

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

WRIT PETITION (L) NO.2572 OF 2020

Wavell Investments Private Limited ...Petitioner

Versus

1. IL & FS Financial Services Ltd.(IFIN) and ors ...Respondents

Mr. Navroz Seervai, Senior Advocate with Mr. Amit Sibal, Senior Advocate, Jayashree Shukla Dasgupta, Ashish Pyasi, Saloni Chowdhary, Dinesh Jadhvani and Zaid Mansuri i/b Dhir & Dhir Associates for the Petitioner.

Dr. Birendra Saraf, Senior Advocate with Rohan Savant, Sachin Chandarana, Mayur Bhojwani, Ms. Dhruvi Doctor i/b Manilal Kher Ambalal and Co. for Respondent No.1.

Mr. Vaibhav Bhure i/b Rahul Singh for Respondent No.2.

Coram : Nitin Jamdar &
Milind Jadhav, JJ.

Date : 29 October 2020.
(Through Video Conferencing)

Order: (Per Nitin Jamdar, J.)

. The Petitioner is a private limited company registered under the Companies Act 1956. The Respondent No.3/Infrastructure Leasing & Financial Limited (IL & FS) is the holding company of Respondent Nos.1 and 2, i.e. IL & FS Financial Services Limited (IFIN) and IL &

FS Transportation Network Limited (ITNL). Loan agreements were executed between the Petitioner and IFIN. There were three loan transactions: First, Term Loan Facility no. I of Rs. 52 Crores dated 22 September 2016. Second, Term Loan Facility no. II of Rs.15 Crores dated 28 April 2017 and third Term Loan Facility no. III of Rs.100 Crores dated 23 March 2018. The Petitioner requested IFIN to extend the benefit of the Moratorium Policy to the Petitioner in respect of term Loan no. I and II. IFIN informed the Petitioner on 23 June 2020 and 5 August 2020 that since the account in respect Loan Transaction no. III of Rs.100 crores was classified as a Non-performing Asset by communication dated 7 May 2019, the benefit of moratorium cannot be extended. These communications are challenged in this Petition. Thus, the Loan Transaction no. III is the subject of controversy.

2. IL&FS is a development and finance company. It operated through many subsidiaries. In the year 2018, the Union of India filed a petition bearing C.P. No. 3638/2018 under section 241(2) of the Companies Act, 2013 in the National Company Law Tribunal, Mumbai, the NCLT stating that the directors were mismanaging the functioning of IL & FS group and there was a large scale fraud. The NCLT, by order dated 1 October 2018 superseded the Board of Directors and appointed a new Board of Directors. The Union of India filed Application No.1173/2020 seeking comprehensive moratorium regarding IL & FS group companies. NCLT rejected this application by order dated 12 October 2018. The Union of India filed Company

Appeal (AT) No.346/2018 in the National Company Law Appellate Tribunal. The NCLAT by order dated 15 October 2018 placed an embargo to institute and continue proceedings against IL & FS Limited and its group companies and issued various other directions.

3. The Loan Facility no. III became due on 28 September 2018, and IFIN issued demand notice to the Petitioner on 2 November 2018 demanding repayment of Rs.100 crores in respect of loan transaction No. III. Under the *Master Direction - Non-Banking Financial Company - Systemically Important Non-Deposit taking Company and Deposit taking Company (Reserve Bank) Directions, 2016* as amended, an account is declared as NPA after ninety days. The Petitioner wrote to IFIN on 22 November 2018 seeking to square off the loan and discharge the Petitioner. The Petitioner also sought repayment of the outstanding facility in respect of the Loan transaction No. I and II. the account was declared as NPA on 25 December 2018. By letter 7 May 2019, Petitioner was informed that default under any one of the three accounts would be considered as default for all.

4. On 12 July 2019, the Petitioner received a notice from Directorate of Enforcement pertaining to investigation under the Prevention of Money Laundering Act 2002 against the IL & FS group. The Petitioner was called upon to provide complete information. The promoter of the Petitioner appeared before the Serious Fraud Investigation Office, Mumbai (SFIO) on 8 March 2019 regarding the

investigation qua affairs of IL & FS and its subsidiaries. The Petitioner filed a criminal complaint with the Economic Offence Wing on 17 May 2019 and an additional complaint on 16 December 2019.

