

**IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
AN APPEAL FROM JUDGMENT AND ORDER PASSED IN ITS
CONSTITUTIONAL WRIT JURISDICTION
ORIGINAL SIDE**

APO 180 of 2023

In

**IA No. GA 1 of 2023
STATE BANK OF INDIA**

VS.

ATIBIR INDUSTRIES CO. LTD. & ANR.

With

APOT 393 of 2023

In

IA No. GA 1 of 2023

CFM ASSET RECONSTRUCTION COMPANY PRIVATE LIMITED

VS.

ATIBIR INDUSTRIES CO. LTD. & ANR.

Present:

The Hon'ble Justice Debangsu Basak

And

The Hon'ble Justice Md. Shabbar Rashidi

For State Bank of India/
Appellant

: Mr. Om Narayan Rai, Adv.
Mr. Santosh Kr. Ray, Adv.
Ms. Rituparna Sanyal, Adv.
Ms. Antalina Guha, Adv.

For the Respondent No. 1/
Writ Petitioner

: Mr. Ranjan Bachawat, Sr. Adv.
Mr. Suman Kr. Dutt, Adv.
Mr. Arijit Bardhan, Adv.
Mr. Sarosij Dasgupta, Adv.
Mr. Soumyajit Mishra, Adv.

For Respondent No. 2.

: Mr. S. N. Mukherjee, Sr. Adv.
Mr. Abhrajit Mitra, Adv.
Mr. Subhankar Nag, Adv.

Mr. Sarvapriya Mukherjee, Adv.
 Mr. B. Kumar, Adv.
 Mr. I. Basu, Adv.
 Mr. Naman Choudhury, Adv.

Hearing concluded on : June 25, 2024
 Judgment on : July 25, 2024

DEBANGSU BASAK, J. :-

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Preface

1. Two appeals directed against the judgement and order dated October 5, 2023, passed in WPO 722 of 2023 have been heard analogously as similar issues are involved, appeals are between the same parties and appeals are directed against the same judgement and order.
2. 2. State Bank of India, (hereinafter referred to as the SBI for the sake of convenience) has preferred the appeal being APO 180 of 2023 while CFM Asset Reconstruction Company (hereinafter referred to as

the ARC for the sake of convenience) has preferred the appeal being APO No. 393 of 2023.

Contentions of SBI

3. Learned advocate appearing for SBI has contended that Atibir Industries Company Limited (hereinafter referred to as the borrower for the sake of convenience) obtained both fund and non-fund-based credit facilities from SBI. Such credit facilities have been sanctioned by a letter dated January 27, 2020. Referring to the letter of sanction dated January 27, 2020, he has pointed out that, amongst the fund-based credit facilities, the borrower enjoyed cash credit as well as term loan facilities. By a letter dated June 11, 2020, the borrower had referred to its earlier letter and resolution plan dated May 26, 2020, the meeting between the borrower and SBI held through video conferencing on June 1, 2020, and the letter of SBI dated June 3, 2020, and submitted a revised restructuring plan for credit facilities. He has contended that SBI accepted the revised restructuring plan submitted by the borrower.
4. Referring to the letter dated June 11, 2020, being the revised plan of the borrower and relevant provisions of the Reserve Bank of India (RBI) circulars, learned advocate appearing for SBI has contended that, the account of the borrower became a non-performing asset

(NPA) on the date when the borrower had applied for restructuring of the credit facilities.

- 5.** Learned advocate appearing for SBI has contended that, in any event, the account of the borrower became an NPA as of October 16, 2020. The account became irregular on January 17, 2020 itself. Moreover, sickness in the account of a borrower has to be treated borrower-wise and not account-wise. In support of such contention, he has relied upon the Master Circular of RBI.
- 6.** Learned advocate appearing for SBI has submitted that SBI issued a web notice dated February 10, 2023, for the sale of the subject financial assets. Borrower had filed a writ petition with regard thereto in which an interim order was passed. Borrower had withdrawn the writ petition on March 21, 2023. SBI had subsequently sold the subject accounts on March 24, 2023, when the subsequent writ petition was affirmed. He has contended that with the interim order in the first writ petition passed on March 6, 2023, being vacated with the withdrawal of such writ petition on March 21, 2023, there was no impediment preventing SBI from selling the financial asset concerned.
- 7.** Learned advocate for SBI has relied upon Reserve Bank of India (Transfer of Loan Exposures) Directions, 2021. He has submitted that the accounts of the borrower were special mention accounts if not

stressed loans on the date when the financial assets were sold. He has referred to Sections 2 (e) and 5 of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act) and contended that there was no impediment on SBI from selling the subject accounts to ARC. He has referred to Chapter IV of the Directions of 2021 and contended that SBI followed such provisions in both letter and spirit. He has pointed out that Direction No. 80 of the Directions of 2021 and contended that SBI can take over standard accounts from ARC, in the event, that ARC has successfully implemented a resolution plan for the stressed loan acquired by them from the lender.

- 8.** Learned advocate appearing for SBI has contended that the learned Single Judge failed to appreciate that, when one account in the bunch of credit facilities enjoyed by a borrower becomes a non-performing asset, then, the entirety of the credit facility is treated as NPA. He has contended that the learned Single Judge erred in concentrating only on the term loan account and holding such a term loan account did not become a NPA. According to him, the learned Judge has failed to appreciate that, the term loan account also became NPA when the borrower had applied for the reconstruction thereof. Both the cash credit account and the term loan account had become

NPA before the issuance of the web notice dated February 10, 2023. In any event both the accounts had become NPA on March 24, 2023, when the accounts were sold to the ARC.

