

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ W.P.(C) 8031/2016 and CM APPL. 33321/2016

Reserved on: 14.12.2016

Date of decision: 08.05.2017

IN THE MATTER OF:

M/S RAJPUR HYDRO POWER LTD AND ORS Petitioners
Through: Mr. Muneesh Malhotra, Advocate with
Mr. Rituraj Shahi, Advocate

versus

M/S PTC INDIA FINANCIAL SERVICES LTD Respondent
Through: Mr. Rajeev Mehra, Senior Advocate
with Mr. Mayank Mishra, Mr. Ritunjay Gupta
and Ms. Shruti Aggarwal, Advocates

**CORAM
HON'BLE MS.JUSTICE HIMA KOHLI**

HIMA KOHLI, J.

1. The petitioner No.1, a company registered under the Companies Act, 2013, had started the construction of Rajpur Hydro Electrical Project in Rajpura Village, Tehsil Shimla, District Himachal Pradesh in December, 2011. On 28.3.2013, the petitioner No.1/company entered into an agreement with the respondent, M/s PTC India Financial Services Ltd. for sanction of a term loan of Rs.60 crores, out of the total project cost of Rs.85.75 crores, for a period of 30 months reckoned from 31.03.2013. In

lieu of the term loan, the petitioner No.1/company created a first charge by way of mortgage in favour of the respondent over all the immovable and movable properties and assets in respect of the project site. The petitioners state that by 01.11.2015, the respondent had disbursed a sum of Rs.47 crores. By then 80% of the project was already complete but the balance loan amount was not being released by the respondent for completion of the project. Instead, the respondent served a notice dated 17.06.2016 on the petitioners threatening to acquire 100% equity shares of the promoters in the petitioner No.1/company.

2. Alleging that the respondent has failed to disburse the loan amounts on time despite several requests, which resulted in bringing the project to a grinding halt, the petitioners have filed the present petition praying *inter alia* that a writ of mandamus be issued to the respondent directing it not to proceed against the petitioner No.2, Director of the petitioner No.1/company and petitioner No.3, wife of the petitioner No.2, by acquiring their 100% equity share capital, or take any coercive steps against the assets of the petitioner No.1/company. Additionally, the petitioners seek directions to the respondent to disburse the complete sanctioned credit facilities and provide for overall costs of the project on account of the alleged non-disbursal of the sanctioned loan as per the Agreement dated 28.3.2013.

3. Notice was issued on the present petition on 15.09.2016. Counsel for the respondent was present on the said date and had sought time to file a counter affidavit, which was duly filed. On 11.11.2016, Mr. Rajeeve

Mehra, learned Senior Advocate appearing for the respondent had questioned the maintainability of the present petition on the ground that the respondent is neither a 'State' nor a 'public authority' or a 'government agency' and also on the ground that the petition as filed, is not maintainable in law. In view of the aforesaid preliminary objections, the parties were first directed to address arguments on the maintainability of the present petition.

4. Mr. Rajeev Mehra, learned Senior Advocate appearing for the respondent argued that the present petition is not maintainable against the respondent. He sought to throw light on the constitution of the respondent to urge that it is a private entity, not involved in any public function or duty; that it is not an '*authority*' within the meaning of Article 226 of the Constitution of India; that it is not a '*State*' within the meaning of Article 12 of the Constitution of India; that it does not fall in the ambit of an "*instrumentality of the State*" or a "*public authority*"; that it is not a government owned or controlled bank; that no shares in the respondent are held by the Central Government or the State Government; that the respondent is not a nationalized bank/scheduled bank/public financial institution or created under the Statute; that it does not discharge any public function or public duty in its usual course of business operations and that its activity of granting loans to several entities is a purely commercial activity, which is private in character. The writ petition was also opposed on behalf of the respondent on the grounds that it is a secured lender under the Securitization and Reconstruction of Financial Assets and Enforcement

of Security Interest Act, 2002 (hereinafter referred to as the “SARFAESI Act”) and therefore, the remedies of the petitioner, being a borrower, lie under the Statute and not by seeking prerogative writs under Article 226 of the Constitution of India.

