In The High Court at Calcutta
Constitutional Writ Jurisdiction
Original Side

The Hon'ble Justice Sabyasachi Bhattacharyya

WPO No. 89 of 2021

Mohan Motor Business Private Limited and another
Vs.
ICICI Bank Limited and another

With

W.P.O. No. 91 of 2021

Metro Niketan Private Limited and another
Vs.
ICICI Bank Limited and others

For the petitioners	:	Mr. Sarabjit Mukherjee, Ms. Madhurima Das, Mr. Rajarshi Dutta
For the respondents	:	Mr. Avishek Guha, Ms. Ruchika Mall
Hearing concluded on	:	20.04.2021
Judgment on	:	27.04.2021

The Court:

1. A sanction was granted for credit facility in favour of the petitioner for an amount of Rs. 200 lakh by the respondent no.1-Bank. On November 22, 2018, there was a modification/renewal of the Sanction Letter dated June 8, 2010, which, inter alia, scaled down the existing limit of Rs.9.90 crore to a proposed limit of Rs.6.25 crore.

2. On February 23, 2019, a letter was issued by the Bank for modification of the Sanction Letter dated November 22, 2018 for the limited purpose of including a corporate guarantee given by the Metro Niketan Private Limited.

3. On September 19, 2020, the Bank issued to the petitioner and to its guaranteers and mortgagors/ corporate guarantors notices under Section 13(2) of the SARFAESI Act, 2002, to which the borrower issued an objection under Section 13(3A) on November 20, 2020. Reply was given by the Bank to the said objection on December 2, 2020.

4. On January 13, 2021, a possession notice under Rule 8(1) of the Security Interest (Enforcement) Rules, 2020, read with Section 13(4) of the SARFAESI Act, was issued by the respondent no.1-Bank for taking symbolic possession of the secured property.

5. On January 14, 2021, the Bank issued a notice under Section 13(4) of the SARFAESI Act and on January 15, 2021, the respondent no.1-Bank issued an e-mail to the petitioners intimating that the loan account of the petitioners was then overdue for the past 91 days.

6. Learned counsel appearing for the respondent-Bank takes a preliminary objection as to maintainability of the writ petition against the actions taken by the Bank under Sections 13(2) and 13(4) of the SARFAESI Act, in view of an equally efficacious alternative remedy being available under Section 17 of the said Act.

7. In support of such contention, counsel cites the following judgments **:**

(i) *United Bank of India Vs. Satyawati Tondon & Ors.,* reported at *(2010) 8 SCC 110;*

(ii) *Kanaiyalal Lalachand Sachdev & Ors. Vs. State of Maharashtra & Ors.,* reported at *AIR 2011 SCW 1194;*

(iii) *Authorised Officer, State Bank of Travancore & Anr. Vs. Mathew K. C.,* reported at *(2018) 3 SCC 85;*

(iv) *Unreported judgment passed by the Division Bench of this Hon'ble High Court in M.A.T. No.128 of 2019 delivered in the case of Bishnu Bikash Sarkar & Anr. Vs. ICICI Home Finance Company Limited & Ors.* dated 6th February, 2019;

(v) *ICICI Bank Vs. Umakanta,* reported at *(2019) 13 SCC 497;*

(vi) Unreported judgment delivered on 14.01.2021 by this Hon'ble Court in *W.P.A. No.11360 of 2020* passed by Hon'ble Justice Hiranmoy Bhattacharya in *Bansal Enterprises Vs. Bank of Baroda.*

8. The respondent-Bank submits that the unreported judgment dated January 14, 2021 passed by a co-ordinate Bench in *WPA 11360 of 2020* was challenged in *MAT No.68 of 2021 (Bansal Enterprises Vs. Bank of Baroda).* A Division Bench of this Court, *vide* order dated January 21, 2021, affirmed the decision of the learned Single Judge. Upon a challenge being preferred before the Supreme Court against the Division Bench judgment by way of Special Leave to Appeal (C) No.2695 of 2021, which was dismissed by the Supreme Court by an order dated February 17, 2021.

