

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

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Date of decision: 18.05.2010

+ WP (C) No.3401 of 2010 & CM No.6832 of 2010

SHRI PRAKASH G. DUDANI

...PETITIONER

Through: Mr. Praveen Aggarwal &
Mr. Pramod Kumar, Advocates.

Versus

UNION OF INDIA & ORS.

...RESPONDENTS

Through: Mr. Rakesh Tiku, Advocate for R-1.

CORAM:

HON'BLE MR. JUSTICE SANJAY KISHAN KAUL

HON'BLE MR. JUSTICE VALMIKI J. MEHTA

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| 1. | Whether the Reporters of local papers
may be allowed to see the judgment? | No |
| 2. | To be referred to Reporter or not? | No |
| 3. | Whether the judgment should be
reported in the Digest? | No |

SANJAY KISHAN KAUL, J. (Oral)

CM No.6833/2010

Allowed subject to just exceptions.

WP (C) No.3401/2010 & CM No.6832/2010

1. Dagmar (I) Enterprises is stated to be a partnership firm with the petitioner and respondent No.3 as partners. The partnership took a loan from respondent No.2 bank. The loan was secured by an equitable mortgage created by the petitioner through deposit of title

documents in respect of farmhouse No.66, Friends Agricultural Pvt. Ltd., Village Thather, Tehsil Sohna, District Gurgaon, Haryana. There were defaults in the repayment of dues and thus respondent No.2 bank filed proceedings for recovery of Rs. 2,91,35.055.00 with *pendente lite* and future interest and costs against the defaulting parties including the petitioner before the DRT in the year 2000.

2. On the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as the said Act) coming into force respondent No.2 bank served the petitioner with a notice dated 3.8.2006 under Section 13 (2) of the said Act. As per notice the petitioner was called upon to pay the amount due as on 30.6.2006, i.e. Rs.9,61,58,236.00 together with interest from 1.7.2006 till date of payment within sixty (60) days from the date of notice failing which the bank would be constrained to exercise its right of enforcement of security interest. The notice was duly served on the petitioner on 8.8.2006 and in view of the failure of the petitioner to repay the amount, on 15.12.2006 respondent No.2 bank exercised powers under Section 13 (4) of the said Act and took over possession of the property putting its notice board on the land. Thereafter communication ensued from the petitioner calling upon the bank to remove its possession but to no avail and a 'Possession and Tender-cum-Auction Sale Notice' was issued on 30.12.2006 in an English newspaper 'The Statesman'.
3. The petitioner filed an application, being SA No.2/2007, under Section 17 of the said Act before the DRT, Delhi against the proposed auction but this application was dismissed on 22.6.2007.

The petitioner sought to challenge that order by filing CM (M) No.984/2007 under Article 227 of the Constitution of India before this Court on the ground that the pre-deposit of 50 per cent of the amount of debt claimed in notice under Section 13 (2) of the said Act in terms of prescription under Section 18 of the said Act made the petitioner remediless as he was not in a position to deposit the said amount. This writ petition was, however, dismissed on 27.7.2007 as the alternative remedy of the appeal was available before the Appellate Tribunal.

4. The petitioner thereafter approached the appellate tribunal (DRAT) under Section 18 of the said Act aggrieved by the order of the DRT dated 22.6.2007 and also filed an application under proviso to Section 18 (1) of the said Act for waiver of pre-deposit amount of 50 per cent. An order was passed by the DRAT on 12.3.2010 directing the petitioner to make a pre-deposit of 25 per cent of the amount claimed by the respondent bank. The petitioner failed to deposit this amount resulting in the order of dismissal of the appeal on 15.4.2010.
5. Learned counsel for the petitioner in the present writ petition filed under Article 226 of the Constitution of India seeks to challenge the requirement of at least 25 per cent of pre-deposit as per the third proviso to Section 18 (1) of the said Act as onerous, unreasonable and arbitrary and therefore ultra vires under Article 14 of the Constitution of India and for restraining the respondent No.2 bank from taking further action under the said Act.
6. In order to appreciate the controversy we reproduce Section 18 of the said Act, which reads as under:

“18. Appeal to Appellate Tribunal

(1) Any person aggrieved, by any order made by the Debts Recovery Tribunal under section 17, may prefer an appeal alongwith such fee, as may be prescribed to the Appellate Tribunal within thirty days from the date of receipt of the order of Debts Recovery Tribunal:

