IN THE HIGH COURT OF KARNATAKA AT BENGALURU

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DATED THIS THE 8TH DAY OF AUGUST, 2022

BEFORE

THE HON'BLE MR. JUSTICE KRISHNA S.DIXIT

WRIT PETITION NO.2004 OF 2022 (GM-RES)

BETWEEN:

M/S NITESH RESIDENCY HOTELS PVT.LTD
HAVING ITS REGISTERED OFFICE AT
NO.25/1, IMPERIAL COURT, 2ND FLOOR,
CUNNINGHAM ROAD,
BENGALURU 560 052.
REPRESENTED BY ITS GENERAL MANGER-
LEGAL AND AUTHORISED SIGNATORY
SRI.K.B.SWAMY.

…PETITIONER

(BY SRI. K SUMAN,SENIOR COUNSEL FOR
SRI. SIDDHARTH SUMAN, ADVOCATE)

AND:

1 . UNION OF INDIA,
BY ITS SECRETARY,
MINISTRY OF FINANCE,
NEW DELHI 110 001.

2 . THE RESERVE BANK OF INDIA
NRUPATUNGA ROAD,
BENGALURU-560 001,
REPRESENTED BY ITS GOVERNOR.

3 . YES BANK LIMITED
HAVING ITS REGISTERED AND
CORPORATE OFFICE AT YES BANK TOWER ONE
INTERNATIONAL CENTRE
TOWER-II, 15TH FLOOR,
SENAPATI BAPAT MARG
ELPHINSTOEN(W), MUMBAI 400 013.
BY ITS AUTHORISED OFFICER.

…RESPONDENTS

(BY SRI. H SHANTHI BHUSHAN, ASG FOR R1;

SRI.DHYAN CHINNAPPA, AAG A/WITH
MISS.RITHIKA RAVIKUMAR, ADVOCATE FOR R3;
R2 SERVED AND UNREPRESENTED)

THIS WRIT PETITION IS FILED UNDER ARTICLES 226 & 227 OF THE CONSTITUTION OF INDIA PRAYING TO QUASH THE ORDER / LETTER BEARING DD. 05.02.2021 ISSUED BY THE R-3 (i.e. ANNX-F); AND ETC.

THIS WRIT PETITION COMING ON FOR **ORDERS** THIS DAY, THE COURT MADE THE FOLLOWING:

ORDER

Petitioner a heavy borrower, is knocking at the doors of Writ Court for assailing the Letters dated 05.02.2021 (Annexure-F) and 07.04.2021 (Annexure-J) whereby all credit facilities extended to him have been recalled. He also lays a challenge to the consequent SARFAESI Notice at Annexure-L; all these are issued by the 3rd Respondent-lender Bank *inter alia* on the ground of defaults committed by the petitioner eventually resulting into its *"debt being classified as non performing asset"*. The net effect of all these impugned instruments are that the petitioner has to discharge in full all his outstanding liabilities aggregating to **Rs. 358,39,49,064/-** (Rupees Three Hundred and Fifty Eight Crore Thirty Nine Lakh Forty Nine Thousand & Sixty Four) only, computed as on 16.07.2021 with interest as agreed, accruing thereon.

2. After service of notice, the Union of India is represented by the Asst. Solicitor General; the 2nd respondent RBI has chosen to remain unrepresented; the 3rd respondent – lender Bank is represented by its private counsel who has filed the Statement of Objections dated 27.05.2022 opposing the petition. Learned Senior Advocate appearing for the lender Bank, makes submission in justification of the impugned proceedings and the cumulative reasons on which they have been structured. He also seeks dismissal of the Writ Petition on the ground that petitioner has perpetrated sharp practices unbecoming of a scrupulous borrower and a culpable litigant.

3. BRIEF FACTS OF THE CASE:

(a) Petitioner, a Private Limited Company is incorporated under the provisions of Companies Act, 1956, with the sole purpose of developing sa hotel namely, '*The Ritz-Carlton-Bangalore'*, for providing accommodation and worldly services. The Hotel was sought to be established on a property which petitioner had obtained by a registered lease deed dated 11.01.2007 with ARCHDIOCEASE of Bangalore. On the assurances & representations of the

petitioner, the third respondent – Bank sanctioned the credit facilities which would include a Term Loan of Rs.291, 00, 00, 000/-, granted in March, 2016. The leasehold rights were furnished by way of security for the repayment coupled with certain personal guarantees & hypothecations.

