

In the High Court of Punjab and Haryana at Chandigarh

CWP No. 26542 of 2022 (O&M)

Reserved on : 09.1.2024

Date of Decision: 22.1.2024

Gunjan Bagga

.....Petitioner

Versus

State of Haryana and others

.....Respondents

**CORAM: HON'BLE MR. JUSTICE SURESHWAR THAKUR
HON'BLE MR. JUSTICE LALIT BATRA**

Argued by: Mr. Japsahej Singh, Advocate
for the petitioner.

Mr. Pardeep Prakash Chahar, Sr. DAG, Haryana.

Mr. J.S.Mehndiratta, Advfocate
for respondents No. 2 to 4.

SURESHWAR THAKUR, J.

1. In the instant petition, the petitioner prays for setting aside the classification/declaration of his account, as NPA on 12.1.2021. The petitioner further seeks the quashing of the notices dated 10.6.2022, 7.10.2022, and, 12.10.2022, as, issued under Section 13(2) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short 'SARFAESI Act') 2002 along with all subsequent proceedings arising therefrom.

Facts of the case

2. It is averred in the petition, that the petitioner was a proprietor of firm named, and, styled, as M/s S.B. Steels and Engineering Works. The said firm was registered on on 3.11.2001. The credit facility of Rs. 25 crores became sanctioned to the petitioner, on 22.9.2017, which was further enhanced to Rs. 30 crores, on 26.3.2019. It is further averred therein, that

upon the advice of the respondent-bank, the petitioner, vide Certificate of Incorporation dated 16.1.2020, thus formed a Private Limited Company under the name and style of M/s SBA Industries Pvt. Ltd., whereupon he took over the assets and liabilities of the firm, and, a No Objection Certificate was issued by the bank concerned, on 18.5.2020. The respondent bank had also issued a back dated Sanction Letter on 26.5.2020, in the name of the firm which had already become non-existent. However, the bank prepared the Credit Monitoring Arrangement (CMA) dated 19.10.2020 in the name of the company. It is further averred, that the respondent bank without any notice or intimation, withdrew the NOC dated 18.5.2020, on 15.1.2021. The petitioner had filed a Civil Suit bearing No. CS 923/2021 against the respondent bank, wherein, the trial Court restrained the respondent bank from taking coercive action, however, yet notice under Section 13(2) of the SARFAESI Act became issued on 10.6.2022, thus during the subsistence of the order (supra).

3. However, the said suit filed by the petitioner became dismissed. Aggrieved thereagainst, the petitioner preferred an appeal, and, vide order dated 7.10.2022, the respondent bank was restrained from taking any coercive action. However, notice under Section 13(4) of the SARFAESI Act became issued on the same very day i.e. 7.10.2022 and on 12.10.2022. However, the insolvency proceedings vis-a-vis the company became initiated under Section 9 of the Insolvency and Bankruptcy Code, 2016 (for short 'the IBC Code, 2016), and, the apposite moratorium became imposed vide order dated 28.6.2022. The respondent bank submitted and got accepted their claim for the outstanding amount against the company. It is further averred in the petition that vide order dated 23.11.2022, as, passed by this

the firm (which had ceased to exist). The respondent bank preferred an SLP No. 4275 of 2020 against the said order, which was dismissed by the Hon'ble Apex Court vide order dated 27.3.2023.

Submissions of the learned counsel for the petitioner

4. The learned counsel for the petitioner submits, that the respondent-bank, has taken contradictory stands against the petitioner, as it had first sanctioned credit facility to the petitioner firm, and, thereafter NOC had been issued for the creation of a private limited company (supra) in substitution of the hitherto registered firm. Thereafter the accounts of petitioner's firm became declared as NPA on 12.1.2021, and, the apposite conversion NOC assigned to the company by the respondent-bank was withdrawn on 15.1.2021. He further submits, that the non-liquidation of the credit facility extended by the respondent-bank, constitutes the claim made, by the bank before the NCLT. The counsel also submits that the provisions of IBC Code 2016, once invoked and CIRP once initiated, shall have an overriding effect on all existing laws, thus by virtue of Section 238 of the IBC Code 2016. It is further contended that the respondent bank could not have withdrawn the NOC without issuing any prior notice or after the company had already been incorporated. The respondent bank despite the firm being non-existent had issued the impugned notices to the firm concerned. He further submits, that the account of the petitioner firm could not have been declared NPA as there is no overdue amount beyond Rs. 30 crores. i.e. the sanctioned limit, and, that ECLGS sanction of Rs. 3.73 crores never became released to the petitioner.

