



IN THE GAUHATI HIGH COURT

(HIGH COURT OF ASSAM, NAGALAND, MIZORAM & ARUNACHAL PRADESH)

W.P(CIVIL) No. 4100/2022

M/S Asean Agencies

Represented by its Proprietor

-Sri Tarik Talom

Aged about 45 years,

S/O-Tarok Talom

Presently residing at H/No. Harmony

Apartment, VIP Road, P.O-Noonmati

P.S. Satgaon, Guwahati-26, Assam

.....Petitioner

-Versus-

1. Union of India

Represented by the Secretary,
Ministry of Finance, Govt. of India,
North Block, Raisina Hill, New Delhi

2. The Chairman-cum-Managing Director,

Bank of India, Star House C-5G Block
Bandra Kula Complex, Bandra East,
Mumbai-400051

3. The Zonal Manager,

Bank of India,
Saikia Commercial Complex,
Sree Nagar, Christian Basti

4. The Chief Manager

Khanapara Branch, VIP Road, Cachal,

Six Mile, Gauhati-781022

.....Respondents

- B E F O R E -
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE SOUMITRA SAIKIA

For the Appellant(s) :Ms. N. Saikia, Advocate

For the Respondents :Mr. A. Ganguly, Advocate
: Mr. A. Dhanuka, Advocate

Date of Hearing : **27.03.2023**

Date of Judgment : **10.04.2023**

JUDGMENT & ORDER(CAV)

(SOUMITRA SAIKIA, J)

This petition is filed by the petitioner seeking a direction from this Court to the respondent Bank to initiate action as per the RBI Circular dated 05.05.2022 and the Pre-Packaged Insolvency Resolution Process under the Insolvency and Bankruptcy Code, 2016 instead of proceeding under the SARFAESI Act. The writ petitioner is a proprietorship firm which is a registered Class-I(A) contractor of (R&B) PWD Department, Government of Arunachal Pradesh. The petitioner is represented by its proprietor Shri Tarik Talom. The petitioner firm has its corporate office at Itanagar in Arunachal Pradesh and is also registered under Goods & Service Tax Act, Act vide registration No. 12ACQPT0456M2Z5. The petitioner firm is also registered under MSME Act

bearing Udyog Adhar No. AR10B0000504. According to the petitioner, he has executed successfully various works under various departments including NF Railway, GM Office. The petitioner applied for a loan from the Bank of India, Khanapara Branch. The respondent No. 4/Bank of India after due consideration of the application by the petitioner, granted loan on various credit facilities vide reference No. KHA/ADV/2016-17/SME/45 dated 04.01.2017 aggregating to an amount of Rs. 7,88,02,679.82 (Rupees seven crore eighty eight lakh two thousand seventy nine and eighty two paisa) towards the petitioner. Due to COVID-19 pandemic situation and nationwide lockdown which was enforced by the Government of India, the business of the petitioner firm suffered severe losses and the petitioner consequently defaulted in the repayment schedule for the loans advanced by the respondent No. 4/Bank of India. According to the petitioner, the total amount of loans sanctioned under the various facilities which was advanced to the petitioner by the respondent Bank and the corresponding dues required to be paid by the petitioner came to a total of Rs. 7,01,59,977.19 (Rupees Seven Crore One Lakh Fifty Nine Thousand Nine Hundred Seventy Seven and Nineteen Paisa only). The break up as furnished by the petitioner in its pleading are extracted as under:

<i>a. Cash Credit</i>	<i>Rs. 5,50,00,000.00</i>	<i>Rs. 5,65,34,483.</i>
<i>b. Term Loan</i>	<i>Rs. 1,57,00,000.00</i>	<i>Rs. 51,76,024.46</i>
<i>c. Demand Loan</i>	<i>Rs. 50,00,000.00</i>	<i>Rs. 51,65,149.</i>
<i>d. FITL</i>	<i>Rs. 31,02,679.82</i>	<i>Rs. 32,84,320</i>
<i>Total</i>	<i>Rs. 7,88,02,679.82</i>	<i>Rs. 7,01,59,977.19</i>

