2023:PHHC:166220-DB

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CWP No.6993 of 2022(O&M)
Date of Decision:16.12.2023

G.P. Realtors Private Limited

......Petitioner

Versus

Reserve Bank of India and others

...... Respondents

CORAM:- HON'BLE MRS.JUSTICE LISA GILL
HON'BLE MRS. JUSTICE RITU TAGORE

Present: Mr.Anand Chhibbar, Sr. Advocate
with Mr. Shikhar Sarin, Advocate
for the petitioner.

Mr. Puneet Bali, Sr. Advocate
with Mr. Nitin Kaushal, Advocate
Ms. Charu Bansal, Advocate
and Mr. Vishavjeet S. Beniwal, Advocate
for respondent no.2.

Mr. Salil Sabhlok, Advocate
for respondent no.3.

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LISA GILL, J(Oral).

1. Petitioner has addressed various prayers in this writ petition which are reproduced as hereunder:-

> "i. Issue a writ in the nature of Certiorari for quashing the impugned assignment deed dated 30.09.2021 (AnnexurE P-10) vide which Respondent no.2 has assigned the loan account of the Petitioner to Respondent no. in violation of the statutory guidelines prescribed by Respondent no.1.
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> ii. Further issue a writ in the nature of a Mandamus directing Respondent No.1 and 2 to adhere and act in

accordance to the rules and statutory guidelines published by Respondent no.1, specifically the Master Circular dated 24.09.2021 (Annexure P-11).

iii. Further issue a writ in the nature of a Prohibition restraining Respondent no.2 from further pursuing its recovery proceedings under the Provisions of the SARFAESI Act, 2002 (Annexure P-3) in the absence of a valid assignment deed in its favour.

iv. Further issue a writ in the nature of Prohibition restraining Respondent no.2 from further pursuing its Petition under the provisions of the Insolvency and Bakruptcy Code, 2016 (Annexure P-2) before NCLT, Chandigarh in the absence of a valid assignment deed in its favour.

v. Further to save the present Petition from being rendered infructuous, pass an appropriate order granting an exparte ad interim stay on the proceedings pending under Section 14 of the SARFAESI Act, 2002 (Annexure P-12) before the District Magistrate, Gurugram and on the proceedings pending under Section 7 of the Insolvency and Bankruptcy Code, 2016 (annexure P-2) before the NCLT, Chandigarh, in the light of the fact that Respondent no.2 has no valid assignment deed in its favour in the eyes of law.

vi. Any further writ, order or direction that this Hon'ble Court may deem necessary in the given facts and circumstances in the interest of justice, equity and fairplay."

2. Petitioner claims to be a company incorporated under the provisions of Companies Act, 1956 engaged in the business of real estate in district Gurugram, Haryana. It is submitted that petitioner, in the year 2016 availed of loan facility to the tune of ₹300 crores for developing an IT-SEQ project at Golf Course Extension Road, Gurgaon. The loan was sanctioned vide sanction letter dated 29.06.2016 (Annexure P-1). Due to outbreak of pandemic Covid-19, there was financial indiscipline on the part of petitioner

and its account was declared 'Non-Performing Asset (NPA), though, statedly in violation of RBI guidelines.

3. Petition under Section 7 of the Insolvency and Bankruptcy Code, 2016 was filed by respondent no.2-IndusInd Bank. Notice dated 3.9.2021 was issued under Section 13 (2) of SARFAESI Act, which was replied to by the petitioner on 22.10.2021. It is submitted that it came to notice of petitioner, on receipt of communication dated 28.10.2021 from the respondent-Bank that it had assigned security interest in question as well as its rights and liability thereof to respondent no.3 i.e. Omkara Asset Reconstruction Pvt. Ltd.

4. Learned counsel for petitioner submits that assignment of the debt vide assignment deed dated 30.09.2021, is absolutely illegal, arbitrary and in total violation of statutory guidelines prescribed by RBI-respondent no.1. It is vehemently argued that assignment of debt by respondent no.2 in favour of respondent no.3 is in the teeth of R.B.I Circular dated 24.9.2021 (Annexure P-11). Reference has been made by learned counsel for petitioner to Chapter IV of the Circular which deals with transfer of loans and particularly to paragraph nos. 53 and 56 and thereafter to paragraph nos. 82-85 thereof to submit that assignment should have been through the Swiss challenge method but the same was admittedly not adopted and adhered to. In this view of the matter the assignment deed dated 30.09.2021 should be set aside by this Court.

