed by the bank which resulted in business transactions of the respondent.

32. As far as quantification of EMI is concerned appellant bank informed the respondent that EMI would be properly reduced if the respondent confirmed to the bank that they did not require further disbursement of the term loan. No such information was received by the appellant bank. Respondent did not respond to

the bank to the effect that they did not require remaining amount, as such, EMI may be re-scheduled.

33. It is settled legal proposition of law that parties to the agreement cannot resile terms and conditions of the agreement without there is written agreement earlier. Hence, appellant as well as respondent both are bound by the terms and conditions of the agreement. If the respondent was not willing or interested for disbursal of the remaining amount of term loan they should have clearly intimated the appellant bank but the same was not done. Accordingly, for want of clear willingness of the respondent for non-disbursal of the remaining amount, it cannot be accepted that appellant bank was at fault for not properly reducing the EMI.

34. On the basis of the discussion made above, I am of the considered view that learned DRT has erred in recording a finding allowing the SARFAESI application and quashed the demand notice dated 29.08.2012. Accordingly, appeal deserves to be allowed and is allowed.

O R D E R

35. Appeal is allowed. Judgement and order dated 07.02.2018 passed by learned DRT-3 Kolkata allowing the S.A. No. 104 of 2014 is set aside. Consequently, S.A. No. 104 of 2014 is dismissed. No order as to costs.

File be consigned to record room.

Copy of the order be supplied to the appellant and the respondents and a copy be also forwarded to the concerned DRT.

Copy of the judgement/Final Order be uploaded in the Tribunal's website.

Order dictated, signed and pronounced by me in the open Court on this the 12th day of October, 2023.

(Anil Kumar Srivastava, J)
Chairperson

Dated : 12.10.2023
/pkb