9. It is further submitted, on maintainability, that the writ petition is premature insofar as the same challenges the notice under Section 13(2) of the SARFAESI Act. On such contention, the Bank relies on *D. Krishnan and others Vs. The Branch Manager, The Federal Bank Limited & another,* reported at *2017 SCC OnLine Mad 24346* and *M/s. Sigma Generators Private Limited & another Vs. Oriental Bank of Commerce & others,* reported at *2014 SCC OnLine 7198.*

10. While addressing the question of maintainability, learned counsel appearing for the petitioners contends that the action of the Bank and its authorized officer in declaring the account of the petitioner as Non-Performing Asset (NPA) on February 24, 2019 is the plinth of the challenge in the present writ petition on the ground that the same is contrary to the Master Circular issued by the Reserve Bank of India on July 1, 2015 containing the Prudential Norms of Income Recognition and Asset Classification and Provisioning Pertaining to Advances. It is argued that the modification dated February 23, 2019 amounted to a restructuring of the account in terms of the RBI Prudential Norms.

11. By placing reliance on Clause 12.1 of such Norms, learned counsel for the petitioners contends that restructuring would normally involve modification of terms of advances/securities, which would generally include, among other things, alteration of repayment period/repayable amount or the amount of instalments/rate of interest (due to reasons other than competitive reasons). It is further clarified in the said Clause that any change in the repayment schedule of a loan would render it a restructured account.

12. Next placing reliance on Clause 17.1 of the Prudential Norms, the petitioners argue that the banks may restructure accounts classified under "standard", "sub-standard" and "doubtful" categories. The Non-Performing Assets, as per Clause 17.2.2, upon a restructuring, would continue to have the same asset classification as prior to restructuring and slip into further lower asset classification categories as per the extant asset classification norms with reference to the pre-structuring

repayment schedule. Placing reliance on Clause (iv) under Annexure-5 of the Prudential Norms, containing Key Concepts, it is reiterated by the petitioners that 'restructuring', as contemplated therein, is in consonance with the Clause 12.1 of the said Norms.

13. Learned counsel for the petitioners contends that once the loan sanctioned was restructured on February 23, 2019 upon taking additional security from the Metro Niketan Private Limited, both as collateral and corporate guarantee, the question of the account being classified as NPA on the very next date, that is, February 24, 2019, could not arise. It is further contended that the modification letter dated February 23, 2019 was accepted and acted upon by the petitioners, but the Bank acted without authority in classifying the loan account of the petitioner as NPA, which is the very basis of the measures taken under the SARFAESI Act, *de hors* the RBI Prudential Norms.

14. It is argued that a collateral remedy cannot be an absolute bar to a writ petition, if the acts of the authority is questioned on the ground of lack of jurisdiction. In this regard, the petitioners rely upon the following decisions:

(i) *Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai & Ors.,* reported at *(1998) 8 SCC 1;*

(ii) *M/s. Godrej Sara Lee Ltd. Vs. Asst. Commissioner (AA) & Anr.* reported at *(2009) 14 SCC 338.*

15. Section 2(1)(o) of the SARFAESI Act, 2002 defines "Non-Performing Asset" as an asset or an account of a borrower which has been classified by a Bank or a financial institution as sub-standard,

doubtful or loss asset. In the event a bank is not administered or regulated by any authority or body established, constituted or appointed by any law for the time being in force, the bank would be governed by the directions or guidelines relating to asset classification issued by the RBI.

16. In the present case, it is argued, the classification of the petitioners' account as NPA ought to have been in accordance with the RBI Prudential Norms. Since such provisions were violated in classifying the loan account as NPA, the consequential action taken by the Bank under the 2002 Act were invalid.

