

IN THE PUNJAB AND HARYANA HIGH COURT AT
CHANDIGARH

236

CWP-35310-2019
Date of Decision: 11.10.2023

OM PRAKASH NARANG

... Petitioner

VERSUS

THE PERMANENT LOK ADALAT FOR PUBLIC
UTILITY SERVICES AND ANOTHER

... Respondents

CORAM: HON'BLE MR. JUSTICE VINOD S. BHARDWAJ.

Present: Mr. Ashutosh Gupta, Advocate
for the petitioner.

Mr. Paras M. Goyal, Advocate
for respondent No.2.

VINOD S. BHARDWAJ, J. (ORAL)

Challenge in the present petition is to the Award dated 14.06.2019 passed by Permanent Lok Adalat (Public Utility Services), Ludhiana, whereby the application moved by the petitioner under Section 22-C(8) of the Legal Services Authorities Act, 1987 has been dismissed.

Learned counsel for the petitioner contends that the petitioner is the sole proprietor of M/s Narang Handloom and in April 2014, the petitioner-applicant availed loan of Rs.50,00,000/- vide account No.HLAPLUD0010-8621. The petitioner-applicant had thereafter availed another loan of Rs.26,26,747/- from respondent-non-banking finance company vide loan account No.HLAPLUD00181385. Thereafter, The terms and conditions of the said loan agreement were settled between the parties at the time of disbursement of the said loan. The applicant-petitioner started repayment of the said loan in equated installments. However, in the year 2016, another bank

agreed to take over both the loans, whereupon the petitioner asked the respondent-non-banking finance company to calculate the total outstanding amount due towards the petitioner. However, while conveying the total outstanding amount, the respondent-non-banking finance company added Rs.85,669.14/- and Rs.4,00,367.77/- respectively towards the foreclosure charges. Despite objecting to the said charges as being in conflict with the guidelines/circulars issued by the Reserve Bank of India from time to time, the petitioner deposited the same under the exigent circumstances. Request for refund of the said amount thereafter was made, but to no avail. A legal notice dated 10.01.2018 was also served upon the respondents, but finding no response, the abovesaid application No.212 dated 11.06.2018 was preferred before the Permanent Lok Adalat (Public Utility Services), Ludhiana. A prayer was thus made for refund of the amount of Rs.1,86,036.91/- to the applicant alongwith interest w.e.f. 08.07.2016 till the amount in question was realized.

On notice, the respondent filed its reply wherein while contending that M/s Narang Handloom is a proprietorship firm, the factual aspects noticed above were not denied. It is, however, contended that the foreclosure charges of Rs.1,86,036.91/- were recovered in view of Clauses 4.3 and 2.9 of the loan agreement, which empowered the respondent to recover the foreclosure charges at the rate of 5% during the initial two years from the date of disbursement and @ 3% thereafter, on the outstanding principal amount. Hence, the charges were levelled legally and were recoverable on account of foreclosure/prepayment of loan account in view of the circulars issued by the National Housing Bank on 14.08.2014 and 22.07.2016.

As the conciliation proceedings conducted under 22-C (4) to (7) of the Legal Services Authorities Act, 1987 failed to yield any result, adjudication in terms of 22-C(8) of the Legal Services Authorities Act, 1987 was undertaken by the respondent-Permanent Lok Adalat (Public Utility Services), Ludhiana.

On consideration of the respective submissions and the evidence led by the parties, the application filed by the petitioner was dismissed by placing reliance on the clarification/circulars issued by the National Housing Bank. Hence, the writ petition has been filed.

