

(2016) 04 DEL CK 0011

In the Delhi High Court

Case No : W.P. (C) No. 5958/2015, CM No. 28489/2015, CM. No. 10798/2015
& CM. No. 22764/2015

North West Sales and Marketing Ltd. and Others

APPELLANT

Vs

IFCI Ltd.

RESPONDENT

Date of Decision : 04-04-2016

Acts Referred:

Constitution of India, 1950 — Article 12, Article 226, Article 32
Securitisation and Reconstruction of Financial Assets and Enforcement of Security
Interest Act, 2002 (SARFAESI) — Section 13, Section 13(2), Section 13(3A), Section
13(4), Secti

Citation : (2016) 04 DEL CK 0011

Hon'ble Judges : Rajiv Sahai Endlaw, J.

Bench : Single Bench

Advocate : Ramesh Singh and Aniruddha Deshmukh, Advocates, for the
Appellant; Atul Sheopuri and R.K. Chaudhary, Advocates, for the Respondent

Final Decision : Dismissed

Judgement

Rajiv Sahai Endlaw, J.—1. The petition claiming the reliefs of i) quashing of letter dated 18th May, 2015 of the respondent Industrial Finance Corporation of India (IFCI) Ltd. revoking the settlement earlier arrived at with the petitioners; ii) a direction to the respondent IFCI Ltd. to forthwith issue "19 No Objection Certificates (NOCs) in respect of the shops indicated" in the email dated 26th December, 2014; iii) a direction to the respondent IFCI Ltd. to restructure the payment schedule of the unpaid installments by extending the time by the period lost; and, v) prohibiting the respondent IFCI Ltd. from taking any steps pursuant to the impugned letter dated 18th May, 2015, came up first before this Court before the Vacation Judge on 10th June, 2015 when observing that the Court was not inclined to entertain the petition or grant any relief to the petitioners, the petition was ordered to be posted post Summer Vacations before the Roster Bench.

2. The petitioners applied for amendment of the petition to also claim the reliefs

of i) impugning the notice dated 28th September, 2015 under Section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest (SARFAESI) Act, 2002 since then issued by the respondent IFCI Ltd. to the petitioners; ii) seeking a direction to the respondent IFCI Ltd. to accept the proposal given by the petitioner on 29th September, 2015; and, iii) to restrain the respondent IFCI Ltd. from taking any coercive steps against the petitioners and / or the guarantors pursuant to the notice dated 28th September, 2015, and which application was allowed on 8th October, 2015.

3. On 12th October, 2015, after hearing the counsel for the petitioners, the following order was passed:

1. The petition impugns the letter dated 18th May, 2015 of the respondent of cancellation of the Settlement Agreement arrived at with the petitioners with respect to the financial assistance rendered to the petitioners. Axiomatically, a mandamus is also sought directing the respondent to inter alia abide by the Settlement Agreement and the notice dated 28th September, 2015 issued by the respondent under Section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest (SARFAESI) Act, 2002 is also impugned.

2. The counsel for the petitioners has been heard at length. It has been enquired from him as to how this writ petition is maintainable in the face of the controversy being entirely contractual and the alternative remedy under Section 17 of the SARFAESI Act before the Debt Recovery Tribunal being available to the petitioners against the measure even if any taken by the respondent Bank under Section 14 of the Act in pursuance to the notice already issued under Section 13(2) of the SARFAESI Act.

3. In this regard, it may also be noticed that it is the contention of the counsel for the respondent appearing on advance notice that the petitioners have been playing hide and seek and have not even signed the Settlement Agreement and not opened the Escrow Account in terms thereof and not informed the details of the area for the sale of which NOC are being asked purportedly in pursuance of the Settlement Agreement.

4. The counsel for the petitioners at this stage states that the matter be posted to 19th October, 2015 to enable the petitioners to bring the buyers along with purchase consideration for the shops for which NOC is being sought now and / or at least place a concrete proposal before this Court in this regard.

5. Costs earlier imposed is waived.

6. List on 19th October, 2015."

4. The counsel for the petitioners on 19th October, 2015 handed over a proposal in terms of order dated 12th October, 2015 with copy to the counsel for the respondent IFCI Ltd. appearing on advance notice and the matter was adjourned to 29th October, 2015 to enable the counsel for the respondent IFCI Ltd. to

obtain instructions.