17. In this context, the petitioners rely on *Sravan Dall Mill P. Limited Vs. Central Bank of India,* reported at *AIR 2010 AP 35.*

18. On merits, it is contended by the petitioners that the Bank, in its reply dated December 2, 2020, admitted that the previous notice under Section 13(2) of the 2002 Act dated July 20, 2020 was recalled by the Bank on September 10, 2020 and a fresh notice under the said provision was issued on September 19, 2020. In paragraph No.4 of such reply, the Bank accepted that the modification letter dated February 23, 2019 was acted upon, but failed to give any reason as to why/how the petitioners' account was classified as NPA on the very next date, that is, February 24, 2019. The reply of the Bank, being not in compliance with Section 13(3A) of the 2002 Act, the classification of the account of the petitioners/borrower as NPA can be challenged. In support of such proposition, learned counsel for the petitioners places reliance on *East India Laminates (P) Ltd. Vs. Union Bank of India.* The account of petitioner no.1, after being restructured

on February 23, 2019, did not remain NPA for a period of less than or equal to 12 months or did not remain in the sub-standard category for a period of 12 months. As such, the petitioners' account was also not a loss asset, since the facility was secured additionally by collateral and corporate guarantee provided by the Metro Niketan Private Limited. Thus, the petitioners' account could not be classified either as sub-standard, doubtful or loss asset as envisaged in Clause 4 of the RBI Prudential Norms.

19. The petitioners further argue that a proper interpretation of the RBI Prudential Norms shows that the decision of classifying an asset as NPA should be based on the record of recovery. An account having temporary deficiencies cannot be so classified. The guidelines for such classification are enumerated in Clause 4.2.4 of the said Norms. Clause 4.2.5 of the said Master Circular, it is argued, mandates that where the arrears of interest and principle are cleared by the borrower in the case of loan accounts classified as NPAs, the accounts should not be treated as non-performing and may be classified as 'standard' account thereafter.

20. That apart, the Bank did not give any notice to the petitioners or Metro Niketan Private Limited prior to classifying the account as an NPA and/or disclose any reason for overruling the objection of the petitioner in its reply. In this context, the petitioners place reliance on *Amar Alloys Pvt. Limited (regd.) Vs. State Bank of India,* reported at *2019 SCC OnLine P&H 571.*

21. Thus, it is argued, the entire actions of the Bank and its Authorized Officer under Sections 13(2) and 13(4) of the SARFAESI Act, 2002,

having emanated from the classification of the petitioners' account as NPA in violation of the RBI Prudential Norms, were without competence or authority.

22. In reply on merits, learned counsel for the respondent-Bank submits that the initial sanction dated June 8, 2010 was renewed from time to time, lastly on November 22, 2018. While renewing such sanction, the existing limit of the borrower for an exposure of Rs.9.90 crore was reduced on request of the petitioners to Rs.6.25 crore, such renewal being valid up to November 21, 2019. The loan account of the borrower, thus, went under stress. Despite several reminders and opportunities to the petitioners intimating the status of the account and to repay the dues from time to time, no steps were taken by the petitioners in that regard. The corporate guarantor, being Metro Niketan Private Limited, stepped in by offering collateral security to secure the loan that was availed by the borrower. Although the respondent-Bank accepted such collateral security, there was no change or modification of any of the terms and conditions of the Sanction Letter dated November 22, 2018 in the modification letter dated February 23, 2019.

23. The Bank submits that the attempt of the petitioner to take shelter under the relevant provisions of the RBI Prudential Norms dated July 1, 2015, on the basis that the loan was restructured on February 23, 2019, is contrary to the facts of the case. The same would be revealed by a mere comparison between the Sanction Letter dated November 22, 2018 and the 'modification' letter dated February 23, 2019. Since there was no restructuring of the credit facility apart from merely

adding collateral security, the Prudential Norms are not attracted at all.

24. The classification of the loan account as NPA on February 24, 2019, was valid in law, since the loan account of the borrower/petitioners was already under stress and there was non-payment in the loan account for a period of 90 days, in consequence whereof, as per the RBI Guidelines, the respondent-Bank was well within its authority to declare the account as NPA.