5. To fortify the aforesaid submissions, the following decisions were cited on behalf of the respondent:-

- (i) State of Bihar and Ors. vs. Jain Plastics and Chemicals Ltd.; **(2002) 1 SCC 216**
- (ii) G. Bassi Reddy vs. International Crops Research Institute and Anr.; **(2003) 4 SCC 225**
- (iii) Federal Bank Ltd. vs. Sagar Thomas and Ors.; **(2003) 10 SCC 733**
- (iv) Binny Ltd. and Anr. vs. Sadasivan and Ors.; **(2005) 6 SCC 657**
- (v) United Bank of India vs. Satyawati Tondon and Ors.; **(2010) 8 SCC 110**
- (vi) K.K. Saksena vs. International Commission on Irrigation and Drainage and Ors.; **(2015) 4 SCC 670**

6. Per contra, Mr. Muneesh Malhotra, learned counsel for the petitioners controverted the stand taken by the respondent that it is not an authority or a State within the meaning of Article 12 of the Constitution of India and it is not amenable to writ jurisdiction under Article 226 of the Constitution of India. He contended that on the contrary, the respondent/company is directly controlled by the Government being a

subsidiary of M/s PTC India Ltd (formerly known as Power Trading Corporation of India Ltd.); that four Central Government Public Sector Undertakings promote the respondent's parent company, which is completely controlled by the Government of India as an IRS Officer was appointed the Chairman of M/s PTC India Ltd. by the Government of India on deputation basis in the year 2003 and a serving Joint Secretary in the Ministry of Power, Government of India is presently working as a Director of M/s PTC India Ltd, who also happens to be a nominee Director of the Ministry of Power; that the Directors/independent Directors/nominee Directors of M/s PTC India Ltd. are also Ex-Technocrats and former Secretaries in the Government of India and have been working with Public Sector Undertakings; that as per the statement of shareholding pattern of the respondent, M/s PTC India Ltd. holds 60% shares and other Central Government/State Government Undertakings namely, NTPC, PFC, NHPC, Power Grid Corporation etc. collectively hold 16.22% shares.

7. It was therefore urged on behalf of the petitioners that the Government of India exercises a deep and pervasive control over the affairs of the respondent through its Public Sector Undertakings and the officials appointed as Directors in the respondent/company play a vital role in the affairs of the respondent; that the Government being involved in the formation of the respondent, its management, control and financial assistance extended to the respondent, makes it amenable to writ jurisdiction and resultantly, the contractual obligations cast on the

respondent can well be examined under Article 226 of the Constitution of India.

8. To fortify the aforesaid pleas, reliance was placed by Mr. Malhotra, learned counsel for the petitioner on the following decisions:-

- (i) Motilal Padampat Sugar Mills Co. Ltd. vs. State of Uttar Pradesh and Ors.; **AIR 1979 SC 621**
- (ii) Gujarat State Financial Corporation vs. Lotus Hotels Pvt. Ltd.; **AIR 1983 SC 848**
- (iii) Mysore Paper Mills Ltd. vs. Mysore Paper Mills Officers' Association and Anr.; **2002 (2) SCC 167**
- (iv) ABL International Ltd. and Anr. vs. Export Credit Guarantee Corporation of India Ltd and Ors.; **(2004) 3 SCC 553**
- (v) State of Uttar Pradesh and Anr. vs. Radhey Shyam Rai; **(2009) 5 SCC 577**

9. This Court has given its thoughtful consideration to the arguments advanced by the counsels for the parties and carefully examined the decisions cited by both sides.

