BEFORE THE DEBTS RECOVERY APPELLATE TRIBUNAL, AT: MUMBAI

Present: Mr Justice Ashok Menon, Chairperson

Appeal No. 57/2022

Between

Phoenix Asset Reconstruction Pvt. Ltd. … Appellant/s

V/s.

Mr. Ketan Ashwinkumar Vaidya …Respondent/s

Mr Vinay Deshpande, i/b M/s V. Deshpande & Co., Advocate for Appellant.

-: Order dated: 11/12/2023:-

Phoenix Asset Reconstruction Private Ltd., the appellant, is aggrieved by the dismissal of the Original Application (O.A.) No. 650 of 2016 on the files of the Debts Recovery Tribunal-I, Mumbai (D.R.T.) vide order dated 31/05/2018 mainly on the ground that it is barred by limitation.

2. The Respondent borrowed money from ABN AMRO Bank NV which merged with the Royal Bank of Scotland NV, the assignor which assigned the debt to the Appellant vide agreement dated 30/04/2012.

3. ABN AMRO Bank was approached for a personal loan by the Respondent, and vide personal loan disbursement instruction letter dated 05/03/2008 a loan of ₹5,50,500 was disbursed on undertaking to repay the same in 60 instalments of ₹13,681/-each, commencing from 01/04/2008 and ending on 02/03/2013. The Respondent had executed an agreement concerning the loan apart from a Demand Promissory Note. On 02/12/2010 the Respondent issued three cheques for a total amount of ₹41,043/-towards defaulted instalments.

On 04/08/2013, another cheque for ₹13,681/- was issued by the Respondent towards the outstanding dues which were presented for collection and dishonoured for want of sufficient funds on 30/08/2013.

4. ABN AMRO Bank was substituted with the Royal Bank of Scotland NV vide notification of the Reserve Bank of India dated 19/03/2010. The debt was assigned to the Appellant on 30/04/2012. The debt was recalled on 25/10/2013 vide a notice demanding repayment of the debt. Despite receipt of the notice, the Respondent failed to respond and hence, the Appellant was constrained to file the O.A. for recovery of an amount of ₹10,17,537/-together with further interest at the rate of 2% per mensem from the date of filing of the O.A. till realisation.

5. The defendant/ respondent remained ex parte despite being served a summons. However, the Ld. Presiding Officer dismissed the O.A. stating that the claim is barred by limitation since the O.A. ought to have been filed within three years from the date of default or for recovery of future instalments. It was also observed that the cheques relied upon by the Applicant were issued in December 2010 and August 2013 in the name of ABN AMRO when the said bank was not in existence from 19/03/2010. It was observed that the cheques were filled up at a later date which attracts offences under the Indian Penal Code and hence the Tribunal intends to initiate criminal proceedings against the officer of the Appellant institution. The Appellant is aggrieved and hence in appeal.

6. The questions that arise for consideration in this appeal are first, whether the applicant's claim is barred by limitation and secondly,

whether the officer of the bank has committed an offence by filling up the cheques issued by the defendant/respondent and liable for action contemplated.

7. The Respondent remained ex parte in the appeal too. The Ld. Counsel for the Appellant was heard. Documents perused.

8. The Ld. Presiding Officer has relied upon a decision of the Hon'ble Supreme Court in *M/s Sundaram Finance Ltd. v/s Noorjahan Biwi & Ano. (2016) 13 SCC 1* to conclude that under Article 55 of the Limitation Act, 1963, the time of limitation begins to run when the contract is broken or when the default is committed in payment of the instalment.

9. In the instance case, the Appellant's predecessor ABN AMRO had lent money to the Respondent to be paid in sixty equal instalments commencing from 01/04/2008. The Respondent defaulted payment of the instalments in between. Cheques were issued and one of the cheques got dishonoured for wants of funds.

10. In the decision of *Sundaram Finance Ltd.* (supra) the Hon'ble Supreme Court held that the right to sue accrues when the hirer commits a breach of the agreement. Committing default in payment of instalments is nothing but a breach of the agreement and thus, it was held that the courts below have rightly taken a view that the period of limitation for filing a suit under Article 55 shall begin with effect from the date when the default was committed by the hirer.

