

\$~

*

IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: 23rd November, 2020

Date of decision: 18th December, 2020

+

W.P.(C) 3580/2020 & CM APPL. 12727-29/2020, 21106-07/2020

AMIT KHANEJA AND ORS.

..... Petitioners

Through: Ms. Meenakshi Arora, Senior Advocate with Mr. Vivek Jain, Mr. Nirvikar Singh Mr. Manish Shekari & Mr. Zulfiquar Memon, Advocates (M:9990252039).

versus

IL & FS FINANCIAL SERVICES LTD.

..... Respondent

Through: Mr. Rajeev Mehra, Senior Advocate with Mr. Atul Sharma, Mr. Abu John Mathew, Mr. Madhusudan, Mr. Baiju Mathew, Advocates for R-1 with Ms. Evneet Uppal, AR of Respondent No.1 in person. (M: 9819930653) Mr. Sudhir K. Makkar, Senior Advocate with Ms. Saumya Gupta, Advocate for R-2. (M: 9711959599)

CORAM:

JUSTICE PRATHIBA M. SINGH

JUDGMENT

Prathiba M. Singh, J.

1. This judgment has been pronounced through video conferencing.
2. The present writ petition has been filed challenging the impugned letter dated 26th May, 2020 sent by Respondent No.1/IL&FS Financial Services Ltd. (*hereinafter 'IL&FS'*), by which it has revoked the in-principle agreement for one-time settlement (*hereinafter 'OTS'*) with the Petitioners in relation to repayment of debt. The reliefs prayed for are set out below:

“a) Issue a Writ of mandamus and/or any other appropriate writ/direction/or order setting aside Respondent’s letter dated 26.05.2020 and grant

all consequential reliefs;

b) Pass any appropriate writ/direction/or order directing the Respondent to extend the time by 3 months for repayment under the terms of Respondent's in principle agreement for one-time settlement dated 03.03.2020/17.03.2020.

c) Issue a Writ of mandamus and/or any other writ/direction/or order directing the Respondent to not take any coercive/adverse steps against the subject properties of the Petitioners.

d) Issue a Writ of mandamus and/or any other appropriate writ/order/direction thereby directing the Respondent to not take any coercive/adverse steps against the subject properties of the Petitioner

e) pass any other order(s) as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case."

Brief Background

3. A perusal of the facts in the present case shows that the Petitioners had availed of various credit facilities from IL&FS between the period 2006 to 2018. Thereafter, due to the defaults of the Petitioners in repayment, a loan recall notice was issued way back in June, 2018 and their account was classified as a Non-Performing Asset (*hereinafter*, 'NPA') on 1st July, 2018. Out of the two properties which were mortgaged with IL&FS by the Petitioner, physical possession of the Anand Lok property was taken over in 2018 itself and a Section 14, SARFAESI Act application was filed by IL&FS *qua* the Chattarpur property as well. A receiver was appointed *qua* the Chattarpur property by the Id. CMM.

4. Thereafter, the Petitioners approached the DRT in a Section 17 application being S.A. 281/2018 for seeking quashing of all proceedings

initiated by IL&FS under the SARFAESI Act. The appointment of receiver by the Id. CMM in respect of the Chattarpur property was also challenged. In view of the fact that the DRT did not grant an interim order in the said application, a writ petition was filed by the Petitioners being W.P.(C) 12091/2018, wherein the following directions were issued on 3rd November, 2018:

“10. At this stage, Mr Chandhiok, learned Senior Counsel states that the petitioners undertake to deposit a sum of ₹10 crores within a period of two weeks from today. He also submits that the petitioners would repay the entire dues within a period of 12 months from today.

11. The petitioners are bound down to the undertaking given on their behalf that they shall deposit a sum of ₹10 crores within a period of two weeks from today. In view of this undertaking, this Court considers it apposite to direct that the Receiver shall not take over the possession of the property till the DRT considers the petitioners’ request for interim relief in accordance with law.”