9. Learned Advocate appearing for SBI has relied upon All India Reporter **1966 Supreme Court 334 (Lekhraj Sathramdas Lalvani vs. N.M. Shah)**, **2003 Volume 4 Supreme Court Cases 712 (High Court of Gujarat and Another vs. Gujarat Kishan Mazdoor Panchayat and Others)** and **2004 Volume 12 Supreme Court Cases 278 (N. Mani vs. Sangeetha Theatre and Others)**.
10. Relying upon **AIR 1997 Cal 321 (Ronix Polymers Private Limited and Others vs. State of West Bengal and Others)**, **1991 Volume 3 Supreme Court Cases 368 (Munindra Kumar and Others vs. Rajiv Govil and Others)**, **AIR 1965 Supreme Court 1992 (Nand Kishore Saraf vs. State of Rajasthan and Another)**, **AIR 1954 Supreme Court 592 (K.N. Guruswamy vs. State of Mysore)**, **1997 Volume 1 Supreme Court Cases 134 (Ramniklal N. Bhutta and Another vs. State of Maharashtra and Others)**, **2010 Volume 11 Supreme Court Cases 557 (Manohar Lal vs. Ugrasen)** and **2010 Volume 10 Supreme Court Cases 1 (ICICI Bank Limited vs. Official Liquidator of APS Star Industries Limited and Others)** learned advocate appearing for SBI has contended that, a futile writ

need not be issued. According to him, since, the accounts had become NPA as of the date of the sale, issuance of any writ in the writ petition has become futile.

- 11.** Relying upon ***1976 Volume 2 Supreme Court Cases 152 (Gurucharan Singh Vs. Kamla Singh and Others)*** learned advocate for SBI has contended that, SBI as the appellant is entitled to take such points of facts and law which emanate out of the pleadings, in the appeal. He has contended that all submissions advanced on behalf of SBI in this appeal are based on facts made available before the learned Single Judge.

Contentions of ARC

- 12.** Learned Senior Advocate appearing for ARC has contended that ARC came across an e-auction notice dated February 10, 2023, issued by SBI concerning the borrower. ARC had participated in the e-auction, became successful, and obtained the assignment of the stressed loan exposure of the borrower from SBI by way of a registered deed of assignment dated March 24, 2023. Then, SBI had already initiated proceedings under Section 7 of the Insolvency and Bankruptcy Code, 2016 against the borrower on March 10, 2022.
- 13.** Learned Senior Advocate appearing for ARC has contended that the borrower filed a writ petition and obtained a stay on the e-auction

notice dated February 10, 2023, on the basis that the one-time settlement offered by the borrower should have been accepted by SBI. The borrower had withdrawn such writ petition on March 21, 2023. Consequent upon such withdrawal of the writ petition interim order passed therein had stood vacated. Thereafter, the assignment had been completed on March 24, 2023. The writ petition in which the impugned judgement and order was passed had been filed immediately thereafter. Initially, the learned Single Judge had refused to pass any interim order on March 24, 2023, in the second writ petition. An appeal had been filed by the borrower in which, orders dated June 8, 2023, and June 12, 2023 had been passed.

14. Learned Senior Advocate appearing for ARC has referred to the list of events. He has contended that ARC having obtained the assignment validly, the same should not be interfered with.

15. Learned Senior Advocate appearing for ARC has contended that asset classification is borrower-wise and not facility wise, in terms of the RBI Master Circular Prudential Norms on Income Recognition, Asset Classification and Provision Pertaining to Advance dated July 11, 2015, all accounts of the borrower have become NPA on October 16, 2020. Borrower had paid a sum of Rs. 80 lakhs on December 11, 2020, in respect of the term loan account only. All other nine accounts

of the borrower had remained unserviced and continued to remain NPA. He has referred to the balance sheet of the borrower for the year ended March 31, 2021, and submitted that the borrower admitted default of more than 90 days in payment of the term loan installment.

16. Learned Senior Advocate appearing for the ARC has contended that the account of the borrower had become NPA on February 10, 2023, being the date of the issuance of the e-auction notice as the account was classified as such on October 16, 2020.

17. Learned Senior Advocate appearing for ARC has pointed out that, the borrower enjoyed credit facilities above Rs. 341 crores and that a sum above Rs. 250 crores has fallen due from the borrower.

18. Learned Senior Advocate appearing for ARC has contended that the e-auction notice dated February 10, 2023, sought to transfer the loan as a stressed loan which is permitted under Section 5 of the SARFAESI Act, 2002 read with Rule 6 of the Master Circular on Prudential Framework for Resolution of Stressed Assets dated June 7, 2019. He has contended that even if the learned Single Judge was correct in recording that the borrower's account did not become an NPA on October 16, 2020, it was at least a special mentioned account on such date, and subsequently, no payment has been made till December 11, 2020, rendering the account as NPA.

- 19.** Learned Senior Advocate for ARC has contended that the borrower's loan was admittedly a stressed loan as defined under Rule 9 (k) of Master Direction of RBI (Transfer of Loan Exposure) Direction, 2021 dated September 24, 2021, as amended on December 5, 2022.
- 20.** Learned Senior Advocate appearing for the ARC has submitted that, despite receipt of the notice under Section 13(2) of the SARFAESI Act, 2002 dated July 8, 2022, the borrower did not reply thereto, or challenge the same. Accordingly, the borrower had accepted the classification of its account as NPA and is now estopped from challenging it.
- 21.** Learned Senior Advocate appearing for ARC has contended that, since the borrower invited restructuring of the term loan account on October 15, 2020, such account was downgraded to NPA classification under Rule 16, 17.1 and 17.2.2.1 of Master Circular-Prudential Norms on Income Recognition, Asset Classification and Provision Pertaining to Advances dated April 1, 2022.