11. The facts of the above-cited decision will have to be gone into to determine whether the decision would apply to the case in hand and an analogy drawn. The plaintiff in that suit referred to in the decision was carrying on a business of extending hire-purchase facilities for the

purchase of commercial vehicles. The plaintiff and first defendant therein had entered into an agreement dated 29.09.1983 by which the plaintiff had financed an amount of ₹1,47,000/-. The hirer was to clear the entire amount due in 36 monthly instalments. The hirer committed default in payment of instalments with effect from 20/05/1984. The plaintiff seized the hired vehicle on 09/02/1985. Thereafter, vide letter dated 12/02/1985 the plaintiff called upon the defendant to settle the contract within 10 days from the date of receipt of the notice. The defendant did not pay. On 30/05/1985, the plaintiff sold the vehicle and adjusted the amount received from the sale of the vehicle toward the debt. There was still a balance of ₹40,138/- which was demanded. Consequently, the suit was filed for the aforesaid amount together with interest. Though the defendant admitted default in repayment of the debt, it was contended that as per Clause 4 of the hirer-purchase agreement, termination without notice is contrary to the statutory provisions. The plaintiff therein contended that the balance towards the liability of the defendant could be ascertained only after the sale of the vehicle on 30/05/1985 and that the suit was filed within three years from the said date and hence, within time. The Hon'ble Supreme Court held that as per Clause 4 of the hirer-purchase agreement, the right to sue accrues when the hirer commits a breach of agreement. Committing default in payment of instalment is nothing but a breach of the agreement and therefore, the limitation for filing the suit under Article 55 shall begin with effect from 20/05/1984 when the default was committed by the hirer.

12. A reading of the said decision would make it adequately clear that the limitation would begin to run by the terms of the agreement

entered into between the parties. Clause 4 of the hire-purchase agreement referred to in the above-cited decision makes it adequately clear runs thus:

> "....that if the hirer commits a breach of agreement, the rights of the hirer under the agreement shall forthwith be determined ipso facto without any notice to the hirer and all the instalment previously paid by the hirer shall be absolutely forfeited to the owners who shall thereupon be entitled to enter any house or place where the said vehicle may then be and seize, remove and retake possession of it and to sue for all the instalments due and for damages for breach of agreement ….."

13. Hence, it is important to note the terms of the agreement in the instant case between the parties to decide when the limitation begins to run.

Clause (v) of the agreement reads thus:

> "(v) on the occurrence of an Event of Default (defined herein under) and/or at any time the bank may deem fit, the bank, without prejudice to its rights to recall the Facility on demand, shall be fully entitled to claim and receive from the Vendors or any amounts disbursed to such Vendors, and I/we hereby fully authorised such Vendors to pay the bank all or any such amounts, without any notice or consent from me/us;"

14. The agreement further details some of the 'events of default' as follows:

> "(c) I fail to perform any of my obligations in accordance with this letter; or
> (e) any of the cheques and/or EDI delivered or to be delivered by me to the bank in terms and conditions hereof is not encashed/acted upon for any reason whatever on presentation/ being made; or
> (j) the account is not sufficiently funded to enable payment of repayments cheques and/or EDI and/or the account is closed and/or becomes in-operative and/or frozen and/or operations including but not limited to debits thereof are

ceased for whatsoever reasons including but not limited to any action or an order by a court of law and/or any statutory authority (ies);

In above mentioned circumstances, the bank may (but shall not be bound to do so), by written notice to me declare the facility to be immediately and forthwith due and payable, whereupon the same shall become due and payable together with the principal and interest thereon and all other sums then owed by me to the bank on whatsoever account and I shall forthwith on receipt of such notice, pay the entire outstanding under the facility to the bank.

Without prejudice to the right of the bank to demand payment of the facility at any time as the bank may deem fit or to any right that the bank may have in law or in terms contained herein, or the right to charge interest for the delayed period, in the event I fail to pay any instalment which was due as per and in accordance with the repayment Schedule-I, and/or any time or times any of the repayment cheques is returned unpaid or presentation of the same, for whatsoever reasons and/or no payment is received by the bank pursuant to an EDI, for whatever reasons, I without prejudice to the right of the bank to recall whole of the amount outstanding under the facility shall pay to the bank, not as interest, but as charges such sum for each such delay/return/non-receipt as may be levied by the bank from time to time for each delay/ return/ non-receipt and such charge shall be levied/ debited to my account and/or otherwise recovered by the bank from me. The bank may at its sole discretion be entitled to revise the above said charges at any time from time to time as the bank may so decide and I undertake to pay such revise charges from the date revision, without any demure or protest."