25. The Bank argues that not only is the writ petition premature in respect of the notice under Section 13(2) of the 2002 Act, which is merely a demand notice, the writ petitioners also have a remedy under Section 17(1) of the 2002 Act to challenge the actions taken by the respondent-Bank under Section 13(4) as well as Section 13(2) of the 2002 Act before the Debts Recovery Tribunal.

26. In the guise of challenging the classification of its loan account as NPA, the respondent-Bank argues, the petitioners have tried to invoke the writ jurisdiction of this Court. However, as per the various judgments as cited by the Bank while arguing the maintainability point, the appropriate remedy of the writ petitioner lay under Section 17(1) of the 2002 Act.

27. On the above grounds, learned counsel for the respondent no.1-Bank contends, the writ petition ought to be dismissed.

28. Heard learned counsel for both sides and perused the written notes of arguments filed by the contesting parties as well as the materials on record. Petitioner No.1 in WPO No.89 of 2021 (Mohan Motors Business Private Limited) and petitioner No.1 in WPO No.91 of 2021

(Metro Niketan Private Limited) are the borrower and corporate guarantor respectively, in respect of the credit facility taken from the respondent No.1 in both the matters (ICICI Bank Limited). The second petitioners in each of the writ petitioners are Directors of the first petitioners respectively.

29. On June 8, 2020, ICICI sanctioned an overdraft facility for Rs.200 lakh in favour of Mohan Motors, which was modified/renewed by a subsequent sanction letter dated November 22, 2018.

30. Subsequently, Mohan Motors defaulted in payment of instalments in respect of the overdraft facility and Metro Niketan came to its rescue by providing a corporate guarantee, which was the only substantial alternation to the initial sanction letter. Such alteration was recorded in a modification letter dated February 23, 2019.

31. On February 24, 2019, the account of Mohan Motors was classified by the ICICI Bank as a Non-Performing Asset (NPA). On September 19, 2020, the Bank issued a notice under Section 13(2) of the SARFAESI Act, 2002 to Mohan Motors as well as Metro Niketan and other guarantors.

32. An objection was filed by the borrower under Section 13(3-A) of the 2002 Act, in response to the notice under Section 13(2). The Bank gave a reply thereto on December 2, 2020.

33. On January 13, 2021, a possession notice was issued under Rule 8(1) of the Security Interest (Enforcement) Rules, 2020, read with Section 13(4) of the SARFAESI Act, 2002 by the ICICI Bank for taking

symbolic possession of the secured property. On January 14, 2021 the Bank issued a formal notice under Section 13(4) of the 2002 Act. The ICICI Bank, on January 15, 2021, issued an e-mail to the petitioners intimating that the loan account-in-question was overdue for the past 91 days.

34. Being aggrieved by the classification of the loan account as NPA on February 24, 2019 and the consequential notice under Section 13, sub-sections (2) and (4) of the 2002 Act, the present writ petitions have been preferred.

35. A preliminary objection as to maintainability of the writ petition is taken by the respondent-Bank, primarily on the issue that there is an equally efficacious alternative remedy availabe in the form of Section 17 of the 2002 Act. Hence, relying on several judgments of the Supreme Court as well as two unreported judgments of this court, the Bank submits that generally the courts adopt a self-imposed restriction by refusing to interfere where an equally efficacious alternative remedy is available to the petitioners.

36. By citing certain judgments in reply, the writ petitioners pointed out that such interference can take place in case of patent jurisdictional errors and under certain exceptional circumstances.

37. The crux of the principles laid down in the cited judgments clearly indicates that interference under Article 226 of the Constitution is only in exceptional cases. Arbitrary exercise of jurisdiction, patent bias, violation of Fundamental Rights and Natural Justice as well as

gross abuse of the process of law are some of such grounds on which High Courts can interfere despite availability of an alternative remedy.

38. In the present case, since the petitioners have specifically alleged lack of authority and arbitrariness on the part of the Bank in classifying the loan account as NPA, the writ petitioners cannot be shut out at the outset, provided they substantiate such allegations.

