2023 INSC 929

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO(S). 4708 OF 2022

INFRASTRUCTURE LEASING AND FINANCIAL SERVICES LTD. **…APPELLANT(S)**

VERSUS

HDFC BANK LTD. & ANR. **…RESPONDENT(S)**

J U D G M E N T

S. RAVINDRA BHAT, J.

1. This appeal[1], is preferred by Infrastructure Leasing and Financial Services Ltd (hereafter "IL&FS" or "the borrower") aggrieved by an order of the National Company Law Appellate Tribunal (hereafter, 'NCLAT')[2]. The point in issue is whether the documents executed by IL&FS by which rents were made over to the respondent, Housing Development Finance Corporation Ltd (hereafter "HDFC" or "the lender") constituted an assignment and thus fell outside the scope of an asset and security freeze order made by the NCLAT.

2. IL&FS had approached the HDFC for financial assistance. By Sanction Letter dated 22.06.2018, the lender sanctioned a financial facility of ₹ 400 crores to the borrower. On 25.06.2018, a *"Master Facility Agreement"* ("MFA") was entered between IL&FS and HDFC for ₹ 400 crores. The MFA envisioned the creation of a separate escrow account with Housing Development Finance Corporation Bank Limited (hereinafter 'Escrow Bank') for opening of a separate escrow account with the Escrow Bank. Along with MFA, an "Assignment

[1] Under Section 432, the Companies Act, 2013
[2] Dated 13.5.2022 in IA 2196/2020 [in CoAp. (AT) No. 346/2018]

Agreement" (hereafter "AA") dated 25.06.2018 was also executed between the IL&FS and HDFC. Under this document (i.e., the AA) the parties agreed that the authorised indebtedness of IL&FS in terms of the MFA, by way of the facility together with the interest thereon was payable from the gross income and revenue to be derived from the operation of the Business Centre Services Agreements/Lease/Leave and License Agreement/s. It was also agreed that '*all the receivables derived/to be derived from the operation of the Borrower's Contracts, a sufficient portion of which, to pay the principal and interest as and when the same shall become due*' in terms of the said MFA was *assigned and pledged* and was to be '*set aside for that purpose on the same day*' and a Power of Attorney by way of Security Interest was also executed between the IL&FS and HDFC.

3. By an order, dated 01.10.2018, NCLT in a petition[3], filed by the Union of India ("UoI") under Sections 241 and 242 of the Companies Act, 2013 (hereafter "the 2013 Act") ordered to supersede the existing board of directors of the IL&FS. A new board of directors was also constituted, to take charge of the affairs of that company. Later, by its order dated 12.10.2018, the NCLT declined to issue a moratorium sought by the UOI, (akin to a moratorium under Section 14 of the IBC) in respect of IL&FS and its 348 group companies. Aggrieved, appeals were filed before the NCLAT. By order dated 15.10.2018 NCLAT, *inter-alia*, stayed: (i) *the institution or continuation of suits or any other proceedings against the IL&FS or its 348 group companies, before any court/tribunal/arbitration panel/arbitration authority*; (ii) *any action to foreclose, recover or enforce any security interest created over the assets of the IL&FS or those of its 348 group companies*; and (iii) *the acceleration, premature withdrawal or other withdrawal, invocation of any term loan, corporate loan, bridge loan, commercial paper, debentures, fixed deposits, guarantees, letter of support, commitment or comfort*

[3] No. 3638 (M.B.) of 2018

and other financial facilities or obligations availed by the IL&FS and its 348 group companies.

4. After the interim order of NCLAT, the borrower informed the Escrow Bank about it, by an email dated 16.10.2018. On 19.10.2018, HDFC instructed the Escrow Bank to transfer monthly instalments from the Escrow Account to the Lender's Account. On 23.10.2018, IL& FS informed the HDFC about the interim order from NCLAT (dated 15.10.2018). The letter stated that the interim order restrained HDFC from appropriating IL& FS account's with Escrow Bank. IL&FS called upon the lender by letter dated 27.10.2018 to reverse the debit of ₹ 6.24 crores and credit the amount back into the account of the borrower. HDFC responded to IL&FS's letter, stating that receivables (i.e. rents) in respect of the secured property were assigned by IL&FS in its favour and that the asset ceased to belong to IL&FS.

5. On 04.01.2019, IL&FS called upon HDFC to reverse the amount which was debited by the Escrow Bank in the escrow accounts. By the order dated 04.02.2019, NCLAT directed the UOI and IL&FS to approach Justice (Retd.) D.K. Jain ("former judge of this court") for consent and discuss the terms and conditions to supervise the operation of the resolution process. The UOI, through the Ministry of Corporate Affairs, in an affidavit stated that certain banks were still debiting amounts from IL&FS group entities classified as "Amber" and "Red" without authorization from the IL&FS board and those debits flouted the order dated 15.10.2018. Restraint orders were sought against banks and financial institutions enjoining them not to debit the accounts of the IL&FS and its group entities and/or appropriate the funds held in the said accounts without authorization of IL&FS and the relevant group entities; and further return/refund/release such amounts that have been debited. On 08.08.2019, NCLAT directed as follows:

> *"...If any of the Bank/Financial Institution has debited any amount in violation of order of this Appellate Tribunal dated 15th October, 2018, it will be open to Union of India/ILFS to bring the same to the notice of Justice*

Shri D.K. Jain for appropriate orders and also intimate the Bank/Financial Institution that it may amount to contempt of court."