10. Article 226 of the Constitution of India that deals with the powers of the High Courts to issue certain writs, orders or directions is meant to enforce any of the rights that are conferred under Part III of the Constitution of India and for any other purpose. There are several authoritative judicial pronouncements that have held that a writ petition can be filed under Article 226 of the Constitution of India for invoking the extraordinary jurisdiction of the High Court not only against a

government/authority that falls within the definition of a ‘State’ or ‘any other person or authority’, but also for “any other purpose”. A writ under Article 226 can also lie against any “person” if it is a statutory body or performs a public function or discharges a public or statutory duty. (Refer: Praga Tools Corpn. vs. C.V. Imanuel; (1969) 1 SCC 585, Shri Anadi Mukta Sadguru Trust vs. V.R. Rudani; (1989) 2 SCC 691 and VST Industries Ltd. vs. Workers’ Union; (2001) 1 SCC 298). Further, a writ petition would be maintainable against an authority that is treated as a ‘State’ within the meaning of Article 12, for enforcement of fundamental and other rights.

11. It is equally well settled that the term “authority” used in Article 226 must receive a wider meaning than the term used in Article 12 and it cannot be confined only to statutory authorities and instrumentalities of the State, but may also cover any other person or body performing a public duty and such a duty must be judged in the light of the positive obligations owed by the person or the authority to the adversely affected person. In the case of Federal Bank (supra), the Supreme Court had carved out eight categories of bodies/persons in para 18 of the said judgment, who were held to be amenable to writ jurisdiction of the High Court, as below:-

“18. From the decisions referred to above, the position that emerges is that a writ petition under Article 226 of the Constitution of India may be maintainable against (i) the State (Government); (ii) an authority; (iii) a statutory body; (iv) an instrumentality or agency of the State; (v) a company which is financed and owned by the State; (vi) a private body run substantially on State funding; (vii) a private body discharging public duty or positive obligation of public nature; and (viii) a

person or a body under liability to discharge any function under any Statute, to compel it to perform such a statutory function.”

12. On a glance at the categories carved out above, it is clear that the Supreme Court has recognized the fact that a writ petition can lie against three sets of bodies as mentioned at Sr.No.(vi), (vii) and (viii) above. The logic of including a private body/entity was explained in the case of Binny Ltd. (supra), where the Supreme Court had observed that it is the nature of the duty performed by such person or body, which is the determinative factor and such a duty can be statutory or non-statutory but the underlying condition is that the action of that body must entail an element of public law.

13. On a conspectus of the case law relating to the maintainability of a writ petition under Article 226 of the Constitution of India and drawing a distinction between public law vis-à-vis private law obligations of the State/public authorities, the Supreme Court had opined in the case of K.K. Saksena (supra) as below:-

“43. What follows from a minute and careful reading of the aforesaid judgments of this Court is that if a person or authority is a “State” within the meaning of Article 12 of the Constitution, admittedly a writ petition under Article 226 would lie against such a person or body. However, we may add that even in such cases writ would not lie to enforce private law rights. There are a catena of judgments on this aspect and it is not necessary to refer to those judgments as that is the basic principle of judicial review of an action under the administrative law. The reason is obvious. **A private law is that part of a legal system which is a part of common law that involves relationships between individuals, such as law**

of contract or torts. Therefore, even if writ petition would be maintainable against an authority, which is “State” under Article 12 of the Constitution, before issuing any writ, particularly writ of mandamus, the Court has to satisfy that action of such an authority, which is challenged, is in the domain of public law as distinguished from private law.” (emphasis added)

14. It is also settled law that writ proceedings are not a remedy for enforcing contractual obligations and under the law, an aggrieved party must approach the court of competent jurisdiction for appropriate relief for breach of a contract. No doubt, the existence of an alternate remedy does not bar the jurisdiction of the High Court to issue a writ but ordinarily, that would be a good ground to refuse to exercise its discretion under Article 226 as disputed questions or rival claims of the parties with regard to breach of a contract are required to be determined on the basis of evidence led before an appropriate forum and not by issuance of writs. [Refer: Jain Plastics and Chemicals (supra) and Binny Ltd. (supra)]