PROVIDED that different fees may be prescribed for filing an appeal by the borrower or by the person other than the borrower:

PROVIDED FURTHER that no appeal shall be entertained unless the borrower has deposited with the Appellate Tribunal fifty per cent. of the amount of debt due from him, as claimed by the secured creditors or determined by the Debts Recovery Tribunal, whichever is less:

PROVIDED ALSO that the Appellate Tribunal may, for the reasons to be recorded in writing, reduce the amount to not less than twenty-five per cent. of debt referred to in the second proviso.

(2) Save as otherwise provided in this Act, the Appellate Tribunal shall, as far as may be, dispose of the appeal in accordance with the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993) and rules made thereunder.”

(emphasis supplied)

7. Learned counsel for the petitioner seeks to rely upon the observations of the Supreme Court in Mardia Chemical Ltd. Vs. Union of India & Ors. (2004) 4 SCC 311. Learned counsel does admit that the question being examined at that stage was in respect of the validity of such pre-deposit under Section 17 of the said Act which is the first judicial adjudication of the notice sent under Section 13 (2) of the said Act. It is in that context that the Supreme Court held that such pre-deposit cannot be sustained. This has resulted in the amendment of the said Act but the requirement of pre-deposit is provided at the appellate stage under Section 18 of the said Act. Learned counsel referred to para 64 of the said judgement which noticed as to why the

pre-deposit had made the remedy illusory. Learned counsel submits that there were various reasons for the same including the imposition at the first instance stage. Para 64 of the aforesaid judgement reads as under:

“64. The condition of pre-deposit in the present case is bad rendering the remedy illusory on the grounds that: (i) it is imposed while approaching the adjudicating authority of the first instance, not in appeal, (ii) there is no determination of the amount due as yet, (iii) the secured assets or their management with transferable interest is already taken over and under control of the secured creditor, (iv) no special reason for double security in respect of an amount yet to be determined and settled, (v) 75% of the amount claimed by no means would be a meagre amount, and (vi) it will leave the borrower in a position where it would not be possible for him to raise any funds to make deposit of 75% of the undetermined demand. Such conditions are not alone onerous and oppressive but also unreasonable and arbitrary. Therefore, in our view, sub-section (2) of Section 17 of the Act is unreasonable, arbitrary and violative of Article 14 of the Constitution.”

8. In our considered view we are unable to accept the said interpretation of the judgement for the reason that the first clause itself begins with the aspect of imposition of this pre-deposit at the first instance and “not in appeal”. The other aspects have to be examined in that context.
9. We may notice in this behalf that the issue of requirement of pre-deposit at the appellate stage has been considered in many judgements dealing with different statutes. In the case of requirement of deposit of 100 per cent of the disputed tax for assessment made under the Delhi Municipal Corporation Act, 1957 the challenge laid was rejected by a Full Bench of this Court and the said judgement was sustained by the Supreme Court in Shyam Kishore Vs. MCD

(1993) 1 SCC 22. It would be useful to extract the following paragraphs:

“31. In *Ganga Bai v. Vijay Kumar*¹, Chandrachud, J. (as His Lordship then was) held that: (SCC p. 397, para 15)

“There is a basic distinction between the right of suit and the right of appeal. There is an inherent right in every person to bring a suit of a civil nature ... (but) the right of appeal inheres in no one and therefore an appeal for its maintainability must have the clear authority of law.”

32. In *Anant Mills Co. Ltd. v. State of Gujarat*² which is an appeal from the decision of the Gujarat High Court in *Anant Mills Co. Ltd. v. State of Gujarat*³ the Supreme Court had occasion to consider vires of Section 406(2)(e) of the Bombay Provincial Municipal Corporations Act (Bombay Act 59 of 1949) as amended by Gujarat Acts 8 of 1968 and 5 of 1970 to the entertainment of the appeal by a person who had not deposited the amount of tax due from him and who had not been able to show to the appellate Judge that the deposit of the amount would cause him undue hardship arising out of his own omission and default. A disability or disadvantage arising out of a party's own default or omission cannot be taken to be tantamount to the creation of two classes offensive to Article 14 of the Constitution, especially when that disability or disadvantage operates upon all persons who make the default or omission. The High Court had taken the view that there was a discrimination between an appellant who deposited the tax and an appellant who did not, which is the necessary consequence of the condition requiring deposit of the amount of tax, which was unreasonable and hit by Article 14 of the Constitution. Setting aside the view of the Gujarat High Court, Khanna, J. speaking for the Supreme Court at pages 246 to 248 observed as under:

