(2020) 04 OHC CK 0001

In the Orissa High Court

Case No : Writ petition (C) No. 8684 Of 2020

Radhakrishna APPELLANT

Vs

Aditya Birla Finance Ltd RESPONDENT

Date of Decision : 03-04-2020

Acts Referred:

Reserve Bank Of India Act, 1934 — Section 45IB, 45(I)(c), 45(I)(e), 45(I)(j), 45(J), 45JA, 45K, 45L, 45MB, 45MBA, 45N,
Hire-Purchase Act, 1972 — Section 2(c)
Industrial Development Bank Of India Act, 1964 — Section 2(i) to (xviii)(c)
Securitisation And Reconstruction Of Financial Assets And Enforcement Of Security Interest Act, 2002 — Section 12
Constitution Of India, 1950 — Article 12, 226

Citation : (2020) 04 OHC CK 0001

Hon'ble Judges : Biswajit Mohanty, J

Bench : Single Bench

Advocate : Avijit Pal,S.K.Rout, A.Dass.K.Rout, A.Das

Final Decision : Dismissed

Judgement

This writ petition has been filed for issuance of direction to the opposite parties to foreclose its loan account No.ABFLBHULAP0000056685 with the

opposite party No.1.

Mr. Avijit Pal, learned counsel for the petitioner submitted that the opposite party No.1 is a non-banking financial institution recognized by Reserve

Bank of India and is understood as such under the provisions of the SARFAESI Act, 2002. According to him, the petitioner took loan from the

opposite parties as per the sanction order under Anenxure-1 and it paid its E.M.I. regularly. Since the opposite parties are charging high rate of

interest i.e. 12% per annum on a floating basis, the petitioner approached the ICICI Bank Home Loan for taking over of the existing loan with the opposite parties. The ICICI Bank Home Loan vide Annexure-2 sanctioned the loan on 29.02.2020. The petitioner wrote to opposite parties for

foreclosure of the loan account No.ABFLBHULAP0000056685. However, the opposite party No.2 vide its e-mail under Annexure-4 declined the

request of foreclosure of loan account on the ground that since the loan is under lock-in period, the aforesaid loan cannot be closed. In such

background, the present writ petition has been filed with the above noted prayer.

On being queried about the maintainability of the writ petition vis-Ã -vis opposite party No.1 - a private non-banking financial institution/company, Mr.

Pal, drew the attention of this Court to the averments made in para-3 of the writ petition which reads as follows:

Â â??3. That the opposite party No.1 is a non-banking financial institution recognized by the Reserve Bank of India and is financial institution as

understood under the provisions of the SARFAESI Act and as such amendable to the jurisdiction of this Honâ??ble Court.â??

and submitted that accordingly this writ petition is maintainable. Further to a query of the Court that as to whether by issuing the letter under

Annexure-4, the opposite parties have violated any statutory rules/directions issued by the Reserve Bank of India, Mr. Pal fairly submitted that there

exists no such statutory rule governing the field covering such matters.

In such background, this Court has to see whether the present writ petition is maintainable against a private non-banking financial institution/company

like opposite party No.1.

The Reserve Bank of India Act, 1934 deals with non-banking financial institutions and companies at Chapter-III-B. Sub-Section (c) of Section 45-I

defines financial institution to mean non-banking institutions, which carries on certain activities, Sub-Section (e) of Section 45-I defines non-banking

institution and Sub-Section (f) of Section 45 defines non-banking financial company. These provisions are quoted here for ready reference.

â??(c) â??â??financial institutionâ??â?? means any non-banking institution which carries on as its business or part of its business any of the

following activities, namely:â?