5. It is further contended that RBI Circular in this respect was issued on 24.9.2021 and offer was put to respondent no.2 by respondent no.3 on 24.9.2021 being valid till 30.9.2021 and therefore contract between the parties had not concluded on 24.9.2021 and assignment deed was executed on 30.9.2021, therefore, by that time, with the RBI Circular dated 24.9.2021

being issued, parties were bound to follow the guidelines thereunder. It is further argued that petitioner does not have any other remedy except to file the present writ petition as it is not within the purview of RBI to set aside an assignment deed which has led to infringement of fundamental rights of petitioner. Once violation of Circular of RBI is proved, this Court, it is submitted, should intervene and set aside assignment deed dated 30.9.2021. Learned senior counsel for petitioner submits that RBI Circulars have a statutory flavour, as has been held by Hon'ble Supreme Court in a number of cases. Reliance has been placed by learned counsel for petitioner on **Sardar Associates vs. Punjab & Sind Bank (2009) 8 SCC 257** and **Central Bank of India v. Ravindra (2002)1 SCC 367.**

6. It is strenuously submitted that respondent no.2 is not entitled in any manner to raise any objection or address any submission in this writ petition inasmuch as it has nothing to do with the debt in question, having assigned the same to respondent no.3. It is thus prayed that this writ petition be allowed.

7. The above arguments have been refuted by learned counsel for respondent no.2, who submits that IndusInd Bank is a necessary and proper party. Further it is the petitioner which has no locus to challenge the assignment deed which is a purely contractual matter between respondent no.2 and respondent no.3. It is further submitted that writ petition in any case is not maintainable/entertainable as respondent no.2 is a private limited bank and respondent no.3 an Asset Reconstruction Company (ARC). Reliance is placed on judgement of Hon'ble the Supreme Court **in Federal Bank Limited Vs. Sagar Thomas, (2003) 10 SCC**, **Phoenix ARC Private Limited versus Vishwa Bharti Vidya Mandir and others, 2022(1) RCR (Civil) 888,** and **a Division Bench judgement of this Court in Fermina**

Developers Pvt. Ltd. and Anr. V. Indiabulls Housing Finance Ltd. (CWP-1806-2023). Furthermore, mandamus sought by the petitioner qua RBI is not maintainable in the absence of notice of demand not being served by the petitioner. Learned counsel for respondent no.2 further points out that in-fact contract between respondents no.2 and 3 stood finalized and culminated on 24.9.2021 itself. While referring to communication dated 24.9.2021 by IndusInd Bank to respondent no.3 attached as part of Annexure R-1, it is pointed out that it is only the formal deed of assignment that was drawn up on 30.9.2021. Therefore, in any case, there is no question of any violation of RBI Circular dated 24.9.2021 as the entire proceedings between respondents no.2 and 3 stood concluded on 24.9.2021 itself.

8. It is vehemently argued that petitioner in any case is not entitled to challenge the assignment deed inasmuch as liability of the petitioner is admitted and cannot be washed away in any manner. Learned counsel has also relied upon the judgement of Hon'ble Supreme Court in **ICICI Bank Ltd. V. APS Star Industries Ltd. (2010) 10 SCC 1**. It is thus prayed that this writ petition be dismissed.

9. We have heard learned counsel for the parties and have gone through the file with their able assistance.

10. Availing of loan facility by petitioner from respondent no.2 to the tune of Rs.3 Crore vide sanction letter dated 29.06.2016 as well as financial indiscipline on the part of petitioner for reasons as may be, are a matter of record. Assignment of debt by respondent no.2 to respondent no.3 vide assignment deed dated 30.09.2021, is also a matter of record though the same has been impugned by the petitioner in this writ petition while submitting that said deed dated 30.09.2021, has been executed by respondent no.2 in favour of respondent no.3 without following the Swiss Challenge

method prescribed in RBI Circular dated 24.09.2021. Other prayers have also been addressed as detailed in para 1 of this order, but prayer at the time of arguments was specifically restricted to assignment of the debt in question.

11. It is pertinent to note at this stage that notice of motion was issued in this writ petition on 06.04.2022 by Coordinate Bench and vide order dated 06.04.2022, proceedings before District Magistrate, Gurugram, initiated by respondent no.3 for taking over possession of the property in proceedings under SARFAESI Act, were directed to be stayed. Learned National Company Law Tribunal (NCLT), Chandigarh, was also restrained from passing any orders admitting the petition under Section 7 IBC, 2016, filed by respondent no.2 while observing that all other proceedings before NCLT, Chandigarh would continue. Respondent no.3, the Asset Reconstruction Company, filed Civil Appeal No. 5272-74 of 2023 (SLP(c) No. 18143 to 45 of 2023, challenging order dated 06.04.2022, granting stay of proceedings under the SARFAESI Act and IBC, 2016. The said appeals were disposed of by Hon'ble the Supreme Court on 18.08.2023, while vacating the interim order while observing that nothing had been opined on the merits of the matter. Proceedings under SARFAESI Act and IBC, 2016, it was directed would continue in accordance with law without being influenced by any order passed in the said proceedings. It is to be noted that learned counsel representing the present petitioner before Hon'ble the Supreme Court had taken a categoric stand that petitioner has not challenged any proceedings pending under SARFAESI Act or IBC, 2016 in the present writ petition and it is only the deed of assignment by original lender i.e., respondent no.2-IndusInd Bank in favour of respondent no.4, which was under challenge being contrary to guidelines framed by RBI. This order had