5. In view of COVID-19 pandemic Reserve bank of India has issued circulars on 27 March 2020, 17 April 2020, and 23 May 2020 dealing with the moratorium for the payment of instalments during this period. IFIN also issued IFIN COVID-19 Relief Policy. Both lay down that the benefit of the moratorium is extended to such borrower whose account is not classified as NPA before 1 March 2020. Pursuant to the request made by the petitioner IFIN on 11 February 2020 for a no objection to dispose of the properties and utilize the sale proceeds of the said towards repayment of its loan transaction Nos. I and II, IFIN granted NOC to the Petitioner on 4 June 2020. According to the Petitioner, due to COVID-19 pandemic created situation, the transaction was not completed.

6. The Petitioner by letter dated 6 June 2020 requested IFIN to grant moratorium of 6 months in payment of interest and the principal falling due between 1 March 2020 and 31 August 2020. By impugned letter dated 23 June 2020, IFIN rejected the request of the Petitioner on the ground that the Petitioner does not fall under the category of "Eligible Borrowers" as defined under IFIN COVID-19 Relief policy. It was informed that the loan transaction No.III was already declared as Non-Performing Asset. The Petitioner reiterated its request by letter

dated 11 July 2020 which was rejected by IFIN by letter dated 5 August 2020. The Petitioner has approached this Court challenging the letters dated 23 June 2020 and 5 August 2020 issued by IFIN.

7. The Petitioner has sought a writ to IFIN to grant moratorium to the Petitioner regarding term loan agreement No. I and II and also challenged the letter dated 7 May 2019 declaring the account of the Petitioner regarding Loan transaction No.III as NPA. Respondents have filed reply affidavits, and the Petitioner has filed a rejoinder.

8. We have heard Mr. Navroz Seervai with Mr. Amit Sibal Senior Advocates for the Petitioner and Dr. Birendra Saraf, Senior Advocate for Respondent No.1 and Mr. Vaibhav Bhure i/b Rahul Singh for Respondent No.2.

9. The Petitioner's contentions, in brief, are: The IFIN has refused to extend the benefit of a moratorium to the Petitioner in respect of loan transaction Nos. I and II. There were back to back loan agreements whereby Respondent No.1 transferred an amount of Rs.100 Crores to the Petitioner by sanction letter dated 23 March 2018. This Term Loan Facility-III was in turn transferred by the Petitioner to Respondent No.2 under a Loan Agreement executed between the Petitioner and Respondent No.2. The loan transaction No.III was wrongly classified as NPA as this loan was only back to back

transaction between the IL& FS and its subsidiaries as part of alleged mismanagement and the Petitioner is an innocent victim thereto. The declaration of the Petitioner's account as NPA for repayment of Term Loan Facility-III is arbitrary and unreasonable because of the default of Respondent No.2 in not making payments to the Petitioner. By the order dated 15 October 2018 passed by NCLAT and since Term Loan Facility-III was a back to back transaction, the Petitioner should be discharged from its obligation to repay Term Loan Facility-III. Neither in the proceeding before NCLT and NCLAT or during an investigation by SFIO anything adverse is recorded against the Petitioner. Not only there is nothing adverse, but even the assertions made in the Petition also have not explicitly been controverted. There is an embargo imposed by NCLAT to proceed against IL & FS, and its group and the Petitioner is therefore remedy-less. During the pendency of this petition, an application filed before the NCLAT to revoke the embargo has been rejected by the order dated 12 March 2020. The amount of Rs.100 crores has been returned, and the Petitioner cannot be considered as debtor in respect of this loan account. Once that position is clear, there is no impediment to grant the benefit of the moratorium to the Petitioner regarding loan transaction No. I and II.