“After hearing the learned Counsel for the parties, we are unable to subscribe to the view taken by the High Court. Section 406(2)(e) as amended states that no appeal against a rateable value or tax fixed or charged under the Act shall be entertained by the Judge in the case of an appeal against a tax or in the case of an appeal made against a rateable value after a bill for any property tax assessed upon such value has been presented to the appellant, unless the amount claimed from the appellant has been deposited by him with the Commissioner. According to the proviso to the above clause, where in any particular case the Judge is of opinion that the deposit of the amount by the appellant will cause undue hardship to him, the Judge may in his discretion dispense with such deposit or part thereof, either unconditionally or subject

to such conditions as he may deem fit. The object of the above provision apparently is to ensure the deposit of the amount claimed from an appellant in case he seeks to file an appeal against a tax or against a rateable value after a bill for any property tax assessed upon such value has been presented to him. Power at the same time is given to the appellate Judge to relieve the appellant from the rigour of the above provision in case the Judge is of the opinion that it would cause undue hardship to the appellant. The requirement about the deposit of the amount claimed as a condition precedent to the entertainment of an appeal which seeks to challenge the imposition or the quantum of that tax, in our opinion, has not the effect of nullifying the right of appeal, especially when we keep in view the fact that discretion is vested in the appellate Judge to dispense with the compliance of the above requirement. All that the statutory provision seeks to do is to regulate the exercise of the right of appeal. The object of the above provision is to keep in balance the right of appeal, which is conferred upon a person who is aggrieved with the demand of tax made from him, and the right of the Corporation to speedy recovery of the tax. The impugned provision accordingly confers a right of appeal and at the same time prevents the delay in the payment of the tax. We find ourselves unable to accede to the argument that the impugned provision has the effect of creating a discrimination as is offensive to the principle of equality enshrined in Article 14 of the Constitution. It is significant that the right of appeal is conferred upon all persons who are aggrieved against the determination of tax or rateable value. The bar created by Section 406(2)(e) to the entertainment of the appeal by a person who has not deposited the amount of tax due from him and who is not able to show to the appellate Judge that the deposit of the amount would cause him undue hardship arises out of his own omission and default. The above provision, in our opinion, has not the effect of making invidious distinction or creating two classes with the object of meting out differential treatment to them it only spells out the consequences flowing from the omission and default of a person who despite the fact that the deposit of the amount found due from him would cause him no hardship, declines of his own volition to deposit that amount. The right of appeal is the creature of a statute. Without a statutory provision creating such a right the person aggrieved is not entitled to file an appeal. We fail to understand as to why the Legislature while granting the right of appeal cannot impose conditions for the exercise of such right. In the absence of any special reasons there appears to be no legal or constitutional impediment to the imposition of such conditions. It is permissible, for example, to prescribe a condition in criminal cases that unless a convicted person is released on bail, he must surrender to custody before his appeal against the

sentence of imprisonment would be entertained. Likewise, it is permissible to enact a law that no appeal shall lie against an order relating to an assessment of tax unless the tax had been paid. Such a provision was on the statute book in Section 30 of the Indian Income Tax Act, 1922. The proviso to that section provided that ‘... no appeal shall lie against an order under sub-section (1) of Section 46 unless the tax had been paid’. Such conditions merely regulate the exercise of the right of appeal so that the same is not abused by a recalcitrant party and there is no difficulty in the enforcement of the order appealed against in case the appeal is ultimately dismissed. It is open to the Legislature to impose an accompanying liability upon a party upon whom a legal right is conferred or to prescribe conditions for the exercise of the right. Any requirement for the discharge of that liability or the fulfilment of that condition in case the party concerned seeks to avail of the said right is a valid piece of legislation, and we can discern no contravention of Article 14 in it. A disability or disadvantage arising out of a party’s own default or omission cannot be taken to be tantamount to the creation of two classes offensive to Article 14 of the Constitution, especially when that disability or disadvantage operates upon all persons who make the default or omission.”