been brought to the notice of this Court on 13.12.2023. It is in this factual background that learned counsel for petitioner submits that it is only the said assignment deed, which is under challenge.

12. Keeping in view the facts and circumstances of the case, we do find merit in the objection raised by learned counsel for respondents to the effect that writ petition is not entertainable qua a Private Asset Reconstruction Company. Hon'ble the Supreme Court in case of **Federal Bank Limited Vs. Sagar Thomas (supra),** has held as under**:-**

> "32. Merely because the Reserve Bank of India lays the banking policy in the interest of the banking system or in the interest of monetary stability or sound economic growth having due regard to the interests of the depositors etc. as provided under Section 5(c)(a) of the Banking Regulation Act does not mean that the private companies carrying on the business of or commercial activity of banking, discharge any public function or public duty. These are all regulatory measures applicable to those carrying on commercial activity in banking and these companies are to act according to these provisions failing which certain consequences follow as indicated in the Act itself. Provision regarding acquisition of a banking company by the Government, it may be pointed out that any private property can be acquired by the Government in public interest. It is now judicially accepted norm that private interest has to give way to the public interest. If a private property is acquired in public interest it does not mean that the party whose property is acquired is performing or discharging any function or duty of public character though it would be so for acquiring authority.
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> 33. For the discussion held above, in our view, a private company carrying on banking business as a scheduled bank, cannot be termed as an institution or company carrying on any statutory or public duty. A private body or a person may be amenable to writ jurisdiction only where it may become necessary to compel such body or association to enforce any

statutory obligations or such obligations of public nature casting positive obligation upon it. We don't find such conditions are fulfilled in respect of a private company carrying on a commercial activity of banking. Merely regulatory provisions to ensure such activity carried on by private bodies work within a discipline, do not confer any such status upon the company nor puts any such obligation upon it which may be enforced through issue of a writ under Article 226 of the Constitution. Present is a case of disciplinary action being taken against its employee by the appellant Bank. Respondent's service with the bank stands terminated. The action of the Bank was challenged by the respondent by filing a writ petition under Article 226 of the Constitution of India. The respondent is not trying to enforce any statutory duty on the part of the Bank. That being the position, the appeal deserves to be allowed."

13. Hon'ble the Supreme Court in **Phoenix ARC Private Limited vs. Vishwa Bharti Vidya Mandir and others (supra),** held as under:-

"Even otherwise, it is required to be noted that a writ petition against the private financial institution - ARC - appellant herein under Article 226 of the Constitution of India against the proposed action/actions under Section 13(4) of the SARFAESI Act can be said to be not maintainable. In the present case, the ARC proposed to take action/actions under the SARFAESI Act to recover the borrowed amount as a secured creditor. The ARC as such cannot be said to be performing public functions which are normally expected to be performed by the State authorities. During the course of a commercial transaction and under the contract, the bank/ARC lent the money to the borrowers herein and therefore the said activity of the bank/ARC cannot be said to be as performing a public function which is normally expected to be performed by the State authorities. If proceedings are initiated under the SARFAESI Act and/or any proposed action is to be taken and the borrower is aggrieved by any of the actions of the private bank/bank/ARC, borrower has to avail the remedy under the SARFAESI Act and no writ

> petition would lie and/or is maintainable and/or entertainable. Therefore, decisions of this Court in the cases of **Praga Tools Corporation v. Shri C.A. Imanual, (1969) 1 SCC 585** and **Ramesh Ahluwalia v. State of Punjab, (2012) 12 SCC 331** relied upon by the learned counsel appearing on behalf of the borrowers are not of any assistance to the borrowers."
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> In view of the above, present petition is dismissed.