10. Respondents, in short, contended the petitioner's claim that loan transaction No.III is wrongly classified as NPA occurred on 28 September 2018 and the petition is filed in August 2020 only when the Respondent refused to extend the benefit of the moratorium. There

was large scale fraud in IL & FS group, which is being investigated, and at this stage, no finding can be given that the Petitioner was an innocent victim. There is no finding by any authority that the Petitioner was innocent. It is not believable that the Petitioner received the amount of Rs.100 crores, executed the documents and claims to be not part of the bogus back to back transactions. In the record, the loan has been given to the Petitioner of Rs.100 crores, and the Petitioner has not repaid the same. The Petitioner has filed an application in NCLT for the same relief, which is pending. All these submissions are without prejudice to the preliminary objection that the writ is not maintainable against Respondent Nos.1 to 3 as they cannot be considered as state instrumentalities. The Board of Directors is not appointed by this Government but by the NCLT under its power to rectify the mismanagement.

11. As regards the preliminary objection on the maintainability of the writ petition, the Petitioner contends that government officers are appointed on the Board of directors. It is contended that the instrumentalities of the Central Government substantially hold the shareholding of IL & FS. Central Government is promoting IL & FS by awarding major infrastructure contracts. There is a deep, pervasive and effective control. Learned counsel for the Respondents, however, agree that merits of the matter can be considered first and in case the Court rejects the petition on merits, the arguments of maintainability be kept open to be urged in other cases. On this basis, we have proceeded to

consider the petition.

12. The Petitioner has raised a dispute regarding Loan transaction No. III. The dispute is also not that loan was not received. It is also not the case of the Petitioner that the Petitioner has repaid the loan. The case is that it was a back to back transaction in which Petitioner was used, and the money went back to the lender through its subsidiaries.

13. The Petitioner's case is pleaded in the Petition as follows:

In March 2018, IFIN requested the Petitioner Company to provide a bridge loan for an interim period of not more than 6 months to ITNL, one of IL&FS's group company. When the Petitioner Company expressed its inability to lend that kind of large sums, the senior leadership team of IL&FS group explained that no funds are required to be arranged and that liquidity shall be provide to it under a back-to-back transaction whereby, IFIN will grant Rs.100 Crores to the Petitioner Company by way of loan agreement and the said loan proceeds can thereafter be given by the Petitioner Company to ITNL for its requirement under a loan agreement between ITNL and the Petitioner Company.

Placing its good faith in a lender who is presumed to act in the welfare of a Borrower, the Petitioner Company agreed to the request to IFIN on assurance of senior leadership of IL&FS group that the Back-to-Back transaction was bona-fide and permissible and will be :

(i) fully financed and secured by IL&FS group with no liability to the Petitioner Company ;

(ii) independent and not connected with the Secured Term

Loan Agreements and securities granted thereunder;

*(iii) squared off within a quarter and not later than 6 months;
and*

(iv) on a no profit – no loss basis to WIPL

On 26th March, 2018, the Petitioner Company received INR 100 Crores from IFIN and within an hour returned the entire INR 100 Crores to IL&FS (ITNL) as per IFIN's instructions.

The Petitioner Company became aware of the several malpractices at IL&FS in September 2018 through reports of Serious Fraud Investigation Officer (SFIO) and the Enforcement Directorate (ED) in the pending investigation against IL&FS group. The Petitioner Company has provided complete evidence of the transaction to the SFIO and ED in the said investigation and with the emergence of critical documents and facts, it is evident that IL&FS had misrepresented to the Petitioner Company at the time of executing the Back to Back Loan Agreements and duped them into believing that it was bona fide and permissible.

(emphasis supplied)

Therefore the foundation of the petitioner's case that the Petitioner agreed to be a part of the back-to-back transaction placing good faith and on the assurance of senior leadership of IL&FS group that the Back-to-Back transaction was bona-fide and permissible. The Petitioner Company learned of the malpractices through reports of Serious Fraud Investigation Officer. IL&FS duped the Petitioner into believing that transaction was bona fide and permissible. To grant relief to the

Petitioner in the Writ Petition, we will have to accept this version of the Petitioner. The moot question is, can we do so.

