Shephali

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION LD-VC NO. 28 OF 2020

Transcon Skycity Pvt Ltd & Ors …Petitioners
Versus
ICICI Bank & Ors …Respondents

WRIT PETITION LD-VC NO. 30 OF 2020

Transcon Iconica Pvt Ltd & Ors …Petitioners
Versus
ICICI Bank & Ors …Respondents

Dr Birendra Saraf, Senior Advocate, *with Samit Shukla, Mr Munaf Virjee, Ms Saloni Shah, Ms Shivani Khanwilkar, Mr Rushab Parekh & Mr Aakash Agarwal, i/b ABH Law LLP, for the Petitioners in both matters.*

Mr Viraag Tulzapurkar, Senior Advocate, *with Ms Bindi Dave, Mr Ieshan Sinha, Mr Aayesh Gandhim & Ms Dhruvi Mehta, i/b Wadia Ghandy & Co, for Respondent No. 1 in WP/30/20.*

Ms Bindi Dave, *with Mr Ieshan Sinha, Mr Aayesh Gandhim & Ms Dhruvi Mehta, i/b Wadia Ghandy & Co, for Respondent No. 1 in WP/28/20.*

CORAM: G.S. PATEL, J
(Through Video Conference)
DATED: 11th April 2020

PC:-

1. Heard by video conferencing, circulation having been granted in view of the urgency made out on praecipe.

2. I have heard at considerable length learned Senior Counsel on both sides — Dr Saraf for the Petitioners and Mr Viraag Tulzapurkar for the 1st Respondent, ICICI Bank. The 2nd Respondent in both these Writ Petitions is the Reserve Bank of India ("**RBI**").

3. In summary, the Petitioners' case is this. The Petitioners had finance facilities from ICICI Bank. These were to be repaid in instalments. The manner of servicing of the debt was fixed by contractual agreement. There is no dispute that until December 2019 there was little or no significant default on the part of the Petitioners, or at least no default such as would or did trigger the declaration of the Petitioners' accounts with ICICI Bank as non-performing assets or NPAs. In other words, if there were indeed any past defaults these seem to have been resolved at least until December 2019. The Petitioners agree that the amounts under the repayment schedule due on 15th January 2020 and again on 15th February 2020 were not paid. They accept that those two defaults did occur. The default amounts have not been paid until now. That, too, is undisputed. Now the consequences under the respective and applicable RBI circulars and notifications is that if payment is not made and the accounts are not regularised within 90 days of the date of default then the borrower's account gets classified as an NPA. Other consequences automatically follow. These include consequences to directors, associated companies, affiliates etc. The 90-day period in respect of 15th January 2020 default would take us

to 15th April 2020. The 90-day period for the 15th February 2020 default would take us to 15th May 2020.

4. In the meantime, there has occurred this global coronavirus or Covid-19 pandemic. Many states, cities and countries have declared lockdowns for various durations and of varying degrees. In India itself there has been a national lockdown. This is presently in force. Whether or not it is to be extended, and if so for how long, is yet unknown. It is also not known whether the lockdown is going to be partially extended in some areas or across the nation as a whole.

5. In the meantime, mindful of these exigencies, the RBI has by various circulars and a press note, to which I will shortly make reference, said that there is to be a moratorium in regard to the repayments and classifications as NPAs. That directive from the RBI on the face of it applied to amounts due after the date of the lockdown. The RBI document itself would prima facie indicate that this moratorium operates with effect from, that is to say it starts from, 1st March 2020, and, as currently advised, goes on up to 31st May 2020.

6. There seems to be no dispute that in regard to any instalment due after 1st March 2020, the moratorium fully applies. The question is whether the moratorium period is excluded in the computation of the 90-day period for amounts that fell due prior to 1st March 2020 and which remain unpaid or in default. To put it even more precisely, if there was a default that triggered the beginning of a countdown for the 90-day NPA-declaration period,

would this countdown timer stop on 1st March 2020 and resume only after the end of the lockdown/moratorium period?

7. Dr Saraf's case for the Petitioners is that correctly read, and as held by a learned single Judge of the Delhi High Court, the moratorium period must be excluded even for the computation of any balance days of the NPA-declaration 90-day period. Otherwise, in his submission, the moratorium itself would be meaningless in situations such as those of the Petitioners. Mr Tulzapurkar for ICICI Bank says that a broad-based declaration or finding returned by a Court could have all manner of unintended consequences in respect of other borrowers and that the Court should be slow in extending any such relief by an ad-interim order that may be construed to apply across the board.

8. He also raises a question of maintainability of these Writ Petitions. I will first deal with the question of maintainability to the limited extent necessary today. I am only noting the rival submissions. I am not returning a final decision on this as yet. Mr Tulzapurkar submits that the decision of a Division Bench of this Court — one that is undoubtedly binding on me — and rendered on 5th March 2020 in the case of *Chanda Deepak Kochhar v ICICI Bank Ltd and Anr*[1] clearly states that a writ petition will not lie against a private bank such as ICICI Bank. The observations in paragraphs 12, 13, 22 and 24 of this decision are as follows:

> 12. The scope of Article 226 of the Constitution of India is wide. Writs and orders of diverse nature can be issued.