5. On 29th October, 2015, the counsel for the respondent IFCI Ltd. informed that the said proposal had been rejected by the respondent IFCI Ltd. However on that date, the counsel for the petitioners handed over an addendum to the proposal and after further hearing the counsels, order was reserved. Thereafter, the petitioners had filed CM No. 28489/2015 to again claim the relief of restraining the respondent IFCI Ltd. from taking coercive steps in pursuance to the letter dated 20th November, 2015 whereby the respondent IFCI Ltd. had rejected the representation of the petitioner submitted under Section 13(3A) of the SARFAESI Act and which came up before this Court on 27th November, 2015 and after hearing the counsel for the petitioners thereon, the order on the said application was also reserved to be pronounced along with the order in the writ petition.

6. It is inter alia the case of the petitioners:

(i) that the two petitioners i.e M/s. North West Sales & Marketing Ltd. and M/s. ARSS Developers Ltd. had availed two loans, one for Rs. 100 crores and the other for Rs. 60 crores from the respondent IFCI Ltd. for the purpose of constructing a mall i.e. "The ARSS Felix" over land ad-measuring 2910 sq. mtrs. in Community Centre, Paschim Vihar, Delhi, having about 120 shops;

(ii) that the respondent IFCI Ltd. recalled the loan and commenced action under Section 13 of the SARFAESI Act;

(iii) that the petitioners approached the High Court of Orissa by preferring a writ petition which was disposed of vide order dated 29th August, 2012 in view of both parties agreeing to make an effort for compromising the disputes;

(iv) that accordingly the aforesaid two loans were restructured vide letter dated 23rd December, 2013 of the respondent IFCI Ltd. and specifically vide Supplementary and Restructuring Agreement dated 4th February, 2014;

(v) that as per the settlement arrived at by the petitioners with the respondent IFCI Ltd., the loans were to be serviced from sale proceeds of the area charged to the respondent and therefore, on making an upfront payment of Rs. 25.30 crores, NOC for the first set of 30 shops was to be issued - the said 30 shops had already been sold and required NOC for getting market confidence;

(vi) that as per the aforesaid settlement, issuance of NOCs was predicated on one and only one condition, viz., upfront payment of Rs. 25.30 crores and was in no way dependent upon payment of future installments;

(vii) that though the petitioners fulfilled their obligation of upfront payment of Rs. 25.30 crores by 17th February, 2014 i.e. within two weeks of the execution of the aforesaid settlement but the respondent IFCI Ltd. did not issue NOCs;

(viii) that after much cajoling, the respondent IFCI Ltd. issued conditional NOCs and that too only for 11 shops - the said conditional NOCs were of no help as it did not serve the purpose;

(ix) the petitioners again approached the respondent IFCI Ltd. and made further payment of Rs. 5 crores which included the consideration of the remaining 7 shops out of the aforesaid 30 shops but the respondent IFCI Ltd. in an arbitrary manner and without any basis and in colourable exercise of power agreed to merely issue 11 NOCs instead of 30;

(x) that though the petitioners offered to pay another Rs. 6.10 crores as a condition for issuance of the remaining 19 NOCs as well as additional 8 NOCs but the respondent IFCI Ltd. revoked the settlement and initiated proceedings under the SARFAESI Act;

(xi) that the respondent IFCI Ltd. in breach of the obligation owed to the petitioners, inspite of the petitioners having fulfilled their part of the settlement agreement, stifling the fundamental rights of the petitioners to carry on their trade and business.

7. As would be obvious from the above, the order dated 12th October, 2015 was in the aforesaid nature of the claim in the writ petition.

8. It is not the case of the petitioners that the respondent IFCI Ltd. is in breach of any binding guideline of the Reserve Bank of India (RBI). The petitioners want this Court to, in exercise of extraordinary powers under Article 226 of the Constitution of India, specifically enforce the settlement agreement with the respondent IFCI Ltd. and of which settlement agreement the petitioners claim to have been ready and willing and having fulfilled their own obligations and allege breach on the part of the respondent IFCI Ltd. However such a power in my view cannot be exercised under Article 226 of the Constitution of India.