Contentions of the borrower

- 22.** The Learned Senior Advocate appearing for the borrower has contended that the classification of the account of the borrower as NPA on October 16, 2020, was de hors the guidelines framed and the directive issued by the Reserve Bank of India. He has referred to

Section 2(o) of the SARFAESI Act, 2002, and contended that an account may be classified as an NPA by the directions and guidelines relating to asset classification issued by RBI. He has referred to the notice dated July 8, 2022, claimed to be under Section 13(2) of the SARFAESI Act, 2002 purporting to classify the account as NPA on October 16, 2020. He has referred to Rule 2.1.2 of the Master Circular of the Reserve Bank of India relating to Prudential Norms on Income Recognition, Asset Classification and Provisioning Pertaining to Advances. He has contended that the term loan account can be classified as NPA after 90 days while, in the facts of the present case, it has been classified as 90th day.

23. Referring to the term loan account, learned Senior Advocate appearing for the borrower has contended that, the installment of the term loan for the month of February 2020 was paid by the borrower on April 6, 2020. Therefore, there was no default concerning the payment of installment for February 2020. According to him, the term loan facility was within limits on April 6, 2020, since the sanctioned term loan limit was Rs. 16,80,00,000. He has referred to the circulars issued by the Reserve Bank of India in the wake of Covid – 19 pandemic namely March 27, 2020, April 17, 2020, and May 23, 2020. He has contended that the cumulative effect of such circulars was that

the borrowers were granted the benefit of the moratorium and that borrowers had been exonerated from paying installments of term loan till November 30, 2020.

24. Referring to the letter dated September 15, 2020, learned Senior Advocate appearing for the borrower has contended that, SBI accepted the change in the Repayment Schedule in respect of the term loan. The revised Repayment Schedule exonerated the borrower from paying any amount till September 30, 2020. Despite the moratorium granted by the RBI, SBI had called upon the borrower to pay the term loan on September 30, 2020. Borrower had paid an amount of Rs. 80,00,000 on December 11, 2020. According to him, therefore, the borrower had cured the default, if any, as of December 11, 2020.

25. Learned Senior Advocate appearing for the borrower has contended that, since the borrower was required to pay the installment of the term loan on September 30, 2020, the account could not have been classified as NPA on October 16, 2020, given the Prudential Norms. He has contended that the contention of SBI that the account of the borrower was irregular since January 17, 2020, was unfounded as the term loan for February was paid by the borrower on April 6, 2020.

26. Learned Senior Advocate appearing for the borrower has contended that the account of the borrower could not have been classified as a stressed loan account and could not have been placed for transfer to an ARC. He has contended that the Web Notice dated February 10, 2023, did not comply with the RBI guidelines on Transfer of Stressed Loan Exposures Directions, 2021. He has referred to the definition of "stressed loan" as laid down in Reserve Bank of India (Transfer of Loan Exposures) Directions, 2021, and contended that essential requirements were not fulfilled. He has referred to the date of assignment dated March 24, 2023, and contended that the transfer was based on the account being classified as a non-performing asset. Referring to paragraph 4.2.5 of the Master Circular-Prudential Norms on Income Recognition, Asset Classification, and Provisioning relating to Advances dated July 1, 2015, he has contended that, with payment, the account could not have been classified as an NPA. He has also referred to paragraph 52 of the Reserve Bank of India (Transfer of Loan Exposures) Directions, 2021.

27. Referring to the circulars dated March 27, 2020, April 17, 2020, and May 23, 2020, issued by RBI on account of Covid-19 pandemic, learned senior advocate appearing for the borrower has contended that, such circulars have statutory force. He has referred to **2010**

Volume 10 Supreme Court Cases 1 (ICIC Bank Limited vs. Official Liquidator of APS Star Industries Limited and Others), to contend that, Master Circulars of the Reserve Bank of India relating to Prudential Norms on Income Recognition, Asset Classification and Provision pertaining to Advances have statutory force. The circulars also have statutory force.

28. Learned Senior Advocate appearing for the borrower has pointed out that, the borrower filed an earlier writ petition WPO 428 of 2023 which was withdrawn on March 21, 2023, with the liberty to file afresh. On March 23, 2023, a Web Notice, styled as "Corrigendum" was issued by SBI. SBI had acted in hot haste in transferring the account on March 24, 2023.

29. Learned Senior Advocate appearing for the borrower has contended that the borrower approached SBI with a one-time settlement (OTS) proposal. He has referred to the OTS made by the borrower from time to time. He has contended that SBI did not explain why the OTS offers were not accepted.

30. Learned Senior Advocate appearing for the borrower has contended that SBI being a statutory authority and a lender was duty bound to act fairly. He has contended that the actions taken by SBI were mala fide. SBI had withdrawn the notice purporting to be under

Section 13(4) of the SARFAESI Act, 2002, to prevent the borrower from approaching the Debts Recovery Tribunal. OTS proposals had not been accepted. In support of the contention that SBI is required to act fairly and in good faith, he has relied upon **2004 Volume 4 Supreme Court Cases 311 (Mardia Chemicals Ltd. and Others vs. Union of India and Others).**

31. Learned Senior Advocate appearing for the borrower has contended that, the stand taken by SBI and ARC that the account of the borrower was NPA on account of default in the cash credit facility was taken for the first time before the Appeal Court and that, the same cannot be permitted. In support of such contention, he has relied upon **2000 Volume 5 Supreme Court Cases 122 (Vimal Chandra Grover vs. Bank of India), 2008 Volume 2 Supreme Court Cases 95 (Mohd. Akram Ansari vs. Chief Election Officer and Others),** and **1985 Volume 2 Supreme Court Cases 670 (Daman Singh and Others vs. State of Punjab and Others).**

32. Referring to Chapter IV Rule 52 of the Master Direction-Reserve Bank of India(Transfer of Loan Exposures) Directions, 2021-lender's policy, learned Senior Advocate appearing for the borrower has contended that the account must be a non-performing asset for a transfer of the same. According to him, SMA status will not do.