6. IL&FS wrote, on 22.08.2019 to former judge of this court to make an appropriate order. IL& FS made representation before the learned judge on 28.08.2019. A letter dated 03.09.2019 was sent by the HDFC reiterating that monies in the escrow account were its exclusive property and that IL&FS could not claim ownership over such property. The Escrow Bank wrote on 04.09.2019 to IL&FS that it had acted in terms of Escrow Agreement and was obliged to hold the money lying in trust for the purpose for which it was received i.e. for the benefit of HDFC. Former judge of this court issued a show-cause notice dated 30.09.2019 to the HDFC and issued a notice to the Escrow Bank on 10.10.2019. The Escrow Bank on 23.10.2019 wrote to former judge of this court stating that the receivables stood assigned in favour of HDFC and monies received were not the assets of the IL&FS. Former judge of this court granted a personal hearing to the parties. On 12.05.2020, former judge of this court recommended the Escrow Bank and HDFC to maintain the *status quo* in the Escrow Account till a final view was taken on the IL&FS's application. The Escrow Bank stopped debiting any amount from the Escrow Account and informed the IL&FS and HDFC about this. On 03.07.2020, former judge of this court issued a final order holding that the actions of the HDFC and Escrow Bank in debiting the amount from the Escrow Account violated the orders passed by NCLAT and thus HDFC and the Escrow Bank were directed to purge themselves within two weeks.

7. HDFC and IL&FS claimed opposing reliefs: the lender, on the one hand, claimed- predictably that the interpretation and directions of former judge of this court in the orders/directions dated 12 May 2020 and 03 July 2020 were incorrect and had to be set aside; the borrower, IL&FS in its applications sought directions that ₹ 112,79,18,348 (Rupees One Hundred Twelve Crore Seventy Nine Lakh Eighteen Thousand Three Hundred Forty Eight), appropriated from its accounts towards debt service payments, were in violation of the order dated 15.10.2018

from NCLAT and in compliance with the order passed by former judge of this court on July 3, 2020.

8. By the impugned order, NCLAT held that so far as part of the receivables deposited in the Escrow Account which were sufficient to meet the principal and interest (payable by IL&FS) assigned by the said borrower to HDFC, *no proprietary interest continued* -with IL&FS nor could it exercise any right over that part of the Escrow Account which was assigned. It was held, borrower *"may have right and interest on the residual of deposits which is an excess of principal and interest for which security interest is created in favour of the lender which Escrow Bank is permitted to transfer to the borrower."* IL&FS's argument that there was no assignment of the receivables, but only the creation of security interest in the receivables was rejected. It was also held that since there was an express assignment of lease rental- sufficient to meet the principal and interest payments-, the *"assignment has to be accepted as assignment"* in favour of HDFC and that 'pledge' in AA did not take away the nature of the transaction documents which was the assignment of receivables. NCLAT also held that the freeze order of 15.10.2018 did not negate the AA nor did it take away the property right of HDFC in the lease rental receivables. However, the right over receivables deposited in the Escrow Account *to the extent they were in excess of principal and interest*, was retained by the IL&FS and in the event, any amount in excess of the said principal and interest was transferred to or debited in the HDFC's account and they needed to be reversed, after adjusting the shortfall in debiting any interest or principal of any earlier months.

Parties' contentions

9. Mr. Ramji Srinivasan, Sr. Advocate urged, on behalf of IL&FS that the MFA (dated 25.06.2018) and other agreements executed on 25.06.2018 clearly indicate that the Facility advanced to the Borrower was loan repayable within 96 months. The Security Interest was created by the Borrower and the receivables

were nothing but security for repayment of the loan. The Escrow Account was created in the Escrow Bank to facilitate the repayment of principal and interest as per the repayment schedule. There was no transfer of title in the receivables from Borrower to Lender. The receivables deposited in the Escrow Bank were the assets of the Borrower which were deposited in the Escrow Bank as security for the repayment of the loan of ₹ 400 Crores. Till 15.10.2018, the escrow agent was debiting the amount as in terms of the Escrow Agreement. However, after the interim order (dated 15.10.2018), the Escrow Bank was not entitled to debit any amount to the Lender's Account which was prohibited by the interim order (dated 15.10.2018) of NCLAT in the pending appeal. IL & FS secured repayment of the loan by assigning the lease rental to the extent of principal and interest payable per month. The MFA and all the agreements clearly depict the relationship between IL&FS and HDFC. The AA cannot be read in isolation. The Escrow Bank held the amount in the account as a trustee and the Power of Attorney Agreement executed on 25.06.2018 was by way of security interest. Repayment was secured by receivables and other additional securities.

10. It was thus argued that the assignment of receivables is only security and not transfer. It is submitted that detailed written submissions were filed before former judge of this court by the parties and after considering every contention, the order dated 03.07.2020 was made by him. That order by former judge of this Court, considered all the submissions by the lender, the borrower and the Escrow Bank, and after examining the principal (and the facility agreement) and all other agreements and attendant circumstances. Under that order, the lender and Escrow Bank were obliged to return the amount debited i.e. ₹112,79,18,348/-.

