HIGH COURT OF MADHYA PRADESH: JABALPUR

(Division Bench)

Writ Petition No. 12620/2018

M/s Kesar Multimodal Logistics Ltd. …..... ..PETITIONER

Versus

Union of India & Others …..... RESPONDENTS

CORAM :

Hon'ble Shri Justice Hemant Gupta, Chief Justice

Hon'ble Shri Justice Akhil Kumar Srivastava, Judge

Appearance:

Mr. Naman Nagrath, Senior Advocate with Mr. Pulkit Deora, Mr. Manveer Singh Sandhu, Ms. Ankita Pandey and Mr. Abhishek Kumar, Advocates for the petitioner.

Mr. J.K. Jain, Assistant Solicitor General and Mr. Sandeep Shukla, Advocate for the respondent No.1/Union of India.

Mr. R.N. Roy, Advocate for the respondent No.3.

Whether Approved for Reporting : **Yes**

Law Laid Down:

- ✓ The Reserve Bank of India has issued the circular dated 12.02.2018 in exercise of its statutory functions, therefore, the circular has a statutory force in view of the judgment of the Supreme Court reported as **(2002) 1 SCC 367 (Central Bank of India vs. Ravindra and others**) and therefore, there cannot be any estopple against a Statute.

- ✓ The decision of the Banks: as to whether the account of the petitioner should be treated under SDR mechanism or the financial assistance advanced to the petitioner is to be recovered under the provisions of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short "the Act"), is a commercial decision taken by the Banks keeping in view their financial risk and the possibility of recovery of the amount from the

petitioner. Such decision taken in view of their financial interest does not warrant any interference in exercise of power of judicial review in the writ jurisdiction of this Court.

- ✓ The petitioner has invoked the writ jurisdiction of this Court after two of the Banks have issued notice under Section 13(2) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. The lead Bank has also issued a notice calling upon the petitioner to repay the entire credit facilities. Therefore, the grievance of the petitioner arises out of the threatened proceedings under the Act for which the remedy lies before the Debts Recovery Tribunal under Section 17 of the said Act after possession is taken as held by the Supreme Court in judgments reported as **(2004) 4 SCC 311** (**Mardia Chemicals Ltd. and others, Etc. Etc. vs. Union of India and others, Etc. Etc.).**

Significant Paragraph Nos.: **6, 8, 10, 13 to 18**

Reserved on: 19.06.2018

O R D E R

(Passed on this 22nd day of June, 2018)

Per : Hemant Gupta, Chief Justice:

The petitioner is a special purpose vehicle incorporated for construction of a composite logistic hub on 88.30 Acres of land pursuant to an agreement signed with Madhya Pradesh State Agriculture Marketing Board on 24.10.2011 for a period of 33 years, which could be further extended by another 15 years.

2. The petitioner has obtained a credit facility of Rs. 108.11 Crore including a Term Loan of Rs. 99.11 Crore and Non-fund based limit of Rs.9.00 Crore for the construction of composite logistic hub from the Consortium of Banks such as Dena Bank, Union Bank of India and Allahabad Bank.

3. It is the stand of the petitioner that the construction of composite logistic hub could not be completed as per plan though the rail operations commenced on 19.04.2016. Thus, it led to increase in the cost of development of the requisite infrastructure. It is further pleaded that due to loss and unavailability of expected business and backlog of interest, the Joint Lenders Forum (JLF) constituted in terms of circular issued by the Reserve Bank of India (for short "the RBI") decided to restructure the petitioner's finances and invoked the Strategic Debt Restructuring Mechanism (SDR) in its meeting held on 20.11.2017. It was decided by the Joint Lenders Forum that the petitioner's case is fit for debt restructuring rather than declaring it as "Special Mention Account". It may be pointed out that the Joint Lenders Forum was constituted in terms of circular dated 08.06.2015 (Annexure P-24) issued by the RBI constituting a Forum for corrective action plan on framework for revitalising the distressed assets in the economy. This Strategic Debt Restructuring Scheme *inter alia* had the following features:

> "**2**. It has been observed that in many cases of restructuring of accounts, borrower companies are not able to come out of stress due to operational/managerial inefficiencies despite substantial sacrifices made by the lending banks. In such cases, change of ownership will be a preferred option. Henceforth, the Joint Lenders' Forum (JLF) should actively consider such change in ownership under the above Framework issued vide the circular dated February 26, 2014.
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> **3.** Further, paragraph 5.1 of the circular states that *both under JLF and CDR mechanism, the restructuring package should also stipulate the timeline during which certain viability milestones (e.g. improvement in certain financial ratios after a period of time, say, 6 months or 1 year and so on) would be achieved. The JLF must periodically review the account for achievement/non-achievement of milestones and should consider initiating suitable measures including recovery measures as deemed appropriate*. With a view to ensuring more stake of promoters

in reviving stressed accounts and provide banks with enhanced capabilities to initiate change of ownership in accounts which fail to achieve the projected viability milestones, banks may, at their discretion, undertake a '**Strategic Debt Restructuring (SDR)**' by converting loan dues to equity shares, which will have the following features:

i. At the time of initial restructuring, the JLF must incorporate, in the terms and conditions attached to the restructured loan/s agreed with the borrower, an option to convert the entire loan (including unpaid interest), or part thereof, into shares in the company in the event the borrower is not able to achieve the viability milestones and/or adhere to 'critical conditions' as stipulated in the restructuring package. This should be supported by necessary approvals/authorisations (including special resolution by the shareholders) from the borrower company, as required under extant laws/regulations, to enable the lenders to exercise the said option effectively. Restructuring of loans without the said approvals/authorisations for SDR is not permitted. If the borrower is not able to achieve the viability milestones and/or adhere to the 'critical conditions' referred to above, the JLF must immediately review the account and examine whether the account will be viable by effecting a change in ownership. If found viable under such examination, the JLF may decide on whether to invoke the SDR, i.e. convert the whole or part of the loan and interest outstanding into equity shares in the borrower company, so as to acquire majority shareholding in the company;

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iii. The decision on invoking the SDR by converting the whole or part of the loan into equity shares should be taken by the JLF as early as possible but within 30 days from the above review of the account. Such decision should be well documented and approved by the majority of the JLF members (minimum of 75% of creditors by value and 60% of creditors by number);

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viii. The JLF must approve the SDR conversion package within 90 days from the date of deciding to undertake SDR;

ix. The conversion of debt into equity as approved under the SDR should be completed within a period of 90 days from the date of approval of the SDR package by the JLF. For accounts which have been referred by the JLF to CDR Cell for restructuring in terms of paragraph 4.2 of circular DBOD.BP.BC.No.97/21.04.132/2013-14 dated February 26, 2014 cited above, JLF may decide to undertake the SDR either directly or under the CDR Cell;

Thereafter, the Reserve Bank of India issued revised guidelines on 25.02.2016 (Annexure P-24). The relevant clauses read as under:-

Part A - Strategic Debt Restructuring (SDR) Scheme

1. The Strategic Debt Restructuring (SDR) has been introduced with a view to ensuring more stake of promoters in reviving stressed accounts and providing banks with enhanced capabilities to initiate change of ownership, where necessary, in accounts which fail to achieve the agreed critical conditions and viability milestones. Therefore, banks should consider using SDR *only* in cases where change in ownership is likely to improve the economic value of the loan asset and the prospects of recovery of their dues. In this regard, the instructions in paragraph 3(i) of circular dated June 8, 2015 on SDR on the issue of triggering invocation of SDR must be scrupulously followed. It is reiterated that the trigger for SDR must be non-achievement of viability milestones and /or non-adherence to 'critical conditions' *linked to the option of invoking SDR*, as stipulated in restructuring agreement, and SDR cannot be triggered for any other reason.