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1 2020 SCC OnLine Bom 374.

The exercise of this power is not bound in technicities. However same width is not to be implied as to whom the writs and directions can be issued under Article 226. Writs can be issued to the State; an authority; a statutory body; an instrumentality or agency of the State; a company financed and owned by the State; a private body run substantially on State funding; a private body discharging public duty or positive obligation of public nature; and a person or a body under liability to discharge any function under any statute, to compel it to perform such a statutory function. A private company would normally not be amenable to the writ jurisdiction under Article 226 of the Constitution. However, there are legislations like the labour legislation or environmental legislation which mandate certain duties. A writ may lie for compliance such duties, for example, under the Industrial Disputes Act. A writ would not lie to enforce purely private law rights. Even if a body is performing a public duty and is amenable to writ jurisdiction, all its decisions would not be subject to judicial review. Contractual duties are enforceable as matters of private law by ordinary contractual remedies such as damages, injunction, specific performance and declaration. Before issuing any writ, particularly writ of mandamus, the Court has to satisfy that action of such authority, is in the domain of public law as distinguished from private law. For a function to be of a public character, the function must be closely related to functions performed by the State in its sovereign capacity. A writ of mandamus or the remedy under Article 226 is a public law remedy and is not generally available as a remedy against private wrongs. Mandamus is limited to enforcement of public duty. If the private body is discharging a public function and the denial of any right is in connection with the public duty imposed on such body, the public law remedy can be enforced. The duty cast on the public body may be statutory or otherwise,

and the source of such power is immaterial, but there must be the public law element in such action.

13. ICICI is a private bank. It is administered by its Board of Directors. ICICI is not established under any statutory instrument. ICICI receives no funds from the Government. Division Bench of this Court in the case of *M/s. Ruchi Soya Industries Ltd. & Ors. v/s. IDFC Bank Ltd. & Ors.* [(2017) SCC OnLine Bom. 4252], in case of another private bank, Standard Chartered Bank, has held that it is not amenable to writ jurisdiction. ICICI is not an Authority under Article 12 of the Constitution of India.

22. The Petitioner has relied upon certain decisions of the Supreme Court in support. The decision of Supreme Court in *Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust and Ors. v/s. V.R. Rudani and Ors.* [(1989) 2 SCC 691], arose from case of a teacher. Andi Mukta Sadguru Trust was running a science college. Teacher working in the college was terminated from service. The college was an institution affiliated to the University under certain obligations. The relationship of the institution with its employees regarding service conditions was governed by rules and regulations of the university. In this contest the Apex Court held that since the employer-employee relationship was governed by statutory provision, there is a public law element regarding the same. In the decision of *Raj Soni v/s. Air Officer Incharge Admn. & Ors.* [(1990) 3 SCC 261], the school where the petitioner, a teacher had worked, though did not receive any aid, the teacher was governed by Delhi Education Code and the employer-employee relationship was thus governed by statutory provisions. In the case of *Marwari Balika Vidyalaya v/s. Asha Srivastava & Ors.* [(2019) SCC OnLine SC 408] the employer, a Private School, was receiving a Grant-in-Aid. Because of the grant, approval was required

for termination, and in this backdrop the Supreme Court had held that the writ was maintainable against such a school receiving a Grant-in- Aid. The case of *Firozali Abdul Karim Jivani v/s. Union of India and Ors.* [(1992) Mh.L.J. - WP 1538/89 dtd. 15/16-10-1991(Bom.)], was decided by this Court. Here the Petitioner had challenged the acceptance of the nomination of a candidate for the post of president of a Multi State Co-operative bank. The action of the returning officer conducting the elections was questioned. The election was regulated by the Multi-State Co-Operative Societies Act. These decisions are rendered where a public duty or public law element existed and where terms of a statute governed the employer-employee relationship, and thus they not applicable to the present case.

24. **ICICI is a private body. It is not an instrumentality of the State.** It receives no public funding. Service conditions of the Petitioner are not governed by any statute. The dispute raised in this Petition arises from a contract of personal service. The termination of the Petitioner is in the realm of contractual relationship. Since Section 35B(1)(b) does not regulate service conditions, approval for termination under it does not adjudicate the rights of the Petitioner as an employee. Though Section 35B(1)(b) postulates that the termination would not come into effect if there is no prior approval of the Reserve Bank, the cause of action for the Petitioner is the termination by ICICI. For the Petitioner, the legal implications of the grant of approval, non-grant of approval or post-facto approval, as the case may be, would be grounds and arguments in the contractual dispute. **Thus merely because the approval under section 35B(1)(b) is questioned, that cannot infuse a public law element in this dispute, which remains a contractual dispute.** For the contractual