5. As per the above directions, a sum of Rs. 10 crores was to be deposited by the Petitioners within two weeks and the entire dues were to be cleared within 12 months. The Court recorded these statements on behalf of the Petitioners as undertakings.

6. Admittedly, these directions were not complied with and the undertakings given to the Court were not honoured. An application was also filed by the Petitioners for modification of the deposit amount to Rs.5 crores instead of Rs.10 crores, which was rejected vide order dated 19th November, 2018.

7. Thereafter, the DRT also dismissed S.A. 281/2018 on 19th July, 2019

and finally possession was obtained of both properties by IL&FS. It was at this stage that settlement proposals were exchanged between the parties.

8. Various proposals were given by the Petitioners for a One Time Settlement ('OTS'), but the final proposal of Rs.100 crores was given on 10th January, 2020 in respect of the outstanding loan of Rs.93 crores. On 3rd March, 2020, the IL&FS agreed in-principle for the payment of 100 crores at one go, either by the Petitioners or by any third party on their behalf. However, the same was subject to various conditions. The principal condition was that the entire amount was to be paid on or before 27th March 2020.

9. The OTS did not fructify as the amounts could not be paid by the Petitioners in the period prescribed by IL&FS, despite requests for extension. This finally led to IL&FS's revocation of the said settlement proposal vide letter dated 26th May, 2020. It is this revocation letter which is under challenge in the present writ petition.

10. The primary ground on which the writ petition is based are the RBI circulars on 'COVID-19 Regulatory Package' bearing no. DOR.No.BP.BC.47/21.04.048/2019-20 dated 27th March 2020, DOR.No.BP.BC.63/21.04.048/2019-20 dated 17th April, 2020 and DOR.No.BP.BC.71/21.04.048/2019-20 dated 23rd May 2020 as well as the RBI Policy Guidelines titled "*Statement on Developmental and Regulatory Policies*". Reliance on these circulars is made by the Petitioners on the ground that these Circulars are meant to give breathing time to borrowers and the revocation of the OTS proposal would run contrary to these circulars and guidelines.

Submissions on behalf of the parties

11. Ms. Meenakshi Arora, Id. Sr. counsel for the Petitioners submits that even in 2018, when the Petitioner's account was classified as a NPA, the Petitioners had made payments of approximately Rs.3.52 crores to IL&FS, which itself shows their bonafide intentions. She further submits that though SARFAESI proceedings were started by IL&FS on 5th July, 2018 and a prime property of the Petitioner in Anand Lok was also taken possession of, no attempt has been made to dispose it off since 2018 and it is only now that the property is being put on sale on a deflated value. It is submitted that during this period, real estate prices have increased by 22-25%, which is a fact of which judicial notice can be taken.

12. Ms. Arora further submits that the Petitioner gave its OTS offer on 6th November, 2019 and it was only five months later i.e. on 3rd March, 2020 that the confirmation of their in-principle agreement to OTS was received from IL&FS. The final settlement proposal with some corrections was finally issued to the Petitioner on 18th March, 2020, with the direction that payments have to be made by 27th March, 2020. This was, however, contrary to their understanding inasmuch as, as per the proposal sent by the Petitioner, 90 days' time was sought from the date of acceptance of the OTS proposal till the date of payment. In fact it was offered, that from the date of acceptance till the date of payment, interest@9% per annum would also be payable to IL&FS. Thereafter, in March, 2020, the lockdown due to the Covid-19 pandemic took place and the entire OTS itself could not be processed.

