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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ W.P.(C) 2970/2020

JR TOLL ROAD PRIVATE LIMITED ..... Petitioner

Through: Mr. Dayan Krishnan, Sr. Advocate with Mr. Rishi Agrawala, Ms. Niyati Kohli, Mr. Karan Luthra and Mr. Ankit Banati, Mr. Surendra Khot and Ms. Shruti Arora, Advs.

versus

YES BANK LIMITED .... Respondent

Through: Mr. Ashwini Chawla, Advocate with Mr. Navin Trivedi, Executive Vice President (Legal) for Yes Bank Ltd.

CORAM:
HON'BLE MR. JUSTICE C.HARI SHANKAR

O R D E R

% 17.04.2020

CM.Nos.10308-09/2020 (exemption)

1. Allowed, subject to all just exceptions.

2. The applications stand disposed of.

W.P.(C) 2970/2020 & CM.No.10307/2020 (ad interim ex-parte directions)

1. This writ petition has been taken up for hearing by video conferencing, in view of the lockdown declared by the Government, pursuant to the n-COVID-2019 crisis.

2. Issue notice to respondents to show as to why rule *nisi* be not issued.

3. Notice is accepted by Mr. Ashwini Chawla on behalf of the respondents.

4. Counter affidavit to writ petition and reply to the application be filed within four weeks, with an advance copy to the petitioner, who may file rejoinders thereto, if any, within two weeks thereafter.

5. Mr. Dayan Krishnan, learned Senior Counsel for the petitioner, prefers his prayer for interim relief, and learned counsel have been extensively heard on the said aspect.

6. The petitioner in this case was incorporated as a Special Purpose Vehicle (SPV) by the National Highways Authority of India (NHAI) for development of a road on NH-11. In the year 2009, NHAI has shortlisted and selected consortium led by Reliance Infrastructure Limited (RIL), to implement the aforesaid project. The petitioner was incorporated as an SPV on 9th December, 2009 for the purpose thereof, in compliance with the conditions contained in the letter of award issued by the NHAI in favour of RIL, for design, engineering, finance, construction etc. of the project.

7. On 25th November, 2011, a Loan Agreement was executed, between the petitioner and the respondent-bank (hereinafter referred to as 'the bank'), whereunder a loan of ₹ 389 crores was advanced by the bank to the petitioner towards the financial assistance to meet a part of the aforesaid project costs. Clause 6.1 (XII) of the agreement required

the petitioner to inform the bank of any loss or damage, suffered owing to any force-majeure circumstances, such as earthquake, flood, typhoon etc. against which the petitioner may not have insured its property. Default in payment of the principal or interest amount empowered the respondent to terminate the loan agreement and take additional steps.

8. It is averred, in the writ petition, that the petitioner has regularly been paying all outstanding dues, keeping the loan account operational and that, till date, an amount of ₹ 80.9 crores, out of the loan amount of ₹ 389 crores stands repaid by the petitioner, apart from interest amount of approximately ₹ 312.06 crores.

9. Mr. Ashwani Chawla, learned counsel for the respondent, however, submits that some amount payable, by the petitioner, as on 31st December, 2019, still remains to be paid and that, therefore, the account of the petitioner could not be treated as clean, even in the beginning of January, 2020.

10. While the situation stood thus, India along with the rest of the World, was ravaged by n-COVID-2019 pandemic, which, as is well known, has resulted in the issuance of a slew of directions by the Government and by various other statutory authorities, including the Reserve Bank of India (RBI). The writ petition submits that, among the steps taken by the Government is the imposition of lock-down, on all activities, including movement of citizens, which came into effect on 25th March, 2020 and has subsequently been extended, presently till 3rd May, 2020. The writ petition submits that, owning to the

imposition of the said lock-down, operational activities of the petitioner came to a standstill. In these circumstances, the petitioner addressed a communication dated 24th March, 2020, to the bank, submitting that *force majeure* events had intervened, resulting in inability, on the part of the petitioner, to continue its operations.

11. Mr. Krishnan, has invited my attention, in this context, to a circular dated 25th March, 2020, issued by the Toll Section of the Ministry of Road Transport and Highways to the Chairman, NHAI, following the order dated 25th March, 2020 of the Ministry of Home Affairs, closing all commercial and private establishments for 21 days w.e.f. 25th March, 2020, which exhorts the NHAI to take necessary instructions for compliance of the said order. The said communication also states that the said closure "may be taken as *force majeure* of the transaction/contract agreement, as per the Ministry of Finance, Department of Expenditure Memo No. F.18/4/2020-PPD dated 19th February, 2020".