> remedies, the Petitioner will have to approach the appropriate forum and not writ jurisdiction.
>
> (*Emphasis added*)

9. There is no doubt that I am indeed bound by this decision. The submission by Dr Saraf for the Petitioners is that *Chanda Kochhar* is entirely distinguishable on the facts of the case. That dispute was entirely contractual; a case of an employee, albeit at a very high position. What is being assailed here is not any action by the ICICI Bank on its own but a circular issued by the RBI, the 2nd Respondent, which is undoubtedly an instrumentality of the State within the meaning of Article 12 of the Constitution of India. That was never the case in *Chanda Kochhar*. That was a purely private contractual dispute. ICICI Bank itself is entirely bound by the directives, circulars, directions and guidelines issued periodically by the RBI. What the Petitioners, therefore, seek is not that the ICICI Bank should act in any particular manner that violates RBI directives or guidelines but, rather, an interpretation of those circulars and guidelines applicable to the moratorium period so as to bind ICICI Bank. What is being questioned here is a directive or set of directives issued by an instrumentality of the State — the RBI — and what the Petitioners seek is an interpretation of those directives and circulars to bring them into accord with their avowed objective. Indeed, there is no contractual dispute at all. The financing terms are undisputed. The default is undisputed. The consequence of the default running for 90-days is undisputed. But there intervenes, in globally extraordinary circumstances, directions issued by the RBI, and it is these directions, and their applicability and interpretation that the Petitioners have placed at the centre of these petitions. Dr

Saraf's submission, as I understand it, is, therefore, that the reckoning of the moratorium period, the interpretation of the RBI circular and guidelines and its applicability to even pre-existing defaults but ones which have not already resulted in an NPA declaration are squarely matters of public law that are amenable to the jurisdiction of this Court.

10. There is also, I notice, and not for the first time, a repetition here of the now almost inevitable departure from established law in the drafting of these petitions. A mandamus is sought, but without any pleading that justice, though demanded, has been denied. The law on this is well-settled. Similarly, there is not even a whisper of an averment as to how the two Respondents are amenable to the writ jurisdiction of this Court. Those matters, though in my view crucial, are perhaps best left for another day. The Petitioners are put to notice that these are among the questions they will have to deal with at some stage.

11. Mr Tulzapurkar points out, and in my view rightly, that the framing of some of the prayers is questionable, and that is putting it mildly.

12. Dr Saraf seeks leave to move an amendment. He is at liberty to do so before the regular roaster Bench at an appropriate time.

13. As I said earlier, I do not intend to decide the question of maintainability at this ad-interim stage. I have taken up the matters because of the grave and extreme urgency so that there should not

be by 15th April 2020, just a few days hence, an automatic rendering of the Petitioners' accounts as NPA with other attendant consequences. The question of maintainability is kept at large for an appropriate date.

14. There is also considerable reliance placed by both sides on a very recent ad-interim order of 7th April 2020 of AK Menon J.[2] This was also in respect of an ICICI entity, ICICI Home Finance Co Ltd. It was, however, not in a writ petition but in a commercial suit accompanied by an interim application. That order sets out the relevant statutory conspectus including the relevant RBI circulars and press notes. In order not to repeat the same material again, I will simply reproduce the entirety of that order as it is self-explanatory.

> 1. This hearing is convened on the video conferencing facility provided by the registry in view of restrictions placed on personal hearings in a court room and in view of the social distancing requirements resulting from the COVID-19 pandemic. The matter has been listed today at the request of the plaintiffs' Advocate and considering the urgency mentioned.
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> 2. Mr. Nankani, learned senior counsel for the plaintiffs-applicants, on instructions, undertakes to ensure that the suit will be properly lodged immediately upon the lock-down is lifted and registry functioning and comply with all office objections within a period of four weeks from such lodgment. The Advocates for the defendants and their representatives named in the appearances have participated in this hearing by video conference.

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2 In Commercial Suit No. LD-VC-7 of 20-20, along with IA No.LD-VC-7(IA) of 2020.

3. This suit has been filed by the plaintiffs against the defendants for a declaration that invocation of the pledge in favour of defendant no.1 in respect of pledged shares of one MEP Infrastructure Developers Limited, as detailed in Exhibit-B to the plaint is invalid; for a permanent injunction restraining the defendants from giving effect to certain e-mails including that of 31st March 2020 and thereby nullifying the sale of pledged shares, for re-crediting the pledged shares to the plaintiffs' demat account; for a temporary injunction restraining the defendants from alienating, selling or transferring the pledged shares and also to withdraw orders for sale of the pledged shares pursuant to the loan sanction letter dated 14th January 2019, annexed at Exhibit-A to the plaint.

