IN THE HIGH COURT OF PUNJAB AND HARYANAAT CHANDIGARH

CWP 17262-2020 (O&M)
Date of decision-31.03.2021

M/s N. C. Overseas and others ...Petitioners

Versus

South Indian Bank Ltd. and another ...Respondents

CORAM:- HON'BLE MR. JUSTICE JITENDRA CHAUHAN
HON'BLE MR. JUSTICE VIVEK PURI

Present: Mr. Manuj Nagrath, Advocate, for the petitioners.

Mr. C.S. Pasricha, Advocate, for the respondents.

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JITENDRA CHAUHAN, J.

The matter has been taken up through Video Conferencing in the light of Pandemic COVID-19 situation and as per instructions.

The petitioners seek issuance of a writ in the nature of certiorari for setting aside notice dated 21.08.2020 (Annexure P6) issued by the respondents under Section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest (SARFAESI) Act, 2002 and for quashing the declaration of the account of the petitioners as Non Performing Asset (NPA) on 24.04.2020 and Asset Classification from Special Mention Account (SMA) II to NPA during the period of moratorium.

The brief facts of the case are that petitioner No.1-company is engaged in the business of export of ready-made garments. Petitioner No.2 is the proprietor of petitioner No.1 and petitioner No. 3 is the guarantor. Petitioner No. 1 had availed the working capital limits (Cash Credit Open

Loan of Rs. 2,00,00,000/- and Export Packing Credit of Rs.1,85,00,000/-) from the respondent-bank on 05.09.2018.

Learned counsel submits that the CC account with the respondent bank was regular upto 31.12.2019 and subsequently became irregular on 31.01.2020 which was again regularized on 06.03.2020. The Loan account was neither NPA nor SMA-II as on 29.02.2020. Due to the outbreak of Novel Corona Virus disease, the complete worldwide lock-down was declared in order to prevent spread of this disease which ultimately resulted into complete closure of businesses including the business of the petitioners. The impugned notice dated 21.08.2020 (Annexure P6) issued by the respondents under Section 13(2) of the SARFAESI Act, 2002 is against the circulars and guidelines issued by the Reserve Bank of India (Annexures P2 to P4) during COVID-19. To buttress his arguments, the learned counsel for the petitioners relies on ***Shakuntla Educational & Welfare Society Versus Punjab & Sind Bank, 2020 (160) SCL 463 (Delhi), Annat Raj Limited Versus Yes Bank Limited, Writ Petition(C) No.5/2020, decided on 06.04.2020 , TransconSkycityPvt. Ltd. &Ors Versus ICICI Bank &Ors, Writ Petition LD-VC No.28 and 30 of 2020, decided on 11.04.2020 and Subramanya Construction and Development Company Limited Versus Union Bank of India, 2020(162) SCL 623 (Karnataka).***

The petitioners have also moved CM No. 1445-CWP of 2021 under Section 151 CPC for grant of status quo ante as on 29.02.2020 and from restraining the respondents from taking physical possession of the mortgaged properties in compliance of the circulars issued by the Reserve Bank of India from time to time.

Learned counsel further refers to order dated 03.09.2020 (Annexure P7) passed by Hon'ble the Supreme Court in ***Gajendra Sharma vs. Union of India and another Writ Petition (Civil) No.825 of 2020*** wherein it was directed that the accounts which were not declared NPA till 31.08.2020, shall not be declared NPA till further orders.