12. Mr. Krishnan submits that his client has not been in a position to collect toll, as a result of which, the liquidation, by his client, to any amounts due to the petitioner has been severely impeded.

13. The communication, dated 24th March, 2020 (*supra*), addressed by the petitioner to the bank, sought in these circumstances, that non-performance of any obligation under the loan agreement dated 25th November, 2011, by the petitioner towards the bank, be not treated as a breach of the agreement, so as to invite any coercive step against the petitioner. It was also prayed that the payment of interest and

repayment under loan agreement, be deferred till the restoration of the normalcy.

14. The writ petitioner also places reliance on a Statement on Developmental Regulatory Policies, as well as the Regulatory Package, both of which was issued by the RBI on 27th March, 2020, whereunder a moratorium had been allowed, on payment of term loans due between 1st March, 2020 and 31st May, 2020. The Regulatory Package further dealt with the classification of the accounts, as Special Mentioned Account (SMA) or Non-Performing Assets (NPA), pursuant to the economic fall-out, consequent to the n-COVID-2019 pandemic, and stipulated, in this regard, thus:

> "15. The package also deals with the classification as Special Mention Account and Non-performing Asset pursuant to the economic fallout from COVID-19 and stipulates as under:-
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> "**Classification as Special Mention Account (SMA) and Non-Performing Asset(NPA)**
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> 5. Since the moratorium/deferment/recalculation of the 'drawing power' is being provided specifically to enable the borrowers to tide over economic fallout from COVID-19, the same will not be treated as concessionor change in terms and conditions of loan agreements due to financial difficulty of the borrower under paragraph 2 of the Annex to the Reserve Bank of India (Prudential Framework for Resolution of Stressed Assets) Directions, 2019 dated, June 7, 2019 ("Prudential Framework"). Consequently, such a measure, by itself, shall not result in asset classification downgrade.
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> 6. The asset classification of term loans which are granted relief as per paragraph 2 shall be determined on the basis of revised due dates and the revised

> repayment schedule. Similarly; working capital facilities where relief it., provided as per paragraph 3 above, the SMA and the out of order status shall be evaluated considering the application of accumulated interest immediately after the completion of the deferment period as well as the revised terms, as permitted in terms of paragraph 4 above.
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> 7. The rescheduling of payments, including interest, will not qualify as a default for the purposes of supervisory reporting and reporting to Credit Information Companies (CICs) by the lending institutions. CICs shall ensure that the actions taken by lending institutions pursuant to the above announcements do not adversely impact the credit history of the beneficiaries."

15. It is pointed out by Mr. Krishnan, learned Senior counsel for the petitioner that in somewhat similar circumstances, this Court had been approached by M/s. Anant Raj Limited against the bank, by way of **WP(C) Urgent 5/2020**, in which, taking into account the aforesaid Statement on Developmental Regulatory Policies and Regulatory Package, issued by the RBI on 27th March, 2020, a learned Single Judge of this court had observed thus:

> "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.
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> 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.
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> 22. As per the contention of the learned counsel for the respondent, prior to declaration of an account as NPA, the

account has to go through the process of declaration as SMA-1 and SMA-2.

23. If a borrower was duly servicing the account until 01.03.2020 and no instalment was overdue, the borrower's account would have been classified as a Standard Asset, i.e., there being no default, which means that the account would not be classified as a SMA – 1 or SMA– 2.

24. If an account is a standard account and not classified as SMA –1- or SMA – 2, it would have to go through the process of SMA-1 and SMA-2 prior to being declared as a non-performing asset.

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-Performing Asset (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 01.03.2020unless 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).

27. The restriction on change in classification as mentioned in the Regulatory Package shows that RBI has stipulated that the account which has been classified as SMA-2 cannot further be classified as a non-performing asset in case the instalment is not paid during the moratorium period i.e. between 01.03.2020 and 31.05.2020 and status quo qua the classification as SMA-2 shall have to be maintained.

28. The effect of the same would be that for a period of three months there will be a moratorium from payment of that instalment. However, stipulated interest and penal charges shall continue to accrue on the outstanding payment even during the moratorium period. If post the moratorium period borrower fails to pay the said instalment, classification would then automatically change as per the IRAC guidelines.

> 29. *Prima facie*, I am of the view that the classification of the account of the petitioner as an NPA on 31.03.2020could 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."