Submissions of the learned counsel for the respondent-bank

5. The learned counsel for the respondent-bank submits;

(i) That the relief sought by the petitioner, is not maintainable, as

the company, had no ownership rights over the mortgaged properties concerned. Therefore, the pendency of CIRP proceedings before the NCLT, Chandigarh, and, the operation of the moratorium, do not absolve the petitioner of its liability, thus as the sole proprietary borrowing firm.

(ii) That the conditions stipulated in the conditional NOC, were not adhered to, by the petitioner.

(iii) That a specific alternative remedy under a specific statute is available to the petitioner, thus the instant petition is not maintainable. It is further contended, that the writ jurisdiction of the High Court, does not extend, to private parties, and, is limited only to an entity performing a “Public Function”.

(iv) That the petitioner has instituted multiple frivolous litigations against the respondent-bank to defeat the rights of the respondent-bank.

(v) That the properties No. (i) to (iv), as mentioned in the impugned notices were mortgaged to the lending institution by the petitioner in his personal capacity, whereas, property No. (v) was mortgaged by the petitioner being a partner of M/s Yohan Industries, wherein, the present petitioner and his father late Mr. Ashok Bagga were the partners.

(vi) That the properties mentioned at Sr. No. (i) to (iv) in the impugned notices, were transferred through transfer/gift deed dated 22.9.2017, in favour of the petitioner by late Mr. Ashok Bagga (father of the petitioner) and by Mrs. Shashi Bagga (mother of the petitioner). However, the petitioner approached the respondent-bank with a proposal, that credit facilities may be enhanced for such properties, and, that the proprietorship concerned, may be converted into a private limited company. Resultantly, the petitioner incorporated the new entity and applied to the respondent-bank

firm to M/s SBA Industries Private Limited (company).

(vii) That, though the respondent-bank had issued a conditional NOC on 18.5.2020, but since the imperative conditions, as echoed therein, remained unfulfilled at the instance of the present petitioner, thus for the well transfer(s) of credit facilities from the Firm to the Company. Therefore, subsequently, the said conditional NOC became withdrawn by the respondent-bank on 15.1.2021.

(viii) That upon repeated defaults in the payment towards the Credit Facility/Loan, by the petitioner, thereby the loan account was classified as Non-Performing Asset on 12.1.2021. Thereafter the respondent-bank served a Loan Recall Notice-cum-Guarantee Invocation Notice to the borrower, on 18.5.2021.

(ix) That the respondent-bank had issued a demand notice dated 10.6.2022 under Section 13(2) of the 'SARFAESI Act' to the petitioner (in capacity as the proprietor of the firm) along with other guarantors.

(x) That some of the partners of the firm filed an application under Section 23 of the Maintenance and Welfare of Parents and Senior Citizens Act, 2007 (for short 'MWPSA Act'), seeking revocation of the gift/transfer deed, thus on the premise, that the imperative/*sine qua non* conditions, spelt therein remained unabided by the present petitioner, thereupon, the said gift deed became revoked on 13.1.2021, thus by the Maintenance Tribunal concerned. However, the petitioner preferred an appeal against the said order, which was also dismissed through an order made thereon on, 4.1.2022.

(xi) That the material fact, inasmuch as, the revoked gifted/transferred properties being mortgaged, has been suppressed from the

(xii) That though the said revocation was challenged by filing CWP No. 139 of 2023. However, on the said writ petition, this Court after hearing the petitioner, became satisfied, that interim protection needs to be made with respect to the relevant properties. Accordingly, a stay order was passed on 9.1.2013 thereby restraining the alienation of the gifted/transferred properties, which were the subject matter of the gift deed revoked by the Maintenance Tribunal concerned.