4. Defendant no.1 has sanctioned a line of credit by way of term loan for a sum of Rs.5 crores for a period of 12 months with an option to renew the same on terms and conditions set out in the Sanction Order. Plaintiff no.1 has pledged 14 lakhs shares of MEP Infrastructure Development Limited ('suit shares'). The suit shares effectively constitute the security for the suit term loan. Defendant no.2 is a depository participant, with whom the suit shares are lying. Defendant no.1 claims that the plaintiffs herein and the plaintiff in companion Commercial suit no.LD-VC-8 of 2020 were liable to pay a sum of approximately Rs.4.72 crores to the defendant no.1 as of 20th January 2020 and being in default of the said amount, the defendant no.1 notified the plaintiffs that they would be invoking the security and liquidating the suit shares. Repeated e-mails have been sent by defendant no.1 to the plaintiffs to this effect and in the process, sale of shares commenced. It is not in dispute that a total of 1,52,413 shares were sold in two tranches particularly on 4th March 2020 and on 31st March 2020.

5. According to the plaintiffs and as canvassed by Mr. Nankani, the defendant no.1 has ignored the fact that BSE Sensex had fallen by 9878.71 points from 1st March 2020 and as a result, the price of the suit shares had also dropped. At all material times, he submitted that the shares were valued @ between Rs.40/- to Rs.37.50 per share and on 2nd March 2020, the shares were trading @ Rs.35/- per share, but on 1st April 2020, the shares value had crashed to Rs.11.55 per share. The sharp decline was caused by the effect of the lock- down announced throughout the country, as a result of which road traffic came to a standstill and the only source of income of the plaintiffs-company and MEPDIL also was badly affected.

6. Mr. Nankani's submitted that the Reserve Bank of India had issued a Press Release dated 27th March 2020, annexed at Exhibit-CC to the plaint declaring the RBI's 'Statement on Developmental and Regulatory Policies' as a result of the financial condition caused by Covid-19. It inter alia contemplates a moratorium on term loans. Mr. Nankani has relied upon paragraph 5 of the said policy statement, which provides that all commercial banks and lending institutions, including the defendant no.1, were permitted to allow a moratorium of three months on payment of installments in respect of all term loans outstanding as on 1st March 2020 and the repayment schedule of subsequent due dates was permitted to be shifted by three months. He submitted that despite this moratorium being announced, defendant no.1 has proceeded to sell the shares and had not extended time for payment.

7. Vide a further circular addressed to all relevant financial institutions, the RBI had announced a "Covid-19-Regulatory Package" Mr. Nankani relied upon the provisions of paragraph 2 thereof to state that the term loan granted by defendant no.1 must be subjected to a three

month moratorium and in that view of the matter, sale of shares could not be permitted. Mr. Nankani submitted that the total value of the shares pledged forming part of this and its companion suit at its lowest value as on date is over Rs.6 crores and therefore the defendant no.1 is substantially protected. He submitted that the benefit of the moratorium must be extended to the plaintiffs especially in view of the RBI guidelines and RBI instructions, as also the fact that other courts have considered these aspects. He referred to the decision of the Delhi High Court in the case of *Anant Raj Ltd. Vs. YES Bank Ltd.* in Writ Petition (C) Urgent No.5/2020, in which case the Court by an order dated 6th March 2020 granted time to make payments having formed a prima facie view that the account of the petitioner therein could not have been classified in NPA; directing status-quo ante and restoring the account classification as is stood on 1st March 2020. He therefore submitted that the effect of the RBI circular is also to prevent affected borrowers from being declared NPA. At this stage, he submitted that he is entitled to relief in terms of prayer clauses (c) and (d) of the suit.

8. The application is opposed on behalf of the 1st defendant-bank by Mr. Shetty who submits that as between the plaintiffs in this suit, filed by the Ideal Toll & Infrastructure Pvt. Ltd and one of its Directors, as on date a total 28,97,587 shares have been pledged to the 1st defendant. In the companion suit filed by a different individual and Director, 29,94,357 shares have been pledged. Mr. Shetty submits that the outstanding amount due from the plaintiffs in this suit as on 12th January 2020 was a sum of Rs.1.71 crores. He further submits that in the second suit filed an individual Director, the amount outstanding was Rs.3.01 crores and therefore a total sum of Rs.4.72 crores is due from the plaintiffs in both the suits. He was instructed to state that if this amount was overdue

as of 12th January 2020 and was unaffected by the moratorium, which in any event would apply to loan repayments due after 1st March 2020. Due dates of installments payable from and after 1st March 2020 would therefore be required to be postponed; whereas, the amounts payable by the plaintiffs were overdue as of January, 2020 itself. It is, therefore, submitted that the moratorium does not apply. He further submitted that if by 13th April 2020, the account is not regularized by payment of Rs.1.71 crores the plaintiffs' account would have to be declared as a NPA. He therefore opposed grant of relief.

