IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

COMMERCIAL APPEAL NO.30 OF 2025

IDBI Bank Limited & Anr. ....Appellants
versus
ICICI Bank Limited & Ors. ....Respondents

WITH
INTERIM APPLICATION (L) NO.32102 OF 2022
IN
COMMERCIAL APPEAL NO.30 OF 2025

IDBI Bank Limited & Anr. ....Applicants
versus
ICICI Bank Limited & Ors. ....Respondents

Mr. Rakesh Singh with Mr. Rashid Khan and Ms. Priyanka Kothari i/b Mr. Rajesh Kumar Singh, *for the Appellants/Applicants.*

Mr. Sharan Jagtiani, Senior Advocate with Ms. Ankita Singhania, Ms. Apurva Manwani and Mr. Pushkar Deo i/b M/s. Trilegal, *for Respondent No.1/ICICI.*

Mr. J.P. Sen, Senior Advocate with Mr. Brian Noronha i/b M/s. Indialaw LLP, *for Respondent Nos.2 and 3.*

CORAM: ALOK ARADHE, CJ. &
SANDEEP V. MARNE, J.

DATE : 03 JULY 2025.

ORDER *(Per : Sandeep V. Marne, J.) :*

1. The Appeal is filed under provisions of Section 13(1-A) of the Commercial Courts Act, 2015 challenging the judgment and order dated 29 September 2022 passed by learned Single Judge of this

Court dismissing Interim Application (L) No.2102 of 2022 filed by the Appellant seeking interim injunction.

2. Brief facts leading to filing of the present Petition, in a nutshell, are that National Highway Authority of India (**NHAI**) and Lanco Devihalli Highway Limited (**LDHL**) had entered into a Concession Agreement dated 9 July 2007 for construction of a road on Build, Operate and Transfer Basis. A Substitution Agreement dated 8 February 2008 was executed between State Bank of India (**SBI**) and Dena Bank (now Bank of Baroda) (collectively referred to as **Senior Lenders**), LDHL and NHAI *inter alia* providing that the Senior Lenders shall be entitled to appropriate any consideration received for the substitution as provided from the Selectee towards payment of their and NHAI's respective dues to the exclusion of LDHL. Rupee Facility Agreement was executed between ICICI and LDHL on 13 June 2012 under which ICICI provided Rupee Facility of INR 90 crore to LDHL. A Master Restructuring Agreement was executed by consortium of 24 Banks (of which Appellant-IDBI Bank Limited is the lead Bank). Lanco Infratech Ltd., ICICI and Senior Lenders also became signatories to the Master Restructuring Agreement. An Indenture of Mortgage dated 1 December 2014 was executed between LDHL, Lanco Infratech and IDBI, under which various properties were mortgaged by LDHL in favour of IDBI. On the same day, a charge was registered with the Registrar of Companies for an amount of INR 111.55 crore. On 16 December 2015, LDHL executed Deed of Hypothecation in favour of ICICI as security interest under the Rupee Facility Agreement, ranking

subservient to the security interest created in favour of Senior Lenders. On 3 August 2017, ICICI issued a notice recalling the financial assistance granted to LDHL under the Rupee Facility Agreement. In August 2018, SBI issued an advertisement as the lender's agent proposing to substitute LDHL with a suitable Selectee in terms of the Substitution Agreement and solicited bids from the prospective bidders for handing over the rights and obligations of the concessionaire under the Concession Agreement for residual period of the concession. According to ICICI, the bid document expressly recorded ICICI's outstanding debt.

3. ICICI was apparently opposed to appointment of new Selectee and filed Commercial Suit No.1447 of 2018 before this Court seeking injunction against Senior Lenders from replacing LDHL under the Concession Agreement without the prior consent of ICICI. On 31 October 2018, an interim order was passed in the Suit directing that NHAI would not grant approval to the Agreement executed by and between the Defendants and the new Concessionaires. It appears that consent terms were filed in the Suit, under which the parties *inter alia* agreed new concessionaire and NHAI shall execute all intermediate documents and that new Concessionaire would deposit consideration of INR 385.90 crore in the Court. The consent order recorded that the issue as to manner of distribution of the amount paid with the Court shall be determined in the Notice of Motion filed by ICICI. In the above background, SBI issued letter dated 22 May 2019 to IDBI intimating the status of the suit and requesting IDBI to file intervention

