

IN THE DEBTS RECOVERY APPELLATE TRIBUNAL AT KOLKATA

Appl. No. 43 of 2018
(Arising out of T.A. 197 of 2014 – DRT-III Kolkata)

**THE HON'BLE JUSTICE SHRI ANIL KUMAR SRIVASTAVA,
CHAIRPERSON**

19.06.2026

1. M/s. Birla Aircon Infrastructure Pvt Ltd Having Office At Dalma House, 1st floor, J.B.Marg, Nariman Point, Mumbai – 400021 and Aahirini Market, Action Area -1, New Town, Rajarhat, Kolkata – 700156.

2. Birla Infrastructure Limited office at Industry House, 159, Church Gate, Reclamation, Mumbai-400020

..□Appellant

--Vs--

1. Bank of Baroda having office at Baroda House, PB No. 56, 506, Mandvi, Baroda – 390006 and Lansdowne Market Branch, 3/1B Mahendra Road Kolkata 700025

2. Mr Anjan Mukherjee residing at 63/4, Harish Chatterjee Street, Kolkata-700025 and FE 491, Sector III, Salt Lake, Kolkata - 700106

3a. Abhisekh Banerjee residing at FE 216, Sector-III, Salt Lake, Kolkata-700106

3b. Amrita Banerjee, residing at FE 216, Sector-III, Salt Lake, Kolkata-700106

4. Ms Manjira Banerjee residing at FE 216, Sector-III, Salt Lake, Kolkata-700106

5. Ms Surupa Mukherjee residing at 63/4, Harish Chatterjee Street, Kolkata – 700025.

..□Respondents

For Appellant : Mr. Nimish Mishra , Id. adv. virtually
Mr. Yubaraj Bhattacharyya, Id. Adv.
Ms. Ramyani Bhattacharya, Id. Adv.
Ms. Aasia Hasan, Id. Adv.

For Respondent : Mr. Avishek Guha, Id. Adv. for bank
Ms. Jayati Chowdhury, Id. Adv. virtually
Mr. Srijit Bose, Id. Adv.
Mr. Souritra Ganguly, Id. Adv. R-2 and 5
Ms. Atreyee De, Id. Adv.
Mr. Nemani Srinivas, Id. Adv. R-3(a) and 3(b).

THE APPELLATE TRIBUNAL :

Instant appeal has arisen against the order dated 14.12.2017 passed by the learned DRT-III Kolkata in I.A. 15 of 2017 arising out of T.A. 197 of 2014 whereby defendant No. 4 to 7 were released from their liability claimed by the bank in the T.A. and bank was directed to proceed with further recovery of balance dues from the defendant no. 1, 2 and 3, main borrowers. Bank was also directed to make necessary amendment in the O.A. by deleting the names of the defendant no. 4 to 7 from the cause title. As regards reducing the claim amount, bank is directed to file a separate affidavit describing calculation of reduced claim amount.

2. T.A. No. 197 of 2014 was filed by the respondent bank against the appellants who are the principal borrowers and respondent no. 2 to 5 who are guarantors for recovery of an amount of Rs.16,75,26,145.71. Settlement arrived at between the bank as well as guarantors, respondent no.2 to 5, to release their properties and their liability towards the loan by making payment of Rs.5.80 crores which was duly paid to the bank. Accordingly, I.A. 15 of 2017 was filed by the bank for releasing respondent no. 2 to 5 from their personal liability / guarantee and

to release their properties and to recover the balance due amount from defendant no. 1, 2 and 3, the appellants in the appeal.

3. This application was moved on 11.01.2017 wherein learned DRT passed an order directing the bank to serve all the defendants along with copy of the I.A. and T.A. Matter was listed on 08.02.2017. One Ms. Rina Khatun, Id. Advocate, appearing for defendants no. 1, 2 and 3 prayed for time and matter was adjourned to 08.03.2017. Other counsel for defendant no. 4 to 7 also appeared. On 14.12.2017 impugned order was passed. Feeling aggrieved by the impugned order, borrower i.e. defendant no. 1, 2 and 3 in the T.A. preferred appeal.