16. Mr. Krishnan, has also invited my attention to a subsequent order, dated 13th April, 2020, passed by another Single Judge of this Court in WP (C) 2959/2020 (***Shakuntala Education Welfare Society v. Punjab and Sind Bank***), which took note of the aforesaid order dated 6th April, 2020, passed by this Court in ***M/s. Anant Raj Limited (supra).*** The learned Single Judge, while hearing WP (C) 2959/2020 was informed that, unlike the petitioner in ***M/s. Anant Raj Limited (supra)*** the petitioner in WP (C) 2959/2020 ***Shakuntala Education Welfare Society (supra)*** was facing hindrance in liquidating his debts on account of a prohibition imposed by the State of U.P. from demanding fees from students. Mr. Krishnan submits that his client is also similarly situated, in view of the notification dated 25th March, 2020 (*supra*), issued by the Toll Section in the Ministry of Road Transport and Highways, whereby fee plazas, wherein toll was collected, have been directed to be closed down during the period of lock-down and this condition has been also directed to be treated as *force majeure* of the concession /contract agreement.

17. Mr. Krishnan has also pointed out that, this morning i.e. on 17th April, 2020, the Governor of the RBI has futher liberalized the situation by way of fresh instructions in the form of statement, paragraph 17 of which reads as under:

> "17. Therefore, it has been decided that in respect of all accounts for which lending institutions decide to grant moratorium or deferment, and which were standard as on March 1, 2020, the 90-day NPA norm shall exclude the moratorium period, i.e., *there would an asset classification standstill for all such accounts from March 1, 2020 to May 31, 2020*. NBFCs, which are required to comply with Indian Accounting Standards (IndAS), may be guided by the guidelines duly approved by their boards and as per advisories of the Institute of Chartered Accountants of India (ICAI) in recognition of impairments. In other words, NBFCs have flexibility under the prescribed accounting standards to consider such relief to their borrowers."
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> (Emphasis supplied)

18. Mr. Krishnan also points out that in view of paragraph 17 of the aforesaid Statement, delivered this morning, entitled the petitioner's account to restoration of the *status-quo ante* in respect thereof, as it existed on 1st March, 2020, on which date, it was, admittedly, in the SMA–II Category, the declaration of the petitioner's account as NPA having come into effect only on 31st March, 2020.

19. Arguing *per contra*, Mr. Ashish Chawla, learned counsel appearing for the respondent bank submits that the declaration of the petitioner's account as NPA, is an automated procedure, which follows the guidelines issued by the IRAI and that, if paragraph 17 of the Statement made by the Governor of the RBI this morning is to be accorded a literal interpretation, it would fly in the face of the said guidelines. Mr. Chawla also seeks to submit that the order, dated 6th April, 2020 (*supra*), of the learned Single Judge of this Court in ***M/s. Anant Raj Limited (supra)*** had, even while granting *status quo ante*, regarding the status of the account of the petitioner as stood prior to

31st March, 2020, directed the petitioner to pay, on or before 25th April, 2020 the instalments, which fell due on 1st January, 2020 along with interest accrued thereon, till the date of payment, irrespective of the lockdown position. Mr. Chawla, submits that the present petitioner cannot be accorded any different treatment, and that grant of any interim relief to the petitioner would have to be subjected to liquidation, by the petitioner, of the amounts due to the bank, as on 31st December, 2019, which was much before the n-COVID-2019 crisis. Mr. Chawla also places reliance on the judgment of the High Court of Bombay, in the matter of ***Transcon Inconia Pvt. Ltd. v. ICICI Bank & Ors, W.P. LDVC.No. 30/2020*** , of which he undertakes to file a copy, passed on 11th April, 2020, which, irrespective of the lock-down, did not permit non-payment, by the petitioner before the High Court of Bombay, of the amounts due by it. Mr. Chawla, has also invited my attention to Clause 3.4 of the loan agreement, dated 25th November, 2011, which reads thus, which in his submission, the respondent has violated:

> "**3.4 ESCROW OF REVENUES AND RETENTION ACCOUNTS**
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> The Borrower shall enter into the Escrow Agreement to establish special purpose **no-lien accounts, viz., Escrow Account and Retention Accounts with the Escrow** Agent and make firm arrangements (i) for prompt deposit of all Project Proceeds to the credit of the said Escrow Account and (ii) for transfer by the Escrow Agent of the **proceeds *of* the Escrow Account into various Retention Accounts in the manner and** priority as may be specified/prescribed by the Lender in a form to be agreed lo between the Lender, the Borrower and NHAI."