2. It is submitted by the petitioner that the Bank authorities unilaterally reduced the cash credit limit sanctioned to the petitioner from Rs. 5.50 Cr to Rs. 4.00 Cr. The petitioner, therefore, represented before the Bank Authority requesting them not to reduce the cash credit limit. The Bank, however, issued notice under Section 13(2) of the SARFAESI Act to the petitioner to discharge full liabilities to the respondent Bank for a total sum of Rs. 7,01,59,977.17 with further interest @ 12.35% per annum compounded with monthly rates with effect from 15.04.2021. The petitioner, thereafter, submitted an application dated 18.07.2021 praying for payment of overdue amount of Rs. 241.79 lakhs partially by way of release-cum-adjustment of excess TDR available with the Bank authority as collateral Security and Balance from the proprietors own sources. The petitioner submits that the bank did not respond to the representation made by the petitioner and consequently the petitioner's account was classified as NPA. The effect of the petitioner's account being classified as NPA is that he was unable to conduct his day-to-day business and is facing extreme difficulties. The further case of the petitioner is that the RBI vide its circular No. DOR.STR.REC.12/21.04.048/2021-22 dated 05.05.2021 has specifically issued a resolution framework No. 2 for giving relief to COVID-19 related stress for Micro Small and Medium Enterprises. As per this guideline, the petitioner is eligible under the eligibility clauses (i) to (v) and has

accordingly made an application to the Bank on 27.07.2021. However, the Bank did not provide relief to the petitioner in terms of the RBI Circular and as a consequence whereof the account of the petitioner was classified as NPA. It is also submitted that the Government of India had also formulated the Pre Packaged Insolvency Resolution Process to deal with those businesses which were classified as NPAs during the COVID-19 Pandemic period. The Government of India had initiated steps to provide fillip to those business operations during the COVID-19 Pandemic period, which have MSME Registration. It is submitted that under both these schemes, the petitioner's case ought to have been considered by the respondent Bank but instead the respondent bank initiated SARFAESI proceedings which is contrary to the RBI Circular as well as to the Government of India scheme for Pre Packaged Insolvency Resolution Process. The learned counsel for the petitioner submits that the petitioner firm comes within the eligibility criteria provided under both the schemes and as such benefits under the said Schemes ought to have been extended to the petitioner firm by the respondent bank. The proceedings initiated by the respondent bank under the SARFAESI Act is contrary to the RBI Circular as well as the Government of India Scheme. It is submitted that the RBI Circular is binding on all banks including the respondent No.4/Bank. The further submission of the learned counsel for the petitioner is that these benefits have not been extended to the petitioner because of some ulterior

motives by the respondent bank and which is arbitrary on the face of it. It is submitted that the benefits under these two schemes were extended to other similarly situated businesses, but the petitioner was deprived of the same for reasons not disclosed by the respondent bank. Being aggrieved, the present writ petition has been filed seeking a direction to the respondent Bank Authorities to initiate action under the Pre Packaged Insolvency Resolution Process under the Insolvency and Bankruptcy Code, 2016 instead of the SARFAESI proceedings and also to extend the benefits under the RBI Circular dated 05.05.2021. The writ petition is preferred on the following grounds:

- "i. That the respondent bank authority have not considered the delay caused due to the pandemic of Covid-19, lock down imposed by the Govt. for last 2 years and for that not only the entire country but the whole world has suffered and incurred loss.*
- ii. The respondent Bank authority have not considered that the petitioner was working for Govt. and all his project site work was stopped at once and all his workers, operators were stuck without any productive work and was only an expense in the form of food and salary.*
- iii. The respondent Bank authority have not considered that RBI on the instruction of Govt. of India had floated ECLGS (Emergency Credit Line Guarantee scheme) so that entrepreneur like the petitioner can get credit up to 20% of outstanding and the Bank did not grant this loan instead reduced the case credit limit of the petitioner from Rs. 550 lakhs to Rs. 400 lakhs.*
- iv. The respondent Bank authority have not considered that RBI has released resolution frame work 2 specifically for entrepreneurs like petitioner for restructure of existing credit facilities.*
- v. The respondent Bank authority have not Considered the Scheme introduced by Govt. of India namely Pre Packaged Insolvency Resolution Process under IBC 2016 instead initiated action under SARFAESI 2002.*

vi, The respondent Bank authority have not considered the facts that IBC has precedence over SARFAESI 2002 and section 238 of the IBC says that "the provision of this code shall have effect, notwithstanding anything inconsistency therewith contained in any other law for the time being in force,"

