

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

% **Date of decision: 17<sup>th</sup> May, 2018**

+ **CS(OS) 450/2016**

**GVK DEVELOPMENTAL PROJECTS**

**PVT LTD & ANR**

**..... Plaintiffs**

Through: Mr. M.L. Lahoty, Mr. Paban K. Sharma & Mr. Anchit Sripat, Advs.

Versus

**POWER FINANCE CORPORATION LTD & ORS.... Defendants**

Through: Ms. Maneesha Dhir & Mr. Karan Batura, Advs. for D-1.

Mr. Shoeb Alam & Mr. Talha A. Rahman, Advs. for D-2.

Mr. Jaswinder Singh, Adv. for D-3.

**CORAM:**

**HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW**

1. The two plaintiffs viz. GVK Development Projects Pvt. Ltd. and GVK Ratle Hydro Electric Project Pvt. Ltd. have instituted this suit against the three defendants viz. (a) Power Finance Corporation Ltd. (PFC), (b) Government of Jammu & Kashmir, and, (c) Union of India, for i) declaration that the demand notice dated 28<sup>th</sup> July, 2016 issued by the defendant no.1 PFC is not in accordance with the Loan Agreement between the defendant no.1 PFC and the plaintiffs and is illegal and not binding on the plaintiffs; ii) permanent injunction restraining the defendant no.1 PFC from initiating coercive action, as the execution of the Ratle HEP (850 MW) Project integrally connected with the Loan Agreement has been frustrated by the impossibility of performance; and, iii) interim order directing the defendant no.1 PFC not to impose any interest or penal interest or other charges till this Court decides the legality of the notice dated 28<sup>th</sup> July, 2016.

2. The suit came up before this Court first on 7<sup>th</sup> September, 2016 when it was adjourned to 16<sup>th</sup> September, 2016. On 16<sup>th</sup> September, 2016, though summons of the suit and notice of the application for interim relief were issued, but no *ex parte* relief granted.

3. On 5<sup>th</sup> October, 2016, the counsel for the defendant no.1 PFC sought time to file written statement / reply and while granting opportunity therefor, the assurance of the counsel for the defendant no.1 PFC that the defendant no.1 shall not take any further action pursuant to demand notices dated 28<sup>th</sup> July, 2016 and 23<sup>rd</sup> September, 2016 and the agreement of the parties to endeavour to find amicable settlement, were recorded.

4. The matter was adjourned from time to time and the interim arrangement has continued till now.

5. The defendant no.1 preferred FAO(OS) No.122/2017 against the order dated 7<sup>th</sup> March, 2017 in the suit, urging that the assurance made on 5<sup>th</sup> October, 2016 was continuing to bind the defendant no.1 and that owing to order dated 7<sup>th</sup> March, 2017 allowing impleadment of defendants no.2 and 3, the matter was unreasonably delayed for completion of pleadings by the said defendants resulting in irreparable loss to the defendant no.1 PFC. However, the said appeal was disposed of by directing expeditious hearing before this Bench.

6. The suit came up before the undersigned on 8<sup>th</sup> January, 2018 when it was enquired from the counsel for the plaintiffs as to how the plaintiffs could seek a negative declaration and restraint against the defendant no.1 PFC from taking actions as may be available to it in law. On request of the counsel for the plaintiffs, the hearing on the said aspect was adjourned.

7. Thereafter again, the process of adjournments continued.

8. Last, on 12<sup>th</sup> April, 2018, the counsel for the plaintiffs stated that the plaintiffs had commenced some settlement talks with the defendant no.1 PFC and sought adjournment on that ground. The counsel for the defendant no.1 again expressed urgency. Making it clear that if no settlement was arrived at, the aspect of maintainability of the suit will be heard and decided today, the matter was adjourned to today.

9. Today again, the counsel for the plaintiffs has started by seeking adjournment for the purpose of settlement and which has been opposed by the counsel for the defendant no.1 PFC.