Referring to Section 5 of the Act of 2002, he has contended that, the power of assignment by a secure creditor is governed by the Reserve Bank of India Guidelines on Reserve Bank of India (Transfer of Loan Exposures) Direction, 2021.

33. Learned Senior Advocate appearing for the borrower has contended that the borrower is entitled to challenge the propriety of the classification of the account as NPA despite not responding to the notice under Section 13(2) of the Act of 2002. He has referred to Section 13(3A) of the Act of 2002 and submitted that a borrower may choose not to respond to such notice. In any event notice under Section 13(2) of the Act of 2002 is a notice of demand. The Act of 2002 has provided for the secure creditor to take a measure under Section 13(4) in the event, the debt is not discharged after the notice under Section 13(2). According to him, non-reply to a notice under Section 13(2) of the Act of 2002 will not operate as an estoppel concerning the classification of the account as NPA. In support of such contention, he has relied upon **AIR 1966 Supreme Court 275 (Union of India vs. Watkins Mayor & Co.)** and **2003 SCC OnLine AP 1129 (Manepalli Udaya Bhaskara Rao vs. Kanuboyina Dharmaraju)**.

34. Learned Senior Advocate appearing for the borrower has contended that the legal rights of the borrowers had been violated.

Since the borrower could not approach the debts recovery tribunal as SBI had withdrawn the notice under Section 34 of the Act of 2002, the borrower is entitled to invoke the writ jurisdiction. In support of such contention, he has relied upon **2004 Volume 4 Supreme Court Cases 311 (Mardia Chemicals Ltd. And Others vs. Union of India and Others)** and **AIR 2020 Cal 136 (Pyari Devi Chabiraj Steels Pvt. Ltd. vs. Axis Bank Limited)**.

35. Learned Senior Advocate appearing for the borrower has contended that, the material date for consideration as to whether the loan exposure of the writ petitioner became an NPA or not was the date when such account was sought to be classified as NPA rather than the date of the assignment. He has contended that neither SBI nor ARC can take shelter under the contention that, SBI was vested with appropriate power under the SARFAESI Act, 2002 to assign. He has contended that neither SBI nor ARC is permitted to act in a fallacious manner. He has relied upon **1975 Volume 1 Supreme Court Cases 559 (Ramchandra Keshav Adke and Others vs. Govind Joti Chavare and Others)** in support of such contention.

36. Learned Senior Advocate appearing for the borrower has contended that the account of the borrower had been never restructured. According to him, the change in the schedule of the

payment had been made following the Master Circulars of the Reserve Bank of India issued during the Covid-19 period and the same permitted a moratorium to be granted. He has contended that no restructuring took place given the Covid-19 relief granted by the Reserve Bank of India.

37. The Learned Senior Advocate appearing for the borrower has contended that reliance on Rule 73 of the Master Direction-Reserve Bank of India (Transfer of Loan Exposures) Directions, 2021 was misplaced. He has contended that Rule 73 has no manner of application as it governs a transferor while Rule 52 applies to a lender. He has referred to the source of funds of ARC and contended that the borrower was entitled to the relief as granted by the learned Single Judge.

Issues

38. The following issues have fallen for consideration in the present appeal:-

- i. Was the account of the borrower NPA as on the date of classification of the same?
- ii. Is the transfer of the financial asset held by SBI in respect of the borrower to respondent No. 2 valid?
- iii. To what relief or reliefs are the parties entitled?

Facts

39. Borrower is a company engaged in the manufacture of sponge iron, pig iron, syntax, and palates and has availed of various credit facilities from the consortium for banks of which SBI is the lead banker. Consortium of bankers of the borrower with SBI as the lead banker in such consortium, had from time to time sanctioned various credit facilities to the borrower at its requests. Such credit facilities included cash credit, term loans as well as letters of credit. The borrower had raised issues concerning the extent and disbursement of the credit facilities. Nonetheless, it continued to enjoy the credit facilities.

40. The borrower had faced difficulties in repaying the credit facilities. By a letter dated January 17, 2020 borrower had informed SBI about its financial conditions and expressed its inability to pay the dues. The borrower had undertook to regularize the account on or before January 22, 2020. On the strength of the pleadings in the writ petition, it is established that the borrower had faced financial difficulties in repaying the credit facilities much before the onset of the COVID-19 pandemic.

41. The Central Government imposed a lockdown between March 24, 2020, to May 3, 2020, due to the Covid-19 pandemic. Factory of the

borrower is located within the State of Jharkhand and the borrower had to comply with the Covid-19 pandemic directions of such State.

42. Borrower has acknowledged its failure to honour the repayment obligations of the credit facilities. The borrower had identified four several factors, claiming that they were external to the borrower, in preventing the borrower from honouring its obligations to repay the credit facilities in time. One of the factors that the borrower has identified is the Covid-19 pandemic.

43. Borrower has pleaded in the writ petition that, it failed to repay the dues which led to the account of the borrower becoming irregular. SBI had declared the account of the borrower to be irregular and directed the borrower to submit a resolution plan. The borrower had submitted a resolution plan with a revised resolution plan being submitted on June 11, 2020, with SBI.

44. Borrower and SBI had held several meetings to resolve the restructuring of the credit facilities. By a letter dated November 20, 2020, the borrower had submitted a framework for the resolution of the irregular accounts. Even thereafter, repeated meetings had been held between the borrower and the SBI.

45. By a letter dated January 17, 2022, SBI had called upon the borrower to pay a sum of Rs. 341,55,36,527.821 along with accrued

interest and other charges dues as also an amount of Rs. 1,10,37,759 as and when they became due. SBI had also withdrawn the holding of operation of the account of the borrower. By a letter dated January 18, 2022 borrower had requested SBI to extend the holding on operations. By a letter dated January 25, 2022, the borrower had explained the reasons for the financial stress and proposed a one-time settlement (OTS) in a phased manner subject to SBI withdrawing any legal proceedings or any adverse action.