(b) The Loan Agreement was entered into on 31.03.2016 and the petitioner had executed a Deed of Undertaking on the same date. Petitioner had specifically declared that it has a clear & marketable title and, transferable interest over the Hotel Ritz-Carlton which was free from any prior charge, lien, encumbrance or litigations. However, the said lease was terminated way back in the year 2014 itself and the dispute was in the arbitration proceedings, a retired judge of this Court being the sole arbitrator. The lender – Bank states that it was not given any inkling of the same. Petitioner was also granted an additional Temporary Overdraft facility of Rs.100,00,00,000/- during the Covid-19 Pandemic pursuant its Letter dated 25.11.2020, the lender-Bank being kept in complete darkness as to the arbitral proceedings.

(c) The lesser vide Letter dated 08.01.2021 informed the lender-Bank about the arbitral award passed on 07.11.2020 upholding the termination of lease and rejecting petitioner's Counter claim for a sum of about Rs. 600 Crores. A challenge to the same before the Commercial Court in COM.AP No. 4/2021, having been rejected the matter is now pending in appeal before a Division Bench of this Court. Petitioner having remained in default, its debt came to be classified as NPA. By the impugned Letters, the entire credit facilities have been recalled on the ground of fraud, misrepresentation & default. A Demand Notice u/s 13(2) of the SARFAESI Act, 2002 has also been issued. Aggrieved by all this, petitioner is before this Court.

(d) The respondent – Bank has filed the Statement of Objections resisting the writ petition contending that: the third respondent is not an instrumentality of the State under Article 12 of the Constitution and therefore, Writ jurisdiction cannot be invoked against its actions; petitioner has got an alternate & equally efficacious remedy against the impugned action and therefore, it should be relegated to the same; petitioner has defrauded the lender-Bank and

therefore, the prudent decision to recall the credit facilities cannot be faltered; petitioner having remained in outstanding debts disregarding demand notices, it's Loan Account has been classified as NPA and therefore, the impugned SARFAESI Notice cannot be voided. It is also contended that the petitioner has not approached the Court with clean hands and he has secured reprieve *ex parte,* without disclosing the true facts.

4. Having heard the learned Counsel for the parties and having perused the petition papers, this Court declines indulgence in the matter for the following reasons:

A. AS TO RESPONDENT BANK NOT BEING '*STATE*' UNDER ARTICLE 12 :

(i) The respondent – Bank, being a private lending agency, apparently does not fit into the term '*other authorities*' within the meaning of Article 12 of the Constitution in the light of Apex Court decision in *R.D SHETTY vs. INTERNATIONAL AIRPORTS AUTHORITY OF INDIA*[1]*,* as rightly contended by its learned Senior Advocate, Mr. Dhyan Chinnappa. Its business is regulated by the RBI Norms does not *ipso facto* establish a pervasive

[1] AIR 1979 SC 1628

control by the RBI or the Central Government, in every activity of business. The response of the Bank to arguably detrimental acts of its borrower, made in the course of its commercial dealings cannot be approximated to an order of a statutory authority, justifying the invocation of remedy at the hands of Writ Court. The principles on which a Bank's response to its customers have to be examined lie in the realm of private law as contradistinguished from judicial review ordinarily undertaken under Articles 226 & 227. A perusal of Bank's Letters dated 05.02.2021 (Annexure-F) & 07.04.2021 (Annexure-J) whereby credit facilities have been recalled at once reveals that the transaction has the overtones of commercial elements; despite vociferous submissions made on behalf of the petitioner, sufficient public law elements warranting invocation of writ jurisdiction are not demonstrated. Therefore, in matters like this, a Writ Court cannot undertake examination of the same, as if it is an *administrative action* amenable to judicial review.

(ii) The transactions between a banker and the borrower are essentially contractual in nature. LORD

CHORLEY in his '*LAW OF BANKING*'[2] writes: "*This debtor and creditor relationship is the basic principle of the law of Banking…".* The House of Lords more than a century & a half ago said: "*The relationship of banker to customer is one of contract…*" vide *FOLEY vs. HILL*[3]; it was remarked by Bankes LJ in *JOACHIMSON vs. SWISS BANK CORPORATION*[4] that in the ordinary case, the relationship of banker to customer depends "*entirely or mainly upon an implied contract*". The observations of RAMASWAMI, J. in *N.M.N. DURAISWAMI CHETTIAR vs. THE DINDIGUL URBAN CO-OPERATIVE BANK*[5] have been pertinently reproduced as under:

> "*The mere opening of an account current with a banker and the banker's acceptance thereof involves a contractual relationship by application. In doing so, it is now the universally accepted view that the relationship between the banker and the depositor is not of a mere depositor or trustee or agent. The legal relation, of a banker and a customer in their ordinary dealings in money is simply that of a debtor and creditor. If the bank makes advances or grants overdrafts the banker is the creditor; on the other hand if the customer opens an account and deposits money the customer is the creditor. But neither of these relations has any fiduciary*

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[2] Lord Chorley, 'Law of Banking', 4th Edition, pp 18 – 19, (1960)
[3] (1848) 2 HL CAS 28
[4] (1921) 3 KB 110
[5] AIR 1957 Mad 745

character, nor does either bear an analogy to the relation between principal and agent…"

It is so even if the lender bank were to be an instrumentality of '*State'* under Article 12 of Constitution of India, subject to all just exceptions into which argued case of the petitioner does not fit.

(iii) When the preliminary issue as to maintainability of the Writ Petition is raised, what needs to be examined is not invariably the **status** of answering respondent as '*State'* or its '*instrumentality'* but the '***essential nature***' of its action called in question. Since the enactment of the Constitution, our system has moved from the formality of '*status'* of an entity to the substance of its '*function'*, while adjudging the claim for writ remedies. In other words, even if the respondent Bank answers the description of '*other authorities'* under article 12, that *per se* may not justify invocation of constitutional jurisdiction. Conversely, even if the respondent does not answer the said description, its action may still be susceptible to judicial review should it be animated by sufficient public law

elements vide *LIC OF INDIA v. ESCORTS INDIA LTD*[6], which is not the case here. Heavy reliance placed by the petitioner on Central Government's Guidelines Emergency Credit Line Guarantee Scheme (hereinafter '*ECLGS*') does not much come to its aid, regardless of its arguable statutory origin, to complain before the Writ Court about the impugned action of the Bank. Reasons are not far to seek: Firstly, the Scheme does not exclude the exercise of *Bankers Prudence* which as of necessity avails in a reasonable measure while making commercial decisions of the kind. Banks handle public money as trustees and therefore, consistent with '*public trust norms*' they should be allowed to take certain decisions as would prove prudent in the given circumstances. Secondly, though petitioner may be right in saying that the ECLGS Loan Scheme answers the generic definition of '*law'* given under Article 13(3) of the Constitution still that does not advance his case inasmuch as the same is not put in challenge as being repugnant to Part III Rights. On the contrary, petitioner wants to found right to relief on the basis of said scheme.

[6] AIR 1986 (1) SCC 264

B. <u>AS TO CUSTOMER'S DUTY TO THE BANK:</u>

(i) The contractual relationship between banker and customer places a duty on both. What *HALSBURY'S LAWS OF ENGLAND*[7] says as to duty emanating from relationship between banker and customer has been pertinently reproduced as under:

> *"The receipt of money by a banker from or on account of his customer constitutes him the debtor of the customer… The customer on his part, undertakes to exercise reasonable care in executing his written orders so as not to mislead the bank or make forgery easy, and <u>to act honestly towards the bank</u>…."*

(ii) The Apex Court in *PRADEEP KUMAR vs. POST MASTER GENERAL*[8] after referring to the English Court's decision in *TAI HING COTTON MILL LTD vs. LIU CHONG HING BANK*[9] at paragraph 34 observed as under:

> *"On the aspect of civil obligation of a customer in terms of banking contract and in tort law, this decision approves the following observations made by the Privy Council in Tai Hing Cotton Mill Ltd. v. Liu Chong Hing Bank Ltd. and Others: "37. Then the Privy Council proceeded to consider the weightier submissions advanced by the bank (1) a wider*

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[7] Halsbury's Laws of England, 4th Edition, Vol. 3, pp 38 – 40, (1973)
[8] CIVIL APPEAL NOS. 8775-8776 OF 2016 disposed off on 07.02.2022
[9] (1985) 2 All ER 947

duty on the part of the customer to act with diligence which must be implied into the contract and alternatively that such a duty arises in tort from the relationship between banker and customer. The Privy Council parted company with the observation by the Court of Appeal here and repelled the plea that it was necessary to imply into a contract between a banker and the customer a wider duty and that it was not a necessary incident of banker/customer relationship that the customer should owe his banker a wider duty of care. This duty is in the form of an undertaking by the customer to exercise reasonable care in executing his written orders so as not to mislead the bank or to facilitate forgery. The Privy Council accepted that an obligation should be read into the contract as the nature of this contract implicitly requires. In other words "the term sought to be implied must be one without which the whole transaction would become futile and inefficacious"