11. Learned senior counsel argued that the lender’s claim that the facilities extended are in the nature of lease rental discounting facility (LRD) as argued by HDFC, and not covered by the injunction is not borne out from the record. He argued that the facility is nothing but a type of term loan offered with security of rental income. The clear indicators that the Facility is secured by charge created

over the property and the receivables (rent) can be gathered from the following: *firstly,* sanction letter for the term loan and the Facility specifically refers to this as a loan for a term of 96 months to be repaid by IL&FS from the lease rentals from commercial premises. *Secondly,* the terms relating to security and repayment also establish this. In fact, none of the documents contain any element or even a mention of the sale and purchase of the debt of IL&FS. The transaction is a loan transaction and not a sale of debt at all.

12. Learned counsel refers to Clauses 3 (sets out purpose of availing facility) and 4 (Establishes nature of relationship between the parties) of the MFA to argue that purpose of availing facility was merely re-financing of the existing debt and clause 4 of MFA clearly establish that nature of relationship between the parties was that of lender-borrower and not that of seller and buyer. It is also pointed out that pursuant to the execution of the financing documents IL&FS submitted form CHG-one[4], which is confirmed by HDFC Ltd, i.e., the lender form for registration of creation of charge to secure the Facility. Therefore, the lender in fact filed its claim as a secured creditor of IL&FS before Grant Thornton India, the client's management consultant.

13. It is argued that various conditions in the MFA and the Escrow Agreement indicate that the transaction is essentially a loan transaction between the lender and the borrower with the creation of a security. Counsel points out that the documents which are part of the MFA nowhere use the expression "lease rent discounting". It is also argued that in terms of the Assignment and Administration Agreement (also executed on 25 June 2018), receivables which are relevant with respect to the security property were created in favour of the lender bank. Because one clause[5] uses the word assignment and at the same time it also states that the amounts i.e. receivables are pledged and will be set aside for that purpose. This clearly indicates that the plain meaning of the term pledge and that the intention

[4] An application for registration, or modification of charge.

[5] Clause 1 of the Assignment and Administration Agreement dated 25.06.2018 – Assignment and Pledge of Receivables.

of the parties was that this amount was to be treated as a security. The expression assigned is clarified later, in the words *"shall be set aside for that purpose"*. When used in conjunction with the expression "pledge", what was contemplated was the creation of a security of the property and not its transfer.

14. It is highlighted that the charge is a kind of security, whether the creditor obtains possession of ownership of the assets or not; it is appropriated to the satisfaction of the debt. From the provisions of the AA and the facility agreement, it is absolutely clear that receivables were charged in favour of HDFC Ltd, the lender, only for securing the obligations of the appellant IL&FS under the Facility agreement and facilitation of repayment and it did not amount to a transfer of the legal title over such receivables which continues to vest with IL&FS. It is submitted that in these circumstances, the holistic reading of all documents as resorted to by former judge of this court was the correct approach. Lastly, it is pointed out that the receivables or the rent paid into the account was to be held in trust by the escrow agent which had to secure compliance with the tribunal's order dated 15.08.2018 and the judgement dated 12.03 2020.

15. Mr. Mukul Rohatgi, learned Sr. Advocate appeared for HDFC Ltd. and refuted the submissions of the learned senior counsel for IL&FS. It was argued that a plain analysis of the transaction documents makes it clear that the facility extended to the borrower is a Lease Rental Discounting (LRD) loan transaction, which is materially different from a traditional loan transaction. An LRD loan transaction involves the assignment/sale of the rent receivables by the landlord to the financing entity at a discounted value in terms of the transaction documents. A certain component of lease rentals arising from the use of the TIFC Property (or Secured Property) i.e., sufficient for repayment of the facility, has been irrevocably assigned in favour of the lender till repayment of the said Facility. Clause 5(c)[6] of Schedule I of the Facility Agreement recognizes that the assigned

[6] 5. Security and Repayment Specific Covenants:

receivables are the exclusive property of HDFC Ltd. The assigned receivables are clearly the property of HDFC Ltd. The borrower has no right/title or interest in the monies/receivables/amount deposited in the Escrow Account. The relief of release/refund/reversal of amounts debited from the Escrow Account stating that the same is in line with the order dated 03.07.2020 issued by former judge of this court is misplaced since the same has not attained finality and was under scrutiny by the tribunal in the applications filed by the lender.

16. It was submitted that no judicial order or judgment prohibited the licensees of the TIFC property from depositing monthly lease rent in the Escrow Account, nor the orders held that the lender was disentitled from using the assigned receivables/rents. The transaction was not prohibited by the order dated 15.10.2018, which was restricted to the assets of the IL&FS. Assigned receivables were not its assets. They were consequently outside the purview of the order dated 15.10.2018. It was contended that former judge of this court by the order (dated 03.07.2020) unduly broadened the ambit of the order dated 15.10.2018. The committee overlooked that the distribution of the rentals/receivables was property of the lender and therefore, fell outside the scope of any direction of the 15th October 2018 order. The borrower was not entitled to any reliefs as claimed in I.A. No 2196/ 2020[7].