2. Paragraph 3.vii of the above-mentioned circular prescribes that *henceforth, banks should include necessary covenants in all loan agreements, including restructuring, supported by necessary approvals/authorisations (including special resolution by the shareholders) from the borrower company, as required under extant laws/regulations, to enable invocation of SDR in applicable cases'*. Further, paragraph 7 of the circular on Revitalising Distressed Assets dated September 24, 2015 advises that JLF will have the option to initiate SDR to effect change of management of the borrower company in cases of failure of rectification or restructuring as a CAP as decided by JLF, subject to compliance with the stipulated conditions. We

reiterate the above mentioned guidelines and advise that necessary covenants should also be part of rectification arrangement.

3. Paragraph 3.xiv.a of the above mentioned circular prescribes that the 'new promoter' (to whom the lenders divest their equity) should not be a person/entity/subsidiary/associate etc. (domestic as well as overseas), from the existing promoter/promoter group. It is reiterated that banks should exercise the necessary due diligence in this regard.

4. Banks should explore the possibility of preparing a panel of management firms/individuals having expertise in running firms/ companies who could be considered for managing the companies till ownership is transferred to the new promoters. Banks may consult IBA and other industry bodies in this regard.

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(Emphasis Supplied)

4. In terms of such circulars, a meeting of the Consortium of Banks was held on 20.11.2017, the minutes of which were circulated on 23.11.2017 (Annexure P-15). It was *inter alia* recorded as under:-

".....On enquiring about the total project cost incurred till date, Mr. Doshi informed that the company has incurred about Rs.183 crores as on date among which Rs.90 crores is brought by Promoter Companies and balance about Rs.93 crores in the form of Debt. Thus, the D/E Ratio of the project is almost 1:1 as against the initial sanctioned D/E Ratio of 2:1.

Lenders expressed that the revenue generation is a major concern and is not as per the estimations. In such a case, cash flow generation are insufficient to service the debt.

Mr. Kilachand, the promoter of the Company explained to the JLF about the strength of the project and positive about the better prospect in future.

The position of Account was exchanged among the members and all banks confirmed that the account is standard; however, there is irregularity in the Account for more than 60 days. Interest/Instalments from 31.08.2017 are to be serviced.

Mr. Doshi informed that the company has been paying the interest regularly till July 17 from the funds infused by promoter company i.e. Kesar Terminals & Infrastructure Limited (KTIL) but KTIL had to make a payment of Rs.2 crores to the Kandla Port Trust as per the directions of the Estate Officer in April – May 2017 and a sum of Rs.5 crores pursuant to the order of the Hon'ble Gujarat High Court, Ahmedabad during October 2017 – November 2017. This led to some stress on the cashflow of KTIL and the funds could not be transferred to KMLL as required. Mr. Doshi finally expressed their inability to service interest for the month of August 2017.

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All the consortium members emphasized to the company to pay the interest regularly even though the SDR is invoked. The consortium members also advised company to route all its transaction through Escrow account held with Dena Bank. The waterfall mechanism should be follow for all the inflows in the Escrow Account. The transactions of the escrow account shall be audited on quarterly basis through the concurrent auditor appointed by Lead Bank.

The respective Banks shall get the mandate from their respective sanctioning authorities for the SDR in 30 days. Lenders advised the company to submit the bank statement of Company's Account held with SBI, Hosanabad which is being used for tax payment purpose only."

(Emphasis Supplied)

5. Another meeting of Joint Lenders Forum was held on 17.01.2018, the minutes of which were communicated to the petitioner on 22.01.2018 (Annexure P-19). The minutes recorded *inter alia* the following:

"SDR Implementation & Equity Conversion:

AGM, Dena Bank informed that the presently equity share capital of the Company is Rs 41.80 crores and the Banks shall have to acquire 51% of the stake in the equity so that member banks shall be required to acquire Rs. 43.50 crores of share capital (i.e. about 4,35,06,123 shares of the company) that to be issued to the respective banks in the ratio of their shares in the consortium.