C. AS TO CULPABLE CONDUCT OF BORROWER *QUA* THE BANK:

(i) Mr.Dhyan Chinnappa, learned Sr. Advocate appearing for the lender Bank is right in contending that the petitioner is not a scrupulous borrower entitled to protection at the hands of this Court exercising extraordinary jurisdiction constitutionally vested in it: petitioner had not disclosed to the Bank in March 2016 about the pendency of arbitration proceedings founded on the termination of lease vide notice dated 11.12.2014; in

fact, he had furnished the very same lease deed by way of security for the repayment of this huge loan aggregating to 323 crore rupees, when the said lease was already terminated (this termination came to be upheld by the arbitral award dated 07.11.2020).

(ii) Even after suffering an arbitral award of enormous liability, petitioner on 03.12.2020 secured additional credit facility for rupees 100 crore under GECL Scheme without giving any inkling about the said arbitral award which upheld the termination of lease in question rejecting petitioner's counter claim for hundreds of crores of rupees. Petitioner's challenge to the arbitral award at the hands of Commercial Court having been negatived, presently a further challenge is said to have been pending before a Division Bench of this court, is beside the point. There was a duty owed by the petitioner to the respondent-Bank to disclose about the notice of termination of lease when it had first applied for a huge loan furnishing the said lease deed as one of the securities for repayment; it also owed the duty to disclose this when it was availing the said additional credit facility when already there was an arbitral

award. However clandestinely withheld that crucial information from the bank.

D. <u>AS TO BANKER'S PRUDENCE AND HUSBANDING ITS FUNDS:</u>

(i) In all civilized jurisdictions, banking has traditionally been treated not just as a business but as a profession. The Bombay Provincial Banking Enquiry Committee (1929-30) had famously observed ***'Banking is my brains and other people's money'.*** Banks deal in other peoples' money. Funds are parked with the banks by broad segments of the public and this establishes a public trust which compels the banker to act with a greater care than individuals engaged in commerce do. **Mr.Robert C.Holland,** an American Economist and Member, Board of Governor of the Federal Reserve System (1973) had given a slogan to the bankers **"HUSBAND YOUR BANKING RESOURCES";** this becomes prominently relevant nowadays when two dozen public sector banks have been closed down or merged with other banks, one of the reasons being 'bad debts'.

(ii) Petitioner is not a peasant or a petty farmer who has availed some frugal loans for mitigating the hardships of life. It is an incorporated company purporting to be worth crores of rupees. Its Managing Director & other Directors have participated in contracting the loans in hundreds of crores of rupees. A customer owes to the Bank a duty to disclose all facts and circumstances that would in the ordinary course of business figure in the decision making process as to the intended loan transaction. This duty becomes more pronounced when such transactions involve huge loans & liabilities. A perusal of the petition papers leaves no manner of doubt as to clandestine failure on the part of borrower in discharging this duty, to say the least. '*Thou art weighed in the balance and found wanting*' aptly applies to the case of petitioner. That being the position, the lender Bank is more than justified in observing in its impugned letter dated 5.2.2021 as under:

> *"Further, even as recently as December 03, 2020, you had approached the Bank for sanction of additional credit facilities under Guaranteed Emergency Credit Line (GECL) scheme. However, even at such time, you did not inform the Bank of any Arbitration Award, let alone the Arbitration Award, which we became aware of only after receipt of the letter from the Land*

owner. This reaffirms an intent to withhold materially critical information with a view to extract incremental facilities from Bank. Further, if the lease was indeed terminated on December 11, 2014, it is clear that the Borrower, from the very inception, intended to defraud the Bank of the security and repayment of the Facilities."

Therefore, impugned action of the lender Bank cannot be said to be vulnerable for challenge in writ jurisdiction.

E. <u>AS TO EMERGENCY CREDIT LOAN GUARANTEE SCHEME AND BANKER'S PREROGATIVE:</u>

(i) The ECLG scheme promulgated by the Central Government which the petitioner's counsel heavily banked upon in support of his case, at its guideline 18 (xiv) imposes an obligation on the lender bank to secure its interest by taking all reasonable measures. The same reads:

"The payment of guarantee claim by the Trustee Company to the lending institution does not in any way take away the responsibility of the lending institution to recover the entire outstanding amount of the credit from the borrower. The lending institution shall exercise all the necessary precautions and maintain its recourse to the borrower for entire amount of credit facility owed by it and initiate all necessary actions for recovery of the outstanding amount, including such action as may be advised by the Trustee Company.