Per contra, learned counsel for the respondents submits that under the garb of present petition, the petitioners in fact are challenging the action under the SARFAESI Act, 2002. As a matter of fact, the default of the petitioners was pre-existing and this fact has been reflected in the notice of motion order dated 16.10.2020 wherein the contention of the respondents is noticed that the amount in favour of petitioners was released on 13.08.2019 and the material was to be exported on or before 25.01.2020 but the same was not exported. The judgment ***M/s. Amar Alloys Pvt. Limited (Regd.) v. State Bank of India, 2019 (3) PLR 81 (DB) (P&H)*** relied upon in the notice of motion order stands stayed by Hon'ble the Supreme Court. Further, Civil Writ Petition No. 825 of 2020 titled ***Gajendra Sharma v. Union of India and another (supra)*** relied upon by the learned counsel for the petitioners has been disposed of by Hon'ble the Supreme Court vide judgment dated 27.11.2020. The petitioners cannot take the benefit of order dated 03.09.2020 (Annexure P7) as the account of the petitioners was already NPA with effect from 24.04.2020 much prior to order dated 03.09.2020. Moreover, this order (Annexure P7) has merged into the final order dated 27.11.2020 and the account of the petitioners was declared NPA due to prior defaults. The issue involved in ***Gajendra Sharma's case (supra),*** which was with regard to home loan, was that no interest should be charged during the period of moratorium whereas in the instant case, the issue is not only of payment of interest but the pre-existing defaults even prior to the period of moratorium. As such the case of the petitioners is on altogether different footing. The petitioners have efficacious alternate remedy against the actions of the bank under SARFAESI Act and as such the writ jurisdiction cannot be invoked, as has been held by Hon'ble Supreme Court in ***ICICI Bank Ltd. V. Umakanta Mohapatra, 2018(3) SCALE 724***, In fact, before filing of the writ petition, notice under Section 13 (2) of the SARFAESI Act had been issued by the bank which is Annexure P6 with the writ petition. The petitioners had filed objections under Section 13(3A) of the SARFAESI Act (Annexure P8), which were disposed of by respondent-bank vide Annexure P9 wherein the respondent bank has categorically averred that the account was classified as NPA owing to irregularity in packing credit limit, wherein the amount was sanctioned on 13.08.2019 against invoice dated 01.08.2019 and the last date of shipment due was on 25.01.2020. The shipment was not made and during the visit of bank officials on 11.02.2020, it transpired that the unit was closed and there was no sufficient stock of raw material.

Learned counsel for the respondents further submits that the judgments relied upon by learned counsel for the petitioners are in the facts of those particular cases related to the interim orders given in specific cases and do not hold good after the order passed by Hon'ble the Supreme Court in ***Union of India v. P.D. Sunny, SLP (C) No.6661/2020*** wherein Hon'ble the Supreme Court had stayed the blanket stay orders passed by Hon'ble Allahabad High Court in the case of ***Darpan Sahu v. State of Uttar Pradesh, Writ Petition (C) No.7014 of 2020 dated 18.03.2020*** and by

Hon'ble Kerala High Court in ***Writ Petition (C) No.8231 of 2020 dated 19.03.2020***.

Learned counsel for the respondents further states that the symbolic possession of the property was taken on 13.11.2020 and the application i.e. CM-12187 of 2020 filed by the petitioners was also dismissed vide order dated 18.11.2020. There are disputed questions of facts as it is the own case of the petitioners that the Export Packing Credit was availed by the petitioners on 13.08.2019 against invoice No.POMLX/2510 dated 01.08.2019 with the last date of shipment/due date as 25.01.2020. Till the date of inspection, neither the goods had been prepared nor shipped and the account had been classified as SMA-II on 24.02.2020, after the visit to the unit on 11.02.2020, when the unit was found closed and the staff of the branch could not find sufficient stock of the raw material, semi finished goods or finished goods. The default of the petitioners was pre-existing.

Learned counsel for the respondents further submits that as per RBI guidelines, asset classification is to be done borrower-wise and not facility-wise. He refers to Clause 4.2.7 (i) of the Master Circular Prudential Norms on Income Recognition, Asset Classification and Provisioning pertaining to Advances dated 01.07.2015, which reads thus:-

> *"4.2.7 Asset Classification to the be borrower-wise and not facility-wise i) It is difficult to envisage a situation when only one facility to a borrower/one investment in any of the securities issued by the borrower becomes a problem credit/investment and not others. Therefore, all the facilities granted by a bank to a borrower and investment in all the securities issued by the borrower will have to be treated as*

NPA/NPI and not the particular facility/investment or part thereof which has become irregular."

