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HIGH COURT OF DELHI AT NEW DELHI

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Judgment Reserved on : 10th July, 2010

Judgment Pronounced on: 13th September, 2010

+ WP(C) No.4653/2010

SATYAVOL VENKAT KRISHNA RAO & ORS. Petitioners
Through Mr. J.M. Bari with Ms. Shweta Bari,
Advocates

versus

UNION OF INDIA & ORS. Respondents
Through Ms. Maneesha Dhir with Ms. Preeti
Dalal and Mr. K.P.S. Kohli, Advs. for
R-1.

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE MANMOHAN

1. Whether reporters of the local papers be allowed to see the judgment? Yes
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

DIPAK MISRA, CJ

Invoking the jurisdiction of this Court under Article 226 of the Constitution of India, the petitioners have prayed for declaration of the second proviso to Section 18 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as 'the SARFAESI Act') as unconstitutional and further to issue a writ of certiorari to quash the order dated 28th June, 2010 passed by the Debts Recovery Appellate Tribunal, Delhi made in Inward No.293 of 2010.

Quite apart from the above, a prayer has been made to recast the proviso to Section 18.

2. The facts which are essentially to be stated for adjudication of this petition are that the petitioner No.1 is the director of the petitioner No.3, M/s PRK Exports Private Limited and the proprietor of the petitioner No.4, M/s Premier Overseas. A loan was granted to the petitioner No.1 by the respondent No.2, the HDFC Bank, under the LAP scheme to the tune of Rs.25 lakhs for which he had mortgaged certain properties.

3. On 13th April, 2007, the respondent bank enhanced the loan granted after reviewing all the parameters of performance and timely repayment of the dues towards the loan from the earlier amount. On 22nd December, 2007, the bank accepted a request for fresh loan to the petitioner No.1 based upon the need of fund on account of business expansion. A security agreement was entered into on 1st January, 2008 between the petitioner No.1 and the respondent No.2 bank whereby an equitable mortgage was created in respect of secured asset by depositing the sale deed dated 14th October, 2005 of the secured asset.

4. Be it noted, various averments have been made about the marital status between the petitioner No.1 and his wife, the respondent No.3 and the litigations that were initiated against each other which, we are disposed to think, are totally irrelevant for the present petition. As set forth, the respondent No.2 issued a demand notice on 13th June, 2009 under Section 13(2) of the SARFAESI Act claiming a sum of Rs.38,35,972/- towards dues

as on 8th June, 2009 in respect of the demand draft loan. The 3rd respondent obtained an ex parte order dated 6th July, 2009 from the Court of Metropolitan Magistrate (East), Karkardooma Courts, Shahdara under Section 23 of the Protection of Women from Domestic Violence Act, 2005 whereby the petitioner No.1 had been restrained from creating any third party interest in the secured asset. An application was moved by the respondent No.2 bank before the Additional Chief Metropolitan Magistrate (Special Acts) Central, Delhi under Section 14(2) of the SARFAESI Act for providing assistance to the bank to obtain possession of the secured asset in accordance with law. The receiver was appointed who was given a notice on 10th November, 2009 for taking possession of the secured asset.

5. As pleaded, the bank issued a demand notice on 13th November, 2009 under Section 13(2) of the SARFAESI Act claiming a sum of Rs.30,46,554.31 towards dues as on 8th June, 2009 in respect of the demand draft loan. It is urged that the said notice has not been received by the petitioners. The third respondent filed an application on 16th November, 2009 under Section 17 of the SARFAESI Act before the Debt Recovery Tribunal-III, Delhi (DRT) which was registered as SA No.324 of 2009. The petitioners filed the reply to SA No.324 of 2009 highlighting the illegalities committed by the 3rd respondent for claiming the secured property being her permanent residence and matrimonial home. The DRT disposed of SA No.324 of 2009 by order dated 18th May, 2010 directing that on clearing the dues of the Standard Chartered Bank in respect of certain properties which have been acquired by the petitioner No.1 in the joint names of the petitioner

No.1 and his wife, the respondent No.3, the respondent No.3-wife would become the absolute owner with a right to sell the property and on payment of dues of the respondent No.2 bank, the original title deed of the secured asset would be delivered to the respondent No.3. Being grieved by the said order dated 18th May, 2010, the petitioners preferred an appeal under Section 18 of the SARFAESI Act before the Debt Recovery Appellate Tribunal, Delhi (for short 'the appellate tribunal'). By order dated 28th June, 2010, the tribunal directed the petitioner-appellant to deposit a sum of 25% of the total principal amount within four weeks failing which the appeal would stand dismissed. The said order, as put forth, has been passed in terms of the third proviso to Section 18 of the SARFAESI Act. It is contended that under these circumstances, the petitioners are compelled to challenge the constitutional validity of the aforesaid provision.

6. It is propounded in the petition that the provisions are unconstitutional as the Parliament has not taken into consideration the diverse kinds of appeals to be filed by the borrowers. The conditions of pre-deposit in all kinds of appeals are onerous and oppressive and further, the same being arbitrary hits at the root of Article 14 of the Constitution of India. It is also urged that such kind of stipulations for pre-deposit in all kinds of appeals does not achieve the desired objectives of the SARFAESI Act.