15. In the case of Satyawati Tondon (supra), referring to the case of Mardia Chemicals Ltd. and Ors. vs. UOI and Ors. reported as **(2004) 4 SCC 311**, the Supreme Court had held that the self-imposed restraint placed by the High Courts in entertaining a petition under Article 226 of the Constitution of India applies with greater rigour in matters involving recovery of taxes, cess, fees, other types of public money and the dues of

banks and other financial institutions. The said view was expressed in the following words:-

“43. Unfortunately, the High Court overlooked the settled law that the High Court will ordinarily not entertain a petition under Article 226 of the Constitution if an effective remedy is available to the aggrieved person and that this rule applies with greater rigour in matters involving recovery of taxes, cess, fees, other types of public money and the dues of banks and other financial institutions. **In our view, while dealing with the petitions involving challenge to the action taken for recovery of the public dues, etc., the High Court must keep in mind that the legislations enacted by Parliament and State Legislatures for recovery of such dues are a code unto themselves inasmuch as they not only contain comprehensive procedure for recovery of the dues but also envisage constitution of quasi-judicial bodies for redressal of the grievance of any aggrieved person. Therefore, in all such cases, the High Court must insist that before availing remedy under Article 226 of the Constitution, a person must exhaust the remedies available under the relevant statute.**” (emphasis added)

16. In the case of Federal Bank (supra), where an employee of the Bank had challenged his dismissal order by filing a writ petition, which was duly entertained despite a preliminary objection taken by the Bank as to the maintainability of the said petition and the order passed by the learned Single Judge, rejecting the said preliminary objection was upheld by the Division Bench, the Bank had filed an appeal before the Supreme Court. After defining the categories of bodies against whom a writ petition is maintainable under Article 226 of the Constitution and examining as to

whether Federal Bank is a private body or it falls within the definition of a State or a local body/other authority under the control of the Government, for being amenable to writ proceedings under Article 226 of the Constitution, the Supreme Court had minutely examined the relevant provisions of the RBI Act and the Companies Act and expressed the following view:-

“22. In view of the aforesaid provisions it is submitted that the control of Reserve Bank of India and the Central Government is all-pervasive over the banking companies: they can cause an inspection to be made, can make scrutiny of the working and accounts of the banking company, can remove the Chairman or appoint additional Directors; the functioning of the banking company can also be suspended, the undertaking can also be acquired. It is further submitted that Reserve Bank of India has been constituted to regulate issue of banknotes and for keeping reserves with a view to secure and maintain monetary stability in the country. It is with that end in view that powers have been vested in Reserve Bank of India to keep proper check on the working and functioning of the banking companies as also in the interest of the depositors and the own interest of the banking company. Such a nature of control indicates that the banking companies discharge functions of public nature.

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26. A company registered under the Companies Act for the purposes of carrying on any trade or business is a private enterprise to earn livelihood and to make profits out of such activities. Banking is also a kind of profession and a commercial activity, the primary motive behind it can well be said to earn returns and profits. Since time immemorial, such activities have been carried on by individuals generally. It is a private affair of the company though case of nationalized banks stands on a different footing. **There may well be companies,**

in which majority of the share capital may be contributed out of the State funds and in that view of the matter there may be more participation or dominant participation of the State in managing the affairs of the company. But in the present case we are concerned with a banking company which has its own resources to raise its funds without any contribution or shareholding by the State. It has its own Board of Directors elected by its shareholders. It works like any other private company in the banking business having no monopoly status at all. Any company carrying on banking business with a capital of five lakhs will become a scheduled bank. All the same, banking activity as a whole carried on by various banks undoubtedly has an impact and effect on the economy of the country in general. Money of the shareholders and the depositors is with such companies, carrying on banking activity. The banks finance the borrowers on any given rate of interest at a particular time. They advance loans as against securities. Therefore, it is obviously necessary to have regulatory check over such activities in the interest of the company itself, the shareholders, the depositors as well as to maintain the proper financial equilibrium of the national economy. The banking companies have not been set up for the purposes of building the economy of the State; on the other hand such private companies have been voluntarily established for their own purposes and interest but their activities are kept under check so that their activities may not go wayward and harm the economy in general. A private banking company with all freedom that it has, has to act in a manner that it may not be in conflict with or against the fiscal policies of the State and for such purposes, guidelines are provided by Reserve Bank so that a proper fiscal discipline, to conduct its affairs in carrying on its business, is maintained. So as to ensure adherence to such fiscal discipline, if need be, at times even the management of the company can be taken over. Nonetheless, as observed earlier, these are all regulatory