Learned counsel for the respondents further states that the submission of the learned counsel for the petitioners is *per se* misconceived and baseless, rather incorrect when the petitioners have themselves admitted that Cash Credit Open Loan limit was irregular as on 31.01.2020. He disputes the assertion of the learned counsel for the petitioners that there were no developments as on 29.02.2020 or that the account was neither NPA nor SMA-II as on 29.02.2020. In fact, in the Packing Credit Account, an amount of Rs.71,95,976/- was sanctioned on 13.08.2019 against invoice PO/MLX/2510 dated 01.08.2019 with the last date of shipment/due date on 25.01.2020. As per existing guidelines, facility was classified as SMA-I as on 24.02.2020, SMA-II as on 25.03.2020 and NPA on 24.04.2020. Further Letters of Credit availed by the petitioners were due and paid on 21.04.2020 by devolving to Cash Credit Open Loan account. The petitioners are trying to take benefit of the period when the Cash Credit Open Loan Account was regularized at one point of time and as such they are trying to conceal the facts about the overdue Letters of Credit and Packing Credits Learned counsel further states that all the facilities including Cash Credit Open Loan, Letters of Credit, Packing Credits (FBP/FBPFC sub-limit to Packing Credit) sanctioned to the petitioners were rightly classified as SMA-I as on 24.02.2020, SMA-II as on 25.03.2020 and NPA as on 24.04.2020. Learned counsel further refers to ***Keshavlal Khemchand and Sons Pvt. Ltd. & Ors. V. Union of India & Ors., 2015 (4) RCR (Civil) 7*** to contend that the moment there is a default and breach of terms of contract, the account would be termed as NPA. The issue of NPA and the definition of NPA had been challenged by various borrowers before Hon'ble the Supreme Court wherein it was held in para 66 that the moment there is a breach of the terms of the contract, under which the loan or advance is granted, the stipulation under the Act of classification of the account of the borrower as NPA as a condition precedent for enforcing the security interest is an additional obligation imposed by the Act on the Creditor. In the instant case, the default of the petitioner is writ large as there was no export till 25.01.2020 and there was no activity on the date of inspection i.e. 11.02.2020.

Learned counsel further states that Hon'ble the Supreme Court in case of ***Small Scale Industrial Manufacturers Association (Regd.) v. Union of India, Writ Petition (C) No.476 of 2020*** **decided on 23.03.2021** had dismissed the writ petition by observing in para 32 as under:

> "*In view of the above and for the reasons stated hereinabove, the present petitions seeking reliefs, namely, (i) total waiver of interest during the moratorium period; (ii) to extend the period of moratorium; (iii) to extend the period of resolution mechanism, namely, 31.12.2020 provided under the 6.8.2020 circular; (iv) that there shall be sector-wise reliefs provided by the RBI; and (v) that the Central Government/RBI must provide for some further reliefs over and above the relief packages already offered, stand dismissed.*"

Learned counsel for the respondents further submits that the demand notice had been issued to the petitioners for an amount of Rs.4,72,10,792.71 as on 20.08.2020 and the petitioners are only interested in gaining undue time, which is impermissible. The petitioners have failed to place on record as to how their accounts are covered under the relief packages announced by the Government of India.

In ***United Bank of India Versus Satyawati Tandon & Ors., 2010 (8) SCC 110,*** Hon'ble the Supreme Court observed as under:-

"17. There is another reason why the impugned order should be set aside. If respondent No.1 had any tangible grievance against the notice issued under Section 13(4) or action taken under Section 14, then she could have availed remedy by filing an application under Section 17 (1). The expression `any person' used in Section 17 (1) is of wide import. It takes within its fold, not only the borrower but also guarantor or any other person who may be affected by the action taken under Section 13 (4) or Section 14. Both, the Tribunal and the Appellate Tribunal are empowered to pass interim order under Section 17 and Section 18 and are required to decide the matters within a fixed time schedule. It is thus evident that the remedies available to an aggrieved person under the SARFAESI Act are both expeditious and effective. 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 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, 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".

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"27. It is a matter of serious concern that despite repeated pronouncement of this Court, the High Courts continue to

> *ignore the availability of statutory remedies under the DRT Act and SARFAESI Act and exercise jurisdiction under Article 226 for passing orders which have serious adverse impact on the right of banks and other financial institutions to recover their dues. We hope and trust that in future the High Courts will exercise their discretion in such matters with greater caution, care and circumspection".*

In the light of the above facts and circumstances and keeping in view the ratio of law laid down by Hon'ble the Supreme Court in ***United Bank of India's Case (Supra),*** *w*e feel that wherever a statute provides for an alternate statutory and efficacious remedy, the same ought to be availed of and must not be bye-passed. In the instant case, admittedly, the petitioners had moved objections (Annexure P8) by invoking the provisions of Section 13(3A) of the SARFAESI Act. The alternate efficacious and adequate remedy is available to the petitioners under Section 17 of the SARFAESI Act.

The case laws cited by the learned counsel for the petitioners are distinguishable on facts. The contention of the learned counsel for the petitioners to grant status quo ante as on 29.02.2020, cannot be countenanced. In view of the above discussion, the present petition and CM-1445-CWP-2021 *sans* merit and are hereby dismissed.

(JITENDRA CHAUHAN)
JUDGE

(VIVEK PURI)
JUDGE

31.03.2021
Riya Grover/gsv

Whether speaking/reasoned	Yes/No
Whether Reportable	Yes/No