10. The counsels have been heard.

11. The counsel for the defendant no.1 PFC has informed i) that under a Loan Agreement dated 8<sup>th</sup> August, 2013 at page 182 of Part-III file, the defendant no.1 PFC agreed to loan a sum of Rs.4076 crores to the plaintiff no.2 and the plaintiff no.1 is the parent company of the plaintiff no.2; ii) that the said loan was for the power project over Chenab River in Jammu & Kashmir; iii) that the defendant no.1 PFC, out of Rs.4706 crores, disbursed Rs.816.90 crores to the plaintiff no.2; iv) that as of today, a sum of about Rs.1139 crores is due from the plaintiff no.2 to the defendant no.1 PFC; v) that the defendant no.1 PFC, in accordance with the Loan Agreement aforesaid, is entitled to take actions as prescribed in Article 7.2 at pages 274 and 277 of the Part-III file; vi) that owing to the statement made by the counsel for the defendant no.1 PFC on 5<sup>th</sup> October, 2016, while taking time for completion of pleadings, the defendant no.1 has been unable, for the last nearly one and a half years, to exercise its right under the Loan Agreement; vii) that the Power Purchase Agreement of the plaintiff no.2 with the State of Jammu & Kashmir has already been terminated and which termination is

learnt to be subject matter of an arbitration proceeding in which cross-examination of witnesses is going on.

12. The plaintiffs have instituted this suit for the reliefs aforesaid, pleading i) that the plaintiff no.1 was awarded the project aforesaid in international competitive bidding; ii) that the plaintiffs started executing the project in right earnest; iii) that there is a 'force majeure' clause in the Power Purchase Agreement as well as in the Loan Agreement with the defendant no.1 PFC at pages 258,259 and 275 of the Part-III file; iv) that the relevant clauses at pages 253, 258, 259 and 260 of the Part-III file are as under:

**“6.1.18 Information**

The Borrower shall furnish to the Lenders' Agent the following reports, statements and information and such other reports and information the Lenders' Agent may require at any time or from time to time.

**(m) *Other Notices***

Promptly, and in any event not later than 15 (fifteen) Business Days upon the Borrower obtaining knowledge thereof or upon their becoming available as the case may be, the Borrower shall notify the Lenders' Agent of:

- (xi)** any event of Force Majeure affecting, or which either the Borrower or any other Material Project Participant claims would affect, the performance by such Person of any obligation under any Transaction Document, together with copies of all notices, calculations, data and other correspondence between such Material Project Participant and the Borrower in respect of any such event, circumstance or condition or notice of any loss or damage which the Borrower may suffer due to any Force Majeure circumstances against which the Borrower may not have insured its properties;”

v) that the relevant clause at pages 272, 274 and 275 is as under:

**“ARTICLE VII**

**EVENTS OF DEFAULT AND REMEDIES**

**7.1 Events of Default**

For the purpose of this Agreement, each of the following events shall constitute an Event of Default:

(e) *Default in Performance of Covenants and Conditions*

(o) *Abandonment of Project*

The Borrower or the Sponsors have Abandoned the Project. The Project shall be deemed to have been Abandoned if the construction activity during the Construction Period has been suspended continuously for a period of 30 (thirty) days or the operations of the Project have been halted for a continuous period of 15 (fifteen) days for the reasons other than force majeure as defined under the Power Purchase Agreement or lack of dispatch instructions under the Power Purchase Agreement or the Borrower takes or refrains from taking a decision which act or inaction can be reasonably said to be establishing the lack or loss of the interest on the part of the Borrower in the Project.”

vi) that owing to the force majeure, the project has come to a standstill; and,

vii) that the demand dated 28<sup>th</sup> July, 2016 by the defendant no.1 PFC is contrary to the Loan Agreement.

13. On 8<sup>th</sup> January, 2018, question as to maintainability of this suit was raised in view of the bar contained in Section 41 of the Specific Relief Act, 1963 providing that an injunction cannot be granted to restrain any person from prosecuting or instituting any judicial proceedings.

14. The counsel for the defendant no.1 PFC has today, also drawn attention to my judgment in ***Radnik Exports Vs. Standard Chartered Bank*** 2014 SCC OnLine Del 3404 and to the order dated 10<sup>th</sup> October, 2014 of withdrawal of RFA(OS) No.139/2014 titled ***Radnik Exports Vs. Standard Chartered Bank*** preferred thereagainst.

15. I have enquired from the counsel for the defendant no.1 PFC, whether not the defendant Standard Chartered Bank in ***Radnik Exports*** supra was entitled to invoke the provisions of the Recovery of Debts due to Banks and Financial Institutions Act, 1993 (DRT Act) and the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act,

2002 (SARFAESI Act) and as to how the said judgment would apply in the present case.

16. The counsel for the defendant no.1 PFC states that the defendant no.1 PFC is also a 'financial institution' within the meaning of Section 2(h) of the DRT Act as well as within the meaning of Section 2(m) of the SARFAESI Act and is also entitled to invoke both the said Acts.