20. Mr. Chawla relies, further, on Clause 7.2 of the loan agreement,

which sets out the consequences of default, which is as under:

> **"7.2 CONSEQUENCES OF DEFAULT**
> **If** one or more of the aforesaid *Events* of Default shall occur and be continuing, thereupon, and in every such *event* and at any time thereafter during the continuance of such event, the Lender shall have the right to terminate their commitments and accelerate the Obligations of the Borrower and in exercise of such rights the Lender may, take one or more of the following actions:
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> (i) give written notice of an *Event* of Default, in which case all commitments and the Lenders' obligations to make Loan, shall be terminated forthwith,
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> (ii) declare the unpaid principal amount of and interest in respect of the Loans and all other Obligations and all other amounts payable by the Borrower hereunder and under the Security Documents to be due and payable, whereupon such amounts shall become due and payable upon expiry of 60 days from such declaration, without presentment, demand, protest or any other notice of any kind, all of which are hereby expressly *waived,* anything contained herein to the contrary notwithstanding,
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> (iii) exercise any and all rights specified in the Security Documents and other Transaction Documents including, without limitation, to accelerate the obligations of the Promoters to make equity and other contributions and to enforce all of the Security created pursuant to the Security Documents, and
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> (iv) exercise such other remedies as permitted or available under Applicable Law."

21. Finally, Mr. Chawla, submits that while the circular dated 25th March, 2020, the NHAI, would have no application to the present case, as amounts were due from the petitioner as far back as in December, 2019; ergo, even if the benefits of the said circular were to be extended to the petitioner, the petitioner ought to be directed to

deposit the amounts due, with the bank within a period of at least one week after the lifting the closure of the Fee Plaza, by the said circular; as thereafter the *force majeure* condition would cease to operate.

22. Mr. Krishnan, at the very outset, of his rejoinder submits that if there was any default in depositing of the amounts in escrow account, as per Clause 3.4 of the loan agreement, that default would be cured, forthwith.

23. Arguing further in rejoinder, Mr. Krishnan reiterates that the statement of the Governor of RBI, released this morning, does not make the freezing of the status of the account, as on 1st March, 2020, subject to any payment. Insofar as the order dated 6th April, 2020 passed by a learned Single Judge of this Court, is concerned, Mr. Krishnan would emphasise that the said order does not impose any condition of payment, but merely records the concession, made by the counsel appearing for the petitioner in that case, and that such a concession could not bind his client. The recording of the said concession cannot, in the submission of Mr. Krishnan, be read as a direction by the court and, in the absence of any conditionto the said effect finding place in the latest Statement released by the Governor, RBI, it would not be proper to make the restoration of the *status quo ante* of the status of the petitioner's account as it existed on 1st March, 2020, conditional on making of any payment.

24. Having heard learned counsel at considerable length, I see no reason to give, either of the parties before me, a treatment different from that which is to be found in the order, dated 6th April, 2020 of a

learned Single Judge of this Court in ***M/s. Anant Raj Limited (supra)***. For the reasons which are already exhaustively set out in the said order, present petitioner would also be entitled to the restoration as *status quo ante*, as status of its account existed on 1st March, 2020. This relief would additionally be justified in view of the paragraph 17 of the statement by the Governor, RBI, as released this morning, which stands extracted, *in extenso,* in paragraph 17 (*supra*).

25. Though, frankly speaking, it is true that the directions, issued by the learned Single Judge in ***M/s. Anant Raj Limited (supra)*** to the petitioner before him regarding payment of amount due prior to 31st March, 2020, on or before 25th April, 2020, was following on a statement made by the learned counsel for the petitioner in that case, I am not convinced that the present petitioner should not be subjected to a similar direction. I am in agreement with Mr. Chawla, in this regard, that the petitioner should also be directed to liquidate the amounts to the bank as on 31st December, 2019, within a reasonable period of opening of the Fee Plaza, i.e. of the rescinding of the Circular dated 25th March, 2020. The petitioner is, therefore, directed to make payment to the respondent, of the amounts due as on 31st December, 2019, which was much before the n-COVID-2019 pandemic struck the country, within a period of five weeks from the opening of the Fee Plaza, i.e. from the discontinuation of the closure as imposed by the circular dated 25th March, 2020 of the Account Section of the Ministry of Road Transport and Highways.

26. List the matter before appropriate Bench on 16th June, 2020.

27. It is clarified that above payment would be made without prejudice to the rights and contentions of the parties in the present case.

C.HARI SHANKAR, J.

APRIL 17, 2020/*r.bararia*