application in the Suit. On 9 October 2019, IDBI filed Intervention Application in the Suit. The said Application however remained pending. On 13 January 2021, an order was passed in the suit urging the parties to settle the disputes with regard to distribution of the deposited amount by the new Concessionaire. While the settlement discussions were at advanced stage, IDBI pressed its Impleadment Application, which came to be rejected by order dated 20 December 2021. After IDBI was denied opportunity to intervene the suit filed by ICICI, the present suit (Commercial Suit (L) No.2100 of 2022) was filed by IDBI seeking a declaration of its security interest being superior to ICICI's security interest. IDBI filed Interim Application (L) No.2102 of 2022 seeking interim injunction restraining release of funds to ICICI Bank and SBI during pendency of the suit. On 27 April 2022, this Court allowed the Senior Lenders to withdraw the undisputed principal amount. This left only the residual amount, on which IDBI as well as ICICI was staking claims. By the impugned judgment and order dated 29 September 2022, the learned Single Judge has proceeded to dismiss IDBI's Interim Application for temporary injunction. Aggrieved by the judgment and order dated 29 September 2022, the present Appeal has been filed.

4. On 12 October 2022, this Court recorded the statement made on behalf of ICICI that it shall not apply for distribution of the substitution proceeds. The Appeal is called out for hearing at admission stage.

5. Mr. Singh, the learned counsel appearing for the Appellant has submitted that the learned Single Judge has grossly erred in dismissing IDBI's Application for temporary injunction, despite making out clear *prima facie* case in support of its claim of charge over the substitution proceeds. That a private arrangement made between ICICI and Senior Lenders recording charge **of** ICICI on substitution proceeds cannot have any effect of IDBI's prior mortgage. That there is specific prohibition on the borrower from creating any security interest in favour of any third party without IDBI's prior permission. That since no permission was taken by ICICI as required in Clause 6.2(iv) of the Loan Agreement dated 30 January 2008, the alleged charge created in favour of ICICI becomes meaningless. That provision for charge of ICICI in the bids invited by Senior Lenders for substitution of the Selectee cannot bind IDBI and that ICICI's so-called charge would always remain subservient **to** the original charge created in favour of IDBI. That the learned Single Judge grossly failed to appreciate that the substitution proceeds are ultimately the assets of the consortium and therefore the same cannot be distributed without determining the priority as fixed under the contract. That since there is a charge on the assets of the Lanco Infratech created in favour of IDBI, it would have priority claim **over** substitution proceeds over ICICI. He would therefore submit that the learned Single Judge ought to have restrained ICICI from withdrawing the substitution proceeds. Lastly it is submitted that the substitution proceeds need to be kept in the Court till priority in the claims of parties is determined. He would accordingly pray for setting aside the impugned judgment and order passed by the learned Single Judge.

6. The Appeal is opposed by Mr. Jagtiani, the learned senior advocate appearing for ICICI. He would submit that the impugned judgment is passed by the learned Single Judge after a detailed consideration of facts on record and after concluding that no *prima facie* case is made out by IDBI. That the learned Single Judge has rightly inferred failure on the part of IDBI to prove that it has any security over the substitution proceeds. Alternatively, even if substitution proceeds are to be treated as an asset of LDHL, such substitution proceeds would, at the highest, constitute 'project assets' and that IDBI's security interest excludes such project assets as IDBI does not have the consent of NHAI. That the learned Judge has rightly held the claim of IDBI suffers from gross delay and laches and that therefore IDBI is not entitled to any interlocutory injunction. He would demonstrate as to how IDBI failed to take any steps to stake a claim to substitution proceeds. That the substitution proceeds are deposited in the Court on account of proceedings initiated by ICICI and that IDBI never bothered to intervene in the same nor raised any claim towards substitution proceeds for considerable period of time. That the learned Judge has rightly taken into consideration this conduct of IDBI while refusing to grant temporary injunction. Lastly, he would submit that the scope of interference by this Court in order refusing to grant temporary injunction is in extremely narrow compass. He would submit that applying the tests laid down in the Apex Court judgment in ***Wander Ltd. & Anr. vs. Antox India Pvt. Ltd.***[1] no case is made out for interference in exercise of discretion by the learned Judge. He would

1 (2011) 6 SCC 73

also rely upon the judgment in ***Ramakant Ambalal Choksi vs. Harish Ambalal Choksi***[2]. He would pray for dismissal of the Appeal.