33. Similarly in *Vijay Prakash D. Mehta/Shri Jawahar D. Mehta v. Collector of Customs (Preventive), Bombay*⁴, the Supreme Court had occasion to deal with the right of appeal created under Sections 129-A and 129-B of the Customs Act, 1962. The appeal provided was against the duty demanded or penalty levied under the Customs Act. The provision for appeal contemplated a condition for deposit of the duty or the penalty pending the appeal. Same plea was taken that the provision for deposit of duty or penalty pending appeal whittled down the appellant’s right of appeal and is ultra vires. The Supreme Court speaking through Sabyasachi Mukharji, J. held as under:

“Right to appeal is neither an absolute right nor an ingredient of natural justice the principles of which must be followed in all judicial and quasi-judicial adjudications. The right to appeal is a statutory right and it can be circumscribed by the conditions in the grant.”

34. Reference may also be made to the decision of this Court in *Collector of Customs & Excise v. A.S. Bava*⁵. In this case Section 35 of the Central Excises and Salt Act, 1944 conferred a right of appeal which was sought to be whittled down by applying the provisions of Section 129 of the Sea Customs Act, 1878, containing a requirement of pre-deposit but with a power in the appellate authority to dispense with it in appropriate cases. This Court held that the attempt of the

Central Excise Act went beyond the powers conferred on the Central Government in this behalf.

35. Similar view was taken by Bharucha, J. (as His Lordship then was) in *Elora Construction Company v. Municipal Corporation of Greater Bombay*⁶ while dealing with the validity of Section 217 (as amended) of the Bombay Municipal Corporation Act (3 of 1988) wherein the right to appeal was similarly restricted, that too retrospectively. The restriction so imposed was challenged on the ground that it violated Article 19(1)(f) of the Constitution which argument was repelled by the learned Judge. The same view was taken by the Calcutta High Court in *Chatter Singh Baid v. Corporation of Calcutta*⁷ where the Calcutta High Court was concerned with the validity of Section 183(3-A) of the Calcutta Municipal Act (33 of 1951) and Chittatosh Mookerjee, J. observed as under:

“Merely because Section 183(3-A) impairs the right of appeal by imposing an onerous condition of deposit of consolidated rate payable up to the date of presentation of appeal on the valuation determined, it cannot be said that Section 183(3-A) is unfair, fanciful, oppressive and arbitrary. The said provision is also not repugnant to or inconsistent with other provisions for payment and recovery of consolidated rates contained in the Calcutta Municipal Act. The sub-section (3-A) of Section 183 does not make right of appeal under Section 183(1) of the Act nugatory or illusory.”

10. We have kept in mind that the very rationale in Mardia Chemical Ltd. case (supra) was the requirement of pre-deposit at the first adjudicatory stage. The condition provided for pre-deposit up to 25 per cent cannot be said to be arbitrary and illegal or violative of Article 14 of the Constitution of India especially keeping in mind the observations made by the Supreme Court in Shyam Kishore case (supra). We may also notice that as observed in the said case the power of the High Court under Article 226 of the Constitution of India is not taken away to interfere in an appropriate case. The challenge, thus, to the provisions of Section 18 of the said Act is without merit.

11. In the given facts of the case we find that the imposition of the condition of pre-deposit of 25 per cent cannot be said to be onerous or calling for exercise of jurisdiction under Article 226 of the Constitution of India. The present proceedings are only an endeavour to evade the liability of the petitioner and prolong the matter on one pretext or the other. Even before the appellate authority the matter kept pending for three (3) years without making any deposit.
12. The writ petition is dismissed with costs quantified at Rs.25,000.00. Rs.10,000.00 be paid to the Union of India and the remaining costs to be deposited with the Delhi High Court Mediation & Conciliation Centre in UCO Bank Account No.48852. At this stage learned counsel for respondent No.1/UOI states that the costs imposed for the benefit of respondent No.1 may be deposited with the Delhi High Court Law Library Fund. Costs to be deposited within fifteen (15) days.

SANJAY KISHAN KAUL, J.

MAY 18, 2010
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VALMIKI J. MEHTA, J.