17. It was contended by HDFC that the transfer of ownership of a portion of the rent receivables by IL&FS in its favour was sufficient to pay the principal and interest whenever it became due in terms of the Facility Agreement. It was not the entire rent receivables but only a portion of the same sufficient to cover the principal and interest, was assigned. The balance portion was not assigned; it continues to be owned by IL&FS. The borrower hence continues to have title and interest in the residual receivables which too was secured.

[..] (c) The Borrower agrees that the Receivables shall be exclusive property of the Lender for the purpose of secured repayment of the Facility and as such the Borrower will not make any further borrowing on the strength of the Receivables on being Borrower's property.

[7] Said IA was Filed for directions against Escrow Bank and lender seeking return of amount debited.

Analysis and Conclusions

18. For appreciation of the transaction (to determine whether the assignment or arrangement was a transfer, or security interest), it would be convenient to peruse portions of the impugned order, which reproduced the relevant conditions in the various documents.

19. The parties entered into a Master Facility Agreement (MFA) on 25.06.2018. The definition clause in the MFA, *inter alia,* defined [Cl. 2 (1)] "due date"; Clause 2 (aa) defined "repayment" and clause 2 (cc) defined "security". Per Clause 2 (cc), *"Security"* had to have the same *"meaning as described in Clause-8 of this Agreement and also described in the Schedule-III".* Likewise, secured property *inter alia,* included immovable property described in Schedule III. The MFA envisioned that the borrower (IL&FS) enters into an *escrow agreement "on such terms as agreed by the lender. The power was to give irrevocable instructions to Escrow Bank. Clause 8 of the MFA deals with the 'security interest'."* Clause 8(8.1) is as follows:

> *"8. SECURITY INTEREST- DESCRIPTION/CREATION/PERFECTION*
> *8.1. The Borrower create Security Interest in such form and manner as instructed by Lender on the asset/property more particularly described in Schedule-III to this Agreement as the principal Security for securing the repayment of the Facility.*
> *The Borrower hereby unconditionally and irrevocably undertakes and confirms to create security interest on the said Secured Property in favour of the Lender and perfect the security creation as mentioned herein above in favour of the Lender in such form and manner as may be deem fit by Lender within 6 months from the date of first disbursement of the Facility. The Company further undertakes and confirms to open an Escrow Account within 30 days of the first disbursement of the Facility for the assignment of receivables arising/accruing from the TIFC Property and creating charge on the said Escrow Account in manner and form as made be deem fit by Lender."*

20. Clause 13 of the MFA provided for 'Assignment/Transfer'. Clause 13.1 of MFA is as follows:

> *"13. ASSIGNMENT/TRANSFER*
> *13.1. The Borrower shall not assign or transfer all or any of its rights, benefits or obligations under the Facility Agreement and the Transaction Documents without the approval of Lender. Lender may, at any time, assign*

> *or transfer all or any of its rights, benefits and obligations under the Facility Agreement and the Transaction Documents. Notwithstanding any such assignment or transfer, the Borrower shall, unless otherwise notified by Lender, continue to make all payments under the Facility Agreement to Lender and all such payments when made to Lender shall constitute a discharge to the Borrower from its liabilities only to the extent of such payments."*

Clause 15 covers 'Event of Default'. Clause 15.2 deals with 'Consequence of Default and remedies'. Schedule-1 of the MFA provides for 'Special Conditions for Rental Discounting. 'Receivables' is defined in Clause 1 of Schedule -I of the MFA in the following words:

> *"Receivables" shall mean and include gross income and revenue derived from the operation of Client's Contracts and shall include Deferred Receivables as stated in Appendix-1."*

21. Clause 4 of Schedule-1 of the MFA deals with 'Borrower's Contracts Specific Covenants'. Clauses 4(c) and Clause 5 (a), (b) and (c) provide as follows:

> *"4. [..] (c) The Borrower shall not alter, change or modify the terms of the Borrower's Contracts in so far as it relates to such terms which would have an adverse effect or impact on the Receivables and/or which shall otherwise detrimentally effect the Lender's interest in the Secured Property and income thereof."*
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> *"5. SECURITY AND REPAYMENT SPECIFIC COVENANTS*
> *a) The Borrower agrees that the Facility shall be secured by exclusive security interest on the Receivables in such mode and manner as deemed fit and desired by the Lender.*
> *b) The Borrower shall, on execution of this Facility Agreement, assign the Receivables in favour of the Lender on such terms as would be entered into between the Borrower and the Lender and pursuant thereto shall execute a Power of Attorney and Assignment and Management Agreement in line with the draft enclosed herewith in Appendix-3 to the Special Conditions.*
> *c) The Borrower agrees that the Receivables shall be exclusive property of the Lender for the purpose of secured repayment of the Facility and as such the Borrower will not make any further borrowing on the strength of the Receivables as being Borrower's Property."*

22. An 'Escrow Account Agreement' was also entered between the lender and the borrower on the same date under which the borrower has to open an Escrow Account with the Escrow Bank. Recital (C) of the Escrow Account Agreement provided:

"(C) The Borrower has agreed that, the payments to be collected/received by the Borrower from the clients of Business Service Centre/License/Lessee of various Units/properties (hereinafter referred to as "the said Units") built and/or to be built and leased/to be leased on the Secured Property detailed in Schedule B hereunder (hereinafter called "the said Property") for/against which the Facility granted/to be granted by Lender as per the Offer Letter and Facility Agreement, shall be credited to the said Escrow Account (hereinafter referred to as "the Receivables") and the Lender shall on satisfaction of the condition as described in Item No. 6 of Schedule A hereunder, adjust all the amounts to be paid by the Borrower to the Lender under the Facility Agreement, from time to time, out of the amounts credited in the said Escrow Account, and permit the transfer in the Designated account of the Borrower opened with the Escrow Bank, the amount as mentioned in Item No. 7 of Schedule A out of the remaining balance in the said Escrow Account after such adjustment as agreed hereunder."

