2024:PHHC:022062-DB

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CWP-12700-2022
Date of Decision: **February 06, 2024**

Ireo Private Limited ..... Petitioner

Versus

Indiabulls Housing Finance Private Limited and another ..... Respondents

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

Present: Mr. Anand Chhibbar, Senior Advocate with
Mr. Shikhar Sarin, Advocate and
Mr. Arpit Chawla, Advocate for the petitioner.

Mr. Akshay Bhan, Senior Advocate with
Mr. Sushant Kareer, Advocate for the respondents.

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LISA GILL, J.

1. Prayer in this writ petition is for quashing notice dated 05.02.2022 under Section 13(2) of Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short – 'SARFAESI Act') and notice dated 08.05.2022 under Section 13(4) of SARFAESI Act.

2. It is submitted that petitioner - Company incorporated as Real Estate Company alongwith its sister concerns, is engaged in Real Estate Sector in North India and has completed multiple projects. Petitioner availed of term loan against property from respondent No. 1 i.e. Indiabulls Housing Finance Private Limited to the tune of Rs.75 crores in the year 2016. Sanction letter is attached as Annexure P1. Timely disbursements were being made by petitioner

but due to outbreak of pandemic COVID-19 and slow down in real estate sector, there was financial indiscipline. Proceedings under SARFAESI Act were initiated against petitioner with notice under Section 13(2) of SARFAESI Act being issued on 26.10.2020, which was duly replied to by petitioner. Notice dated 26.10.2020 was withdrawn by respondent No. 1 as communicated on 07.01.2021 (Annexure P5) with respondent No. 1 reserving its right to reinitiate the same in future in accordance with law. Account of petitioner, it is stated, was thereafter being regularly serviced though there was again financial indiscipline in latter half of 2021. Demand notice dated 05.02.2022 was again issued under Section 13(2) of SARFAESI Act (Annexure P6). Reply was submitted but objections raised by petitioner were dismissed summarily. It is submitted that thereafter petitioner did not receive any notice under Section 13(4) of SARFAESI Act but came to know about publication of possession notice in newspaper on 08.05.2022. Petitioner immediately approached respondents on 11.05.2022 with revised repayment schedule, which was accepted by respondents as evidenced by e-mail dated 12.05.2022 (Annexure P11). Repayment proposal given by petitioner is as under:-

1. INR 25 crores by 31^{st} May 2022
2. INR 25 crores in June 2022
3. INR 15 crore in July 2022
4. INR 25 crores in August 2022
5. Balance amount of the outstanding facility by October 2022

3. It is submitted that pursuant to approved repayment schedule, sum of Rs.12 crores was deposited on 12.05.2022 and another amount of Rs.8 crores on 27.05.2022. Despite approval of revised repayment schedule, respondents

continued with proceedings under SARFAESI Act in an illegal manner. Hence, present writ petition.

4. Notice of motion was issued by Co-ordinate Bench in this writ petition on 01.06.2022 while noting the contention on behalf of petitioner that petitioner had deposited sum of Rs.25 crores by 31.05.2022 pursuant to its proposal for revised payment schedule as communicated vide e-mail dated 11.05.2022 and which on perusal of e-mails attached as Annexures P10 and P11 seemed to have been agreed to. It was further directed that in view of deposit of said amount, no coercive action should be taken against petitioner by respondents till next date of hearing.

5. It is to be noted at this stage that debt in question was assigned by respondent No. 2 i.e. Indiabulls Asset Reconstruction Company Limited to Assets Care and Reconstruction Enterprise Limited (ACRE) vide assignment agreement dated 29.06.2022. CM-4165-CWP-2023 was duly filed by ACRE to be impleaded as party.