39. Although the argument of the petitioners that such classification as NPA was the genesis of subsequent proceedings under the SARFAESI Act, and a challenge against such classification is permissible in writ jurisdiction, is impressive at the first blush, the reliefs claimed in the writ petitions, if granted, would tantamount to interference with the notice and measures taken by the ICICI Bank respectively under sub-sections (2) and (4) of Section 13 of the SARFAESI Act. The genesis of such notices or any illegal therein can very well comprise grounds of effective challenges against both such actions of the Bank, which leaves ample scope for alternative remedy to the writ petitioners.

40. Hence, a *post facto* challenge to the genesis of the Bank's actions before the writ court cannot, by itself, be a justification of the maintainability of the writ petition, after measures have already been taken under the 2002 Act.

41. As such, the limited scope of exploration in the present writ petitions hinges around the question whether the bank had authority to classify the loan account-in-question as NPA at the relevant juncture.

42. Although the petitioners have annexed the Master Circular dated July 1, 2015 issued by the Reserve Bank of India (RBI) pertaining to Prudential Norms on Income Recognition, Asset Classification and Provisioning pertaining to Advances, the first few clauses thereof, being Clause No.1 to 3.4 of the Master Circular, are conspicuous by their absence in the Annexures (it would be more palatable for all if we take such omission as a clerical error).

43. Clause 2 contains the definitions. Clause 2.1 defines non-performing assets. In the various sub-clauses of Clause 2.1.2, a Non-Performing Asset (NPA) has been described as a loan or an advance where interest and/or instalment of principal remains overdue for a period of more than 90 days in respect of a term loan and the account remains 'out of order' in respect of an overdraft/cash credit.

44. Clause 2.2 stipulates that an account should be treated as 'out of order' if the outstanding balance remains continuously in excess of the sanctioned limited/drawing power for 90 days. Clause 2.3 defines 'overdue' as any amount due to the Bank under any credit facility, if not paid on the due date fixed by the Bank.

45. Hence, in the present case, the loan account of the borrower qualified for being classified as NPA on the date of such classification, that is February 24, 2019, in view of the payable amounts remaining overdue/out of order for over 90 days. Hence, there was no fault on the part of the ICICI Bank in classifying the account as NPA at that point of time.

46. Section 13(2) of the 2002 Act provides that where any borrower, which is under a liability to a secured creditor under a security agreement, makes any default in repayment of secured debt or any instalment thereof, and its account in respect of such date is classified by the secured creditor as non-performing asset, then the secured creditor may require the borrower by notice in writing to discharge in full its liabilities to the secured creditor within 60 days from the date of notice, failing which the secured creditor shall be entitled to exercise all or any of the rights conferred on it under Section 13(4), subject to the exceptions provided therein. Section 13(4) is a consequence of such failure and the measures contemplated thereunder automatically follow upon the failure of the borrower to comply with the requirements of Section 13(2).

47. Section 13(3-A) of the SARFAESI Act provides an opportunity of representation and raising objection to the borrower. In the present case, the writ petitioners subjected themselves to the provisions of the SARFAESI Act by giving a representation /objection to the notice under Section 13(2), which was duly considered by the respondent No.1-Bank.

48. Thus, it is evident that there was no arbitrariness or material irregularity in the Bank's actions.

49. The next question which crops up is whether the writ petitioners were entitled to the benefit as contemplated in Clause 17.2.2 of the Prudential Norms of 2015, which provides that the non-performing assets, upon restructuring, would continue to have the same asset

classification as prior to restructuring and slip into further lower asset classification categories as per extant asset classification norms with reference to the pre-restructuring repayment schedule. Reliance is placed by the writ petitioners on Clause 17.1 of the Norms, pertaining to eligible criteria for restructuring of advances as well as the Key concepts used in the guidelines as defined in Annexure 5 as well as Clause 12.1 of the Norms to argue that restructuring would normally involve modification of terms of the advances/securities, which would generally include, among others, alteration of repayment period/repayable amounts/the amount of instalment/rate of interest (due to reasons other than competitive reasons). Any change in repayment schedule of a loan would render it a restructured account.