9. **Having heard learned counsel for the parties and having considered their respective submissions, I am of the view that the protection sought to be availed of by the plaintiffs by virtue of the RBI circulars would clearly apply to all amounts due after 1st March 2020.** In the instant case, the plaintiffs were liable to pay Rs.1.71 crores as of 12th January 2020. There is no doubt that defendant no.1 has a vested right to sell the pledged shares. The sale of shares at this moment would appear to be prompted by anxiety to recover the amount of Rs.1.71 crores that is overdue from the plaintiffs. In view of the willingness of the plaintiffs to regularize the account and considering the fact that the RBI has clearly opined that the moratorium can be granted for three months on payment of all installments, it would appear that it is only the installments falling due between 1st March 2020 and 31st May 2020 that are contemplated under the Covid-19 Regulatory Package, as seen from paragraph 2 of RBI Circular dated 27th March 2020, annexed at Exhibit-DD to the plaint. The Press Release dated 27th March 2020 on 'Statement of Developmental and Regulatory Policies' seems to suggest that moratorium would apply in respect of payment of installments of terms loans outstanding "as of 1st March 2020". That would seem to include even the

amounts due to the 1st defendant from the plaintiffs in this suit but the Statement of Developmental and Regulatory Policies is only a Press Release setting out the policies to address stress in financial conditions caused by Covid-19. They do not constitute the directions to the banks.

10. In my view the directions to the banks and financial institutions is to be found in the RBI Circular No.RBI/2019-20/186 (DOR No.BP.BC.47/21.04.048/2019-20) dated 27th March 2020. This is the effective circular directing the banks to grant benefit of Covid-19 Regulatory Package. This circular issued directions in detail for rescheduling of term loan payments and working capital facilities, easing of working capital financing, classification as Special Mention Accounts and Non-Performing Assets. It is this and certain other conditions that came into effect as on 27th March 2020. The instructions in paragraph 2 reads as follows :-

> "2. In respect of all terms loans (including agricultural term loans, retail and crop loans), all commercial banks (including regional rural banks, small finance banks and local area banks), co- operative banks, all-India Financial Institutions and NBFCs (including housing finance companies) ("lending institutions") are permitted to grant a moratorium of three months on payment of all installments1 falling due between March 1, 2020 and May 31, 2020. The repayment schedule for such loans as also the residual tenor, will be shifted across the board by three months after the moratorium period. Interest shall continue to accrue on the outstanding portion of the term loans during the moratorium period."

(*Emphasis supplied*)

11. The footnote to clause 2 reads as follows '*Instalments will include the following payments falling due from March1, 2020 to May 31, 2020:(i)principal and/or interest components; (ii) bullet repayments; (iii) Equated Monthly instalments; (iv) credit card dues.*" **It is therefore clear that the grant of moratorium of three months would apply to the payment of all installments falling due between 1st March 2020 and not those installments which were due prior thereto. I am therefore unable to agree with the submissions of Mr. Nankani that the amount admittedly due as of January 2020 would be covered by the moratorium.** This moratorium would however cover the amounts claimed by defendant no.1 in the companion suit filed by the individual Director viz. Commercial Suit No.LD-VC-8 of 2020. **In the present suit, therefore, I am of the view that both the parties' rights are entitled to be protected and with that intention, I am of the view that the order that I propose to pass will meet the ends of justice.**

12. Considering the fact that the plaintiffs' income stream now stands seriously depleted, the fact that the defendants cannot dispute, I pass the following order :-

(i) Plaintiffs shall pay to the defendant no.1 a sum of Rs.30 lakhs on or before 18th April 2020.

(ii) Plaintiffs shall pay a further sum of Rs.70 lakhs to defendant no.1 on or before 30th April 2020.

(iii) The balance amount of Rs.71 lakhs, along with accrued interest on overdue amount as of 12th January 2020 till date of payment shall be paid over to defendant no.1 on or before 15th May 2020.

> (iv) In the meanwhile none of the pledged shares, excluding those that have already been sold at the close of trading today, shall be sold by the defendants.
>
> (v) Till a default is committed, the plaintiffs suit loan account shall not be declared a Non-Performing Asset. In the event of any default in payment of any of these amounts, the defendant no.1 shall be at liberty to sell shares pledged by the plaintiffs in Commercial Suit No.LD-VC-8 of 2020 to the extent required to recover the balance due as on the date of default in Loan Account No.120000002080 pursuant to sanction letter dated 14th January 2019, annexed at Exhibit-A to the plaint without further reference to court.
>
> (vi) Since certified or authenticated copies may not be available for some time, all concerned shall act on a copy of this order digitally signed by the Personal Secretary of the Court and transmitted by email to the Advocates concerned.
>
> (*Emphasis added*)

15. Mr Tulzapurkar places considerable reliance on paragraph 12 of this order. His submission is this. *First*, that there should be no ambiguity about the extension of the moratorium period to the Petitioners. This is entirely without prejudice to his arguments that the moratorium exclusion is not available to the Petitioners at all. *Second*, his submission is that the format and structure of Menon J's order ought to be followed by the Court even today. The reason is that in paragraph 12, Menon J fixed an absolute date or finite period

for payment of the defaulting instalments. This should not be left open-ended.