17. In *Radnik Exports* supra, it was held that (a) the Debt Recovery Tribunal (DRT) has jurisdiction, power and authority to decide on the defence to an application for recovery of debt filed before it; (b) once the DRT is held to have such a power, the jurisdiction of the Civil Court to declare existence of a state of affairs which is a defence to a claim before the DRT, has to be necessarily held to be barred; (c) Section 34 of the Specific Relief Act enables any person entitled to any legal character or to any right as to any property to institute a suit, against a person denying or interested to deny his title to such character or right, for a declaration that he is so entitled; (d) under the said provision, negative declaration can also be claimed; it is thus possible, under the said Section 34 to sue for a declaration that the plaintiff is free of debt; (e) Section 34 is even otherwise not the sole repository for the relief of declaration; (f) it is thus open to every person against whom a bank or financial institution may have a claim for recovery of a debt, to sue in a Civil Court on the same grounds on which he may have a defence before the DRT to such claim of a bank / financial institution, for declaration that he is not a debtor of the bank / financial institution and is not liable to pay any amount to the bank / financial institution; (g) however, if it were to be thus held that both, the Civil Court as well as the DRT would have jurisdiction to decide whether a person against whom a bank / financial

institution has a claim as a debtor, is in fact a debtor or not and / or is liable to pay the amount claimed by the bank or not, the possibility of a conflicting finding being rendered by the Civil Court and the DRT cannot be ruled out and in which case the finding of the Civil Court will prevail over the finding of the DRT; (h) such an interpretation would set at naught the very reason for the enactment of the DRT Act and establishment of the DRT and would lead to a waste of effort on the part of DRT in adjudication, if the same were not binding; the same is not permissible; (i) the intendment of the DRT Act is speedy recovery of dues to the bank and the DRTs and DRATs are expected to see to it that an ingenious litigant does not take recourse to dilatory tactics; (j) in *Jagdish Singh Vs. Heeralal* (2014) 1 SCC 479, it was held once a remedy has been provided under the SARFAESI Act, the jurisdiction of the Civil Court would be barred; (k) Section 34 of the SARFAESI Act also prohibits a Civil Court from granting any injunction in respect of any action “taken or to be taken” in pursuance to any power conferred by or under, not only the SARFAESI Act, but also the DRT Act; (l) thus the relief claimed of permanent injunction restraining a bank / financial institution from acting upon or seeking to enforce any transaction under the agreements qua which the relief of declaration as void is claimed, is prohibited; (m) once the jurisdiction to grant consequential relief of injunction is barred, the relief of declaration cannot be granted.

18. In fact, the counsel for the defendant no.1 PFC states that the defendant no.1 PFC had also obtained corporate guarantees from other companies also for the loan and the defendant no.1 PFC has been unable to take action against them also for the reason of the statement made on 5<sup>th</sup> October, 2016.

19. The counsel for the plaintiffs, inspite of being repeatedly requested to address on the aforesaid legal aspect only, wants to address on the merits of the case and which as per ***Radnik Exports*** supra cannot be adjudicated in this proceeding and have to be taken by way of a defence, if available, in the proceedings which the defendant no.1 PFC may be entitled to initiate against the plaintiffs.

20. The counsel for the plaintiffs has also referred to the order dated 4<sup>th</sup> September, 2017 in FAO(OS) No.122/2017 titled ***Power Finance Corporation Ltd. Vs. GVK Development Projects Pvt. Ltd.*** arising out of the present suit but I am unable to find the same also to be relevant to the aspect aforesaid.

21. The counsel for the plaintiffs has lastly urged that the suit, on 8<sup>th</sup> January, 2018, was ripe for framing of issues and issues be framed in the suit and the suit be put to trial.

22. Once the suit is not maintainable in terms of ***Radnik Exports*** supra, no issues are required to be framed and the suit does not have to be put to trial. It is quite evident that the plaintiffs by this suit, are merely intending to evade any action being taken by the defendant no.1 PFC against the plaintiffs, instead of contesting the same on merits.

23. The suit is dismissed.

24. The plaintiffs are also burdened with costs of Rs.2.5 lacs payable to the defendant no.1 PFC.

25. Decree sheet be drawn up.

26. The counsel for the plaintiffs states that permission be granted to prefer an appeal to the Division Bench.

27. There is no need for such permission.

28. The counsel for the plaintiffs then seeks extension of protection.

29. The protection which the plaintiffs have enjoyed till now was in the circumstances aforesaid and having found the suit itself to be not maintainable, the concession made by counsel for defendant no.1 PFC cannot be extended.

**MAY 17, 2018**  
'gsr'..

**RAJIV SAHAI ENDLAW, J.**