3. The respondent Bank contested the case of the petitioner by filing its counter-affidavit. It is contended that contrary to the contentions raised by the writ petitioner, the Bank had responded to the application submitted by the petitioner for restructuring the account as stated. It is contended that in terms of the RBI Circular dated 05.05.2021 the request by the petitioner for restructuring the account under the resolution framework 2.0 of the RBI Guideline was communicated by an email dated 30.12.2021 by the Branch Manager, Khanapara Branch of the Bank. The extract of the email is enclosed as Annexure-8, Page 49 to the counter-affidavit filed by the respondent/Bank. The petitioner was requested to deposit the amount required immediately for upgradation of the loan account so that the restructuring process can be implemented as per the scheme. However, the said amount not being deposited in response to the e-mail issued, the restructuring could not be proceeded with. It is contended that since the restructuring of the loan account under the RBI resolution framework 2.0 could not be proceeded with, the bank proceeded to issue notice under Section 13(2) of the SARFAESI Act. In response to the contention of the petitioner that the bank failed to initiate

proceeding/action under the Pre Packaged Insolvency Resolution Process under the Insolvency and bankruptcy Code, 2016, it is contended by the Bank that the said scheme can be made applicable only to corporate applicant. In order to be eligible to avail the benefit under the said scheme, the applicant must either be a company registered under the Companies Act or a Limited Liability Partnership (LLP). The petitioner is admittedly a proprietorship firm and therefore, it is not eligible to be included in the said scheme and therefore, no process can be initiated under the said scheme as sought for by the petitioner.

4. The petitioner also filed a rejoinder-affidavit reiterating its contentions made in the writ petition. In the rejoinder affidavit, it was further contended by the petitioner that the RBI serves as the Nodal Agency to all Banks and Financial Institutions. All Banks are licenced to operate as per the policy of RBI. The respondent Bank is required to follow and implement all such circulars and schemes that may be released by the RBI. The petitioner reiterated that the respondent Bank did not consider the RBI instructions including the Emergency Credit Line Guarantee Scheme to enable entrepreneurs like the petitioner to get credit upto 20% of the outstanding and instead sought to reduce the credit limit of the petitioner from Rs. 5.50 cr to 4.00 crs and therefore, it had failed to discharge his duties under the Banking Regulation Act, 1949.

5. The learned counsel for the petitioner has urged before this Court that any circular issued by the RBI is binding on any bank including the respondent

No. 4. Therefore, the failure of the bank to extend the Resolution Framework 2.0 scheme is contrary not only to the provisions of the banking Regulations Act is in violation of the law laid down by the Apex Court. The learned counsel for the petitioner refers to the judgment of the Apex Court in ***Central Bank of India Vs. Ravindra*** reported in (2002) 1 SCC 367 to contend that the RBI circulars and directives are binding on all banks and they are required to diligently enforce and implement any such directives or schemes as may be initiated by the RBI. The learned counsel for the petitioner also refers to the Judgment of the Apex Court in Gajendra Sharma Vs. Union of India & Ors [W.P(C) No. 825/2020] in support of her contentions that where the Government of India has taken specific measures to mitigate the hardships and distress faced by the various business entities like the petitioner during the COVID-19 pandemic situation, the banking authorities were duty bound in law to enforce such measures brought in by the Government of India and the banking authorities are responsible to ensure that all the steps are taken to implement the decision of the Government of India so that the benefits as contemplated by the Government of India percolates to those for whom the financial benefits have been envisaged and extended. In the same context, the learned counsel for the petitioner presses into service the Judgment of the Apex Court rendered in M/S Sardar Associates & Ors Vs. Punjab and Sind Bank & Ors reported in (2009) 8 SCC 257 to buttress her contention that when

guidelines are issued by the RBI, a right is created in favour of the borrower. It is, therefore, submitted that the benefits conferred under the RBI Circular No. DOR.STR.REC.12/21.04.048/2021-22 regarding Resolution Framework 2.0 and the Pre packaged Insolvency Resolution Process under Insolvency and Bankruptcy Code, 2016 has created a right in favour of the petitioner. The petitioner is entitled to have his rights being implemented by the bank and inspite of the same being brought to the knowledge of the bank, the bank chose to ignore the directives issued under the RBI Resolution Framework 2.0 and Insolvency and Bankruptcy Code, 2016 and instead initiated proceedings under SARFAESI Act. The right of the petitioner under these circulars having not been enforced, the present writ petition is filed praying for writ of mandamus as well as writ of Certiorari for setting aside the proceedings initiated under SARFAESI Act.