13. Id. Sr. counsel seeks relief under the various RBI circulars which have provided relief to borrowers on loans and interest during the Covid-19

pandemic by extending the moratorium period till 31st August, 2020. According to her, the RBI circular dated 27th March, 2020 gave benefit to borrowers on the principal amount, interest as well as bullet repayment. In her submission, bullet repayment would also include the OTS amount. Reliance is also placed upon the amendment in Section 10(a) of the Insolvency and Bankruptcy Code, 2016 (“IBC”), by which the benefit of one year was given for insolvency proceedings to not be initiated during the lockdown period. The fact that the OTS amount was to be paid by 27th March, 2020 and revocation was made on 26th May, 2020 shows that the entire chain of events took place during the operation of first circular itself.

14. Reliance is also placed on the judgment in ***J. Rajiv Subramaniyan and Ors. v. Pandiyas and Ors. [(2014) 5 SCC 651]***, to argue that the intention of the SARFAESI Act, 2002 is to ensure that the secured asset earns maximum yield when being auctioned. According to Ms. Arora, the outstanding principal amount was of Rs.93.5 crore, whereas the OTS amount is Rs.100 crores. Recently, IL&FS has sought to sell their entire loan portfolio at the outstanding principal amount. Ld. Sr. counsel submits that under such circumstances, when the Petitioners are willing to honour the OTS amount, which is over and above the outstanding principal amount, the Petitioners’ request for further time deserves to be considered before auctioning of the two properties.

15. On a query from the Court as to the maintainability of the present writ petition, Ld. Sr. counsel submits that since the Petitioners are entitled to relief in view of the RBI circulars and the same has not been granted by the IL&FS, accordingly the writ petition is maintainable.

16. On the other hand, Mr. Rajeev Mehra, Ld. Sr. counsel on behalf of

the IL&FS, challenges the maintainability of the present writ petition. He submits that the disputes between Petitioners and IL&FS are in the realm of contractual law. Moreover, IL&FS has already invoked its statutory rights under the SARFAESI Act and it is also entitled to proceed in accordance with law by issuing auction notices and taking them to their logical conclusion, in view of the defaults of the Petitioners. The Petitioners' only remedy, if any, would be in terms of the SARFAESI Act and not by way of writ petition invoking the extraordinary jurisdiction of this Court.

17. Reliance is placed on *UBI v. Satyavati Tondon*[(SLP(C) No.10145 of 2010)] and the recent judgment of the Supreme Court in *K. Virupaksha vs The State Of Karnataka* (SLP (Criminal) No.5701 of 2019), wherein it has been categorically held, that once SARFESI proceedings have been commenced, only the Debt Recovery Tribunal (DRT) would have powers to intervene, and no intervention is permissible in writ jurisdiction.

18. On merits, Mr. Mehra submits that IL&FS's response on 3rd March, 2020 was a counter-offer to the Petitioner, containing various conditions, the principal one being that the entire sum of Rs.100 crores would have to be paid by 27th March, 2020. The said counter-offer made it very clear that it only contained an in-principle agreement, and no definite settlement was being entered into, till the terms were agreed. Since the Petitioner did not respond to the said counter-offer, nor could it fulfil the conditions therein, the offer was finally revoked by IL&FS in May, 2020.

19. He further submits that the reason why the Anand Lok property could not be sold, even though possession was taken in 2018, was due to various applications which were filed by M/s Milky Investment and Trading under the SARFESI Act before the DRT. He submits that the order sheets thereto

would show that IL&FS had not delayed the matter in any manner.

20. Mr. Mehra, ld. Sr. counsel vehemently urges that neither of the RBI circulars protect any defaulters under the garb of the pandemic, if they did not honour the loans which had become payable by or before the pandemic broke out. In the present case, the declaration of the Petitioner's account as NPA took place in 2018 and there is no existing loan. In fact, the judgment of the DRT dated 19th July, 2019 has upheld the liability of the amount to be recovered from the Petitioners under SARFAESI proceedings. It is submitted that the present case being one in which adjudication has taken place, the RBI circulars which provided for a moratorium and interim relief for borrowers would not apply in the case of the Petitioners. Moreover, since IL&FS has not invoked the IBC, the amendment to Section 10(a) would be of no assistance to the Petitioner in any manner.