14. On the charge of the Respondents that there is a delay in challenging the classification of the account as Non-Performing Asset, the Petitioner contends that the Petitioner applied before NCLT and NCLAT and bonafide believed that, that aspect would be decided. In these circumstances, since the NCLAT refused to lift the embargo, the Petitioner has approached the Court. This cannot be a satisfactory explanation. If the Petitioner is of the opinion that the NCLAT would give the very same relief, then the application of the Petitioner is still pending. The petitioner could have approached the writ jurisdiction much earlier. It was only when IFIN refused to extend the benefit of the moratorium because of the account of the Petitioner as NPA, a challenge is raised in August 2020. There is a substance in the contention of the Respondent of delay and latches by the Petitioner. However, even otherwise, we have examined the petition on merits as follows.

15. The Petitioner firstly contends that the above-reproduced case has not explicitly been controverted by the Respondents in the replies, the assertion of the petitioner's innocent involvement shall be deemed to have been accepted. The Petitioner relies on the decisions in the case of *C.S. Rowjee & Ors. vs. State of Andhra Pradesh and Ors.*¹; *Badat &*

1 AIR 1964 SC 962

*Company Bombay vs. East India Trading Company*² and *Balraj Taneja & Anr. vs. Sunil Madan & Anr.*³

16. There is no merit in this contention. If the replies of the Respondents are read in totality, there is no such acceptance of the Petitioner's innocence. The reason the Respondents have not asserted to the contrary is that investigation is still going on. It is the petitioner, pending investigation, is seeking a declaration of innocence. The law laid down in the decisions cited by the Petitioner, therefore, cannot be applied. Pendency of investigation is dealt with later in this judgement. Further, the manner and degree of conclusions drawn from evidence on record depend on the jurisdiction exercised. The standard of proof required in the disciplinary proceeding, criminal proceedings and civil proceedings differ. Foundation required to exercise writ jurisdiction is different. The writ court is not a court of appeal. Exercise of writ jurisdiction is discretionary. The Petitioner has invoked the writ jurisdiction, and the Petitioner must satisfy the Court that its case is bonafide and acceptable. It is in the exercise of writ jurisdiction we consider the factual position.

17. The petitioner then contends that in the reply the Respondents, more particularly of Respondent no.1 dated 2 September 2020, has gone to the extent of refuting that the petitioner granted any loan to Respondent no.2 on instructions, which is contrary to the

² AIR 1964 SC 538

³ (1999) 8 SCC 396

correspondence on record. It is contended that this statement amounts to perjury. The Petitioner contended that Respondent Nos.1 to 3 who are part of IL & FS group know the money is returned back and therefore demanding money from the Petitioner is unfair and is in breach of Article 14 of the Constitution of India.

18. There is no merit in this contention. The replies draw a clear distinction between the erstwhile Board of Directors separate from the entity. The Respondent contends that the erstwhile Board of Directors committed fraud, and these were not the genuine transaction on behalf of the legal entity. Respondent Nos.1 to 3 have explained that they represent the Board of Directors appointed by NCLT because of the mismanagement by the earlier directors and they have a different role to perform. Therefore there is no unfairness in Respondent Nos.1 to 3 going by the records and not supporting the actions of the displaced Board of directors. The stand taken by the Respondents is to be understood in this context. There is no case of forgery by the Respondents.

19. Petitioner submits there are bank statements and documents which evidence that Rs.100 crores received by ITNL from the Petitioner and were transferred to ILFS Airports Ltd. subsidiary company of IFIN. The Petitioner contends there is nothing against the Petitioner in the SFIO report, and therefore there is no impediment in issuing the direction as sought for. Reliance was sought to be placed on

the statement of Subhash Chandra of IL & FS made in the investigation before SFIO. It is contended that there is no specific role attributed to the Petitioner.

20. The portions of the investigation report of IL & FS Financial Services Ltd. and its subsidiaries under Section 212 (1)(c) of the Companies Act, 2013 by the Serious Fraud Investigation Office, Ministry of Corporate Affairs, New Delhi dated 28 May 2019 is placed on record. The Investigation revealed that IFIN from November 2017 onwards, instead of directly lending to group companies deceptively lent loans to external parties which were transferred to the IFIN's Group companies, mainly IL&FS Transportation Networks Limited to circumvent RBI directives and exposure to group companies with no fresh lending. The Report refers to the movement Rs.100 crores from IFIN to ITNL through the Petitioner. The Report reveals that the Credit Approval Memorandum (CAM) and other documents of Petitioner identified the amount receivable from ITNL group, which exceeded the loan amount. SFIO report states that the purpose of this loan is shown as Working Capital requirement / General Corporate Purposes / Refinance of existing loans and Extending loans and advances, etc. The Report states that Rs.100 crore given to Petitioner eventually turned to be NPA. Further loans were approved even when adverse comments were mentioned in the CAM. Statement of Udayant Malhoutra, Managing Director and Promoter of Petitioner on 8 March 2019 was recorded. Statement of Subhash Chandra, the main