16. There is, as I noted earlier, a decision of a learned Single Judge of the Delhi High Court. Menon J's order refers to it: *Anant Raj Ltd. Vs. YES Bank Ltd.*[3] It is at page 134 of the compilation in the first matter. That order was also in a writ petition against a bank. The RBI appears not to have been joined to that proceeding; at least that does not clearly appear from the order copy annexed. In that casem the Petitioner was servicing a Yes Bank loan regularly until 31st December 2019. It defaulted on payment of an instalment due on 1st January 2020. That was the subject matter of the writ petition. This automatically triggered the onset of the NPA countdown. The case before the learned Single Judge of the Delhi High Court was that further amounts could not be paid because of the adverse economic conditions brought about by the COVID19 pandemic. The Court considered the provisions of the moratorium and the RBI regulatory package. These are set out at some length in that order including the provisions that are annexed to the Petition before me today, and referenced in Menon J's order above.

17. The bank contended before the learned Judge of the Delhi High Court that these moratorium guidelines and package were not applicable to the petitioner since that petitioner was already in prior default as on 1st March 2020.

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3 Writ Petition (C) Urgent No.5/2020; order dated 6th April 2020, per Sanjeev Sachdeva J.

18. Dr Saraf submits that this puts the Delhi High Court decision on the same footing as the case of the Petitioners before us today. They too are in default as on 1st March 2020. It was argued there, as it is before me today, that the moratorium package is applicable only to those instalments that were to fall due on or after 1st March 2020 and only to those borrowers who were properly servicing their accounts until 1st March 2020, i.e. those not in default on that date. Mr Tulzapurkar does contend that there was a concession on the part of the respondent before the Delhi High Court, but I do not think that is material for my purposes today. I will instead look at paragraphs 20 and 21 of the Delhi High Court decision at page 140 of the paper-book:

> 20. **Reading of the Statement on Development and Regulatory Policies issued by RBI on 27th March, 2020 along with Regulatory Package issued on March 27, 2020 prima facie shows that the intention of the RBI is to maintain status quo as on 01.03.2020 with regard to the all the instalments payment for which had to be made post 01.03.2020 till 31.05.2020.**
>
> 21. Paragraph 5 to 7 of the Regulatory Package with regard to Classification of Accounts **also indicates that the intention of RBI is to maintain status quo with regard to the classification of accounts of the borrowers as they existed as on 01.03.2020.**
>
> (*Emphasis added*)

19. Then come paragraphs 25 and 26:

> 25. **If the Regulatory Package is applicable only to Standard Asset accounts, there was no necessity for the**

> **RBI to refer to Classification of an account as a Non-PerformingAsset (NPA) in its Regulatory Package and RBI could have only referred to the change of classification as a SMA.**
>
> 26. **If the interpretation given by learned counsel for the respondent were to be accepted, then an account which was classified as a Standard Asset as on 29.02.2020, cannot become an NPA post 01.03.2020 unless it goes through the process of SMA. Since the account cannot be classified as SMA for instalments falling due post 01.03.2020, where was the question of stipulating a moratorium for classification as a Non-Performing Asset (NPA).**
>
> (*Emphasis added*)

20. It was in light of this that the learned Single Judge of the Delhi High Court proceeded to hold in paragraph 29—

> 29. **Prima facie, I am of the view that the classification of the account of the petitioner as an NPA on 31.03.2020 could not have been done by the respondent.** Accordingly, status quo ante is restored qua the classification of the account of petitioner and the account classification as it stood on 01.03.2020 shall stand restored.
>
> (*Emphasis added*)

21. Now this, it will be remembered, is in the context of a petitioner who defaulted not within the moratorium period, but on 1st January 2020.

22. In any case, I do not believe I am called upon to make such a categorical finding at this stage. My task, as I see it, is to attempt to preserve the parties in status quo ensuring the minimal prejudice to both sides in these unprecedented and exceptionally difficult times. Clearly the Petitioners are in distress. Equally clearly, ICICI Bank should not, on account of the lockdown, the moratorium declared by the RBI and the default of the Petitioners, find itself to be in difficulty or not in compliance with the directives issued by its regulatory authority, the RBI. Of course, ICICI Bank itself cannot, therefore, make any concession in regard to the RBI directions and moratorium. Therefore, nothing that Mr Tulzapurkar says or submits today is therefore to be construed or read as an admission or as a concession on his part.

23. What needs to be done is to fashion a workable order limited to the facts of this particular case ensuring that it sets no precedent for ICICI Bank in other cases and yet ensuring that the Petitioners have enough latitude to be able to service their debt. In addition, I have no doubt that the Petitioners will have to be put to terms. Apart from anything else, there must be a provision that if the Petitioners default in compliance with the directions that I propose to issue today, they will not then be entitled to apply to a Court in any forum or in any proceeding for a further extension of time, irrespective of the consequences that follow.