7. Mr. Sen, the learned Senior Advocate appearing for Respondent Nos.2 and 3 would submit that his clients do not have any say in the fight between IDBI and ICICI towards the balance of substitution proceeds. He would however seek a clarification about order passed by this Court not affecting the other pending Applications before the learned Single Judge.

8. Rival contentions of the parties now fall for our consideration.

9. Commercial Suit (L) No.2100 of 2022 has been filed by IDBI seeking a declaration that the charge created in its favour on the assets of LDHL in accordance with Indenture of Mortgage dated 1 December 2014 has priority over the security interest created in favour of ICICI under the Deed of Hypothecation dated 16 December 2015. IDBI has also sought a declaration that it is entitled to residual amount from the amount lying and deposited in accordance with order passed by this Court. Thus the broad frame of IDBI's suit is to seek a declaration that the charge created in its favour under the Indenture of Mortgage shall have priority over the security interest created in favour of ICICI.

2 2024 SCC Online SC 3538

10. For securing an interlocutory injunction in its favour, it is necessary for IDBI to demonstrate that it has any charge over the substitution proceeds. As observed above, the original contract for construction of the road was executed by NHAI with LDHL. Various lending banks have lent moneys to LDHL for execution of the project, IDBI being one such lending banks. The Senior Lending Banks have executed Substitution Agreement with LHDL and NHAI under which the Senior Lenders are/were entitled to substitute NHAI with new contractor, if the project is not executed in timely manner by LDHL. In exercise of its right under the Substitution Agreement, the Senior Lenders have appointed a new contractor (referred to as the **Selectee**) and such Selectee has deposited the amount of INR 385.90 crore in this Court, over which Senior Lenders, ICICI and IDBI are staking claims. This Amount of INR 385.90 crore brought in by the Selectee are the 'substitution proceeds'. The Senior Lenders, who brought on board the new Selectee and on account of whose efforts, the substitution proceeds are brought in, have been permitted to withdraw the undisputed principal amount from the substitution proceeds. The fight between IDBI and ICICI, who are not the Senior Lenders, is about the remainder of the substitution proceeds.

11. The amount deposited in this Court is towards substitution of the concessionaire. *Prima facie,* they are not the entitlements of LHDL. It is not that for assignment of its contractual rights, LHDL has received the said amount of INR 385.90 crore, over which IDBI would have a charge. IDBI's charge is *prima facie* on assets of

LHDL/Lanco Infratech. If the substitution proceeds were the entitlements/assets of LHDL, what IDBI contends would have been correct. However, the said amount of INR 385.90 crore is procured by the Senior Lenders from the Selectee as per the terms and conditions of the Substitution Agreement, under which LHDL has apparently agreed for substitution proceeds being recouped by the lenders. In our view therefore, the learned Single Judge has rightly held that the substitution proceeds are not the assets of LHDL over which IDBI can claim prior charge.

12. As observed while narrating the facts of the case, Indenture of Mortgage dated 1 December 2014 executed by LDHL and Lanco Infratech created charge in favour of IDBI over various properties mortgaged by LDHL. IDBI relies on Clause (iv) 2 of the said Indenture of Mortgage in support of its contention that the security interest created thereon would include 'project assets' also. However, the said clause clarifies the position that charge of IDBI over project assets was subject to approval being given by NHAI under the Concession Agreement. As of now, there is nothing on record to indicate that NHAI ever gave approval for creation of charge of IDBI on the project assets. Since ICICI's charge is recorded in the bid document issued by Senior Lenders issued for substitution of the concessionaire, ICICI claims right of withdrawal of the substitution proceeds. On the other hand, it is IDBI's case that the Indenture of Mortgage executed in its favour by LHDL/Lanco Infratech would have overriding effect over the private arrangement made between the Senior Lenders and ICICI recording ICICI's charge over the substitution proceeds.