measures to keep a check and provide guideline and not a participatory dominance or control over the affairs of the company. For other companies in general carrying on other business activities, maybe manufacturing, other industries or any business, such checks are provided under the provisions of the Companies Act, as indicated earlier. There also, the main consideration is that the company itself may not sink because of its own mismanagement or the interest of the shareholders or people generally may not be jeopardized for that reason. **Besides taking care of such interest as indicated above, there is no other interest of the State, to control the affairs and management of the private companies.** Care is taken in regard to the industries covered under the Industries (Development and Regulation) Act, 1951 that their production which is important for the economy, may not go down, yet the business activity is carried on by such companies or corporations which only remains a private activity of the entrepreneurs/companies.

27. Such private companies would normally not be amenable to the writ jurisdiction under Article 226 of the Constitution. But in certain circumstances a writ may issue to such private bodies or persons as there may be statutes which need to be complied with by all concerned including the private companies. For example, there are certain legislations like the Industrial Disputes Act, the Minimum Wages Act, the Factories Act or for maintaining proper environment, say the Air (Prevention and Control of Pollution) Act, 1981 or Water (Prevention and Control of Pollution) Act, 1974 etc. or statutes of the like nature which fasten certain duties and responsibilities statutorily upon such private bodies which they are bound to comply with. If they violate such a statutory provision a writ would certainly be issued for compliance with those provisions. For instance, if a private employer dispenses with the service of its employee in violation of the provisions contained under the Industrial Disputes Act, in

innumerable cases the High Court interfered and has issued the writ to the private bodies and the companies in that regard. **But the difficulty in issuing a writ may arise where there may not be any non-compliance or violation of any statutory provision by the private body. In that event a writ may not be issued at all. Other remedies, as may be available, may have to be resorted to.**” (emphasis added)

17. Applying the tests laid down in its earlier decisions to the facts of the case brought out in Federal Bank (supra), the following conclusion was drawn by the Supreme Court:-

“28. The six factors which have been enumerated in the case of Ajay Hasia vs. Khalid Mujib Sehravardi; (1981) 1 SCC 722 and approved in the later decisions in the case of Ramana Dayaram Shetty vs. International Airport Authority of India; (1979) 3 SCC 489 and the seven Judges Bench in the case of Pradeep Kumar Biswas vs. Indian Institute of Chemical Biology; (2002) 5 SCC 111 may be applied to the facts of the present case and see whether those tests apply to the appellant Bank or not. As indicated earlier, share capital of the appellant Bank is not held at all by the Government nor is any financial assistance provided by the State, nothing to say which may meet almost the entire expenditure of the company. The third factor is also not answered since the appellant Bank does not enjoy any monopoly status nor can it be said to be an institution having State protection. So far as control over the affairs of the appellant Bank is concerned, they are managed by the Board of Directors elected by its shareholders. No governmental agency or officer is connected with the affairs of the appellant Bank nor is any one of them a member of the Board of Directors. **In the normal functioning of the private banking company there is no participation or interference of the State or its authorities. The statutes have been framed regulating the financial and commercial activities so that fiscal**