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

5. Learned counsel for appellants would submit that appellants are the borrowers of respondent no.1, i.e. Bank of Baroda under the Business Transfer Agreement (BTA) executed between the appellant and respondent no. 2 to 5 who are the guarantors and mortgagors. Originally respondent no. 2 and 3 being partners of the appellant no.1, namely M/s Aircon Engineering Services, availed financial credit facility from the bank and various

documents were executed. Equitable mortgage was also created in favour of the bank. Business of the partnership firm was transferred by respondent no.2 and 3 to the appellant no.1 by way of BTA dated 25.03.2011. Respondent no.1 bank agreed to transfer the existing credit facilities to the partnership firm in favour of the bank. It is further submitted that BTA provided that respondent no. 2 to 5 would continue to remain liable by way of their personal guarantees and equitable mortgages over their immovable properties for securing repayment of the credit facilities, notwithstanding the transfer of business.

6. Learned counsel would further submit that the I.A. 15 of 2017 was filed by the bank for following prayers :

- a) An order or orders for releasing the defendant no. 4,5,6 and 7 from their personal liability and/or guarantee.
- b) To allow the applicant bank to release the properties of the defendant No.4,5,6 and 7 as mentioned hereinbefore in the paragraph No.9 sub para (b);
- c) And also allow the applicant to proceed for recovery of balance sum along with interest against the defendant no. 1,2 and 3;
- d) And / or to pass any such order or orders as Your Lordship may deem fit and proper.

7. It is submitted that no opportunity of hearing was accorded by the DRT to the appellants, although material rights of the appellants are affected by the impugned order. It is further submitted that learned DRT passed the order beyond the prayer

made by the bank. Learned counsel would further submit that under the law mortgage could not be released rather it can only be redeemed in terms of Section 60 of the Transfer of Property Act. Learned counsel would submit that application was moved by the bank in collusion with respondent no. 2 to 5. Learned counsel placed reliance upon the case of **Bank of Baroda Vs. Karwa Trading Company & Anr.** reported in (2022) 5 SCC 168.

8. Per contra, learned counsel for respondent bank would submit that learned DRT has rightly allowed the I.A. 15 of 2017 which was moved by the bank on receipt of the amount of Rs.5,81,79,372/- from respondent no. 2 to 5. Learned counsel would further submit that release of guarantee or mortgage is a commercial decision taken by the bank, which could not be questioned by the borrower. Learned counsel placed reliance upon Section 138 of the Indian Contract Act. Right and liability of Respondent no. 2 to 5 has to be considered qua the bank and not the appellants as the bank is the beneficiary of the same. It is further submitted that part release of the mortgage properties does not amount to the total liquidation of the debt. Section 60 of the Transfer of Property Act also provides that mortgagers'

right to redeem the mortgage property depends upon payment of the mortgage debt due against the creditor. Learned counsel for respondent would further submit that appellants' case is that they have not been given opportunity of hearing by the learned DRT. In that case they could have moved application for recall or review of the impugned order, but they filed appeal which means they are challenging the impugned order on merit and not on any other ground. It is further submitted that appellants are trying to take contradictory pleas as in one place they have submitted that respondent no. 2 to 5 could not have been discharged by the learned DRT, on the other hand they are trying to take advantage of the payment made by the respondent no.2 to 5. Bank has every right to proceed for recovery of debts according to the agreement made between the parties.

9. At the very outset without entering into the merit of the rival contentions raised by the parties, we would like to consider the issue of *audi alteram partem* in favour of the appellants. At this stage, it is not in dispute that Business Transfer Agreement was executed between the parties. Terms and conditions of the same are binding upon the parties in Clause 11 it is mentioned :

“In the event of this guarantee being determined either by notice by me/us or by demand in writing by the Bank. It shall be lawful for the bank to continue the account of the Principal notwithstanding such determination and my/our liability or for moneys advanced or paid or agreed to be advanced or paid and liabilities or obligation incurred by the bank at the date when the guarantee is so determined shall remain notwithstanding any subsequent payment or out of the cash credit by or on behalf of the Principal upon the limit aforesaid.”