6. Learned counsel for respondents raised preliminary objection regarding entertainability of this writ petition. It was further submitted that petitioner has tried to mislead this Court by stating that amount of Rs.25 crores has been deposited with respondents in May, 2022 whereas it is only sum of Rs.5 crores which was deposited and that sum of Rs.20 crores was deposited with Indiabulls Commercial Credit Limited (ICCL) on 30.05.2022. It was asserted by learned counsel for respondents that this amount of Rs. 20 crores was deposited by petitioner in view of financial liability arising out of agreement dated 30.03.2021 having no concern with the account in question. It was further submitted that this amount was payable by petitioner to ICCL, pursuant to

separate agreement dated 30.03.2021 entered into between petitioner and others with ICCL which though a sister/subsidiary concern of respondent No. 1 is a separate entity in its own right. Learned counsel for respondents submitted that in the grab of interim order dated 01.06.2022, petitioner is trying to stall proceedings under SARFAESI Act in an unjustified manner, thus, leaving secured creditor with no way to seek enforcement of security interest despite huge outstanding of Rs. 120 crores towards respondents. Proceedings under Section 14 of SARFAESI Act are being illegally stalled by petitioner in this manner. It was, thus, prayed that this writ petition be dismissed with cost.

7. Learned senior counsel for petitioner responded to preliminary objection regarding entertainability of writ petition by submitting that respondent No. 1 is NBFC under Reserve Bank of India Act, 1934 (for short – 'RBI Act') and has obtained registration under Section 45(1A) of RBI Act, which obligates the respondent to work and manage its business in public interest and is bound to comply with all policies and directions issued by RBI from time to time in public interest. Thus, respondent carrying out public functions was amenable to writ jurisdiction. It was further submitted that respondent No. 1 – Indiabulls Housing Finance Private Limited and respondent No. 2 – Indiabulls Asset Reconstruction Company Limited have already assigned the debt to ARCE, therefore, respondents No. 1 and 2, in any case, have no right to pursue the matter. The debt which has been assigned to ARCE is of Rs.86.87 crores. Said amount already stands paid, therefore, ARCE also has no locus to oppose this petition. Moreover, exceptional circumstances have been displayed by the petitioner, which call for exercise of equitable jurisdiction by this Court under Article 226

of Constitution of India. In this situation, present writ petition it was urged should be entertained, adjudicated upon and allowed.

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

9. Taking of financial facility by petitioner from respondent No. 1, subsequent default on its part and initiation of proceedings under SARFAESI Act against petitioner are a matter of record. It is the case of petitioner that amount of Rs.25 crores in terms of revised payment schedule stood deposited in terms of communication dated 11.05.2022 (Annexure P11) whereas the case of respondents is that the said amount has been credited in the account of ICCL pursuant to financial liability of petitioner arising out of agreement dated 30.03.2021. Apart from the fact that disputed questions of fact are involved in this writ petition, we find merit in the objection raised by learned counsel for respondents that this writ petition is not entertainable qua the respondents. This issue has been settled in a number of cases. Hon'ble the Supreme Court in the case of **Federal Bank Limited Vs. Sagar Thomas, (2003) 10 SCC** 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."

10. Thereafter, 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."

11. Similar arguments as have been raised in present writ petition regarding entertainability were succinctly dealt with and negated by Division Bench of this Court in **Fermina Developers Pvt. Ltd. and Anr. V. Indiabulls Housing Finance Ltd. (CWP-1806-2023),** while holding as under:-

> 18. We may observe that the respondent-NBFC is engaged in a commercial activity with the primary objective to earn returns and profits. We take it that the respondent has its own resources to raise its funds. It is not the case projected on behalf of the petitioner(s) that there is any contribution or share holding at the instance of the State.
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> 19. NBFCs of the like of the respondent have not been set up for the purposes of building economy of the State but such companies have been voluntarily established for their own purposes and commercial interest. Be that as it may, the respondent/NBFC would have to act in a manner that it is not in conflict with or against the fiscal policies of the State and it is for such purpose, guidelines and directives are provided under various enactments including the Reserve Bank of India Act to ensure that a proper fiscal discipline is maintained. The pleadings on record are bereft of any averments to suggest that the respondent/NBFC is carrying out any public function.
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> 20. 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. The reliance placed by the petitioners on the judgment in ***Indiabulls Housing Finance Limited (supra)*** is misplaced. The challenge in such case was to a communication dated 14.03.2020 whereby the Administrator of Yes Bank Limited, informed the Bombay Stock Exchange (BSE) Limited and National Stock Exchange as regards the decision of writing off, the Additional Tier 1 Debenture Bonds. A writ under Article 226 of the Constitution of India was held to be maintainable against the private bank on the basis that the impugned action runs contrary to the Information Memorandum in question which was a statutory contract. The facts of the present case are clearly distinguishable inasmuch as the repayment structure/OTS letter dated 01.09.2021 (Annexure P-2) as has been discussed hereinabove was in the realm

> of a pure private contract and not in furtherance of any statutory obligation."