equilibrium may be kept maintained and not get disturbed by the malfunctioning of such companies or institutions involved in the business of banking. These are regulatory measures for the purpose of maintaining a healthy economic atmosphere in the country. Such regulatory measures are provided for other companies also as well as industries manufacturing goods of importance. Otherwise these are purely private commercial activities. It deserves to be noted that it hardly makes any difference that such supervisory vigilance is kept by Reserve Bank of India under a statute or the Central Government. Even if it was with the Central Government in place of Reserve Bank of India it would not have made any difference, therefore, the argument based on the decision of All India Bank Employees' Assn. vs. National Industrial Tribunal; AIR 1962 SC 171 does not advance the case of the respondent. It is only in case of malfunctioning of the company that occasion to exercise such powers arises to protect the interest of the depositors, shareholders or the company itself or to help the company to be out of the woods. In times of normal functioning such occasions do not arise except for routine inspections etc. with a view to see that things are moved smoothly in keeping with fiscal policies in general.

29. There are a number of such companies carrying on the profession of banking. There is nothing which can be said to be close to the governmental functions. It is an old profession in one form or the other carried on by individuals or by a group of them. Losses incurred in the business are theirs as well as the profits. Any business or commercial activity, maybe banking, manufacturing units or related to any other kind of business generating resources, employment, production and resulting in circulation of money are no doubt, such which do have impact on the economy of the country in general. But such activities cannot be classified as one falling in the category

of discharging duties or functions of a public nature. Thus the case does not fall in the fifth category of cases enumerated in the case of Ajay Hasia (supra). Again we find that the activity which is carried on by the appellant is not one which may have been earlier carried on by the Government and transferred to the appellant company. For the sake of argument, even if it may be assumed that one or the other test as provided in the case of Ajay Hasia (supra) may be attracted, that by itself would not be sufficient to hold that it is an agency of the State or a company carrying on the functions of public nature. In this connection, observations made in the case of Pradeep Kumar Biswas (supra) quoted earlier would also be relevant.” (emphasis added)

18. It was thus concluded in the captioned case that simply because the RBI lays down the banking policy, does not mean that private companies that carry on business or the commercial activity of banking, discharge any public function or public duty. Therefore, it cannot be stated that such companies are amenable to writ jurisdiction unless and until they are enforcing statutory obligations of a public nature, casting positive obligations on them. Holding that in a case where disciplinary action has been taken by the Bank against an employee and his services have been terminated, the employee is not trying to enforce any statutory duty cast on the bank by filing a writ petition under Article 226 of the Constitution of India, the Supreme Court had allowed the appeal filed by Federal Bank.

19. Coming to the instant case, as noted above, the respondent is a public limited company, promoted by M/s PTC India Ltd., another public limited company. It is a Non-Banking Financial Company (in short ‘NBFC’) duly notified under the SARFAESI Act and has been classified as an as an

Infrastructure Finance Company by the RBI. The respondent does not accept any deposits from the public. It is listed on both, the Bombay Stock Exchange Limited and the National Stock Exchange of India Ltd. The purpose of incorporation of the respondent has been declared in the 'Main Objects' clause of its Memorandum of Association, which discloses that the focus is on carrying out commercial activity of making investments in and financing all kinds of projects, industry, companies and persons engaged in various activities in the energy sector. Clause A.1 of the Memorandum of Association of the respondent/company throws light on the objects of the respondent and states as follows:-

“1. To carry on and engage in the business in India or abroad for investment/financing whether short term, medium term, intermediate and long term, working capital and any other investment or loan requirements in all types of projects, industry and company(ies) or persons engaged in any kind of business inclusive of but not limited to Power Generation, Transmission and Distribution, Capital Goods/Plant and Machinery Deployment, Engineering & Construction, Energy Sector, Fuel Supply, Oil and Gas Sector, Gas fields, Refining of Crude Oil, Gasification, Regasification, import of fuels, Liquefactions plant, pipelines and coal mine/coalfield, mining of coal, facilitating transportation, load/unloading of coal, Port development/facilities, fuel transportation, Infrastructure Development or energy conservation and other sector.”