14. Arguments as raised by learned counsel for petitioner regarding entertainability before us have been succinctly dealt with by Division Bench of this Court in **Fermina Developers Pvt. Ltd. and Anr. V. Indiabulls Housing Finance Ltd. (supra).** Argument raised in case of **Fermina Developers Pvt. Ltd. and Anr. V. Indiabulls Housing Finance Ltd. (supra)** was also that the respondent therein is a NBFC under RBI Act 1934 and had obtained registration under Section 45-1A of RBI Act, which obligates the respondent to work and manage its business in public interest and that said respondent was also an institution registered under provisions of National Housing Bank Act, 1987 and was bound to comply with all policies/directions issued by RBI from time to time in public interest and was carrying out public function. An attempt was also made to distinguish the judgment of Hon'ble the Supreme Court in **Phoenix ARC Private Limited vs. Vishwa Bharti Vidya Mandir and others** (supra). All pleas as raised were negated by the Division Bench in its decision dated 23.02.2023 in the aboveaid writ petition while holding as under:-

> "In view of the discussion hereinabove and keeping in view the Dictum laid down by the Supreme Court in Federal Bank (Supra), St. Mary (supra) and Phoenix ARC (supra) we have no hesitation in concluding that the respondent-NBFC would not be amenable to the writ jurisdiction of this Court under Article 226 of Constitution of India."

15. It was further held that it is the mandate of the Constitution in terms of Section 141 thereof that law declared by the Supreme Court shall be binding on all Courts within the territory of India and it is not open for the High Court to question correctness of a decision of Hon'ble the Supreme Court even though the points sought to be urged before the High Court had not been considered by Hon'ble the Supreme Court. Reference was made to judgment of Hon'ble the Supreme Court in **Suganthi Suresh Kumar Vs. Jagdeeshan (2002) 2 Supreme Court Cases 240**.

16. Moreover, it is pertinent to note at this stage that assignment of debt is a matter of contractual relationship between respondent no.2 and 3. Petitioner being a borrower in any case is not entitled to challenge the same. In case of **ICICI Bank Ltd. V. APS Star Industries Ltd. (supra),** it has been held has under:-

> "46. As stated above, an outstanding in the account of a borrower(s) (customer) is a debt due and payable by the borrower(s) to the bank. Secondly, the bank is the owner of such debt. Such debt is an asset in the hands of the bank as a secured creditor or mortgagee or hypothecatee. The bank can always transfer its asset. Such transfer in no manner affects any right or interest of the borrower(s) (customer). Further, there is no prohibition in the BR Act, 1949 in the bank transferring its assets inter se. Even in the matter of assigning debts, it cannot be said that the banks are trading in debts, as held by the High Court(s). The assignor bank has never purchased the debt(s). It has advanced loans against security as part of its banking business. The account of a client in the books of the bank becomes Non Performing Asset when the client fails to repay. In assigning the debts with underlying security, the bank is only transferring its asset and is not acquiring any rights of its client(s). The bank transfers its asset for a particular agreed price and is no longer entitled to recover anything from the

borrower(s). The moment ICICI Bank Ltd. transfers the debt with underlying security, the borrower(s) ceases to be the borrower(s) of the ICICI Bank Ltd. and becomes the borrower(s) of Kotak Mahindra Bank Ltd. (assignee).

47. At this stage, we wish to once again emphasize that debts are assets of the assignor bank. The High Court(s) has erred in not appreciating that the assignor bank is only transferring its rights under a contract and its own asset, namely, the debt as also the mortgagee's rights in the mortgaged properties without in any manner affecting the rights of the borrower(s)/mortgagor(s) in the contract or in the assets. None of the clauses of the impugned Deed of Assignment transfers any obligations of the assignor towards the assignee."

17. In the given facts and circumstances besides the fact that assignment of debt is a contractual matter between respondents no.2 and 3 with petitioner having no truck with the same, correctness or otherwise of assignment deed due to violation of RBI Circular dated 24.09.2021, cannot be the subject matter of adjudication in the present proceedings and more so with respondents no.2 and 3 taking a categoric stand that the contract between them had been finalized on 24.09.2021 itself and it is only the final deed of assignment which was drawn up subsequently on 30.09.2021.

18. In all fairness, we would also deal with the objection raised by learned counsel for the petitioner to the effect that respondent no.2 is not entitled to address any arguments having assigned the debt to respondent no.3. Petitioner, admittedly in default, seeks setting aside of assignment deed by respondent no.2 in favour of respondent no.3 but contends in an inexplicible manner that respondent no.2 is not entitled to contest this writ petition. We do not find any merit in this argument, which is rejected being misconceived.

19. Keeping in view the facts and circumstances as above, we do not find any ground to interfere in this writ petition, which is accordingly dismissed. Pending application(s), if any, stands accordingly disposed of.

(LISA GILL)
JUDGE

(RITU TAGORE)
JUDGE

December 16, 2023.
lucky/s.khan

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