46. Borrower and SBI had held meetings concerning the OTS offered and the borrower had submitted a revised proposal for OTS on January 27, 2022. Borrower had re-submitted another OTS proposal dated February 28, 2022 and May 23, 2022. The borrower had continued to submit OTS proposals with SBI.

47. SBI had approached the Debts Recovery Tribunal under the provisions of Section 19 of the Recovery of Debts and Bankruptcy Act, 1993, and filed an original application being OA 260 of 2022 for recovery of the sum of Rs. 396,36,17,844.

48. Borrower had continued with its efforts of OTS with SBI. SBI had however not accepted the OTS. Borrower had paid a sum of Rs. 25 crores to SBI from time to time between the period February 6, 2021, till January 25, 2023.

- 49.** SBI issued a notice dated July 8, 2022, under Section 13 (2) of the Act of 2002 after classifying the account of the borrower as a NPA on October 16, 2020. SBI had called upon the borrower to pay a sum of Rs. 410,26,78,340/- plus further interest and incidental expenses along with costs.
- 50.** Borrower has acknowledged receipt of the notice dated July 8, 2022, under Section 13 (2) of the Act of 2002. The borrower did not respond to such notice. Borrower did not claim that the account was not an NPA with effect from October 16, 2022, as claimed by SBI in its letter dated July 8, 2022.
- 51.** SBI had invoked Section 13 (4) of the Act of 2002 by a notice dated October 28, 2022. By a notice dated November 4, 2022, SBI had recalled the notice dated October 28, 2022, issued under Section 13 (4) of the Act of 2002.
- 52.** SBI issued a web notice dated February 10, 2023, inviting bids from Asset Reconstruction Companies/non-banking financial companies/banks for the transfer of the entire loan facility of the borrower. The borrower had filed a writ petition challenging such notice being WPO 428 of 2023. In such a writ petition interim orders had been passed. Borrower had however withdrawn such writ petition on March 21, 2023.

53. On March 23, 2023, SBI had issued a Web Notice recording its decision to conduct the e-auction process of the Stressed Loan Exposures of the borrower on March 24, 2023.

54. SBI had assigned the account of the borrower to the ARC on March 24, 2023. The borrower had filed a fresh writ petition WPO 722 of 2023 in which the impugned judgement and order was passed. In the writ petition, the borrower had sought relief concerning the classification of the account of the borrower as an NPA in light of the circulars issued by the Reserve Bank of India Covid-19 circulars, cancellation of the Web Notice dated February 10, 2023, and order of restraint on the SBI from conducting the e-auction of the Stressed Loan Exposures of the borrower on March 24, 2023 in terms of the Web Notice dated March 23, 2023.

Decision

55. The relationship between the parties to the appeal is governed by the provisions of the Act of 2002. Section 5 of the Act of 2002 has permitted ARC to acquire rights or interest in financial assets. It has provided that, notwithstanding anything contained in any agreement or any other law for the time being in force, any Asset Reconstruction Company may acquire financial assets of any bank or financial institution by any of the two modalities provided in sub-section (1) of

Section 5. Financial assets have been defined in section 2 (l) of the Act of 2002. None of the parties have contended that the account of the borrower does not fall within the definition of a financial asset as contemplated under the Act of 2002.

56. Section 5 of the Act of 2002 has recognised the right of any Asset Reconstruction Company to acquire the financial asset of any bank or financial institution, notwithstanding anything contained in any agreement or any other law for the time being in force. However, the right of a bank or financial institution to invite any Asset Reconstruction Company to acquire any financial asset from it has been circumscribed by various circulars issued by the Reserve Bank of India, from time to time.

57. In the facts and circumstances of the present case therefore, we have to decide whether SBI had acted beyond the binding circulars of the Reserve Bank of India in putting up and selling its financial assets to the ARC or not.

58. The Reserve Bank of India had issued Master Direction-Reserve Bank of India (Transfer of Loan Exposures) Directions, 2021 laying down a comprehensive, self-contained set of regulatory guidelines governing the transfer of loan exposures. The Directions of 2021 has noted that no lender shall undertake any loan transfers or acquisitions

other than those permitted under the Directions of 2021 and in the manner prescribed therein. It has also provided that the directions shall apply to all loan transfers undertaken by the lenders as mentioned in Clause 3 thereof, including the sale of loans through novation or assignment, and on participation. In short, the Directions of 2021 has permitted transfer of loan exposures which turned into stressed loans on satisfaction of the parameters laid down therein. It has defined "stressed loans" to mean loan exposures that are classified as NPA or special mention accounts (SMA).

59. SMA has been defined in Reserve Bank of India (Prudential Framework for Resolution of Stressed Assets) Directions, 2019. Such Directions of 2019 have provided a framework for the resolution of stressed assets. It has laid down criteria for early identification and reporting of stress. It has provided that, the lender shall recognise incipient stress on loan accounts immediately on default, by classifying assets as SMA following the parameters laid down therein. It has also provided for SMA subcategories. It has noted both revolving credit facilities as also non-revolving credit facilities in the manner of early identification and reporting of stress. In respect of revolving credit facilities such as cash credit, the account has been directed to be classified as SMA on the outstanding balance remaining

continuously more than the sanctioned limit or drawing power, whichever is lower, for a period above 31 days.

60. In terms of clause 2. 2. 1 of the Master Circular-Prudential Norms on Income Recognition Asset Classification and Provision Pertaining to Advances dated April 1, 2022, issued by Reserve Bank of India cash credit account has to be treated as out of order if the outstanding balance in the cash credit account remains continuously more than the sanction limit for 90 days. Clause 2. 1. 2 of the Master Circular of 2022 has provided that, if the cash credit account remains out of order as indicated in clause 2. 1. 2 of the Master Circular of 2022 then the same would be treated as NPA. Clause 4. 2 .7 of such Master Circular has provided that asset classification is to be borrower-wise and not facility-wise.