50. Clause 17.1.1 provides that Banks may restructure the accounts classified under 'standard', 'sub-standard' and 'doubtful' categories. Subsequent clauses of the Prudential Norms, 2015 also provide for the situations in which such restructuring is undertaken.

51. However, the petitioners conveniently overlook the provisions of Clauses 17.2.3 and 17.2.4 of the Norms, which provide that standard accounts classified as NPA and NPA accounts retained in the same category on restructuring by the Bank should be upgraded only when all the outstanding loan/facilities in the account perform satisfactorily during the 'specified period', that is, principal and interest on all facilities in the account are serviced as per terms of payment during that period.

52. It is further provided that in case satisfactory performance after the specified period is not evidenced, the asset classification of the restructured account would be governed as per the applicable prudential norms with reference to the pre-restructuring payment schedule.

53. The reference to standard, sub-standard and doubtful categories is entirely irrelevant for the purpose of considering the validity of the classification of the loan account as NPA.

54. That apart, the modification letter issued on February 23, 2019 merely incorporated an additional corporate guarantee given by the Metro Niketan, without altering any of the terms of the original sanction, as modified on November 22, 2018.

55. On February 24, 2019, irrespective and independent of the modification letter, the account of the borrower qualified for being classified as a non-performing asset, which was duly declared by the ICICI on that date.

56. Mere incorporation of additional corporate guarantee by the Metro Niketan, *ipso facto,* does not come within the purview of the 'restructuring' as contemplated in the Prudential Norms under reference and/or in commercial jurisprudence in general.

57. Such minor modification did not alter the terms and conditions of the original sanction sufficient to obliterate the defaults already committed by the borrower.

58. Hence, I find no irregularity and/or arbitrariness in declaration of the borrower's loan account as NPA on the relevant date.

59. Reliance by the petitioners on Clause 4.2.4 which relates to temporary deficiencies, which would not qualify an asset to be classified as NPA, is entirely misplaced.

60. Clause 4 of the Guidelines explains the categories of NPAs and defines sub-standard, doubtful and loss assets. Such classification occurs only upon the asset having remained non-performing over a period. However, the broad guidelines for the classification of assets as NPA is on a much wider scale than temporary deficiencies, as defined in Clause 4.2.4. Clause 4.2.4 is a miniscule exception of temporary deficiencies, which has nothing to do with the present case, where several reminders were given to the borrower and guarantors for clearing off the bank's dues, which were consistently ignored by the writ petitioners.

61. The subsequent notice under Section 13(2) of the SARFAESI Act and measures taken under Section 13(4) thereof were only necessary corollaries consequential upon such classification as NPA within the contemplation of Section 13 of the 2002 Act. Hence, there is no substantial basis for the challenge in the present writ petitions to the classification of the loan account as NPA.

62. The present writ petitions are, *ex facie*, attempts to bypass the regular remedy available under Section 17 of the 2002 Act in the garb of a challenge to the root of such action *post facto* measures being taken under Section 13. Hence, let alone making out any exceptional case

of arbitrariness, miscarriage of justice or violation of any Fundamental Right or principle of Natural Justice, the actions taken by the Bank, from classifying the loan account as NPA to taking measures under Sections 13(2) and 13(4) of the 2002 Act, were all above board and well within the authority of the Bank. Hence, there is no merit in the present writ petitions.

63. Accordingly, WPO No.89 of 2021 and WPO No.91 of 2021 are dismissed on contest. The petitioners in each of the said writ petitions shall pay costs of Rs.50,000/- (Rupees Fifty Thousand) each to the ICICI Bank Limited, being respondent No.1 in both the matters, within 30 days from date for the unnecessary harassment caused to respondent No.1 and to deprecate the mala fide attempt to subvert and delay the process of law in an oblique manner.

64. Urgent certified copies of this order shall be supplied to the parties applying for the same, upon due compliance of all requisite formalities.

(Sabyasachi Bhattacharyya, J.)