accused, was recorded on 24 October. The Report mentions that from the working papers and emails examined by the investigation team, it is evident that the Engagement Team knew the fraudulent funding of borrowers. Most of these entities were the entities used for layering of loans to be given to ITNL and its subsidiaries/associates. This modus was adopted to avoid the RBI direction regarding lending to the group companies. Nothing turns on the statement of Subhash Chandra regarding the Petitioner's role. The SFIO report nowhere indicates that the Petitioner was not part of the deception and was not aware of the implications. Nowhere from the report, we get that SFIO has concluded the investigation regarding how third parties were involved.

21. Petitioners next contention is that the Division Bench of this Court in the case of *N. Sampath Ganesh Vs. Union of India & Ors.* has observed that SFIO report is the final report. The Respondent contends this report is not final and the investigation is going on, and the Division Bench of this Court has not observed that the report is final.

22. In the case of *N. Sampath Ganesh Vs. Union of India & Ors.*, the auditors of IL & FS, had challenged the directions and the prosecution against them under section 212(14) of the Companies Act 2013. One of the question before the Division Bench was whether the SFIO Report was an interim report. This question arose before the Division Bench in the context of the Petitioners therein that is the

auditors. Division Bench observed report pertaining to IL & FS only and the transaction with third parties had not been looked into. It also observed that this report is not a standalone and further investigation into affairs would affect findings in the report. Therefore merely based on the observations rendered in the context of petitioners before the Division Bench, it cannot be held there is nothing to be investigated further. There is no categorical finding by the Division Bench that SFIO report regarding the larger fraud was final. The observations indicate to the contrary that various aspects are yet to be looked into.

23. Petitioners oral arguments are contrary to its stand in the rejoinder. Petitioner has pleaded thus:

“... till date there is no adverse finding in any of the reports. Furthermore, the said investigation is going on for the last 2 years and till date there is no adverse finding by any of the Authorities against the Petitioner company. The Petitioner Company is fully cooperating with all Authorities. However, the Petitioner Company cannot be made to suffer such an investigations will take indefinite time specifically in the situation when there are no preliminary and adverse findings against the Petitioner Company any of the Investigating Reports and hence the Petitioner Company has been exonerated in the preliminary inquiries. Meanwhile, the Petitioner Company is suffering as its account has been illegally classified as NPA and request for grant of moratorium has also been arbitrarily rejected.”

Therefore by the Petitioner's own case, the investigation is going on, and the Petitioner is co-operating with the investigation. No argument

is made before us that pending investigation against the Petitioner be expeditiously disposed of.

24. A copy of the complaint filed by SFIO in the year 2019 in the Court of Sessions Judge, Mumbai is placed on record. The complaint indicates that the transaction of which the Petitioner claims to be innocent was done in a highly irregular manner. Loans were given based on Letters of Comfort and without securities. Lending was done without any due diligence, without the actual requirement of funds. Most of the intermediaries were transferring the funds in the same way. There was a fraudulent *modus operandi* of giving loans to defaulting borrowers. Accounts are placed on record to demonstrate how the transaction took place. The complaint clearly shows that the entire transaction, of which the Petitioner was a part, was questionable.

25. In the order dated 12 March 2020 the NCLAT has indicated the extent of the alleged fraud. The matter involved far more than merely three group companies. The fraud came to light through various reports that IL & FS had defaulted on debt obligations. The default is of almost Rs 91000 crores. It was noted that IL & FS management was suppressing information about its financial solvency. There were various cases of commission and omissions. There was widespread mismanagement of funds not only by the management of IL & FS but throughout IL & FS group and in unscrupulous manner public money was being mismanaged.