21. He further submits that the proposal of assignment of the loan offer cannot be a reason for the Petitioners to get any additional time to make the payments. Assignment just means that there is new party that may step in at a later stage. However, the loan would still be recoverable. Reliance is placed upon the judgment of the ld. Division Bench in *Haryana Steel and Alloys Ltd. v. IFCI Ltd. and Anr. [AIR 2007 Del 65]*. He submits that IL&FS is within its powers to take whatever steps that are needed, for safeguarding the financial amounts due and payable to it.

22. Ld. Sr. counsel in conclusion emphasises that even the prayer in the writ petition had only sought a three months period to repay the dues under the OTS, which period has also lapsed since June, 2020, clearly showing that the Petitioner had no intention to honour the OTS.

23. Ms. Arora, in rejoinder, submits that the entire purpose of relying

upon the RBI circulars is that these are beneficial measures taken by the government and the RBI, in favour of borrowers who may be in difficult circumstances owing to the COVID-19 pandemic, and the Petitioners ought to be entitled to the said benefits as well.

24. On instructions, she submits that the Petitioners may be given time till 31st March, 2021, to honour the OTS proposal for Rs.100 crores, failing which, IL&FS may be permitted to take steps in accordance with law.

Analysis and Findings

25. The question that arises is whether the said RBI circulars and the RBI policy guidelines for COVID-19 would apply to the Petitioners and whether the Petitioner, can in law, pray that the revocation of the OTS proposal be quashed and IL&FS be directed to abide by the OTS proposal.

26. The facts that emerge in this case show that the Petitioners have been in default since 2018. Various legal proceedings have already commenced between the parties and in fact the reprieve given by the Id. Division Bench to the Petitioners vide order dated 3rd November, 2018 was also not availed of by the Petitioners. Thus, the Petitioners are not only in default of the loan but have also failed to adhere to undertakings given before the Id. Division Bench of this Court. The DRT has also, vide its final order dismissed the challenge by the Petitioners to the SARFAESI proceedings initiated by the Respondent. The findings of the DRT in its final judgment/order dated 19th July, 2019 are as under:

“xxx

Record reveals that the applicants have admitted that the borrower availed the finance, but failed to complete and in some cases even start the construction projects envisaged to be completed with

the finance availed, attributing economic slowdown as the reason for that.

xxx

Thus end-use of the facility was not done in the terms of the agreement. In such a situation, the respondent was justified in recalling the advance, even in the so-called moratorium period as the construction of projects were not started/remained incomplete.

xxx

In view of the above, classification to NPA category by the respondent is justified, even before the instalments fell due and were defaulted, as claimed by the applicant on the happening of 'event of default'.

xxx

The plea of the applicants that the recall notice was issued before the account being declared NPA has no footing, as the respondent bank was within its rights to recall the advance any time. All the actions taken under the SARFAESI Act, have admittedly been initiated after the NPA date i.e. 30.06.2018 and the applicants have failed to bring on record any violation of the rules in this regard."

27. Thus, the declaration of the Petitioner's loan account as an NPA was upheld by the DRT.

28. The basic premise on which relief is being sought by the Petitioners is that one M/s Puran Associates (NBFC) has sanctioned a loan of Rs.100 crores to the Petitioners and that the Petitioners ought to be given time to raise the money from the said NBFC and pay the same to IL&FS. It is for this purpose that apart from relying on the RBI circulars, three months' time was sought when the writ petition was filed to enable the Petitioners to raise the amounts to be paid to the Respondent.

29. This petition was first listed before this Court on 17th June, 2020, on

which date, considering that there was in fact a letter by M/s Puran Associates that it was willing to extend a loan of Rs.100 crores, this Court had impleaded M/s Puran Associates as Respondent No.2. Thereafter, affidavits were sought from them. The stand taken by the said NBFC was that the letter dated 4th November, 2019 confirming the sanction of a corporate loan to the Petitioners was subject to due diligence and verification of their various properties. Time was then sought by Respondent No.2, to complete the diligence and verification.