20. A glance at the shareholding pattern of the respondent/company reveals that 60% of its shares are held by M/s PTC India Ltd. and the balance 40% shares are held by other entities, including Mutual Funds/UTI, Financial Institutions and Banks, Insurance Companies, Body Corporates,

Qualified Foreign Investors and individual shareholders. From the shareholding pattern of the respondent/company, it is apparent that the Central Government or the State Government does not hold any shares in the company. It is also an admitted position that the respondent is not a creation of the Statute, but a public limited company registered with the RBI. The activities of the respondent are purely commercial and private in nature. It does not enjoy any monopoly status; nor does it have any State protection. It does not discharge any public function or statutory function, which has been sought to be enforced in the present petition. Simply because the activities of the respondent are regulated by the RBI, it being in the business of lending money on commercial terms, will not make it amenable to writ jurisdiction. The arguments advanced by learned counsel for the petitioners that 60% of the shares of the respondent/company are held by M/s PTC India Ltd., which is a Public Sector Undertaking, cannot be a determinative factor when it comes to examining the character and functions discharged by the respondent. Nor can the fact that M/s PTC India Ltd. is headed by bureaucrats or that its Board of Directors include bureaucrats/technocrats be of any relevance when the structure of the respondent/company is to be examined. In the normal functioning of the respondent, clearly, there is no participation by the State or its authorities.

21. As noted earlier, the shareholding capital of the respondent/company is not held by the Government. The petitioners have not been able to demonstrate that financial assistance of any nature is being provided by the State or its authorities to the respondent/company. The Board of Directors

of the respondent/company are elected by its shareholders without any interference by the State or the Public Sector Companies. The petitioners have also miserably failed to demonstrate that the respondent is performing any public function or it participates in social and economic affairs in public interest or works for the collective benefit of a section of the public. Merely because the respondent/company has entered into a Loan Agreement with the petitioners in the course of conducting commercial transactions, will not make it amenable to writ jurisdiction when the said loan has been extended as a part of its business activity.

22. The judgments cited by learned counsel for the petitioners would also not be of any avail. In the case of Mysore Paper Mills (supra), the Supreme Court had held that the nature of the duty imposed on the body to be adjudged in the light of the positive obligation owed by it to the affected party, would be determinative of the question of issue of a writ of mandamus to compel its performance and had gone on to observe that there cannot be a straight-jacket formula for adjudging as to whether any person or authority answers the description of 'State' within the meaning of Article 12, for which it would be necessary to look into the constitution of the body, the purpose for which it had been constituted, the manner of its functioning including and the mode of its funding. Having applied the aforesaid tests to the respondent herein, quite clearly, it is not amenable to writ jurisdiction. The deep and pervasive control over the affairs of the respondent, as alleged by learned counsel for the petitioners, is sorely

missing in the present case. Therefore, the decision in the case of Radhey Shyam Rai (supra) cannot have any application to the facts of this case.

23. While there can be no quarrel with the legal principles on the maintainability of a writ petition, as laid down by the Supreme Court in ABL International Ltd. (supra), the caveat issued in the said case to the High Courts with regard to imposition of certain restrictions on their plenary powers to issue prerogative writs under Article 226, cannot be lost sight of. In any case, this Court has concluded that the respondent herein is not a 'State' or 'any other person or authority'. For the very same reason, the underlying principles of the doctrine of promissory estoppel enunciated by the Supreme Court in the case of Motilal Padampat Sugar Mills (supra) and referred to by the petitioners cannot be invoked against the respondent. Nor does the decision in Gujarat State Financial Corporation (supra) have any application to the facts of the case at hand.