(i) the financing, whether by way of making loans or advances or otherwise, of any activity other than its own;

(ii) the acquisition of shares, stock, bonds, debentures or securities issued by a

Government or local authority or other marketable securities of a like

nature;

(iii) letting or delivering of any goods to a hirer under a hire-purchase agreement as defined in clause (c) of section 2 of the Hire-Purchase Act, 1972

(26 of 1972);

(iv) the carrying on of any class of insurance business;

(v) managing, conducting or supervising, as foreman, agent or in any other capacity, of chits or kuries as defined in any law which is for the time being

in force in any State, or any business, which is similar thereto;

(vi) Collecting, for any purpose or under any scheme or arrangement by whatever name called, monies in lumpsum or otherwise, by way of

subscriptions or by sale of units, or other instruments or in any other manner and awarding prizes or gifts, whether in cash or kind, or disbursing monies

in any other way, to persons from whom monies are collected or to any other person,

[but does not include any institution, which carries on as its principal business,â?

(a) agricultural operations; or

(aa) industrial activity; or]

(b) the purchase or sale of any goods (other than securities) or the providing of any services; or

(c) the purchase, construction or sale of immovable property, so however, that no portion of the income of the institution is derived from the financing

of purchases, constructions or sales of immovable property by other persons;]

[Explanation.â?" For the purposes of this clause, â??â??industrial activityâ??â?? means any activity specified in sub-clauses (i) to

(xviii) of clause (c) of section 2 of the Industrial Development Bank of India Act, 1964 (18 of 1964);]

(e) â??â??non-banking institutionâ??â?? means a company, corporation [or cooperative society;]

[(f) â??â??non-banking financial companyâ??â?? meansâ?

(i) a financial institution which is a company;

(ii) a non-banking institution which is a company and which has as its principal business the receiving of deposits, under any scheme or arrangement or in any other manner, or lending in any manner;

(iii) such other non-banking institution or class of such institutions, as the Bank may, with the previous approval of the Central Government and by

notification in the Official Gazette, specify.]â??

Section 45-IA speaks of the requirement of registration of such non-banking financial companies.

The said section also deals with the circumstances under which the Certificate of Registration granted to a non- banking financial company can be

cancelled. Section 45- IB makes provision for maintenance of percentage of assets vis-Ã -vis such company with certain conditions. Section 45-IC

speaks of creation of reserve fund for every non-banking financial company also with certain conditions. Under Section 45-ID, Reserve Bank has got

the power to remove the directors of such companies in order to prevent improper conduct of business of such non-banking financial companies which

is detrimental to public interest or to the interest of depositors. Section 45-IE contains provision for supersession of Board of directors of non-banking

financial company under certain circumstances. Under Section 45-J, the Reserve bank has the power to regulate or prohibit issuance of prospectus or

advertisement soliciting deposits of money from public. Further regulatory measures have been provided under Section 45-JA. Under Section 45-K,

the Reserve Bank has got power to issue direction to such non-banking financial institution in public interest. Also under Section 45-L, the Reserve

Bank has the power to call for information from such financial institutions and to give directions in order to regulate the credit system. Under Section

45-MB, the Reserve Bank has the power to prohibit the non-banking financial company from accepting deposits if such company violates provisions of

the Act or fails to comply with any direction give by the Reserve bank. Under Section 45-MBA, the Reserve Bank has got the power to frame

scheme for amalgamating one non-banking financial institution with any other non-banking institution, for reconstruction of the non-banking financial

company and splitting of non-banking financial company in public interest or in the interest of the financial stability. Section 45-N empowers the

Reserve Bank to cause inspection of any such non-banking financial institution. Thus Chapter-III-B deals mainly with the power of Reserve Bank to

regulate the activities of the non-banking financial companies. A reading of Sub-

Section (c), (e) & (f) of Section 45-I of the Reserve Bank of India

Act, 1934 only show that a non-banking financial company/institution mainly deals with advancing of loans, acquisition of share, stock, bonds,

debentures and marketable securities, letting or delivering of goods to a hirer under a hire purchase agreement, carrying on insurance business,

managing & supervising of chits and collecting monies in lumpsum by way of sale of units and awarding prizes and gifts etc. All these make it clear

that non-banking financial companies deal with ordinary commercial activities having no monopoly status. Therefore, such activities cannot be

classified as discharging of public function/public duties/statutory duties.