(xiii) That the operational creditors of the company initiated the Corporate Insolvency Resolution Process (for short 'CIRP') under Section 9 of the IBC Code 2016, against the company, before the National Company Law Tribunal, Chandigarh (for short NCLT, Chandigarh). Accordingly, the company was admitted into CIRP on 28.6.2022. Consequently, moratorium was imposed, and, an Insolvency Resolution Professional was appointed. It is also submitted, that despite the petitioner being admitted into CIRP, yet the respondent-bank being the sole creditor of the proprietary concerned, remained unintimated about the said factum. The respondent-bank becoming aware of the ongoing CIRP proceedings, had proceeded to file a claim before the NCLT, Chandigarh. However, it is submitted, that the said claim was withdrawn by the latter on 5.1.2023. The said withdrawal has been argued to be a sequel of the subjudice IBC proceedings rather becoming leveraged by the present petitioner, thus to defeat the recovery rights of the respondent-bank.

6. On the basis of the above made submissions, this Court is of the profound view, that the hereinafter substantial questions of law are required to be formulated, and, also are required to be answered.

7. (i) Whether in terms of the moratorium order becoming passed on 28.6.2022, thus by the NCLT, Chandigarh,

whether thereby in terms of Section 238 of the IBC Code, 2016, provisions whereof stand extracted hereinafter, thus they have an over riding effect, so as to bar the further continuation of proceedings, thus under the SARFAESI Act, thus for the recovery of the financial debt ?

“The provisions of this Code shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law.”

- (ii) Whether the verdict made by the Hon’ble Apex Court in ***Indian Overseas Bank versus M/s RCM Infrastructure Ltd. and another*** reported in ***2022 AIR (Supreme Court) 2687***, wherein, there occurs a declaration, that the provisions of Section 238 of the IBC Code, 2016, thus have an overriding effect over other laws, inasmuch as, also to the statutory recourse mandate under the Sarfaesi Act, thus is applicable or is not applicable to the facts at hand ?
- (iii) Whether the admission of the petitioner into CIRP by the Company Law Appellate Tribunal concerned, leading the latter to make a moratorium, thereby precludes the lending institution to initiate proceedings under the SARFAESI Act, before the DRT concerned ?
- (iv) Whether the present petitioner has practiced *suggestio falsi and suppressio veri*, inasmuch as, his concealing, thus from the Maintenance Tribunal concerned, that through his mortgaging the properties, which became

gifted to him by his parents, yet such gifts becoming in collusion with the present petitioner, rescinded by his parents, thus frustrating the lending institution to redeem the moneys released into the loan account of the present petitioner ?

Reasons for rejecting the submissions addressed before this by the learned counsel for the petitioner, and, for accepting the submissions addressed before this by the learned counsel for the respondent-bank. Also the reasons for answering the substantial question of law against the petitioner and in favour of the respondent bank.

8. For the reasons to be assigned hereinafter, the overriding effect assigned by the provisions (supra), as carried in the IBC Code, 2016 vis-a-vis other laws relating to recovery of loans from the borrowers, thus by the banking institutions, thereby also foreclosing rights of the lending institutions to initiate proceedings under the SARFAESI Act, rather does not apply to the facts of the instant writ petition.

9. The prime reason for making the above conclusion, erupts from a reading of paragraph 24, of the verdict made by the Hon'ble Apex Court in *Indian Overseas Bank's* case (supra), para whereof becomes extracted hereinafter, wherein, it is mandated that the imposition of a moratorium, thus on commencement of CIRP, though creates a prohibition against launching of any action, thus to recover or enforce any security interest created by the "corporate debtor" in respect of its property.

"It is thus clear that after the CIRP is initiated, there is moratorium for any action to foreclose, recover or enforce any security interest created by the Corporate Debtor in respect of its property including any action under the SARFAESI Act. It is clear that once the CIRP is commenced, there is complete prohibition for any action to foreclose, recover or enforce any

security interest created by the Corporate Debtor in respect of its property The words “including any action under the SARFAESI Act” are significant. The legislative intent is clear that after the CIRP is initiated, all actions including any action under the SARFAESI Act to foreclose, recover or enforce any security interest are prohibited.”