	Pre Conversion		Post Conversion	
	% Shareholding	No of Shares	% Shareholding	No of Shares
Promoters	100%	418,00,000	49%	418,00,000
Lenders	0%	-	51%	435,06,000
Total	**100%**	**418,00,000**	**100%**	**853,06,000**

Bank wise sharing pattern of equity and remaining debt:

Conversion rate : Rs.10.00					
	Share %	**Fresh Shares**	**Equity increased**	**Total Debt**	**Remaining Debt**
Dena Bank	50%	217,53,000	2175,30,000	475407656	2578,77,656
Union Bank of India	25%	108,76,500	1087,65,000	241095032	1323,30,032
Allahabad Bank	25%	108,76,500	1087,65,000	247552862	1387,87,862
	100%	435,06,000	4350,60,000	9640,55,550.00	5289,95,550

Further lenders advised the company to increase the authorised capital accordingly so the same can be implemented in timely manner and also requested the company to find any suitable investor.

Lenders emphasised to the company to pay the interest regularly even though the SDR is invoked. The consortium members also advised company to route all its transaction through Escrow account held with Dena Bank. The waterfall mechansim should be follow for all the inflows in the Escrow Account. The transactions of the escrow account shall be audited on quarterly basis through the concurrent auditor appointed by Lead bank. JLF authorised the lead bank to appoint a Concurrent Auditor from their empanelment."

6. It may be stated that the petitioner Company was to pay interest regularly even though the Strategic Debt Restructuring was invoked. But, no interest has been paid by the petitioner. Mr. Naman Nagrath, learned senior counsel appearing for the petitioner could not point out to this Court even though repeated query was made to find out the compliance of the obligations of the petitioner. The petitioner was also required to find out any other suitable investor, which condition again has not been taken care of by the petitioner.

7. The Reserve Bank of India issued another circular on 12.02.2018 (Annexure P-1) whereby the revised guidelines were issued superseding the earlier instructions aimed at the resolution of stressed assets in the economy in view of the enactment of Insolvency and Bankruptcy Code, 2016. The relevant extracts of the circular dated 12.02.2018, read as under:

> "**IV. Exceptions**
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> **17**. Restructuring in respect of projects under implementation involving deferment of date of commencement of commercial operations (DCCO), shall continue to be covered under the guidelines contained at paragraph 4.2.15 of the Master Circular No.DBR.No. BP.BC.2/21.04.048/2015-16 dated July 1, 2015 on 'Prudential norms on Income Recognition, Asset Classification and Provisioning pertaining to Advances'.
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> **V. Withdrawal of extant instructions**
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> **18**. The extant instructions on resolution of stressed assets such as Framework for Revitalising Distressed Assets, Corporate Debt Restructuring Scheme, Flexible Structuring of Existing Long Term Project Loans, Strategic Debt Restructuring Scheme (SDR), Change in Ownership outside SDR, and Scheme for Sustainable Structuring of Stressed Assets (S4A) stand withdrawn with immediate effect. Accordingly, the Joint Lenders' Forum (JLF) as an institutional mechanism for resolution of stressed accounts also stands discontinued. All accounts, including such accounts where any of the schemes have been invoked but not yet implemented, shall be governed by the revised framework.
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> **19.** The list of circulars/directions/guidelines subsumed in this circular and thereby stand repealed from the date of this circular is given in Annex - 3."

8. It is, thereafter, two members of the Consortium Banks have issued the notices under Section 13(2) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (in short "the Act"). The Union Bank of India has issued the notice under Section

13(2) of the Act on 05.04.2018 (Annexure P-28) in respect of an amount of Rs.26,48,08,984.00 and another Consortium Bank i.e. Allahabad Bank has issued the notice under Section 13(2) of the Act on 04.05.2018 (Annexure P-29) in respect of outstanding amount of Rs.26,26,13,207.00. The Lead Bank of the Consortium i.e. Dena Bank has issued a notice on 28.03.2018 (Annexure P-27) communicating that on account of default in repayment of dues, the account has been classified as Non-Performing Assets (NPA) w.e.f. 30.11.2017 and a sum of Rs.55.04 Crore is outstanding. The petitioner was informed that if the amount is not paid within seven days, the Bank shall be constrained to initiate legal action. As per the petitioner, the said Bank has not initiated any proceedings under the Act.