24. The inevitable conclusion is that the petitioners are not entitled to invoke Article 226 of the Constitution of India for relief against the respondent. Instead, they ought to exhaust the alternate efficacious remedy available to them under the SARFAESI Act, as contemplated in Mardia Chemicals (supra) and Satyawati Tondon (supra). Being a borrower, if the petitioners have a grievance against the creditor, then they have a right to ventilate same, but only before the forums that are available to them in law. The term "*authority*" cannot be given such a wide meaning so as to take in its ambit, the respondent herein, when the petitioners have failed to demonstrate the nature of public function being discharged by it.

25. It may be noted that at the time when the present petition was filed, the petitioner had claimed that the respondent had issued a notice dated 17.06.2016, calling upon them to discharge their liabilities under the Agreement dated 23.03.2013 and had cautioned them that in the event of failure to do so, it shall exercise its rights to acquire 100% shares of the petitioner No.1/company. However, on the eve of filing the petition, the respondent had in fact issued a notice to the petitioners on 02.09.2016, under Section 13(2) of the SARFAESI Act, to which they had responded by forwarding a reply on 27.10.2016 taking *inter alia*, several objections. A rejoinder was duly issued by the respondent vide letter dated 17.11.2016, stating *inter alia* that in the event the petitioners fail to pay a sum of Rs.65,73,75,290/-, calculated upto 15.08.2016, together with future interest within 15 days from the date of issuance of the rejoinder, the respondent shall seek legal recourse under Section 13(4) of the SARFAESI Act. Pertinently, by the time the petitioners had dispatched a reply to the respondent's notice under Section 13(2) of the SARFAESI Act, the present petition had already been filed and notice was issued thereon on 15.09.2016.

26. Till the date of reserving the judgment in the present petition, the respondent had not taken any further action against the petitioners under Section 13(4) of the SARFAESI Act. The court may hasten to clarify here that after issuance of the notice under Section 13(4) of the SARFAESI Act, the Statute does not specify any timeline within which further action must

be taken. In the case of Devi Ispat Ltd. vs. SBI reported as (2014) 5 SCC 762, it has been held that the remedy of a writ petition under Article 226 of the Constitution of India is in any case not available against a notice under Section 13(2) of the SARFAESI Act for the reason that an alternate remedy of making a representation is available to the petitioners.

27. In the present case, the petitioners had made a representation to the respondent vide letter dated 27.10.2016, but the respondent/creditor has rejected the same under Section 13(3A) of the SARFAESI Act. The reasons for rejecting the petitioners' representation have been communicated by the respondent vide its reply dated 17.11.2016. In the case of Mardia Chemicals (supra), it was clarified that a borrower "*may not be entitled to challenge the reasons communicated or the likely action of the secured creditor at that point of time unless his right to approach the Debt Recovery Tribunal as provided under Section 17 of the Act, matures on any measure having been taken under sub-section (4) of Section 13 of the Act*". This being the legal position, as and when the respondent takes any steps under Section 13(4) of the SARFAESI Act, the petitioners will be entitled to approach the Debt Recovery Tribunal for relief under Section 17 of the SARFAESI Act.

28. Given the fact that the Statute lays down a step-by-step procedure for the creditor to take action thereunder and remedies have been provided to the debtor against such action, judicial prudence demands that this Court must refrain from exercising its jurisdiction under Article 226 of the Constitution of India. Any view to the contrary shall derail the procedure

contemplated under the Statute and seriously impact the rights of financial institutions like the respondent herein, to recover its dues.

29. In view of the aforesaid fact and circumstances, the plea of the petitioners that the respondent is amenable to writ jurisdiction of the High Court is repelled. It is held that the present petition is not maintainable against the respondent under Article 226 of the Constitution of India as it is neither a “State”, or “any other person or authority” and nor is it discharging any public or statutory duty. If they have a grievance against the respondent, then the petitioners must seek recourse to proceedings under the SARFAESI Act, which provides for a special procedure for recovery of debts due to the Banks and financial institutions, to be moved at the appropriate stage.

30. The present petition is accordingly dismissed as not maintainable, alongwith the pending application, but with no orders as to costs.

(HIMA KOHLI)
JUDGE

MAY 08, 2017
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