9. Supreme Court in *Joshi Technologies International Inc. Vs. Union of India*, (2015) 7 SCC 728, after analyzing a host of earlier judgments particularly in *ABL International Limited Vs. Export Credit Guarantee Corporation of India*, (2004) 3 SCC 553 has held i) that though there is no absolute bar to the maintainability of a writ petition even in contractual matters or where there are disputed questions of fact or even when monetary claim is raised but discretion lies with the High Court which under certain circumstances can refuse to exercise; ii) the High Court will normally not exercise such discretion unless the action has some public law character attached to it; iii) whenever a particular mode of settlement of dispute is provided in the contract, the High Court would refuse to exercise its discretion under Article 226 and would relegate the parties to the said mode of settlement; iv) if there are very serious disputed questions of fact which are of complex nature and require oral evidence for their determination, again the High Court in its discretion would not entertain a writ petition; v) money claims, particularly arising out of the contractual obligations, are normally not to be entertained except in exceptional circumstances; vi) ordinarily where a breach of contract is complained of, the party complaining of such breach may sue for specific performance of the contract, if contract is capable of being specifically performed and otherwise may sue for damages; vii) if the contract between the

private party and the State / its instrumentality and / or agency of the State is under the realm of a private law and there is no element of public law, the normal course for the aggrieved party is to invoke the remedies provided under the ordinary civil law rather than approaching the High Court under Article 226 of the Constitution of India and invoking its extraordinary jurisdiction and only if the nature of the activity or controversy involves public law element can the matter be examined by the High Court in a writ petition under Article 226 to see whether action of the State and / or instrumentality or agency of the State is fair, just and equitable.

10. Supreme Court, again in order dated 18th March, 2015 in Civil Appeal No. 3053/2015 arising out of SLP(C) No. 15689/2011 titled National Highways Authority of India Vs. MEIL-EDB LLC (JV) held that in pure contractual matters extraordinary remedy of writ under Article 226 or under Article 32 of the Constitution of India cannot be invoked and that the writ Court should abjure from going into the minute calculations and controversy should be left to the Civil Court to decide.

11. In the present case, not only is there no public law element in the controversy but also alternative remedy under Section 17 of the SARFAESI Act is available to the petitioners.

12. The counsel for the respondent IFCI Ltd. appearing on advance notice also disputed that the petitioners were in compliance of their part of the Supplementary & Restructuring Agreement. He contended that in fact no such agreement even had come into being because the same was not signed, no Escrow Account as agreed was opened, no post dated cheques as agreed handed over and affirmation of the guarantors thereto not received. It was also informed that the respondent IFCI Ltd. has already in the past waived overdue interest of Rs. 20 crores and given other discounts to the petitioners. Reliance was also placed on the judgment of the Division Bench of this Court in M/s. Sigma Generators Pvt. Ltd. Vs. Oriental Bank of Commerce, 2015 (217) DLT 622 holding that the borrowers of banks / financial institutions cannot interfere with the Scheme of SARFAESI Act whereunder the banks / financial institutions after considering the representation against the notice under Section 13(2) and after rejecting the same are entitled to take action under Section 13(4) and that where statute lays down a procedure comprising of successive steps for action thereunder and has also provided a remedy against such action after the final step is taken, the rule of availability of such remedy being a bar to exercise of jurisdiction under Article 226 cannot be defeated by approaching the High Court against an intermediary step and by contending that thereagainst no alternative remedy is provided.

13. Though the counsel for the petitioners contended that since the respondent IFCI Ltd. is a State / instrumentality of State within the meaning of Article 12 of the Constitution of India and is acting in breach of its contract, a writ petition would be maintainable but in the light of the settled position of law, I am unable

to agree. I may in this regard refer to CCPL Developers Pvt. Ltd. Vs. Gail (India) Ltd. , Play well Impex (P) Ltd. Vs. United India Insurance Co. Ltd. [LPA No. 892/2015 preferred thereagainst is found to have been withdrawn on 17th December, 2015], Hejian Solidkey Petroleum Machinery Co. Ltd. Vs. Indian Oil Corporation Ltd. , Chakradar Auto Udyog Pvt. Ltd. Vs. Engineering Export Promotion Council (DB) and Govt. of NCT of Delhi Vs. New Variety Tent House , 189 (2012) DLT 65 (DB) [SLP(C) No. 23577/2012 preferred thereagainst is found to have been dismissed on 3rd August, 2012].

14. There is thus no merit in the petition.

Dismissed.

No costs.