Counsel for the petitioner contends that the respondents had levelled the such charges ignoring the master circular issued by the Government of India, Ministry of Finance and the Reserve Bank of India as per which the foreclosure charges could not be claimed against the individual borrowers. The relevant part of the publication issued by the Government of India, Ministry of Finance dated 01.08.2014 reads thus:

“No Foreclosure Charges by NBFCS on all Floating Term Loans to Individual Borrowers

The Reserve Bank of India (RBI) does not propose to restrict foreclosure charges charged by the Non-Banking Financial Companies (NBFCs) on pre-payment of loans to a maximum of three percent at present. RBI has issued a circular dated 14th July, 2014 to all Non-Banking Financial Companies/Residuary Non-Banking Companies with regard to levy of foreclosure charges/pre-payment penalty on Floating Rate Loans, as a measure of customer protection and also in order to bring in uniformity with regard to pre-payment of various loans by borrowers of banks and NBFCs, stipulating that NBFCs shall not charge foreclosure charges/prepayment penalties on all floating rate term loans sanctioned to individual borrowers, with

immediate effect. The RBI has not received any such data till date regarding NBFCs non-compliance of the directions issued recently on 14.7.2014 on levy of foreclosure charges/pre-payment penalty on floating rate loans.”

(Emphasis supplied)

He thus contends that the circular dated 14.07.2014 was thus circulated to all non-banking financial companies/residuary non-banking financial companies not to levy any foreclosure charges/pre-payment penalty on total outstanding loan amount against individual borrowers. He contends that as per the law laid down by this Court as well as numerous other judgments pronounced by different High Court, the sole proprietorship and individuals are one entity and cannot be segregated from that of an individual. Consequently, even though the loan may have been advanced in favour of a sole proprietorship, however, it still retains its fundamental character of an individual. He places reliance on the judgment of this Court in **CWP-6048 of 2017** decided on 23.05.2017 in the matter of **‘State Bank of Patiala Vs. Permanent Lok Adalat (Public Utility Services), Rewari.’**, wherein it has been held as under:

“The main contention of learned counsel for the petitioner is that the petitioner Bank is entitled to pre-payment charges at the rate of 4.25% of the over-standing amount from Respondent No.2 on account of taking over loan/ cash credit limit by HDFC Bank as per letter of arrangement and clause 30 of the Monetary Policy 2014-2015 of the Reserve Bank of India relates only to levy of penalty of pre-payment of Term Loans attracting floating rate of interest and saving Bank accounts and not applicable to the case of respondent No.2 to whom working capital by way of Cash Credit Limit was allowed by the petitioner Bank in the name of her sole proprietorship concern, respondent No.3.

A perusal of the impugned order indicates that the letter of arrangement Ex.R7 –B dated January 22, 2016 has been carefully perused by the Permanent Lok Adalat which has observed that by the hand-written lines in clause 10, it has been incorporated that the petitioner Bank will be entitled to take over charges @ 4.25% on the total loan amount whereas documents in the original agreement never contained the said plea in clause 10 of the general terms and conditions. The documents which were supplied by petitioner Bank at the time of renewal and the documents downloaded from e-mail, did not contain the above said condition. On account of absence of any hand-written point in clause 10 of the general terms and conditions which was supplied by the petitioner Bank at the time of renewal Ex.P-1 and Ex.P-7, the petitioner Bank was held not liable to recover pre-payment charges/ take over charges @ 4.25%.

With the assistance of learned counsel for the petitioner I have gone through the Master Circular on Customer Service in Banks, issued by Reserve Bank of India. There is a specific provision made in the said circular in para 6 which deals with levy of service charges. Para 6.1 of the circular reads as follows:-

“6.1 Fixing service charges by banks

The practice of IBA fixing the benchmark service charges on behalf of member banks has been done away with and the decision to prescribe service charges has been left to individual banks. While fixing service charges for various types of services like charges for cheque collection, etc., banks should ensure that the charges are reasonable and are not out of line with the average cost of providing these services. Banks should also take care to ensure that customers with low volume of activities are not penalised.

Banks should make arrangements for working out charges with prior approval of their Boards of Directors as

recommended above and operationalise them in their branches as early as possible.”

As per para 6.4 of the Circular, which deals with levy of foreclosure charges/ pre-payment penalty on floating rate term loans, it has been laid that banks will not be permitted to charge foreclosure charges/ prepayment penalties on all floating rate term loans sanctioned to individual borrowers. In para 6.6 of the Circular, an advice has been given to the bank to follow a uniform, fair and transparent pricing policy and not discriminate between their customers at home branch and non-home branches.

In view of the above said circumstances, this Court is of the opinion that the petitioner Bank is not entitled to any recovery of take-over charges as the entire amount due had already been paid to the petitioner and that the condition for recovery of charge @ 4.25% has been illegally incorporated in the agreement. No ground is made out to interfere in the order passed (sic) by respondent No.1.”