61. Since the borrower had enjoyed both fund-based and non-fund-based credit facilities it has to be seen as to whether any of the credit facilities enjoyed by the borrower was NPA or SMA on October 16, 2020, as claimed by SBI in its notice under Section 13 (2) of the Act of 2002 or not. Classification of any of the credit facilities as NPA would affect the borrower across the spectrum of credit facilities enjoyed, as the asset classification must be borrower-wise and not account-wise.

62. Section 5 of the Act of 2002 read with Master Direction-Reserve Bank of India (Transfer of Loan Exposures) Directions, 2021 and applying the definition of SMA as has been provided in Reserve Bank of India (Prudential Framework for Resolution of Stressed Assets) Directions, 2019 and the definition of NPA as has been provided in Master Circular-Prudential Norms on Income Recognition Asset Classification and Provision Pertaining to Advances dated April 1, 2022 it is to be adjudged as to whether SBI acted within its authority in putting up and selling its financial assets, as done.

63. As noted above, from time to time, the credit facilities of the borrower have been reviewed and renewed. The last of the sanction letter is dated January 27, 2020, where, the borrower had been sanctioned a cash credit limit of Rs. 155 crores. Borrower had submitted Reconstruction plan several times and one of such plans was submitted by a letter dated June 11, 2020. There, the borrower had on page 3 thereof, acknowledged that the cash credit limit was Rs. 155 crores and that the amount outstanding as of March 31, 2020, was Rs. 278.56/- and on June 6, 2020, was Rs. 302.00/-. The borrower had therefore acknowledged the cash credit account to have been overdrawn beyond the sanctioned limit and the overdrawal remaining over the sanctioned limit for a period over 60 days taking

the period from March 31, 2020 till June 6, 2020. In terms of “I. Framework for Resolution of Stressed Assets as has been provided in Prudential Framework for Resolution of Stressed Assets dated June 7, 2019, the cash credit account was SMA-2 on June 6, 2020, having been in default for a period above 61 days from March 31, 2020. Nothing has been placed on record to suggest that the cash credit account had been made regular as of the date of the issuance of the notice under Section 13 (2) of the Act of 2002. The cash credit account remained irregular and overdrawn from March 31, 2020, at the very least till the date of the issuance of such notice and continued to be so till the date of the assignment.

64. On the strength of the reconstruction plan submitted by the borrower on June 11, 2020, and the discussions above, it can be safely concluded that the account of the borrower had become a stressed asset because of default in the cash credit account, and the terms loan account, much before the onset of the Covid 19. The circulars of the Reserve Bank of India had precluded SBI from classifying the loan account of the borrower as NPA till August 31, 2020. The default in the cash credit account had remained beyond August 31, 2020. The default had remained till the notice dated July

8, 2022, issued under Section 13 (2) of the Act of 2002 classifying the account as NPA on and from October 16, 2020.

65. Nothing has been placed on record at the behest of the borrower either in the writ petition or in this appeal that, the account of the borrower was not an NPA under the cash credit limit being exceeded as of October 16, 2020, for 90 days or in excess thereof.

66. The borrower had contended before the learned single judge that the term loan account was not irregular and that the account could not be classified as NPA based on alleged default in the term loan account. This contention of the borrower has no factual basis. The term loan repayment schedule had been reworked based on the three COVID-19 circulars issued by the Reserve Bank of India in a letter dated September 15, 2020, issued by SBI. Receipt of this repayment schedule has been acknowledged by the borrower. Such letter has provided that, the first repayment schedule would be September 30, 2020, instead of May 29, 2020, and the subsequent instalments likewise. It has also provided that interest accrued and not serviced during the moratorium that is up to August 31, 2020, shall be payable on September 30, 2020. Admittedly, the borrower had repaid the installment of the term loan payable on September 30, 2020, on December 11, 2020. Application for acceptance of reconstruction plan

by a borrower has rendered the accounts of the borrower as stressed accounts. On such score alone, the borrower has applied for acceptance of the reconstruction plan much before the account being classified as NPA is precluded from contending that the term loan account was not an NPA.

67. Assuming that the borrower may claim the benefit of the doubt concerning the classification of the term loan account as NPA, then also, the account of the borrower so far as cash credit facilities are concerned, turned NPA, and therefore, the account was correctly classified as NPA by SBI.

68. The borrower had assailed the classification of NPA and alleged that, since the account was not an NPA, the financial asset could not have been sold by SBI to the ARC. Since the borrower had assailed the classification of the account as NPA, it was incumbent upon it to establish conclusively before the learned single judge that, the classification was incorrect. It had failed to discharge its burden of proof on such aspect. It had enjoyed various credit facilities such as term loans and cash credit facilities as well as other non-fund-based credit facilities. The burden of proof was on the borrower to establish that, none of the credit facilities could have been classified as NPA on October 16, 2023, in terms of the Master Circular of the Reserve Bank

of India. It has failed to discharge such burden of proof. It had invited the attention of the learned single judge merely to the term loan account while it was enjoying other credit facilities and it was incumbent upon it to establish that none of such other credit facilities had become NPA.

69. ICICI Bank Limited (*supra*) has held that debts are assets of the bank. As an owner bank has the right to transfer its assets and such transfer in no manner affects any right or interest of the borrower. It has been observed in paragraphs 46 and 47 as follows: –

"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 mortgagee or hypothecatee. The bank can always transfer its assets. 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 a non-performing asset when the client fails to repay. In assigning the debts with underlying security, the bank is only transferring its assets 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 the underlying security, the borrower(s) ceases to be the borrower(s) of ICICI Bank Ltd. and becomes the borrower(s) of Kotak Mahindra Bank Ltd. (assignee).