13. It appears that LDHL could not complete the work assigned to it and accordingly the Senior Lenders, led by SBI, decided to substitute the concessionaire and invited bid documents. Perusal of the covenants of the bid document dated 23 October 2018 would indicate that amounts outstanding in the books of ICICI were included in the definition of the term “outstanding debt”. However, the debts due to IDBI were not included in the definition of the term “outstanding debt”. The bidder was supposed to assume the liability to discharge outstanding debt. Thus, the new entity taking over the project (Selectee) was to take over obligation to repay the outstanding debt to ICICI. However, there is no such obligation on the Selectee to repay outstanding amount of IDBI.

14. It is also seen that the aggregate transaction consideration has been deposited in the Court in the suit filed by ICICI, who made consistent efforts to protect its interest after Senior Lenders decided to replace the concessionaire. Immediately after the bid document was floated, ICICI had written to SBI on 30 August 2018 and 10 September 2018 requesting the SBI to keep the prospective concessionaire informed about ICICI’s rights and demanding that all surplus left after making payment towards Senior Lenders should be paid directly to ICICI Bank towards repayment of outstanding dues. ICICI has filed suit (Commercial Suit No.1447 of 2018) seeking restraint order against replacement of concessionaire as it perceived violation of its rights upon entry of the new concessionaire. ICICI then got armed with interim order dated 31 October 2018 restraining NHAI from granting any approval to the

agreement to be executed to the new concessionaire. In ICICI's suit, consent order was passed under which INR 385.90 crore came to be deposited by the new concessionaire in the Court. While all these steps were being taken by ICICI, IDBI was watching as a mute spectator without taking any steps. It waited till SBI wrote letter dated 22 May 2019 requesting it to intervene in ICICI's suit. Thus IDBI expected an invitation and filed application for impleadment in ICICI's suit in October 2019 only after SBI requested **in** to intervene in the suit by letter dated 22 May 2019. Though the Impleadment Application was filed in October 2019, the same was apparently not moved or pressed despite the suit being listed on numerous occasions for various purposes. It is only after this Court passed order in ICICI's Suit on 13 January 2021 directing the parties to consider settlement, IDBI pressed its Impleadment Application after more than two years, which came to be dismissed on 20 December 2021 holding that IDBI is not a necessary party to suit filed by ICICI. Thus, IDBI whiled away time and did not take any steps to stake its claim in respect of substitution proceeds. The Senior Lenders were finally permitted to withdraw undisputed principal amount by order dated 27 April 2022. It is only when turn of ICICI came to withdraw the balance substitution proceeds, IDBI pressed application for temporary injunction. The learned Judge has considered the above conduct of IDBI in sleeping over its alleged rights as a major factor for non-grant of equitable relief of temporary injunction. We do not find any element of perversity in exercise of such discretion by the learned Judge.

15. The learned Judge has held that IDBI has failed to *prima facie* establish that its security interest under the Indenture of Mortgage extends to the substitution proceeds deposited in the Court in ICICI's suit. We are in full agreement to the said *prima facie* finding recorded by the learned Single Judge as the substitution proceeds are neither property of LDHL nor they can be treated as proceeds arising out of liquidation of assets of LDHL. Once it is held that the substitution proceeds are not the property of LDHL, IDBI cannot claim charge over the substitution proceeds by relying upon Clause (iv) of the Indenture on Mortgage. That the learned Judge has rightly held that substitution proceeds and amounts lying in courts constitute a different source of funds and cannot be treated as assets/properties of LDHL. The substitution proceeds cannot be treated as receivables of LDHL as the same are brought in by the new concessionaire and therefore they cannot be covered under the Indenture on Mortgage executed in favour of IDBI by indenture. We are also in agreement with the alternate finding recorded by the learned Judge that even if IDBI's security interest were to be treated over the project assets, the same required consent of NHAI, which is not obtained. The learned Judge has rightly relied on Clause (iv) of the Indenture of Mortgage providing for mandatory consent of NHAI for creation of any security interest over the project assets. There is nothing on record to indicate that NHAI never gave its consent for creation of charge of IDBI over project assets.

16. In our view, the balance of convenience was clearly tilted against IDBI. ICICI has been litigating and taking all possible

measures to recover monies due to it. On the other hand, IDBI's conduct in watching proceedings as mute spectator clearly indicate lack of interest on IDBI’s part to secure amounts due to it. In any event, the net result of rejection of IDBI’s application for temporary injunction would result in ICICI Bank being paid approximate amount of INR 100 crores, which are balance in substitution proceeds deposited in this Court. In the event of IDBI succeeding in the suit, ICICI Bank can always be directed to bring back the said amount with interest. It is not that ICICI is financially incapable of bringing back INR 100 crores in the Court. Thus, the balance of convenience is clearly tilted against the IDBI and the learned Judge has rightly refused any temporary injunction in favour of IDBI.