12. Thus, present writ petition is not entertainable. We also do not find any merit in the argument raised by learned counsel for petitioner that respondents do not have any locus to contest the matter having assigned the debt to ARCE in the interregnum with the said Reconstruction Company also having no locus to challenge the proceedings. Application was duly filed on behalf of ARCE for impleadment which was directed to be listed alongwith writ petition. The fact that the said application was not formally allowed at the earliest can be of no avail to the petitioner. We allow the application while rejecting the argument so raised by learned counsel for petitioner, which in any case, has no concern with the assignment of debt, which is clearly a distinct transaction between the said two entities.

13. Learned counsel for petitioner is unable to carve out any exceptional or extraordinary circumstance, which calls for interference by this Court in exercise of jurisdiction under Article 226 of Constitution of India for setting aside proceedings under SARFAESI Act initiated against the petitioner. Challenge in the writ petition, in any case, is to demand notice dated 05.02.2022 issued under Section 13(2) of SARFAESI Act and possession notice dated 08.05.2022 under Section 13(4) of SARFAESI Act. It is to be noted that SARFAESI Act is a complete code itself providing for specific remedies for any grievances which may arise in respect to proceedings taken thereunder. Interference by this Court in exercise of jurisdiction under Article 226 of Constitution of India in such like matters has to be minimal and actuated only in extra-ordinary and exceptional circumstances. Reference in this regard can be

made to judgments of Hon'ble the Supreme Court in **Union Bank of India v. Satyawati Tandon and others, 2010(8) SCC 110; Varimadugu Obi Reddy v. B. Sreenivasulu and others, 2023(1) R.C.R.(Civil) 34** and **M/s South Indian bank Ltd. and others v. Naveen Mathew Philip and another, 2023(2) RCR (Civil) 771.** Hon'ble the Supreme Court in the case of **M/s South Indian Bank** (supra) held as under:-

> "13. ...... We may, however, reiterate the settled position of law on the interference of the High Court invoking Article 226 of the Constitution of India in commercial matters, where an effective and efficacious alternative forum has been constituted through a statute.
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> 14. A writ of certiorari is to be issued over a decision when the Court finds that the process does not conform to the law or statute. In other words, courts are not expected to substitute themselves with the decision-making authority while finding fault with the process along with the reasons assigned. Such a writ is not expected to be issued to remedy all violations.
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> 15. The object and reasons behind the Act 54of 2002 are very clear as observed by this Court in **Mardia Chemicals Ltd. v. Union of India, (2004) 4 SCC 311**. While it facilitates a faster and smoother mode of recovery sans any interference from the Court, it does provide a fair mechanism in the form of the Tribunal being manned by a legally trained mind. The Tribunal is clothed with a wide range or powers to set aside an illegal order and thereafter, grant consequential reliefs, including re-possession and payment of compensation and costs. Section 17(1) of the SARFAESI Act gives an expansive meaning to the expression "any person", who could approach the Tribunal.
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> 18. While doing so, we are conscious of the fact that the powers conferred under Article 226 of the Constitution of India are rather wide but are required to be exercised only in extraordinary circumstances in matters pertaining to proceedings and adjudicatory scheme qua a statute, more so in commercial matters involving a lender and a borrower, when the legislature has provided for a specific mechanism for appropriate redressal."

14. Therefore, any which way, present writ petition does not call for any interference by this Court.

15. Keeping in view the facts and circumstances of the case, this writ petition is dismissed with liberty to petitioner to avail remedy(ies) available to it in accordance with law. There is no expression of opinion on merits of the matter. Furthermore, it is always open to parties to arrive at any mutually acceptable settlement.

(LISA GILL)
JUDGE

(RITU TAGORE)
JUDGE

February 06, 2024
Rts

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