Clause-3 of the Escrow Account Agreement provides 'Bank's Covenants' which reads as follows:

"3. BANK'S COVENANTS:
(a) The Escrow Bank hereby agrees to act as such and to accept all monies to be delivered to or held in the Escrow Account, pursuant to the terms and conditions of this agreement. This Escrow Bank shall hold and safeguard the Escrow Account, during the terms of this Agreement and shall hold all cash in the Escrow Account, at the request of the Borrower and to safeguard the repayment of the Facility and for the benefit of the Borrower and the Lender in accordance with the terms mentioned herein.
(b) The Escrow Bank shall not be required to verify and ensure that the money(ies) deposited is the Receivables and all money(ies) deposited at any time in any quantum should be treated as the Receivables.
(c) The Escrow Bank agreed that during the currency of the term of this Agreement as may be amended from time to time, the Escrow Bank shall ensure that the Escrow Account is operated and maintained as per the terms set out herein and shall not permit any deviation, without the written consent of the Lender.
(d) The Escrow Bank agrees that all money(ies) received by it under this Agreement shall, until transferred in accordance with this Agreement, be held in trust for the purposes for which they were received, and shall be segregated from other accounts of the constituents of the Escrow Bank and from the funds and Property of the Escrow Bank, in accordance with the banking law and practice.
(e) The Bank shall transfer such amounts to the account of the Borrower which are in excess of the minimum balance required to be maintained in the Escrow Account in accordance with the terms stated herein."

23. Clause 4(b) of the Escrow Account Agreement deals with 'Operation and Maintenance'. Clause 4(a), (c) and (e) provides as follows:

> *"4. OPERATION AND MAINTENANCE*
> *(a) The Borrower agrees that, the payments to be collected/received by the Borrower from the Business Service Centre/Licensee/lessee of various Units/properties built and/or to be built and leased/to be leased on the Property which is more particularly described in Schedule of the said Facility Agreement (hereinafter called "the said Property") for/against which the Facility granted/to be granted by Lender as per the Offer Letter and Facility Agreement, shall be credited to the said Escrow Account (hereinafter referred to as "the Receivables") and the Lender shall on satisfaction of the condition(s) as described in Item No. 6 of Schedule A hereunder, adjust all the amounts to be paid by the Borrower to the Lender under the Facility Agreement, from time to time, out of the amounts credited in the said Escrow Account, and transfer to the Designated Account of the Borrower, the amount as mentioned in Item No. 7 of Schedule A out of the remaining balance in the said Escrow Account after keeping the minimum balance in the Escrow Account.*
> *(c) The Lender shall be entitled to instruct the Escrow Bank from time to time to transfer amounts from the Escrow Account including as stated hereinabove. The Lender shall appropriate these monies towards the repayment of the Facility, as and when the same is due and payable in full together with all other amounts payable under the Facility Agreement.*
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> *(e) The Borrower hereby irrevocably authorizes the Escrow Bank to pay and to transfer the money(ies) received in the Escrow Account to the Lender as per the terms and conditions agreed in the Offer Letter, Facility Agreement and this Agreement as may be applicable from time to time."*

24. An *Assignment and Administration Agreement* was also entered on the same date i.e., 25.06.2018 with the lender and borrower. This agreement provided for the assignment of the receivables by the borrower to the lender. Recital clause 3 is as follows:

> *"3. It has been agreed that the authorised indebtedness incurred by the Borrower in terms of the Facility Agreement by way of the Facility together with the interest thereon shall be payable from the gross income and revenue to be derived from the operation of the Business Centre Services Agreements/Lease/Leave and License Agreement/s as more particularly detailed in the Schedule-1 ("Borrower's Contracts") to this Agreement (hereinafter referred to as "Receivables").*
> *Xxxx*

Further Clause 1 of the Assignment and Administration Agreement reads as:

> *1. Assignment and Pledge of Receivables*
> *All the Receivables derived/to be derived from the operation of the Borrower's Contracts, sufficient portion of which, to pay the principal and interest as and when the same shall become due in terms of the said Facility Agreement, is hereby assigned and pledged and shall be set aside for that*

> *purpose and this Assignment and Pledge shall extend to and include any assessments that may be levied pursuant to Clause 4(a) hereof."*

25. A Power of Attorney document too was executed by IL& FS on 25.06.2018. By the Power of Attorney, the borrower *irrevocably nominated*, constituted and appointed HDFC as its true and lawful attorney on behalf of the borrower. By recital clause 2 of the said Power of Attorney document, HDFC could *"appropriate the proceeds received towards the discharge of the Facility"*; recital clause 5 enabled the lender to put to use, the secured property and give the business centre, etc, on leave, license or lease basis in the event the borrower's existing arrangements were terminated or ended. Recital clause 7 enabled HDFC to receive all rents and all other sums in respect of such premises.