30. This Court had granted time on a few occasions owing to the lockdown to enable the NBFC to complete the diligence and verification. However finally, since the valuation etc. was not concluded by the NBFC, the final hearing commenced on 25th September, 2020. Even, thereafter, till the conclusion of arguments, there has been no development in terms of confirming payment of Rs.100 crores by the NBFC to the Petitioners.

31. On the last date, Ms. Meenakshi Arora, Id. Sr. counsel sought time till 31st March, 2021 to honour the proposal of 100 crores to be paid to IL&FS, in response to which Id. counsels for IL&FS stated that the OTS proposal stands revoked.

32. It is in this background that the Court has to consider whether the Petitioners are entitled to any reliefs. A perusal of the RBI circulars and policy guidelines shows that these are meant for mitigating the burden of debt which may have been brought about due to the COVID-19 pandemic. This Court does not consider the present case as one wherein any disruption took place due to the COVID-19 pandemic. Even prior to the OTS proposal being given by the Petitioners, the Petitioners were already in default. The response by IL&FS in March, 2020 may not have given sufficient time to

the Petitioners to make the payment in terms of the OTS. However, the revocation of the OTS did not take place in March, 2020 but in May, 2020. Even, thereafter, since June, 2020 to November, 2020, the Petitioner had sufficient time to raise the money and pay IL&FS. However, no payment has been forthcoming from the Petitioner. Despite the lapse of more than six months, no concrete step was taken by the Petitioners to honour the OTS.

33. The circulars of the RBI and the guidelines thereunder relate to reliefs to be granted for payments of interest and declaration of accounts as NPAs etc., during the COVID-19 pandemic. These circulars and policy guidelines cannot lend any support to the Petitioners' case where the defaults are prior to the outbreak of the pandemic itself. The legality of the revocation of the OTS in May, 2020 cannot be tested on the benchmark of the recent RBI circulars and the policy guidelines inasmuch as these settlements are independent of the said circulars and guidelines. Moreover, the RBI circular itself make it clear that the same is for "continuity of viable businesses" and not for accounts which are already declared as NPA, as is in the present case.

34. The one-time settlement proposal by IL&FS was in respect of a party which had already defaulted, against whom legal proceedings had been initiated and properties which were mortgaged had already been taken possession of by IL&FS. Thus, much water had flown in respect of the loan transactions after defaults by the Petitioner. This is not a case where some mitigating factors need to be considered or that the pandemic had caused any financial stress on the Petitioners.

35. Despite the Petitioners having sought three months' time in the writ petition for finalizing the OTS proposal and raising of Rs.100 crores, even

the grants of six months' time has proved to be insufficient. The present case does not relate to postponement of payment of instalments of loans or where any accounts would be classified as NPAs, for defaults made during the COVID-19 pandemic.

36. While there is no doubt that the pandemic did cause disruption to normal business operations and genuine borrowers ought to be given the benefit of the RBI circulars and policy guidelines, the Petitioners do not fall in that category. The defaults by the Petitioners date back to 2018. The defaults continued over a period of two years prior to the outbreak of the pandemic itself. Such cases cannot be those which would be entitled to benefits under the policies of the RBI which are meant to give some relief during the pandemic.

37. Moreover, in the present case, despite repeated opportunities having been given by the Division Bench at the stage when the DRT proceedings were going on and even after the filing of the present writ petition, the same have been of no avail. No further relief can be granted.

38. Under these circumstances, the writ petition is dismissed. The Respondent is permitted to proceed against the Petitioners, in accordance with law. No further orders as to costs. All pending applications are disposed of.

PRATHIBA M. SINGH
JUDGE

DECEMBER 18, 2020

dj/A