10. Therefore, a keenest reading of the above speakings, as made in the above extracted paragraph of the verdict (supra), reveals, that the relevant foreclosure, against recovery or enforcement of any security interest, thus on an apposite moratorium being imposed, thus on commencement of CIRP, is galvanized, only when the lendings are made to “a corporate debtor in respect of its property”. Therefore, the mandate (supra), and/or the overriding effect, assigned to the provisions of Section 238 of the IBC Code, 2016, is to thus negate the rights of the lending institutions, to in the face of the imposition of apposite moratorium, to rather launch proceedings under the SARFAESI Act against the present petitioner, hence would become fully activated, but only when the present petitioner, thus evidently was a corporate debtor, or when the property which became mortgaged, was the property of the corporate entity, but was not the personal property of the mortgagor. However, the present petitioner is neither a corporate debtor nor the property of the corporate debtor, becomes mortgaged to the lending institution, thus leading the latter to release the moneys, into the loan account, of the present petitioner. In consequence, the mandate made by the Hon’ble Apex Court in *Indian Overseas Bank’s* case (supra), is not applicable to the above evident facts at hand.

11. Though, the conversion of hitherto sole proprietor firm, was made on the conditional NOC, which became issued on 18.5.2020, by the lending institution vis-a-vis the present petitioner’s firm, but since evidently

the said NOC, was a conditional NOC, which but required that the borrower makes the completest compliance to the spoken therein conditions. However, apparently when the spoken therein conditions remained uncomplied, therefore, the conditional NOC was but required to be withdrawn, and, became so rescinded on 15.1.2021.

12. Though, the learned counsel for the petitioner has argued, that a notice prior to the withdrawal of the NOC was required to be served, upon the present petitioner, but even if assumingly that no prior notice was served, upon the present petitioner, and, thereby assuming that there was a purported breach to the principles of natural justice. However, the said purported breach, rather is overcome by the factum, that if the NOC, for the relevant purpose, was a conditional one, and, if there was a prolonged intentional non-compliance to the imperative conditions, set-forth therein, thereby there was no occasion for the respondent bank to issue any prior notice to the withdrawal of the NOC. Significantly when therebys, there would be prolongation of recoursable legal avenues thus to the respondent-bank, for therebys its seeking redemption of the mortgaged moneys, inasmuch as, through its adopting, and, recouring the statutory mechanism, as contemplated in the SARFAESI Act. Conspicuously also when any prolongation in launching of recovery proceedings through employments of ill-stratagems by the present petitioner, but would defeat an expeditious bad debt remediation, rather being made, which rather is the holistic purpose behind the enactment of the SARFAESI Act. In consequence, any purported breach to the principles of natural justice becomes completely inconsequential.

13. Be that as it may, since on the revocation of the conditions in the NOC, it had an ill-cascading effect, upon the conversion of the hitherto

registered partnership firm, into a corporate entity, thus also begetting annulment, thereby when the registered partnership firm concerned, was restored to its original nomenclature. Therefore, thereby too, when the partnership firm is not seek a corporate debtor, thereby also the admission of the corporate entity into CIRP by the NCLT, Chandigarh, may not be construed to be lawful nor also thereby the apposite moratorium holds any sway or clout, besides thereby the overriding effect assigned to the provisions (supra), as carried in the IBC Code, 2016, against the launching of proceedings by the lending institution under the SARFAESI Act, also does not hold any leverage.

14. The further effect of the above, is that, when in the submissions (supra) addressed before this Court, by the learned counsel for the respondent-bank, are also supported by an affidavit, to that effect, thus accompanying the corresponding reply, furnished to the instant writ petition, by the respondent-bank, thereupon when in terms of the said affidavit, the hereinafter properties, thus were the personal properties of the present petitioner, besides when property No. (v) was mortgaged by the present petitioner, being the partner of M/s Yohan Industries, a partnership firm in which the petitioner and his late father, were the partners.

- (i) *All the pieces and parcel of land at Plot bearing No. 418, situated in the residential colony known as Sector 15, Urban Estate, Faridabad, Teh. and District Faridabad, Haryana.*
- (ii) *All the pieces and parcel of land at Plot bearing No. 5-G/35-A situated at NIT Faridabad, Haryana.*
- (iii) *All the pieces and parcel of land on the northern side of the portion of property bearing No. 5-G/35 situated in New Township, Faridabad, Teh. and District Faridabad, Haryana.*
- (iv) *All the pieces and parcel of land with boundary wall and old construction measuring 238 sq. yds. Situated at Bagga Complex, Plot No. 34-A, Block 5-G, near St. Joseph's Convent School, NIT Faridabad, Haryana.*
- (v) *All the pieces and parcel of land at Plot bearing No. 263,*