15. From a reading of the above-extracted portions of the agreement, it would indicate that the bank had the discretion to claim the entire amount on default of any one of the instalments or wait till the last instalment was payable or till a cheque was dishonoured. The Appellant had in terms of the aforesaid clauses in the agreement the power, in the event of default to claim the entire amount due. It is adequately clear that the terms of the agreement gave discretion to the bank to decide when to trigger the recall of the loan upon the

occurrence of an event of default. The fact that EMIs were to be paid in sixty instalments over the period spanning from 01/04/2008 gave the Appellant the right to treat any of the defaulted EMIs as an 'event of default'. The commencement of the period of limitation would thus be triggered once a notice was issued giving the liberty to the Appellant to choose as to when to sue. Under the circumstances, it cannot be said that the suit was barred by the limitation. I find support for this view in the decision, *Kotak Mahindra Bank Ltd. vs. Anuj Kumar Tyagi 2015 SCC OnLine Del 14130*.

16. Regarding the dishonouring of the cheque, the Ld. Presiding Officer committed an error in finding the officer of the bank responsible for committing a crime. S.139 of the Negotiable Instruments Act, 1881 raises a presumption that a cheque duly drawn was in discharge of a debt or liability. However, the presumption is rebuttable and the onus lies on the drawer to rebut it by adducing cogent evidence to the contrary. In the instant case, the fact that post-dated cheques were drawn and handed over to the bank is admitted. The dishonouring of the cheque is an event of default for the bank to proceed against the borrower. There is no rebuttal evidence forthcoming from the drawer of the cheque. The D.R.T. cannot conclude on the cheques on its own without any rebuttal evidence forthcoming. The Hon'ble Supreme Court has in *Bir Singh vs. Mukesh Kumar (2019) 4 SCC 197* held thus:

> "32. The proposition of law which emerges from the judgments referred to above is that the onus to rebut the presumption under Section 139 that the cheque has been issued in discharge of the debt or liability is on the accused and the fact that the cheque might be post-dated does not absolve the drawer of the cheque of the penal consequences

of section 138 of the Negotiable Instruments Act.

33. A meaningful reading of the provisions of the Negotiable Instruments Act including, in particular, Sections 20, 87 and 139, makes it amply clear that a person who signs a cheque and makes it over to the payee remains liable unless he adduces evidence to rebut the presumption that the cheque had been issued for payment of a debt or in discharge of a liability. It is immaterial that the cheque may have been filled in by any person other than the drawer, if the cheque is duly signed by the drawer. If the cheque is otherwise valid, the penal provisions of Section 138 would be attracted.

34. If the signed blank cheque is voluntarily presented to a payee, towards some payment, the payee may fill up the amount and other particulars. This in itself would not invalidate the cheque. The onus would still be on the accused to prove that the cheque was not in discharge of a debt or liability by adducing evidence.

35. It is not the case of the respondent-accused that he either signed the cheque or parted with it under any threat or coercion. Nor is in the case of the respondent-accused that the unfilled signed cheque has been stolen. The existence of a fiduciary relationship between the payee of a cheque and its drawer, would not disentitle the payee to the benefit of the presumption under Section 139 of the Negotiable Instruments Act, in the absence of evidence of exercise of undue influence or coercion. The second question is also answered in the negative.

36. Even a blank cheque leaf, voluntarily signed and handed over by the accused, which is towards sum payment, would attract presumption under Section 139 of the Negotiable Instruments Act, in the absence of any cogent evidence to show that the cheque was not issued in discharge of a debt."

17. The Ld. Presiding Officer therefore jumped to a hasty conclusion that the cheques handed over by the borrower to the creditor were misused by the creditor. There is a specific undertaking given by the borrower that the cheques could be utilised and the borrower also makes himself responsible for the dishonouring of the cheque.

The appeal is therefore allowed and the impugned judgment/order of the D.R.T. in O.A. No. 650 of 2016 is set aside and the O.A. is allowed as prayed for directing the Respondent/ Defendant to pay to the Appellant/Applicant a sum of ₹1,017,537/-together with future interest at the rate of 2% per mensem from the date of filing of the O.A. till realisation. A Recovery Certificate shall be issued accordingly.

Sd/-
Chairperson

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