26. The effect of these documents is what the court is concerned with. It is a known principle of contract interpretation, that the substance of a document, is discernible from its terms, rather than the label or its nomenclature. In *Yellapu Uma Maheswari and Ors. vs. Buddha Jagadheeswararao & Ors.*[8], the court held:

> *"It is well settled that the nomenclature given to the document is not decisive factor but the nature and substance of the transaction has to be determined with reference to the terms of the documents and that the admissibility of a document is entirely dependent upon the recitals contained in that document but not on the basis of the pleadings set up by the party who seeks to introduce the document in question."*

In *Assam Small Scale Ind. Dev. Corp. Ltd. & Ors. v. J.D. Pharmaceuticals & Anr*[9] the court stated as follows:

> *"The nature of transaction is required to be determined on the basis of the substance there and not by the nomenclature used. Documents are to be construed having regard to the contexts thereof wherefor 'labels' may not be of much relevance."*

This was also stated in *V. Lakshmanan v. B.R. Mangalagiri & Ors*[10] (that the *"nomenclature or label given in the agreement as advance is not either decisive*

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[8] 2015 (11) SCR 849
[9] 2005 (4) Suppl. SCR 232
[10] 1994 Supp (6) SCR 561

or immutable."). This principle of substance, over the form, was followed in *Super Poly Fabriks Ltd. vs. Commissioner of Central Excise, Punjab*[11].

27. That one document is styled or described in a certain manner, or that it uses a certain expression, or term is not conclusive; it is the effect of all the terms, of the documents, which bring out the true purport and intention of the parties. Likewise, another allied principle of contract interpretation, is that where the transaction is not the subject of one document, but several, which refer to each other, or a reading of all, describe the entire contract, then, it is open to the court to consider all of them together. This principle was stated in *S. Chattanatha Karayalar v The Central Bank of India & Ors*[12] wherein this court held that:

> *"The principle is well-established that if the transaction is contained in more than one document between the same parties they must be read and interpreted together and they have the same legal effect for all purposes as if they are one document. In Manks v. Whiteley, [1912] 1 Ch. 735 Moulton, L.J. stated :*
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> *"Where several deeds form part of one transaction and are contemporaneously executed they have the same effect for all purposes such as are relevant to this case as if they were one deed. Each is executed on the faith of all the others being executed also and is intended to speak only as part of the one transaction, and if one is seeking to make equities apply to the parties they must be equities arising out of the transaction as a whole."*

28. Undoubtedly as argued on behalf of IL&FS, there are certain conditions in the MFA – [clauses 2 (cc) and 2 (dd)] which define "security" and "security interest". Read along with clause 8.1 and Schedule III, these would lead one to infer those receivables or rents that which IL&FS is entitled to, form the security for the advance extended to it by the lender. Nevertheless, as discussed earlier, these conditions cannot be read in isolation because the MFA itself adverts to other documents - all of which were executed by the parties contemporaneously. The condition in the Assignment and Administration agreement which [was also executed on the same day, i.e. 25.06.2018], clearly indicates that rents payable to

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[11] 2008 (6) SCR 1076
[12] 1965 (3) SCR 318

IL&FS stood unconditionally assigned to HDFC. The use of the expression "pledge" in this context cannot be made much of. This is because the assignment is not hedged with any condition; it entitles HDFC to appropriate the proceeds, to the extent of liability of IL&FS.

29. The Lease Rental Discounting (LRD) arrangement - a new kind of financial agreement by which a banker allows credit facilities to a commercial property owner, has the flexibility of ensuring that the asset owner is given access to credit. The dominant condition is that a substantial portion or the entire rent or receivables which the owner would be entitled to are made- sold or assigned, absolutely to the creditor bank. This is with the intention that the borrower's liabilities are discharged automatically from the proceeds payable in respect of the property. Such amounts virtually are by way of unsecured debts. In other words, future rent payable is actually an unsecured debt that the owner/borrower would have been otherwise entitled to claim, but for the assignment or transfer, to the lender/creditor. Because the owner is a debtor of the bank, the latter becomes the creditor of the tenant or the lessee as the case may be. This arrangement has the advantage of virtually *ring fencing* the creditor from the eventuality of bankruptcy or an insolvency event, which the borrower might be exposed to. In fact, the Reserve Bank of India (RBI) has formulated guidelines which regulate all banks' conduct in regard to the LRD facilities and they extends to a class of borrowers who own commercial properties.

30. It would also be relevant at this stage to notice that clauses 1 and 4(c) and (j) of the Assignment Agreement categorically set aside the rents payable to IL&FS, in favour of the assignee, i.e. the lender bank. Furthermore, the Escrow Agreement records (through clause 2) that all receivables to which the borrower would be entitled would be deposited in the escrow account. Furthermore, the lessees or tenants of the properties owned by the borrower be instructed to pay such an amount in the escrow account itself. Clause 4(c) of the Escrow Agreement is more categorical; it authorizes only the lender (i.e., HDFC) to instruct the

escrow bank to transfer the amounts and permits the bank to appropriate amounts towards adjustment arising out of the Facility liability. In the same line, the General Power of Attorney (GPA) document (especially clauses 2 and 5) categorically entitles the lender/HDFC to appropriate the proceeds deposited towards the discharge of the borrower's liability under the Facility. Clause 5 similarly entitles access to the lease rent. Furthermore, the bank/lender virtually steps into the shoes of the borrower and by the terms of the GPA is also authorized to let out the premises in case due to an unforeseen situation an existing lessee or tenant vacates it or is unable to pay.