When the lender Banks in given facts & circumstances of the case take a decision as dictated by the prudence, for abruptly recalling the credit facilities, it is not for the courts to sit in appeal over their wisdom. Writ Courts neither have means nor the expertise to re-evaluate the "*prudential decisions*" of the Banks that are made in the ordinary course of their commercial transactions with accumulated wisdom in the trade.

(ii) After all, the scope of judicial review of '*Bankers Decisions'* is too restrictive, as observed by a Division Bench of this Court in *MANNE GURUPRASAD vs. M/S.PAVAMAN ISPAT PVT. LTD*[10]; paragraphs III (iii) & (iv) of the said decision read as under:

> *"(iii) In matters between the Banker & borrower, a Writ Court has no much say except in two situations: where there is a statutory violation on the part of the Bank/financial institution, or where the Bank acts unfairly/unreasonably; Courts exercising constitutional jurisdiction u/A 226 do not sit as Appellate Authorities over the acts & deeds of the Bank and seek to correct them; even the doctrine of fairness/reasonableness does not convert the Writ Courts into appellate authorities over administrative decisions concerning the Banking business; unless the action of the Bank*

[10] Writ Appeal No.100103/2021, disposed off on 13.07.2021

is apparently malafide, even a wrong decision taken by it cannot be interfered.

(iv) It is not for the Court or a third party to substitute it's decision howsoever prudent or business like it may be, for the decision of the Bank; in commercial matters, the Courts do not risk their judgments for the judgments of the bodies to which that task is assigned; a Public Sector Bank or a Financial Institution cannot wait indefinitely to recover its dues; the fairness required of the Bank cannot be carried to the extent of disabling it from recovering what is due; in matters of loan transactions, fairness cannot be a one-way street; both the Bank & the borrower have to be equally fair to each other ..."

F. <u>AS TO CULPABLE CONDUCT OF PETITIONER *QUA* THE COURT:</u>

(i) Petitioner had secured an *ex parte* interim order without disclosing certain material and relevant facts. The said interim order reads as under:

"Issue emergent notice.

Stay as prayed for, subject to petitioner depositing 30% of the amount due with the 3rd respondent-Bank as under:

(i) a sum of ₹10,00,000/- (Rupees Ten Lakh only) within two weeks;
(ii) a sum of ₹10,00,000/- (Rupees Ten lakhs only) within next two weeks and
(iii) remaining sum of `10,00,000/- (Rupees Ten lakhs only) within one week next following, failing which, not only the interim order, the petition itself stands rejected."

Had the petitioner averred in the petition about his not disclosing to the bank about the termination of lease in question followed by arbitral proceedings, when he was borrowing from the bank a huge sum of Rs. 323 crore in March 2016 initially & whilst availing additional loan of Rs.100 crore in December 2020, i.e., after suffering the arbitral award, this Court would not have favoured him with reprieve of the kind. Just mentioning about the termination of lease & arbitral award, in the petition averments would not do, to say the least.

(ii) The Apex Court time and again has warned that the cases of unscrupulous litigants should be thrown out at the threshold vide *S.P.CHENGALVARAYA NAIDU (DEAD) BY LRS vs. JAGANNATH (DEAD) BY LRS*[11].Petitioner has suppressed about the availability of alternate remedy in law. The petitioner seeks to call in question the Notice issued u/s 13(2) of the SARFAESI Act, 2002. There is an alternate and more efficacious relief availing to the borrower/noticee for doing this, by invoking remedial provisions of the Act. Writ remedy is not the panacea for all such arguable legal injuries vide Apex Court decision in

[11] AIR 1994 SC 853

PHOENIX ARC PRIVATE LIMITED vs. VISHWA BHARATI VIDYA MANDIR[12]. No extraordinary circumstances are demonstrated from the records despite vociferous submissions of petitioners' counsel warranting grant of relief in constitutional jurisdiction.

In the above circumstances, the Writ Petition being devoid of merits, is liable to be dismissed and accordingly, it is, costs having been reluctantly made easy.

This court places on record its deep appreciation for the able research and assistance rendered by its official Law Clerk cum Research Assistant, Mr.Faiz Afsar Sait.

Sd/-
JUDGE

Snb/cbc

[12] (2022) 5 SCC 345