24. With this, I will turn briefly to the narrative of facts to the extent that they are necessary. I will take the facts in the first Petition ("**Transcon Iconica**"). The dates in the second Petition

("**Transcon Skycity**") are the same although the amounts may differ and there may be certain details that are at variance. These are not of immediate relevance.

25. Transcon Iconica has credit facilities for a construction or development project in the Mumbai suburbs. This is a term loan account and it is secured by various documents including a credit arrangement letter dated 22nd December 2017. The term loan was in the amount of Rs. 80 crores. Of this apparently Rs 30 crores has been disbursed. There is also a facility agreement which specifies a repayment schedule of 18 instalments and interest instalments. Repayment of the principal amount was to commence from 15th February 2020. The interest payment due on 15th January 2020 and the principal and interest payment due on 15th February 2020, as I noted above, remained unpaid.

26. The petition then has a narrative about the adverse effect of the global pandemic and the impact this has had on the construction industry.

27. There is then a reference to the Reserve Bank of India statement of development and regulatory policies of 27th March 2020. This document is extensively referred to in Menon J's order and in the decision of the Delhi High Court. This was followed by detailed instructions also issued on 27th March 2020. Particular emphasis is laid on the footnote (extracted in Menon J's order) which says that instalments include payments due from 1st March 2020 until 31st May 2020 and include principal and interest

components, bullet repayments, equated monthly instalments and credit card dues.

28. These detailed instructions dealt with the classification of accounts as Special Mention Accounts ("**SMA**") and Non-Performing Assets ("**NPA**") as already set out in Menon J's order. A copy of the detailed instructions issued by the RBI is included in the compilation of exhibits filed along with this Petition.

29. Now to the correspondence between the parties. Transcon Iconica wrote to ICICI Bank on 31st March 2020 highlighting the situation, referencing the RBI statement and requesting ICICI Bank to extend the moratorium on all outstanding interest and principal repayments. ICICI Bank replied on 3rd April 2020 informing Transcon Iconica of the moratorium information and attaching a request form. Transcon Iconica submitted the necessary information. Transcon Iconica's term loan account is presently classified as SMA-2. By 1st March 2020, an amount of Rs. 33 lakhs were due against the first instalment from Transcon Iconica and the amount due on 15th February 2020 was Rs. 1.86 crores. The figures for Transcon Skycity are different but the periods are the same.

30. Now existing provisions of the relevant IRAC guidelines issued by the RBI, including clause 2.1.2 at page 44 and clause 4.2 at page 48 provide for a virtually automated system. This means that the countdown timer begins on the date of the default and runs for 90 days. If the accounts are not regularized within that time, the

account is declared a Non-Performing Asset and further consequences then begin to follow.

31. The grievance of the Petitioners is that ICICI Bank has not responded to the Petitioners' requests for extending the moratorium. Hence, this Petition.

32. I will set out the four prayers (a), (b), (c), and (d) in the Transcon Iconica Petition. The prayers in the companion Transcon Skycity's Petition are the same although the account number may differ.

> A. That this Hon'ble Court be pleased to issue a writ of mandamus or any other appropriate writ, order or any other writ in the nature of mandamus directing Second Respondent's Statement of Development and Regulatory Policies dated March 27, 2020 and the Reserve Bank of India's COVID-19 Regulatory Package dated March 27, 2020 is applicable to Petitioner's Term Loan Account No. 0000004693;
>
> B. That this Hon'ble Court be pleased to issue a writ of mandamus or any other appropriate writ, order or any other writ in the nature of mandamus restraining the First Respondent, its officers, agents and servants from classifying the Petitioner's Term Loan Account No. 0000004693 as Non – Performing Asset,
>
> C. In the alternative to prayer clause A, this Hon'ble Court be pleased to declare Second Respondent's Statement of Development and Regulatory Policies dated March 27, 2020 and the Reserve Bank of India's COVID-19 Regulatory Package dated March 27, 2020 as

unconstitutional and violative of Articles 14 and 19(1)(g) of Constitution of India for being arbitrary and discriminatory.

D. That pending the hearing and final disposal of this Petition, this Hon'ble Court be pleased to restrain the First Respondent from taking any coercive step/action or any other measure to alter the status of Petitioner's Term Loan Account No. 0000004693 to Non-Performing Asset;

33. This narrative shows that there is absolutely no doubt about the following. *First*, that the Petitioners are twice in default and were in default on 1st March 2020, the moratorium start date. That moratorium period currently extends to 31st May 2020. *Second*, it is also undisputable that the 90-day period had not ended by 1st March 2020 for either of these two Petitioners. As regards the first instalment that was unpaid on 15th January 2020, the clock was at about 45 days before the moratorium was imposed. For the second overdue instalment of 15th February 2020, the clock was at somewhat less perhaps about 15 days. Now that the moratorium has started running, should there be a suspension of this countdown timer for NPA-declaration and for reckoning the 90-day period? That is the only question that is before me and that is the real question that is being pressed by Dr Saraf.