26. We note that the Petitioner has filed an interim intervention application before NCLAT. The Petitioner sought a declaration that the Petitioner does not owe the Rs.100 crores as claimed by the Respondent to them. The prayers are to modify the order of embargo, to refrain IFIN from taking any steps regarding Loan Agreement No.III, discharge the Petitioner from loan agreement No.III. In this application, the Petitioner has narrated the history, and the same assertion is made that the Petitioner placed full trust and confidence in the senior management of IL & FS. It is asserted that the facility sanctioned in favour of the Petitioner by IFIN was at the request of IFIN, and it was availed for a private loan to ITNL. Several parties are appearing before NCLAT and NCLT. Application filed by other entities for lifting the grant of the moratorium was rejected by the NCLAT by detailed order on 12 March 2020. Petitioner's application is still pending in NCLAT, and it is not rejected. If it is rejected, the Petitioner can challenge the rejection. The Petitioner has also lodged its claim with M/s. Grant Thornton, an agency appointed to review and admit the claims of the creditors of the group companies of Respondent No.3 which also includes Respondent No.2. All these claims are under consideration before appropriate authorities.

27. The petitioner contends that the writ petition be entertained and merely because there is a fraud by IF& LS group the Court should not proceed on the basis that the Petitioner is guilty. It is contended

that there is nothing against the Petitioner as on date and the assertion of the Petitioner that the Petitioner was innocent third party needs to be accepted and direction to grant moratorium should be given. Though the Petitioner has urged that the Petitioner is not seeking clean chit from the Court, indirectly, the Petitioner is doing the same.

28. The Petitioner's claim can be examined from a common-sense point of view. No prudent commercial entity would enter into a transaction of such a large amount without making necessary enquiries regarding bonafides and legality of the transactions. This is not a case of an innocent individual investor. Petitioner urged that it has suffered a loss in this transaction. The obvious question arises why then the Petitioner chose to be part of the transaction? Why would a commercial entity enter into a transaction of Rs.100 crores and then suffer loss willingly? The simplistic explanation of the Petitioner is that it innocently believed the words of the leadership of the IL & FS. The Petitioner's behaviour is contrary to ordinary commercial prudence. It is not possible to believe that the Petitioner was not aware of the implications of the transactions. We find it difficult to believe that the Petitioner would be commercially so naive to simply rely on the assurance and accept the liability of Rs.100 crores.

29. The mismanagement of IL & FS group is looked into by NCLT and NCLAT. SFIO is conducting its own investigation. The proceedings before us do not arise from the investigation carried out by

SFIO nor from the orders passed by NCLAT. We do not have the inputs from the investigating agency. Based on the documents placed before us, the Petitioner wants us to uphold its innocence. The new Board of Directors' on 28 January 2019 appointed External Auditors to examine the loan given by the superseded Board. The interim report by the Forensic Auditor on 20 February 2019 has indicated that loans of approximately Rs. 2270 Crores were routed to the group companies with third parties like the Petitioner. There are various other companies with a similar role like the Petitioner. The exact role of all the parties is still unclear. The finding sought by the Petitioner will be relied upon by such other similarly situated companies to contend that they all were innocent third parties. Any finding given by us accepting the involvement of the petitioner as innocent will have ramifications on the pending proceedings.

30. A prerogative writ is not granted as a matter of course. The Writ Court intervenes where justice, equity, and good conscience require its intervention. Considering the totality of the circumstances, the simplistic foundation of the Petitioner's case cannot be accepted. We are not convinced of the bonafides of the petitioner, as asserted in the petition. That being so, we refuse to exercise our equity jurisdiction.

31. The argument of the Respondents of maintainability is kept open to be urged in another case. It clarified that the observations on the role of the Petitioner are in the context of refusal to exercise the writ

jurisdiction.

32. The Writ Petition is rejected.

33. This judgment/order will be digitally signed by the Personal Assistant/Private Secretary of this Court. All concerned to act on production by fax or email of a digitally signed copy of this order.

(MILIND JADHAV, J.)

(NITIN JAMDAR, J.)