17. As an Appellate Court, examining correctness of discretion exercised by the Trial Judge while refusing to grant temporary injunction in favour of IDBI, the scope of interference lies in extremely narrow compass. The learned Judge has exercised judicious discretion while making an order under Order XXXIX, Rules 1 and 2 of the Code of Civil Procedure, 1908. In ***Wander Ltd.*** (supra) it is authoritatively held that an Appellate Court would not interfere with exercise of discretion by the Trial Court unless the discretion is shown to have been exercised arbitrarily, capriciously, perversely or in disregard of settled legal principles governing the grant or refusal of interlocutory injunction. It is not open for us to reassess the material and reach a different conclusion merely because such view may also be possible. We are of the view that the findings recorded by the learned Single Judge are plausible and

therefore we cannot substitute the discretion exercised by the learned Single Judge by coming to a different conclusion.

18. Recently, Full Bench of this Court in ***UTO Nederland B.V. & Anr. vs. Tilaknagar Industries Ltd.***[3], in a judgment authored by one of us (*the Chief Justice*) has answered the questions referred to it relating to use of discretion by the Trial Court while making an order of temporary injunction. The questions are answered in paragraph 31 of the judgment as under :-

> "31. For the aforementioned reasons, the questions referred to us are answered as follows:
>
> > (i) The Division Bench decision of this Court in ***COLGATE PALMOLIVE COMPANY (SUPRA)*** sets out the correct principle of law. An order of temporary injunction does not cease to be a discretionary order merely because the learned motion Judge did not find any *prima facie* case and refused to grant interim restraint order. It correctly holds that in the matter of temporary injunction, the Court does not adjudicate on the subject matter or any part of it on merits and considers the application for temporary injunction in the light of well-known principles and exercises its discretion weighing all relevant consideration without any expression of opinion on merits of the matter. The Division Bench has rightly held that the decisions of this Court in ***HIRALAL PARBHUDAS (SUPRA) and M/S. NATIONAL CHEMICALS AND COLOUR CO. (SUPRA)*** have no relevance while deciding an appeal arising out of an order of injunction.
> >
> > (ii) The scope and ambit of an appeal from an order passed by the trial Judge has already been delineated by the Supreme Court in ***WANDER LTD. (SUPRA), SHYAM SEL AND POWER LIMITED (SUPRA)*** and ***RAMAKANT AMBALAL CHOKSI (SUPRA)***. In view of aforesaid

3 Appeal No.66 of 2012, decided on 28 April 2025.

> enunciation of law by Supreme Court, it is evident that the appellate court will not interfere with exercise of discretion of Court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily or capriciously or perversely or where the Court had ignored the settled principles of law regulating grant or refusal of interlocutory injunctions. The Appellate Court while deciding an appeal, has to examine whether the discretion exercised is not arbitrary, capricious or contrary to the principles of law and the appellate Court may, in a given case, has to adjudicate on facts even in such discretionary orders."

19. Reliance by Mr. Jagtiani on judgment of the Apex Court in ***Ramakant Ambalal Choksi*** (supra) is also apposite, in which it is reiterated that mere possibility of taking different view by Appellate Court cannot be a ground for setting aside the decision of the Trial Court taken in exercise of discretion under Order XXXIX of the Code.

20. Keeping in mind the contours of jurisdiction of the Appellate Court while examining correctness of order made by Trial Judge in exercise of jurisdiction under Order XXXIX of the Code, we do not find that any valid ground is made out for interfering in the impugned judgment and order of the learned Single Judge. No case is made for admission of the Appeal or for grant of any relief therein. The Appeal is accordingly **dismissed.** It is however clarified that the observations made in the Order are only for deciding IDBI's entitlement for temporary injunction and nothing observed herein shall influence the Court while deciding any independent application(s) or the final decision of the Suits.

21. In view of the disposal of the Appeal, Interim Application does not survive and the same is also **disposed of**.

(SANDEEP V. MARNE, J.) **(CHIEF JUSTICE)**

SUDARSHAN RAJALINGAM KATKAM

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