34. As regards the first default, 45 days remain to be reckoned. As regards the second default of February 2020, 75 days remained to be reckoned. Should the lockdown period include these days or not is the question, and it is Dr Saraf's submission that the purpose of the moratorium and the entire rationale of it as reflected in the orders of the Delhi High Court would be nullified if this was not extended.

35. At this stage, Mr Tulzapurkar invites my attention to paragraph 11 of Menon J's order where this question also seems to have arisen. I have extracted the relevant portion above. That was a case of a pledge being invoked because the value of certain pledged shares varied. In paragraph 11, Mr Justice Menon expressly negatived the submissions made by the Petitioner before him that any amount due as of January 2020 would also be covered by the moratorium.

36. What is important for my purposes today is the observation in the last line of paragraph 12 where Menon J clearly held that in these times steps must be taken to protect the rights of both parties. It is in this context that he fashioned the order that we find in paragraph 12.

37. Now returning to the prayers in the Petition itself, I find that the wording of prayer clause (d) is altogether too broad. First of all it provides no end date and it makes no provision for a default at the end of the moratorium. Such a broad-based relief is not possible even if other contentions are kept at large.

38. Having regard to the facts of this case, and recognizing the need to sufficiently protect the interests of both sides, I make the following order:

(a) Subject to the conditions set out below, the period of the moratorium during which there is a lockdown will not be reckoned by ICICI Bank for the purposes of

computation of the 90-day NPA declaration period. As currently advised, therefore, the period of 1st March 2020 until 31st May 2020 during which there is a lockdown will stand excluded from the 90-day NPA-declaration computation *until* — and this is the condition — the lockdown is lifted. Thus, irrespective of the continuance of the moratorium until 31st May 2020, if the lockdown is lifted at an earlier date than 31st May 2020, then this protection available to the Petitioners will cease on the date of lifting of the lockdown, and the computing and reckoning of the remainder of the 90-day period will start from that earlier lifting of the lockdown-ending date.

(b) In that scenario, should the lockdown be lifted before 31st May 2020, the Petitioners will have 15 days after the ending of the lockdown in which to regularize the payment under the first instalment due on 15th January 2020 and a further three weeks thereafter to regularize the payment under the second instalment due on 15th February 2020.

(c) If the lockdown extends beyond 31st May 2020, then these days will be deferred accordingly, irrespective of whether the moratorium itself is extended beyond 31st May 2020.

(d) The whole of the moratorium period is, evidently, excluded for all amounts that fall due during that moratorium period.

39. To be abundantly clear about these provisions: this order is therefore not a backward extension of the moratorium to January 2020. It is predicated on, and only on, the current lockdown period which makes normal functioning impossible. The moratorium period of 1st March 2020 to 31st May 2020 does not per se give the Petitioners any additional benefits in regard to the prior defaults, i.e. those that occurred before 1st March 2020. Thus, the relief to the Petitioners is co-terminus with the lockdown period, not the declared end of the moratorium. This is the only way to harmonize the present requirements of both sides with the observations of Menon J.

40. I realize that this may result in additional days (less than 90) being allowed to be reckoned in the countdown or timer because the lockdown came into effect *after* 1st March 2020. But that is a consequence the Petitioners must accept in regard to the prior defaults.

41. As to whether the Petitioners are entitled to the benefit of the entire moratorium period in respect of the prior defaults of January and February 2020, whether on the basis of the Delhi High Court decision or on any other ground, the rival contentions are expressly kept open.

42. It is also clarified that these directions consciously do not take into account any partial or staggered lifting of the lockdown, but only a complete lifting. The reason is self-evident. It may be well nigh impossible for any court ever to decide whether or not a 'partial lifting' of the lockdown enables the Petitioners to resume their normal operations and, if so, to what extent. The exclusion from the 90-day NPA-declaration timer and countdown can only therefore operate during the lockdown period, full or partial, and will end upon the complete lifting of the lockdown.

43. ICICI Bank is not to be held accountable or liable for these extensions. At the cost of repetition, I am making it clear that this order is based not on any concession or admission made by the ICICI Bank nor any concession that is attributable to its Counsel at the hearing today. There has been no such concession and there has been no such admission by Counsel Mr Tulzapurkar appearing for ICICI Bank.

44. It is also clarified that this order will not serve as a precedent for any other case in regard to any other borrower who is in default or any other bank. Each of these cases will have to be assessed on their own merits.

45. Lastly, it is clarified that these are only prima facie and tentative views. Nothing in this order is to be construed as a final determination of any issues or competing rights.

46. This order will be digitally signed by the Private Secretary of this Court. All concerned will act on by fax or email of a digitally signed copy of this order.

(G. S. PATEL, J)