Reference is also made to the judgment of High Court of Calcutta (Kolkata) in the **Writ Petition No.5521 (W) of 2017** titled as **Devender Surana Versus Bank of Baroda & others** where a similar question arose. After considering the issue in detail, the Hon'ble Calcutta High Court held as under:

“Reserve Bank of India by its circular dated May 7, 2014 dealt with the levy of foreclosure charges/prepayment penalty on floating rate term loans. The circular referred to in Part B of the first bi-monthly monetary policy statement, 2014 announced on April 1, 2014. It noted that, such bi-monthly monetary policy statement indicated that, in the interest of the consumers, bank should consider allowing their borrowers the possibility of prepaying floating rate term loans without any penalty. The Reserve Bank of India by such circular advised the banks that, they will not be permitted to charge foreclosure charges/

prepayment penalties on floating rate term loans sanctioned to individual borrowers with immediate effect.

Therefore, at least with effect from May 7, 2014, banks are not entitled to charge foreclosure/prepayment penalties on floating rate term loan sanctioned to individual borrowers from such date notwithstanding the terms of the sanction.

It has been contended that, the petitioner being a sole proprietorship firm cannot be considered to be an individual borrower coming within the purview of the circular dated May 14, 2014.

A natural person and his sole proprietorship firm are the same legal entity. The liability of the sole proprietorship firm is that of the natural person carrying on business under its name. The sole proprietorship firm of a natural person and the natural person owning the firm do not enjoy the benefit of being treated as separate legal entities

They are the one and the same legal entity. In the facts of the present case, although the loan was sanctioned in the name of a sole proprietorship firm, the natural person owning the sole proprietorship firm is liable. In law, therefore, the respondent no. 1 sanctioned credit facility to a natural person, albeit in the name of the sole proprietorship firm owned by such natural person.”

Having noticed above, the respondent No.1 was directed to refund the sum received by it alongwith interest to the petitioner.

Reference is also made to the judgment of the High Court of Delhi in the matter of **Savita Rani Versus Naresh Kumar** and another in **RCREV 218 of 2016** decided on 22.09.2017, wherein the legal position has been extracted by the Delhi High Court as regards the status of an individual vis-a-vis a ‘sole proprietorship’. The same reads thus:

“10 Legal position in this regard is settled. The phrase Sole Proprietorship is defined in Black’s Law Dictionary (Eighth Edition), Pg. 1427 as follows:-

*“**Sole Proprietorship-** 1. A business in which one person owns all the assets, owes all the liabilities and operates in his or her person capacity., 2. Ownership of such a business.- Also terms individual proprietorship.”*

11. Hence, sole proprietorship is one that is run by a natural person. There is no legal distinction between the owner and the business entity. It is the owner who is in control of all the elements of the proprietorship.”

Per contra, the learned counsel for the respondents has argued that the Award has been passed by correctly appreciating the clarification/circulars issued by the National Housing Bank. The deduction of the amount towards foreclosure charges had been made in consonance with the abovesaid circulars issued by the National Housing Bank and no fault can be found thereto. A reference is made to the circular No.17 of 2015-16 dated 22.07.2016 with respect to levy of foreclosure charges. The relevant extract thereof reads thus:

“All Registered Housing Finance Companies

Dear Sir/Madam

Levy of foreclosure charges/pre-payment penalties -Clarification

Please refer to our Circulars NHB(ND)DRS/Policy Circular-63/2014-15 and 66/2014-15 dated August 14, 2014 and September 3, 2014, respectively, in terms of which, inter-alia, all floating rate term loans sanctioned to individual borrowers by the Housing Finance Companies (HFCs), are exempted from any foreclosure charges/prepayment penalties.

2. It has come to our notice that some of the HFCs continue to levy foreclosure charges/pre-payment penalties on term loan sanctioned to Individual borrowers under different nomenclatures, such as loan origination cost, loan maintenance

cost, etc. This is in contravention of the provisions of the Circulars referred to above. We clarify that these provisions apply to all term loans sanctioned only to individual borrowers.