6. Per contra, Mr. A. Ganguly, learned Standing Counsel for the Department disputes the contentions of the learned counsel for the petitioner. He submits that in so far as the RBI circulars directives are concerned, it is evident from the counter affidavit filed that the bank had responded to his request, however it is the petitioner who failed to respond to the email and make the necessary deposits sought for as a consequence whereof the scheme could not be implemented. There was no fault on the part of the bank. The petitioner was aware of the requirements under the Scheme vide the email dated 30.12.2021

of the bank. In so far as the Pre packaged Insolvency Resolution Process initiated by the Government of India under the insolvency proceedings is concerned, the learned counsel for the bank referring to the provisions of the IBC, 2016 submits that the petitioner being a proprietorship firm is not eligible to be included under the said scheme. The said scheme is open only for corporate entities like a company or a limited liability partnership and the petitioner does not fall under the criteria prescribed. Therefore, there is no question of proceedings or initiating under the IBC, 2016 scheme.

7. The learned counsel for the parties have been heard. Pleadings on record have carefully perused. We have given our anxious thoughts to the submissions made and the Judgments cited at the bar.

8. There is no doubt that the entire country was affected because of the COVID-19 pandemic situation and the lockdowns were enforced to contain the pandemic. There is no doubt that several business entities including the entities like the petitioner may have suffered losses because of the COVID-19 pandemic situation. It is because of such financial distress faced by the entities like the petitioner that the Government had time and again brought out different schemes to ameliorate the grievances and the hardships faced by the business entities.

9. There is no dispute that the RBI by circular No. DOR.STR.REC.12/21.04.048/2021-22 had brought out resolution framework

2.0- Resolution of COVID-19 related stress of Micro, Small and Medium Enterprises (MSMEs). For the purposes of this case Sub Clause (vi) & (vii) of clause 2 are relevant. The same are extracted below:

"(vi) The restructuring of the borrower account is invoked by September 30, 2021. For this purpose, the restructuring shall be treated as invoked when the lending institution and the borrower agree to proceed with the efforts towards finalizing a restructuring plan to be implemented in respect of such borrower. The decisions on applications received by the lending institutions from their customers for invoking restructuring under this facility shall be communicated in writing to the applicant by the lending institutions within 30 days of receipt of such applications. The decision to invoke the restructuring under this facility shall be taken by each lending institution having exposure to a borrower independent of invocation decisions taken by other lending institutions, if any, having exposure to the same borrower.

(vii) The restructuring of the borrower account is implemented within 90 days from the date of invocation."

10. It is seen that as per the said circular, the restructuring is to be invoked or shall be invoked when the lending institution and the borrower agree to proceed with the efforts towards finalizing or restructuring plan to be implemented in respect of such borrower. The petitioner submits that it had applied before the respondent bank for implementation of the said scheme by an application dated 21.07.2021. In response to the said application, the bank had replied by way of an e-mail, a copy of which is found at Annexure-A page

49 of the counter affidavit. By the said email the petitioner was requested to deposit the balance amount immediately required for upgradation of the account as detailed with an application immediately so that the restructuring as per the scheme may be implemented. Thereafter, no response from the petitioner was forthcoming to suggest that the petitioner had taken necessary steps as required under the RBI circular dated 05.05.2021 so that the restructuring as sought for can be implemented in the interest of the petitioner.

11. On a pointed query by this Court, the learned counsel for the petitioner submitted that she had no instructions as to whether any further communication was resorted to by the petitioner in response to the email issued by the bank. In so far as the claim of the petitioner that the Pre packaged Insolvency Resolution Process brought out by the Government of India under the IBC, 2016 is concerned, a bare perusal of the Notification dated 09.04.2021 read with the IBC, 2016 reveals that it is meant for a corporate applicant. Under Section 5(5) of the IBC 2016, the corporate applicant means:

- (a) corporate debtor; or
- (b) a member or partner of the corporate debtor who is authorized to make an application for the corporate insolvency resolution process [or the pre-packaged insolvency resolution process, as the case may be,] under the constitutional document of the corporate debtor; or

- (c) an individual who is in charge of managing the operations and resources of the corporate debtor; or
- (d) a person who has the control and supervision over the financial affairs of the corporate debtor;

12. As such by definition prescribed under the IBC, 2016 the applicant does not come within the definition of corporate applicant. Consequently, the insolvency and Bankruptcy (pre-packaged insolvency) Rules, 2021 are not applicable in so far as the petitioner is concerned.