9. With this background, learned counsel for the petitioner has argued that since the Joint Lenders Forum has construed the loan account of the petitioner as "under stress" but not as Non-performing Assets and that it has been decided to purchase the shares of the petitioner by the Consortium Banks, therefore, such decision is bound to be honoured by the Banks. Since a decision has been taken to restructure the Company, therefore, the Banks, at this stage, are bound by the decision taken by the Joint Lenders Forum in its meetings held on 20.11.2017 and 17.01.2018. The said decisions cannot be revoked by the Banks on the strength of the subsequent circular of the Reserve Bank of India issued on 12.02.2018 (Annexure P-1).

10. Learned counsel for the petitioner also relies upon an order passed by the Supreme Court on 16.04.2018 in SLP (C) No.9286-9287/2018 (**Jayaswal Neco Industries Limited & Another vs. Reserve Bank of India**

& others) wherein, in an appeal against an order of Bombay High Court in WP (Lodging) No.56/2018 [*Jayaswal Neco Industries Limited & Another vs. Reserve Bank of India & others*] filed on 08.01.2018, the Court has passed an order of *status quo*. It may be stated that the order of the Bombay High Court dealt with the Master Restructuring Agreement dated 12.12.2017.

11. Learned counsel for the petitioner also refers to an order passed by a Division Bench of Allahabad High Court on 31.05.2018 in **Writ (C) No.18170/2018** (**Independent Power Producers Association of India vs. Union of India and 5 others**) whereby the Secretary, Ministry of Finance, Government of India has been directed to hold a meeting through the Secretaries of the respondent Nos.2 to 5 to find out solution to the problem in the light of the observations made by the Thirty-Seventh Report of Standing Committee on Energy presented to Lok Sabha on 07.03.2018 with regard to stressed/non-performing assets in the electricity sector.

12. We have heard learned counsel for the petitioner at length and find no merit in the present writ petition.

13. The impugned circular dated 12.02.2018 has been issued in exercise of power conferred on the RBI by Section 35AB of the Banking Regulations Act, 1949 and Section 45(L) of the Reserve Bank of India Act, 1934. The jurisdiction of the Reserve Bank of India to issue the circulars to the scheduled Banks in terms of the Banking Regulations Act, 1949 is not disputed. In fact, the jurisdiction of the Reserve Bank of India to issue the circulars under Section 35A of the said Act has been considered by a

Constitution Bench of the Supreme Court in a decision reported as **(2002) 1 SCC 367 (Central Bank of India vs. Ravindra and others**) wherein it has been held as under:-

> "**51**. The Banking Regulations Act, 1949 empowers Reserve Bank, on it being satisfied that it is necessary or expedient in the public interest or in the interest of depositors or banking policy so to do, to determine the policy in relation to advances to be followed by banking companies generally or by any banking company in particular and when the policy has been so determined it has a binding effect. In particular, the Reserve Bank of India may give directions as to the rate of interest and other terms and conditions on which advances or other financial accommodation may be made. Such directions are also binding on every banking company. Section 35-A also empowers the Reserve Bank of India in the public interest or in the interest of banking policy or in the interests of depositors (and so on) to issue directions generally or in particular which shall be binding. With effect from 15.2.1984 Section 21-A has been inserted in the Act which takes away power of the Court to reopen a transaction between a banking company and its debtor on the ground that the rate of interest charged is excessive. The provision has been given an overriding effect over the Usury Loans Act, 1918 and any other provincial law in force relating to indebtedness."