Similarly, Chapter-II of the SARFAESI Act, 2002 deals with regulation of securitization and reconstruction of financial assets of banks and financial

institutions. Section 12 of the Act deals with power of Reserve Bank to determine policy and issue directions which are in public interest or to regulate

financial system of the country. Thus, merely because opposite party No.1 is understood as financial institution under the SARFAESI Act and merely

because R.B.I. also regulates its activities, it cannot be said that it is discharging public duties. In fact, there exists no averment in the writ petition

asserting that the opposite party No.1 is an authority, which discharges public duty making it amenable to writ jurisdiction of this Court.

In this context, it would be profitable to refer to the decision of the Supreme Court as rendered in the case of Federal Bank Ltd. Vs. Sagar Thomas,

reported in AIR 2003 S.C. 4325. Though the said judgment is rendered in the context of a private company carrying on banking business, the ratio of

the said decision can apply with equal force to non-banking financial company like opposite party No.1 which stands more or less on the same footing.

There the Supreme Court has made it clear that a writ petition under Article 226 of the Constitution of India may be maintainable against (i) the State

(Govt.); (ii) Authority; (iii) a statutory body; (iv) an instrumentality or agency of the State; (v) a company which is financed and owned by the State;

(vi) a private body run substantially on State funding; (vii) a private body discharging public duty or positive obligation of public nature (viii) a person or

a body under liability to discharge any function under any Statute, to compel it to perform such a statutory function. In such background, on the private

banking company, the Supreme Court observed that the banking is a kind of profession and a commercial activity and the primary motive behind it is to

earn returns and profits. It works like any other private company in the banking business having no monopoly status. These companies have been

voluntarily established for their own purpose and interest but their activities are kept under check so that their activities may not go way ward and

harm the economy in general. After discussing the provisions of the Reserve Bank of India Act and Banking Regulation Act, the Supreme Court held

that the guidelines provided therein are to maintain proper fiscal discipline and if need arises, the management of the company can be taken over.

Therefore, the above noted Acts as discussed earlier mainly contain regulatory provisions to keep a check on their functioning and provide guidelines

and do not reflect participatory dominance or control over the affairs of such company. In such back ground, these private companies would normally

not be amenable to the writ jurisdiction. But in certain circumstances, a writ may issue against such private bodies where these violate statutory

provisions. When there is no violation of any statutory provisions, a writ may not be issued at all. It also made clear that there is nothing on the basis of

which it can be said that carrying on the profession of banking as akin to carrying on governmental functions. Rather banking is an old profession in

one form or the other carried on by individuals or by a group of them. Losses incurred in the business are theirs as well as the profits. Any business or

commercial activity-may be banking or others no doubt have impact on the economy of the country in general, but such activities cannot be classified

as one falling in the category of discharging of duties/functions of public nature. 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, it does not mean that private companies carrying on the business of banking,

discharge any public function or public duty. Thus, ultimately, the Supreme Court held that the writ petition against Federal Bank is not maintainable.

Hence as indicated earlier on an analysis of different provision of the Reserve Bank of India Act, 1934, it is clear that the non-banking financial

companies only indulge in ordinary business or commercial activities which cannot be described as akin to governmental function. Therefore, following

the ratio of the above noted judgment, these activities cannot be classified as one falling under the category of discharging of public function or public duty. Thus the opposite party No.1 cannot be covered either under parameter (vii) or (viii) as delineated in Federal Bank case (supra). Admittedly

other six parameters are not attracted to the present case. The above ratio has also been referred to in the decision of the Supreme Court in the case

of Ramakrishna Mission and another Vs. Kago Kanya and others, reported in 2019 (5) SCALE 559.

Besides above, there exists no pleadings whatsoever to show that either the opposite party No.1 is a â??Stateâ? within the meaning of Article 12 of

the Constitution or is under an obligation to discharge any statutory function vis-Ã -vis the grievance raised. Rather Mr. Pal as indicated earlier has

fairly submitted that there exists no statutory rule to take care of the grievance of the petitioner. In such background, this Court has no hesitation in

coming to a conclusion that this writ petition as laid is not maintainable. Accordingly, the same stands dismissed. However, the petitioner is at liberty to

seek appropriate remedy before the appropriate forum as permitted under law, if so advised, for redressal of its grievances.