3. *Further, the issue relating to applicability of the aforesaid Circulars to a Sole Proprietorship Concern/Firm or an HUF, as a borrower/co-borrower has also been examined in the light of complaints / representations received by us. We clarify that the intent and spirit of the circular is to protect the interest of the individual borrowers. Therefore, a Sole Proprietorship Concern/Firm or an HUF, as borrower or co-borrower will not be treated as an individual borrower for the purpose of these circulars.”*

While referring to the above, counsel for the respondents contends that the aforesaid clarification had been issued by the National Housing Bank in respect to the Master Circular of the Reserve Bank of India and it was specifically held that the abovesaid Master Circular issued by the Reserve Bank of India is applicable only to the individuals and the same would not be applicable to sole proprietorship concern/firm or HUF firm as borrower. The non-banking financing company would thus be entitled to claim foreclosure charges from such borrowers.

A pointed query was posed to the petitioner as to how a clarification w.r.t. to the Master Circular issued by the Reserve Bank of India could have been issued by the National Housing Bank and to be held binding as a correct interpretation of the said circular. He could not refer to any judgment to substantiate his arguments. He has also not placed on record any clarificatory circulars/guidelines issued by the Reserve Bank of India which resonate the aforesaid interpretation and exclude the sole proprietorship concern/firms or HUF firm from being considered as individuals in terms of the

Master Circular/guidelines issued by the Reserve Bank of India. He, however, contends that National Housing Bank being an apex body and having been constituted under the Statute is thus an instrumentality of the State and the abovesaid circular having been issued by the instrumentality of the State, which is wholly owned by the Reserve Bank of India should be considered to be valid, binding and a legally enforceable interpretation, which would thus empower and entitle the respondent/non-banking financing company from effecting recovery of the foreclosure charges.

I have heard the learned counsel for the respective parties and have gone through the documents and record available on case file with their able assistance.

The issues that arise for consideration before this Court are as to whether an individual would also include a proprietorship concern/firm or not? Or that the entity of proprietorship concern/firm is different and distinct from that of an individual.

I find myself in agreement with the judgments relied upon by the counsel for the petitioner which have equated an individual to a proprietorship concern/firm and have held that the entity of the proprietorship concern/firm is not distinct from that of an individual. Further, the said issue was considered by this Court in the matter of **Association of Property Professionals Versus State of Haryana and Others** bearing **CWP No.19796-2018** decided vide judgment dated 12.12.2022. Relevant extract thereof reads as under:-

“17. In the above-said background, it is essential to look into the definition/interpretation of sole proprietorship under various other statutes/statutory framework as an external aid to assign meaning to the said phrase. In the context of the taxation law, a

sole proprietorship business in India is not taxed as a different legal entity. Rather, the business owners file their business taxes as a part of their individual tax returns. Similarly, under the Chartered Accountants Act, 1949, Section 2 (haa) defines sole proprietorship to mean individual who engages himself in the practice of accountancy or offers to perform his services refer to in clauses (ii) to (iv) of Sub Section 2. Thus, the entity of sole proprietorship has been described as that of the individual himself. Further, a sole proprietorship does not require any mandatory registration under any law. The requirement for registration of license is only specific to the nature of the business being undertaken. There is no regulatory or statutory mechanism which gives a distinct entity to a sole proprietorship other than that of the individual-the owner himself.

18. It is thus a well settled position in law that a proprietary (sic) concern and the proprietor are one and the same and that they cannot be treated as separate juristic entities. The proprietary concern derives its identity and individuality from the proprietor and subsumes itself in the proprietor. Segregation of the two is incomprehensible in law when it comes to determining their rights and liabilities and legal fiction regards them as one. They would thus fall under the definition of an individual. Consequently, the petitioners as sole proprietors cannot be treated as an entity “other than individual” when the registration as a Real Estate Agent is in the name of the proprietary (sic) concerned. The demand raised through Public Notice (Annexure P-8) is thus bad and unsustainable and the petitioners would be liable to pay the registration charges/renewal charges as are applicable to the individuals instead of the category “other than individual”.