47. At this stage, we wish to once again emphasise 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 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 the assets. None of the clauses of the impugned deed of assignment transfers any obligations of the assignor towards the assignee."

70. SBI as a lender has several options to recover the outstanding in the loan account as against the borrower. One of the remedies that SBI has, as a lender, is to proceed under the Act of 2002 against the borrower since the borrower created a security interest in favour of SBI in respect of its assets.

71. The Act of 2002 has provided a multitude of options to a lender such as SBI to effectively manage its exposure vis-à-vis a borrower. A lender can proceed under Section 5 of the Act of 2002 and sell the financial asset upon such financial asset becoming SMA or NPA. A lender can also proceed under Section 13 of the Act of 2002 to recover its dues from the borrower.

72. Requirements of statutory compliance on the lender under the two routes noted in the preceding paragraph are different. In respect of a sale under Section 5 of the Act of 2002, the account of the borrower needs to be either SMA or NPA before the date of sale.

73. When a lender chooses to proceed under Section 13 of the Act of 2002 it is then required to issue a notice under Section 13 (2) thereof. In such notice, the lender is mandatorily required to specify that the account of the borrower has been classified as NPA and that a specific amount is outstanding on a particular date. Such a notice triggers the mechanism under Section 13 (3-A) of the Act of 2002. Upon receipt of notice under Section 13 (2) of the Act of 2002, a borrower has a right to reply thereto. The lender is statutorily obliged to respond to such a reply within 15 days of the date of receipt of the reply from the borrower, in the event, the lender does not accept the representation or the objections of the borrower contained in the reply. The lender has the right to take any of the measures specified under Section 13 (4) of the Act of 2002 in the event, the borrower fails to discharge its liability in full within the period specified in subsection (2) of Section 13 of the Act of 2002.

74. In the facts and circumstances of the present case, SBI as the lender has chosen to sell its financial assets under Section 5 of the Act

of 2002. Such action of SBI is not a measure contemplated under Section 13 (4) of the Act of 2002. In the event, SBI had taken a measure under Section 13 (4) of the Act of 2002 then, the relevance of the classification of the account as NPA on October 16, 2020, as stated in the notice under Section 13 (2) of the Act of 2002 may have had assumed a greater significance. However, since SBI had invoked provisions of Section 5 of the Act of 2002 in assigning the financial assets to an ARC, such action of SBI has to be adjudged on the anvil of whether the account was SMA or NPA on the date of the initial web notice or not.

75. SBI had published the web notice for the first time on February 10, 2023. As of that date, none of the parties before us has contended that the account of the borrower was not NPA or SMA. All credit facilities enjoyed by the borrower from SBI had become NPA much before February 10, 2023, and continued to remain so on February 10, 2023.

76. In other words, the date on which the account should be considered as NPA or not for a sale under Section 5 of the Act of 2002, in the facts and circumstances of the present case, would be the date of publication of the web notice and need not be pinned to the date of NPA mentioned in the notice under Section 13 (2).

77. Viewed from such a perspective, the action of SBI in putting up the financial assets for sale and ultimately assigning the same in favour of the ARC cannot be faulted. It did not violate any binding Directions of RBI in doing so.

78. A writ court can interdict an exercise of sale of financial assets undertaken by a bank or financial institution purporting to act under the provisions of the Act of 2002 when such bank or financial institution did not take recourse to Section 13 (4) of the Act of 2002. However, the interdiction has to be on accepted and established legal grounds. The writ petitioner has to establish that, the action undertaken by the bank or the financial institution was contrary to any statute or the directions of Reserve Bank of India. The act of assignment or the process to assign the financial asset per se does not violate any right of the borrower. In the facts and circumstances of the present case, the borrower as the writ petitioner has failed to establish any action of SBI to be beyond the Act of 2002 or any binding directions of the Reserve Bank of India.

79. ***Lekhraj Sathramdas Lalvani (supra)*** has laid down that when an authority passes an order which is within its competence, it cannot fail merely because it purports to be made under the wrong provision if it can be shown to be within its power under any other rule, and the

validity of the impugned order should be judged on a consideration of the substance and not of its form. A similar view has been expressed in the ***High Court of Gujarat and Another (supra)*** and ***N. Mani (supra)***.

80. The account had been correctly classified as NPA by SBI. In any event, the account had been SMA on the date of assignment for the borrower to successfully invite the writ Court to interdict the assignment. For valid assignments, the account needs to be SMA or NPA on the date of assignment. In this case, SBI did not take any measure under Section 13(4) of the Act of 2002.

81. A single bench of this court has recognised that a writ court does not issue any futile writ in ***Ronix Polymers Private Limited and others (supra)***. Noting that, any directions issued may be futile as the same could not be implemented, the Supreme Court has in ***Munindra Kumar and others (supra)*** refused to grant relief. ***Nand Kishore Saraf (supra)*** has taken note of ***K. N. Guruswamy (supra)*** and observed that a writ can be refused solely on the ground that issuance thereof would be ineffective.

82. ***Ramniklal N. Bhuttu (supra)*** has observed that power under Article 226 is discretionary. It can be exercised only in furtherance of the interest of justice and not merely on making out of a legal point

and that interest of justice and the public interest coalesce. A similar view has been expressed in ***Manohar Lal (supra)***.

83. On the aspect as to whether parties to an appeal can introduce a new plea or not several authorities have been relied upon. ***Gurucharan Singh (supra)*** has observed that a pure question of law going to the root of the case and based on undisputed and proven facts can be raised even before the court of the last resort provided the opposite side was not taken by surprise or otherwise unfairly prejudiced. ***Vimal Chandra Grover (supra)*** has held that, a new plea which is a pure question of law going to the root of the case, a new plea may be allowed to be raised with the permission of the court.