31. The borrower is correct in arguing that the expression LRD is nowhere used in any of the documents executed at the time. Yet, as discussed earlier in the judgment, it is the nature and substance of the transaction which is determinative. An application of the rule that all the contemporaneous documents are to be read together, to discern the true purport of the contract, it is evident that what the parties intended was the assignment of the debt, i.e., the rents payable.

32. It would at this stage, be necessary to consider whether such amounts payable on a future date are to be considered property and, therefore, capable of transfer. Under the Transfer of Property Act, 1882, Section 5 states generally that all manner of property is capable of transfer. Section 6 lays out what are the kinds of properties or actions which are not transferable: these are *"personal claims"* in the nature of tortious claims and "choices in action" cannot be transferred.

33. "Actionable claim" is defined by the Transfer of Property Act, 1882 (hereafter "TPA") in the following manner:

> ***"Section 3 Interpretation clause****....*
> *"actionable claim" means a claim to any debt, other than a debt secured by mortgage of immoveable property or by hypothecation or pledge of moveable property, or to any beneficial interest in moveable property not in the possession, either actual or constructive, of the claimant, which the Civil Courts recognise as affording grounds for relief, whether such debt or beneficial interest be existent, accuring, conditional or contingent:"*

Thus, in terms of Section 3 of the TPA, actionable claim means (a) claim to an unsecured *debt* (other than a debt secured by mortgage of immovable property, hypothecation or pledge (b) beneficial interest in a movable property. Both these are recognised as enforceable. Other claims, however, do not fall within the expression "actionable claim".

34. Sections 130, 131 and 132 of TPA, deal with transfer of actionable claims:

> ***"130. Transfer of actionable claim***—
> *(1) The transfer of an actionable claim [whether with or without consideration] shall be effected only by the execution of an instrument in writing signed by the transferor or his duly authorised agent, shall be complete and effectual upon the execution of such instruments, and thereupon all the rights and remedies of the transferor, whether by way of damages or otherwise, shall vest in the transferee, whether such notice of the transfer as is hereinafter provided be given or not: Provided that every dealing with the debt or other actionable claim by the debtor or other person from or against whom the transferor would, but for such instrument of transfer as aforesaid, have been entitled to recover or enforce such debt or other actionable claim, shall (save where the debtor or other person is a party to the transfer or has received express notice thereof as hereinafter provided) be valid as against such transfer.*
> *(2) The transferee of an actionable claim may, upon the execution of such instrument of transfer as aforesaid, sue or institute proceedings for the same in his own name without obtaining the transferor's consent to such suit or proceeding and without making him a party thereto.*
> *Exception —Nothing in this section applies to the transfer of a marine or fire policy of insurance or affects the provisions of section 38 of the Insurance Act, 1938 (4 of 1938).* <u>*Illustrations*</u>
> *(i) A owes money to B, who transfers the debt to C. B then demands the debt from A, who, not having received notice of the transfer, as prescribed in section 131, pays B. The payment is valid, and C cannot sue A for the debt.*
> *(ii) A effects a policy on his own life with an Insurance Company and assigns it to a Bank for securing the payment of an existing or future debt. If A dies, the Bank is entitled to receive the amount of the policy and to sue on it without the concurrence of A's executor, subject to the proviso in sub-section (1) of section 130 and to provisions of section 132.*
> ***Section 131. Notice to be in writing signed****- Every notice of transfer of an actionable claim shall be in writing, signed by the transferor or his agent duly authorized in this behalf, or, in case the transferor refuses to sign, by the transferee or his agent, and shall state the name and address of the transferee."*

35. In *Mewa Lal and Ors. vs. Tara Rani*[13] it was held that:

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[13] AIR 1973 All 165

> *"Actionable claim can be transferred only by execution of an instrument in writing signed by the transferor or his duly authorised agent, whereas under Section 54 of the Transfer of Property Act, "Sale" is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised. This payment of price, in full or in part or promised is by the purchaser to the seller. The sale of a property of a value of more than Rs. 100/- has to be compulsorily registered, whereas, an actionable claim of any amount can be had only by execution of an instrument. Thus, the sale of a property and sale of an actionable claim are two different things and one has no relation with the other. As the transfer of an actionable claim is not done by a registered deed…"*

36. This court has ruled, in *Sunrise Associates vs Govt. Of NCT of Delhi*[14] that:

> "*Distinct elements are deducible from the definition of 'actionable claim' in Section 3 of the Transfer of Property Act. An actionable claim is of course as its nomenclature suggests, only a claim. A claim might connote a demand, but in the context of the definition it is a right, albeit an incorporeal one. Every claim is not an actionable claim. It must be a claim either to a debt or to a beneficial interest in movable property. The beneficial interest is not the movable property itself, and may be existent, accruing, conditional or contingent. The movable property in which such beneficial interest is claimed, must not be in the possession of the claimant. An actionable claim is therefore an incorporeal right.*
> ******
> *An actionable claim would include a right to recover insurance money or a partner's right to sue for an account of a dissolved partnership or the right to claim the benefit of a contract not coupled with any liability (see Union of India v. Sarada Mills (1973 SCR (2) 484).. A claim for arrears of rent has also been held to be an actionable claim State of Bihar v Maharajadhiraja Sir Kameshwar Singh 1952 SCR 889, 910). A right to the credit in a provident fund account has also been held to an actionable claim (Official Trustee, Bengal v L. Chippendale AIR 1944 (Cal.) 335; Bhupathi Mohan Das v Phanindra Chandra Chakravarthy & Anr. AIR 1935 (Cal.) 756).*"