The orders issued by the Government of India exclude all individual borrowers from being subjected to foreclosure charges. The

applicability of the aforesaid order dated 01.08.2014 appended as Annexure P-4 alongwith the present petition has not been disputed. Further, it is also not a subject matter of dispute that the application for foreclosing the loan account was submitted by the petitioner on 20.04.2016 whereas the clarification relied upon by the respondent was issued by the National Housing Bank on 22.07.2016. Hence, the application for foreclosing the loan account had been filed by the petitioner much prior to the issuance of aforesaid clarification. As such, the said clarification was not in force when the application for foreclosing the loan account was submitted by the petitioner and the charges were determined and levied.

In any case, once the master Circular had been issued by the Reserve Bank of India, the clarification could have only been issued by the Authority which authored the said Master Circular i.e. the Competent Authority which is Reserve Bank of India. Counsel for the respondent has failed to point out or refer to any provision as per which the National Housing Bank has been conferred with the power to issue the clarification and/or the authority to amend/modify the terms and conditions/guidelines/ clarifications issued by the Reserve Bank of India. A mere fact that the National Housing Bank is wholly owned by the Reserve Bank of India does not give it an overriding power to issue any such direction/ clarifications or which amounts to addition/alteration or interpretation of the terms and conditions of the circulars issued by the Reserve Bank of India. Any such Authority cannot *ipso facto* be conferred with the power to issue a binding interpretation to a document that has originated from the Reserve Bank of India. Consequently, the abovesaid status of the respondent-National Housing Bank being wholly

owned by the Reserve Bank of India does not make it an Authority which is competent to issue clarification w.r.t. the circulars issued by the Reserve Bank of India. At the same time, the publication of 01.08.2014 was issued by the Government of India, in the Ministry of Finance and in the Parliament. The Circular of 14.07.2014 is not referred to in the Circular dated 22.07.2016 of National Housing Bank. The said clarification has remained undisputed and no evidence has been adduced on record that the above circular was superseded or modified by the Reserve Bank of India.

The Permanent Lok Adalat (Public Utility Services), Ludhiana failed to take into consideration the aforesaid aspect and has placed much reliance on the Circular No.17 of 2015-16 dated 22.07.2016 notwithstanding that above said circular was issued much later than the submission of the application by the petitioner for foreclosing his account and also without appreciating or referring to any power having been conferred upon the National Housing Bank for issuance of such clarification.

Any clarification which runs contrary to law cannot be accepted. Further a reference made to the terms and conditions of the agreement to justify the said charges can also not be held to be valid. A contract is required to be compliant of law and has to be in conformity with the same. A contract cannot be read over and above the statutory mandate and to hold that notwithstanding the legal position, a proprietorship concern/firm shall be an entity separate from the individual borrower.

I find that the Permanent Lok Adalat (Public Utility Services), Ludhiana committed an error in law by failing to appreciate the aforesaid proposition in law as also the competence of the National Housing Bank to

issue any clarification to the Master Circular of the Reserve Bank of India as also the undisputed factual aspect that the application for foreclosing the account was submitted much prior to the clarification issued by the National Housing Bank on 22.07.2016. The alleged clarification issued later in point excludes the sole proprietorship/HUF by virtue of the clarification. The exclusion of a Class/beneficiary cannot be read retrospectively and has to be applied prospectively. The exclusion thus can apply only for future transactions and not for the transactions that matured earlier. The legal aspects must be kept in mind by the Permanent Lok Adalat and any Award based on misapplication of law would render such Award liable to be set aside.

For all the foregoing reasons, the impugned Award passed by the Permanent Lok Adalat (Public Utility Services), Ludhiana suffers from an illegality, perversity and misappreciation of well settled law. The impugned Award dated 14.06.2019 passed in Application No.212 dated 11.06.2018 is thus set aside. The respondent is directed to refund the foreclosure charges to the petitioner alongwith interest @ 6% per annum from the date of filing of the Application before the Permanent Lok Adalat (Public Utility Services), Ludhiana till its actual disbursement.

Petition is allowed accordingly.

OCTOBER 11, 2023

rajender

(VINOD S. BHARDWAJ)
JUDGE

Whether speaking/reasoned : Yes/No

Whether reportable : Yes/No