84. ***Mohd. Akram Ansari (supra)*** has held that it is not ordinarily open to a party to file an appeal to seek to argue a point which even if taken in the petition has not been dealt with in the judgement of the court below. It observed that the party who has such a grievance may approach the same court which passed judgement and argue that the other points were pressed but not dealt with. A similar view has been expressed by ***Daman Singh and others (supra)***.

85. Supreme Court in ***Yeswant Deorao Deshmukh (supra)*** has held that, when a question of law is raised for the first time in a court of last resort, upon the construction of a document, or facts either

admitted or proved beyond controversy, it is not only competent but expedient, in the interest of justice, to entertain the plea.

86. In the facts and circumstances of the present case, SBI and ARC have contended that, the issue as to whether the account of the borrower had become NPA or not was not correctly decided as, the cash credit account of the borrower which had become NPA thereby making the entire credit facility enjoyed by the borrower as NPA, was not brought to the notice of the court.

87. Pleadings filed before the learned Single Judge have raised the issue as to whether the account of the borrower was NPA on October 16, 2023, as claimed and whether the assignment was valid. Contentions raised in the appeal are concerning such issues only. No new document is sought to be introduced. Borrower cannot be said to be taken by surprise.

88. In ***Watkins Mayor & Co (supra)*** Supreme Court while dealing with the claim of compensation on account of storage has held that no reply to the notice of demand was of no consequence. The full bench of the Andhra Pradesh High Court in ***Manepalli Udaya Bhaskara Rao (supra)*** has held that non-reply to a notice of demand issued before the filing of a summary suit under Order 37 of the Code of Civil Procedure, 1908 was of no consequence.

89. In the facts and circumstances of the present case, the borrower did not reply to the notice under Section 13 (2) of the Act of 2002 dated July 8, 2022. Section 13 (3-A) of the Act of 2002 has obliged the secured creditor to consider the representation or objection of a borrower to a notice under Section 13 (2) of the Act of 2002 and if the secured creditor concludes that such representation or objection is not acceptable, to communicate within 15 days of the receipt of such representation or objection the reason for non-acceptance of the representation or objection of the borrower.

90. Unlike a civil suit filed under Order 37 of the Code of Civil Procedure, 1908, or a suit filed for compensation on account of storage, which does not statutorily empower the recipient of a demand notice to respond to and the issuer of such demand notice to deal with the response within a specified time, a notice under Section 13 (2) of the Act of 2002 can be responded to by the borrower and the secured creditor who has issued such notice is obliged to inform the reasons as to non-acceptance or non-tenability of the objection within the specified period of 15 days from the date of receipt of the response.

91. Not responding to a notice under Section 13 (2) of the Act of 2002 raises a rebuttable assumption that the borrower has accepted the default in repayment of secured debt and the classification of the

account as NPA. This presumption being rebuttable, the borrower can do so by making a representation or raising an objection under Section 13 (3-A) of the Act of 2002. The borrower who has not responded under Section 13 (3-A) can nonetheless rebut the presumption in a proceeding under Section 17 of the Act of 2002. When a measure under Section 13(4) is taken. A measure under Section 13(4) can be taken only after a notice under Section 13(2) has been issued and a response given by the lender to a reply of the borrower under Section 13(3-A) of the Act of 2002. The borrower has to rebut the presumption that the account was not NPA after the secured creditor has issued a notice under Section 13 (2) of the Act of 2002, for it to succeed in any action taken by the Bank or financial institution under the Act of 2002.

92. In the facts and circumstances of the present case, as discussed above, SBI has proceeded under Section 5 of the Act of 2002 and not under Section 13(4) thereof. In any event, the borrower has failed to discharge the burden of proof rebutting the presumption that the account became NPA on the date of the web notice which is February 10, 2023.

93. *Ramchandra Keshav Adke (supra)* has noted the rule that where the power is given to do a certain thing in a certain way, the

thing must be done in that way or not at all and that other methods of performance are necessarily forbidden. In the facts and circumstances of the present case, SBI has acted in a manner recognized by law, and as such the ratio of such case does not come into bearing.

94. The contention on behalf of the ARC that, under Section 13 (8) of the Act of 2002, the borrower has lost the right of redemption on the date of the publication of the public notice cannot be accepted, in the facts and circumstances of the present case. No public notice under rule 9 (1) of the Security Interest (Enforcement) Rules, 2002 had been issued by SBI. SBI had assigned its financial assets in favour of ARC. Assignment of financial assets is not a transfer of title of the mortgaged properties held by SBI in favour of ARC.

95. In ***Pyari Devi Chabiraj Steels Private Limited (supra)*** the single bench of this court has considered the bar under Section 34 of the Act of 2002 and held that the civil court has to return a finding on the subject matter of the suit. If the subject matter of the suit relates to a secured asset over which a secured creditor claims security and such secured creditor has taken a measure under Section 13 (4) of the Act of 2002 or is capable of taking a measure under such provision, then such civil suit is barred under Section 34 of the Act of 2002.

96. *Mardia Chemicals Ltd (supra)* has considered the vires of the unamended provisions of the Act of 2002. According to the observations made therein, Section 13 (3-A) of the Act of 2002 has been inserted.

Conclusion

97. In view of the discussions above, the first issue is answered in the affirmative, in favour of SBI and ARC, and against the borrower. The second issue is also answered in the affirmative in favour of SBI and ARC and against the borrower. So far as the third issue is concerned, we allow both the appeals and set aside the impugned judgement and order dated October 5, 2023. Consequent to the appeals being allowed WPO 722 of 2023 is dismissed. There shall be no order as to costs.

[DEBANGSU BASAK, J.]

98. I agree.

[MD. SHABBAR RASHIDI, J.]