The issue involved in that case was whether the sale of lottery tickets, amounted to the sale of goods, attracting a sales tax levy. The court held that the sale did not involve goods, *but the sale of actionable claim:*

> *"The question is, what is this right which the ticket represents? There can be no doubt that on purchasing a lottery ticket, the purchaser would have a claim to a conditional interest in the prize money which is not in the purchaser's possession. The right would fall squarely within the definition of an actionable claim and would therefore be excluded from the definition of 'goods' under the Sale of Goods Act and the sales tax statute [..]*"

[14] 2006 Supp(2) SCR 421

The court characterised the rights contained in a lottery ticket, and that they represented a right in *futuro,* the sale of which amounted to the sale of an actionable claim:

> *"The right to participate being an inseparable part of the chance to win is therefore part of an actionable claim. The authorities considered by the Court in H.Anraj do not support the sub division of the chance to win into a further distinct right to participate. The Court sought to draw the distinction between the chance to win and the right to participate by describing the former as a right 'in futuro' and the latter as "in praesenti". Both the rights are in fact 'in futuro'. In any event the distinction is immaterial to the question as to whether the subject matter of the transfer is an actionable claim, since an actionable claim may be existent, accruing, conditional or contingent."*

37. In another decision, *Noor & Ors. v G.S. Ibrahim (Dead) by LRs*[15] it was held that:

> *"If right to recover the arrears is assigned, then the transferee/landlord can recover those arrears as rent and if not paid maintain a petition for eviction under the rent laws for those arrears as well."*

38. In another decision, *ICICI Bank v Official Liquidator of APS Star Industries Ltd*[16] this court held that:

> *"rights under a contract are always assignable unless the contract is personal in its nature or unless the rights are incapable of assignment, either under the law or under an agreement between the parties. A benefit under the contract can always be assigned. That, there is, in law, a clear distinction between assignment of rights under a contract by a party who has performed his obligation thereunder and an assignment of a claim for compensation which one party has against the other for breach of contract.*
> *19. In the case of Camdex International Bank Ltd v Bank of Zambia reported in (1998) Q.B. 22 (CA) the following observation which is relevant to the present case needs to be quoted:*
> *"The assignment of a debt will not be contrary to public policy solely on the grounds that the assignee has purchased the debt for a considerably discounted price or because that price is only payable after a period of credit. Nor will the assignment be contrary to public policy simply because the assignee may make a profit on the transaction at the end of the day. If there was no prospect of a profit, Hobhouse LJ observed, commercial entities would never purchase debts."*
> *20. Similarly, the following proposition in Chitty on Contracts, 27th edn. (1994) at para 19.027 is relevant to be noted.*
> *"It is also well established that a claim to a simple debt is assignable even if the debtor has refused to pay. The practice of assigning or `selling' debts*

[15] 2003 Supp (2) SCR 204
[16] 2010 (12) SCR 644

> *to debt collecting agencies and credit factors could hardly be carried on if the law were otherwise. "*
> *21. In view of the above exposition of law, we find that under the impugned Deed of Assignment only the Account Receivables in the books of ICICI Bank Ltd. has been transferred to Kotak Mahindra Bank Ltd. The obligations of ICICI Bank Ltd. towards its borrower(s) (customer) under the loan agreement secured by deed of hypothecation/mortgage have not been assigned by ICICI Bank Ltd. to the assignee bank, namely, Kotak Mahindra Bank Ltd. Hence, it cannot be said that the impugned Deed of Assignment is unsustainable in law. The obligations referred to in the impugned Deed of Assignment are the obligations, if any, of ICICI Bank Ltd. towards Kotak Mahindra Bank Ltd. (assignee) in the matter of transfer of NPAs."*

39. The earlier discussion in this judgment, about the true nature of the transaction in this case led this court to hold that it is an assignment and not a pledge. The reference to pledge, in some places in the documents, did not undermine the fact that the rents payable to and receivable by the lender (IL&FS) stood absolutely assigned to HDFC. The provisions of the TPA and the discussion of the various authorities support the conclusion that there can be a transfer of debts, which are defined as actionable claims. In the present case, the rents payable by IL&FS tenants, lessees and licensees are debts, which stood transferred to the creditor, i.e. HDFC Bank. Therefore, the NCLAT's conclusions are unexceptionable; the challenge to its correctness, therefore fails.

40. For the foregoing reasons, this court holds that there is no merit in the appeal. It is accordingly dismissed, there shall be no order on costs. Pending application(s), if any, shall also stand disposed of.

….....J.
[S. RAVINDRA BHAT]

….....J.
[DIPANKAR DATTA]

NEW DELHI;
OCTOBER 19, 2023.