13. The contention of the petitioner that the benefit under the Emergency credit Line Guarantee Scheme which was initiated by the Government of India was also denied to the petitioner. Although an averment in support of such contention is not pleaded in the writ petition initially but the same has been brought on record by way of a rejoinder affidavit. However, a careful perusal of the rejoinder affidavit reveals that there is no statement that the petitioner made necessary application under the Emergency credit Line Guarantee Scheme to avail the benefit as provided under the said scheme. It is merely contended that the petitioner has been deprived of the benefits under the said scheme by the bank. The learned counsel for the petitioner also has not been able to bring it to the notice of the Court any such application that has been preferred by the petitioner seeking benefits under the said scheme, which the petitioner claims had accrued during the COVID-19 pandemic phase. The writ

petition itself was filed on 13.06.2022 and the rejoinder affidavit was filed on 21.11.2022. The prayers made in the writ petition in so far as issuance of directions to initiate proceedings of Pre-Packaged Insolvency Resolution Process under IBC, 2016 are evidently not available to the petitioner as the petitioner is not a corporate entity as per the definition in IBC 2016. The benefit sought by the petitioner under the RBI Circular of Resolution Framework 2.0 has not been initiated by the petitioner himself pursuant to the email issued by the bank requesting the petitioner to make necessary deposits for upgradation of account in order to restructure it as per the scheme. This email was issued on 30.12.2021. No averment or submission is made on behalf of the petitioner as to why the petitioner was sought to approach this court in June 2021 only even though the response from the bank was issued as far back as 30.12.2021.

14. Under such circumstances, it appears that this writ petition is directed solely as a ploy to delay the further proceedings initiated under the SARFAESI Act which has already been initiated against the petitioner. The SARFAESI Act is a complete code in itself and it has statutory Authorities prescribed for redressal of grievances raised by the petitioner in the writ petition.

15. This Court is of the considered view that there was sufficient laches on the part of the petitioner in pursuing the matter before the bank in right earnest in terms of the schemes which was floated by the RBI. The writ Court

being a Court of equity cannot come to the aid of a litigant is not diligent or is guilty of laches. Where the SARFAESI Act provides for efficacious alternative remedy, ordinarily a writ Court will not exercise its jurisdiction under Article 226. In the facts and circumstances of the present case, the writ petitioner has not been able to demonstrate as to why the powers under Article 226 should be invoked by this Court without the writ petitioner exhausting the statutory alternative remedies as provided for under the SARFAESI Act. In this context, the Judgment of the Ape Court rendered in ***Authorized Officer, State Bank of Travancore & Anr. Vs. Mathew K.C.***, reported in ***(2018) 3 SCC 82*** is very relevant. In this case, the Apex Court held that it is the solemn duty of the court to apply the correct law without waiting for an objection to be raised by a party, especially when the law stands well settled. Any departure, if permissible, has to be for reasons discussed, of the case falling under a defined exception, duly discussed after noticing the relevant law. In financial matters grant of ex parte interim orders can have a deleterious effect and it is not sufficient to say that the aggrieved has the remedy to move for vacating the interim order. Loans by financial institutions are granted from public money generated at the taxpayer's expense. Such loan does not become the property of the person taking the loan, but retains its character of public money given in a fiduciary capacity as entrustment by the public. Timely repayment also ensures liquidity to facilitate loan to another in need, by circulation of the

money and cannot be permitted to be blocked by frivolous litigation by those who can afford the luxury of the same.

16. While there is no quarrel with the proposition of law laid down by the Apex Court which are pressed into service by the learned counsel for the petitioner, in the facts of the case as described above, the Judgments cited will have no application. Time and again, the Apex Court has held that when a SARFAESI proceeding is initiated ordinary to the writ Courts would loathe to interfere save and except the exceptions curbed out by the Apex Court in Authorized Officer, State Bank of Travancore & Anr. (Supra), the apex court has precisely laid down the circumstances under which the writ court should interfere in SARFAESI matters.

17. Since in the facts and circumstances of this case, the present does not fall within the exceptions curbed out by the apex court, this Court would refrain from passing any orders in respect of the SARFAESI proceedings initiated by the bank against the petitioner.

18. For the aforementioned reasons, the writ petition fails and the same is therefore, dismissed as being devoid of any merit. No order as to cost.

JUDGE

CHIEF JUSTICE

Comparing Assistant