*situated in the Industrial Model Township, Phase-II,
Sector-3, Bawal, Haryana.*

15. Consequently, when the properties at Sr. No. (i) to (v), thus were mortgaged in pursuance to a registered deed of gift, being made in favour of the present petitioner, by his parents, which was subsequently annulled in the proceedings being drawn by the parents of the petitioner, before the Tribunal concerned. However, prima facie it appears, that when one of the donors i.e. father of the present petitioner, namely late Mr. Ashok Bagga, was also the guarantor of the loan facility, as assigned to the present petitioner, yet he along with his wife, but to ensure the stalling of the debt recovery proceedings, thus in collusion with the present petitioner, chose to seek annulment of the said gift deed. The above is apparent from the fact, that the mortgage made to the respondent-bank of the gifted properties, but became concealed by the parents of the present petitioner from the Tribunal concerned, which made the order of revocation in respect thereof.

16. It appears, that thereby prima facie the parents of the present petitioners, rather in collusion with the present petitioner, who is their son, despite theirs making a gift deed in favour of their son, rather to enable him to secure borrowing from the lending institution concerned, but on his mortgaging their property(ies), yet reiteratedly theirs intentionally attempting to frustrate the relevant recovery of the lendings, as made to the present petitioner, by the lending institution, thus through adopting the ill-stratagem of seeking revocation of the gift deed. Irrespective of the above, as stated (supra), when this Court for reasons (supra), has held that the overriding provisions of Section 238 of the IBC Code, 2016, are inapplicable to the facts in hand, besides when it has also been held by this Court, that the mandate made by the Hon'ble Apex Court in *Indian*

Therefore, this Court answers the above substantial questions of law against the present petitioner, and, in favour of the respondent-bank.

17. Even though CWP No. 139 of 2023, has been filed before this Court, against the concurrent orders revoking the gift deeds, as made by the parents of the present petitioner, but enclosing therein, the apposite mortgaged properties, and, though therein an interim order became passed against the concerned, against the making of alienation of the said properties, but in the face of the above revocation being collusive, thus it is open to the lending institution, to seek the promptest closure of the said writ petition, so that may be on the above premise of apposite collusiveness, thereby the said mortgage created over the gifted properties, becomes enhanced, thus for ensuring the recoveries therefrom being made of the mortgage moneys.

18. It is clarified, that though an interim order became made by this Court, thus restraining the respondent-bank from initiating recovery proceedings under the SARFAESI Act, against the present petitioner, and, though the said order became affirmed by the Hon'ble Apex Court. However, the above order was made during the pendency of the instant writ petition, yet when this Court has, for reasons (supra), declined the writ reliefs to the petitioner, thereby to the considered mind of this Court, the said order restraining the respondent-bank against its launching recovery proceedings under the SARFAESI Act, against the present petitioner, does not hold the relevant consequentiality, as the said interim order merges into the final verdict, as made on the instant writ petition.

19. Moreover, in terms of the verdict made by the Hon'ble Apex Court in ***Phoneix ARC Private Limited versus Vishwa Bharati Vidya***

maintainable against the banks, thus against their drawing statutory measures, for making recovery(ies) of the lendings made to the borrowers concerned, rather on the banks invoking the SARFAESI Act, rather thereby the borrower has been spelt therein, to be at liberty to avail the remedy alternate to the writ remedy, inasmuch as, the borrower availing the remedy constituted under the SARFAESI Act. Resultantly, thereby too the instant petition is not maintainable, the same being a gross abuse of the process of law.

20. Moreover, thereby too, the institution of the civil suit concerned, in respect of the subject matter covered within the domain of the SARFAESI Act, is also not a workable remedy. In consequence, the outcome, if any, of the civil suit concerned, instituted in respect of the subject matter, may also be inconsequential. In sequel, the instant petition is declared to be not maintainable, but leaving liberty to the present petitioner to access the statutory remedies, thus before the DRT concerned.

21. In aftermath, this Court finds no merit in the instant petition, and, is constrained to dismiss it. Accordingly, the instant petition is dismissed, but with liberty aforesaid to the petitioner.

22. No order as to costs.

23. All pending applications, if any, are also disposed of.

(SURESHWAR THAKUR)

JUDGE

(LALIT BATRA)

JUDGE

January 22, 2024

Gurpreet

Whether speaking/reasoned : Yes/No
Whether reportable : Yes/No