10. It is also not in dispute that respondent no.2 to 5 are the guarantors/Mortgagors who paid certain amount to the bank. Thereafter, bank moved the I.A. 15 of 2017. I.A. 15 of 2017 was filed on 11.01.2017 before the learned DRT. Learned Presiding Officer, DRT observed that hearing of the I.A. should be given after giving notices to all the defendants. Defendants were given opportunity to file objections. Thereafter matter was listed on 08.02.2017 wherein Ms. Rina Khatun, learned advocate, appeared for defendant no.1, 2 and 3 and sought adjournment which was allowed. Matter was adjourned to 08.03.2017. Thereafter, matter was adjourned to 19.07.2017 and 14.12.2017. On 14.12.2017 when the impugned order was passed learned counsel for bank and counsel for defendant no. 4,5,6 and 7 were present. There is no mention of defendant no. 1, 2 and 3 in the Order. There is no mention as to whether any opportunity of

hearing was given to the defendant no. 1, 2 and 3 or not?

Whether they were absent? In the order itself it is mentioned that "Learned counsel for these defendants also prays the same"

11. This observation is regarding defendant no. 4,5,6 and 7. It is also mentioned in the order that defendant no.1, 2 and 3 are the main borrowers and defendants no. 4 to 7 are the guarantors.

At this stage it would be appropriate to quote the relief sought for by the bank in the I.A. 15 of 2017 :

- a) An order or orders for releasing the defendant no. 4,5,6 and 7 from their personal liability and/or guarantee.
- b) To allow the applicant bank to release the properties of the defendant No.4,5,6 and 7 as mentioned hereinbefore in the paragraph No.9 sub para (b);
- c) And also allow the applicant to proceed for recovery of balance sum along with interest against the defendant no. 1,2 and 3;
- d) And / or to pass any such order or orders as Your Lordship may deem fit and proper.

12. Learned DRT passed the following order :

"(i) Considering the above submission, the I.A. being I.A. No. 15 of 2017 is allowed. Applicant bank is within its authority to release the guarantors against payment of settlement amount, settled between creditor Bank and guarantors.

Applicant bank is entitled to proceed with further recoveries of balance dues from the defendant no. 1, 2 and 3, the main borrowers.

(ii) Applicant bank is directed to make necessary amendments in the O.A. deleting the names of above said defendants from the cause title (array of parties) and ojn other places in the O.A. and also for reducing the claim amount. As regards reducing the claim amount applicant bank is directed to file a separate affidavit giving the calculation of reduced claim amount. The said affidavit shall be taken on record as a modified claim amount in the O.A.

Copy of this order be given to the applicant bank as well as to the defendant for compliance.”

13. Bare perusal of the relief sought and the order passed by the learned DRT would reflect that learned DRT granted reliefs which were not even sought for in the I.A. 15 of 2017. Direction was issued to delete the names of defendants no. 4 to 7 from the cause title of T.A. and also to reduce the claim amount. If the settlement was arrived at between the parties in accordance with law, then why the defendants no. 1, 2 and 3, who are borrowers, were not given opportunity of hearing? As would appear from the record that no opportunity of hearing was accorded to the borrowers before passing the impugned order, which was required under the law.

14. Learned counsel for respondent would submit that appellants have not moved any application for recall of the impugned order, but they filed appeal challenging the merit of the matter. We are not convinced on the contention made by the learned counsel for respondent as ground of *audi alterem partem* which could not be taken before the learned DRT can be taken by the appellant in appeal.

15. Accordingly, we are of the considered view that opportunity of hearing including opportunity of filing objections against I.A. 15 of 2017 should have been granted by the learned DRT to the appellants. Thereafter I.A. should have been disposed of in accordance with law, which was not done by the learned DRT. Such a procedure adopted by the learned DRT is not in accordance with law.

16. As far as rival contention of the parties regarding merits of the matter are concerned, since opportunity of hearing was not accorded to the appellants, we refrain ourselves from recording any finding on these issues as it may affect the merits of the matter which is to be considered by the learned DRT. Learned DRT should consider the merits of the application along with objections and decide the I.A. 15 of 2017 afresh in accordance with law. Accordingly, matter is remanded back to learned DRT to decide the same afresh.

O R D E R

17. Appeal is allowed. Impugned order dated 14.12.2017 is set aside with the direction to learned DRT to accord opportunity of hearing to the appellants herein. Learned DRT should give

opportunity to the appellants herein to file their objection in I.A. 15 of 2017 and thereafter after giving opportunity of hearing to the parties shall decide the I.A. afresh in accordance with law.

Costs easy.

File be consigned to record room.

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 19th day of June, 2026.

(Anil Kumar Srivastava, J)
Chairperson

Dated : 19.06.2026
/pkb