Therefore, the Reserve Bank of India exercised the statutory jurisdiction in terms of the provisions of the Banking Regulation Act to issue the circular in respect of terms and conditions on which advances or other financial accommodations may be made by the scheduled Banks. Thus, Mr. Nagrath, learned counsel for the petitioner has rightly not disputed the jurisdiction of the Reserve Bank of India to issue the circular on 12.02.2018.

14. The argument of the learned counsel for the petitioner is that since a decision has already been taken by the Joint Lenders Forum in respect of Strategic Debt Restructuring Scheme, therefore, the instructions issued on

12.02.2018 will not be applicable. We do not find any merit in the said argument. The Clause 18 of the circular dated 12.02.2018 (Annexure P-1) contemplates that all accounts including such accounts where any of the schemes have been invoked "but not yet implemented" shall be governed by the revised framework. The decision of the Joint Lenders Forum on 20.11.2017 and later, on 17.01.2018 does not show any implementation of the scheme finalized by the Joint Lenders Forum. The petitioner has not paid any amount of interest as is contemplated in the meeting held on 17.01.2018 nor has it introduced any suitable investor nor have the Banks paid a sum of Rs. 43.50 Crore to purchase share capital of the petitioner. Therefore, the decision of the Joint Lenders Forum has not been implemented, which can be said to be saved by the circular dated 12.02.2018, whereby the earlier circulars issued by RBI constituting the SDR and the Joint Lenders Forum have undergone complete change.

15. The decision of the Banks: as to whether the account of the petitioner should be treated under SDR mechanism or the financial assistance advanced to the petitioner is to be recovered under the provisions of the Act, is a commercial decision taken by the Banks keeping in view their financial risk and the possibility of recovery of the amount from the petitioner. Such decision taken in view of their financial interest does not warrant any interference in exercise of power of judicial review in the writ jurisdiction of this Court.

16. At this stage, Mr. Nagrath raised a feeble argument that action of the Banks is not permissible on the ground of promissory estopple.

However, such argument is noticed only to be rejected. The principle of promissory estoppel will not be applicable in the present case for the reason that the petitioner has not performed its duty of payment of interest as decided in the meeting held on 17.01.2018 nor has brought any investor on board. Still further, when the Reserve Bank of India has issued the circular on 12.02.2018, it is in exercise of statutory functions and therefore, the circular has a statutory force as held by the Supreme Court in **Ravindra's case (supra)** as well. Further, there cannot be any estopple against a Statute, therefore, the plea of promissory estoppel does not warrant any serious consideration.

17. The order of Allahabad High Court relied upon by the learned counsel for the petitioner in the case of **Independent Power Producers Association of India** (**supra**) deals with the stressed/non-performing assets in the electricity sector. The direction for consideration is in terms of the report of the Standing Committee on Energy presented to Lok Sabha on 07.03.2018. The present is not an Electricity/Energy sector nor is there any same or similar report of the Standing Committee; therefore, the reliance of the petitioner on such order is again not tenable. Similarly the order of *status quo* passed by the Supreme Court in the matter of **Jayaswal Neco Industries Limited (supra)** is again not helpful to the arguments raised as in the said proceedings; Banks have not initiated any proceedings under the Act.

18. The petitioner has invoked the writ jurisdiction of this Court after two of the Banks have issued notice under Section 13(2) of the Act. The lead

Bank has also issued a notice calling upon the petitioner to repay the entire credit amount of over Rs.55.00 crores though it has not issued a notice under Section 13(2) of the Act. Therefore, the grievance of the petitioner arises out of the threatened proceedings under the Act. The remedy of the petitioner against such threatened action is before the Debts Recovery Tribunal under Section 17 of the Act but after possession is taken, as is mandated by the Supreme Court in its judgments reported as **(2004) 4 SCC 311** (**Mardia Chemicals Ltd. and others, Etc. Etc. vs. Union of India and others, Etc. Etc.)**.

19. In view of the aforesaid, we do not find any merit in the present writ petition. The same is **dismissed**.

(HEMANT GUPTA)
CHIEF JUSTICE

(AKHIL KUMAR SRIVASTAVA)
JUDGE

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