7. It is contended that unless there is determination, the provisions of Section 18 of the SARFAESI Act would not reasonably be attracted and such rigorous and onerous provisions tantamount to failure of justice. It is

averred that such stringent conditions would defeat the very purpose of the appeal and hence, invites the frown of Article 14 of the Constitution of India. It is asserted that the Parliament should have conferred the appellate tribunal with the power to waive the full amount depending upon the nature of the case and the same not having been provided, the provision is ultra vires Article 14 of the Constitution. It is asseverated that the concept of undue hardship has not been kept in view and further, the various circumstances are not being taken into consideration which makes the legislation unconstitutional. Additionally, it is urged that there is possibility of abuse of power and unworkability of the provision.

8. We have heard Mr. J.M. Bari along with Ms. Shweta Bari, learned counsel for the petitioners, and Ms. Maneesha Dhir along with Ms. Preeti Dalal and Mr. K.P.S. Kohli, learned counsel for the respondent No.1. It is worth noting that regard being had to the nature of the prayer made, the learned counsel for the parties advanced their contentions and the learned counsel for the respondent No.1 fairly stated that she does not want to file the counter-affidavit.

9. Section 18 of the SARFAESI Act deals with the provision of appeal to the appellate tribunal. The said provision reads as under:-

“18. Appeal to Appellate Tribunal.- (1) Any person aggrieved, by order made by the Debts Recovery Tribunal [under section 17, may prefer an appeal along with such fee, as may be prescribed] to an 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.”

10. The 3rd and 4th provisos to sub-section (1) were brought into the statute book by the Act of 30 of 2004 with effect from 11th November, 2004. On a perusal of the said provisions, it is luminescent that the appellate tribunal has been conferred with the power to reduce the amount not less than 25%. The submission of Mr. Bara, learned counsel for the petitioners, is that the aforesaid provision is unconstitutional as an onerous condition is imposed while providing a remedy for appeal and secondly, the legislature has not visualised the various categories of appeals which could be preferred before the tribunal but has only provided that the borrower is required to deposit the amount.

11. To appreciate the controversy, it is apposite to refer to Section 17 of the SARFAESI Act. Section 17 provides for an appeal to be preferred by any person including a borrower aggrieved by any of the measures referred

to in sub-section (4) of Section 13 taken by the secured creditor or his authorised officer. Sub-section (2) of Section 17 initially provided that such appeals shall not be entertained by the DRT unless the borrower has deposited with the DRT 75% of the amount claimed in the notice referred to in sub-section (2) of Section 13. There is a stipulation that the tribunal may, for reasons to be recorded in writing, waive or reduce the amount to be deposited under the said Section. The constitutional validity of the said provision came to be assailed. This came to be dealt with by their Lordships in *Mardia Chemicals Ltd. , etc. etc. V. Union of India and others etc. etc.*, AIR 2004 SC 2371. While dealing with the stipulation as regards the condition of pre-deposit under Section 17 of the Act, their Lordships have held thus:-

“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 its 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 meager amount (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 Art.14 of the Constitution.”

12. In the said decision, in paragraph 82, their Lordships have held thus:-

“We, therefore, subject to what is provided in paragraph 80 above, uphold the validity of the act and its provisions

except that of sub-section (2) of Section 17 of the Act, which is declared ultra vires of Article 14 of the Constitution of India.”

13. In view of the aforesaid, it is vivid that the validity of the Section was upheld. In this context, we may refer with profit to the discussion in *Mardia Chemicals Ltd.* (supra) wherein their Lordships referred to the decisions in *Seth Nandlal v. State of Haryana*, AIR 1980 SC 2097, *Vijay Prakash D. Mehta v. Collector of Customs (Preventive), Bombay*, AIR 1988 SC 2010 and *Shyam Kishore v. Municipal Corporation of Delhi*, AIR 1992 SC 2279 wherein it has been held that the right of appeal is a creature of the statute and while granting the right, the legislature can impose conditions for the exercise of such right so long as the conditions are not so onerous as to amount to unreasonable restrictions rendering the right almost illusory. Their Lordships treated the appeal to the DRT, as provided under Section 17, as an approach to the adjudicating authority in the first instance and not in appeal and, accordingly, held the imposition of conditions to be invalid and all other provisions of the SARFAESI Act were declared to be valid.

14. In view of the aforesaid enunciation of law, there can be no trace of doubt that Section 18 which provides for appeal to the Debts Appellate Recovery Tribunal and is hedged by reasonable conditions cannot be treated to be ultra vires.

15. The learned counsel for the petitioners suggested that the second proviso to Section 18 should be substituted and for the sake of completeness, we reproduce the said suggestion:-

“Provided further that no appeal shall be entertained unless the borrower **who wants to save the secured asset from sale by the secured creditor**, 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, which is less.”

16. It is well established principle of law that the Courts of law can neither substitute legal provisions nor legislate. In this context, we may refer with profit to the decisions in *Chandigarh Administration and others v. Manpreet Singh and others*, (1992) 1 SCC 380, the Apex Court has held that the High Court can strike down an offending rule on stated ground of invalidity and direct the authority to re-frame it and act accordingly but cannot itself re-frame it and issue directions.

17. In *Saurabh Chaudri and others v. Union of India and others* (2003) 11 SCC 146, the Apex Court in paragraph 72 has held thus:

"77. The courts are normally reluctant to issue any direction to the Central Government for making law. Following our practice, we refrain ourselves from issuing any direction in this regard. We hope and trust that the Central Government expeditiously considers making of a legislation or taking such steps as are necessary in this behalf keeping in view the requirement of coordination in higher education in terms of Entry 66 List I of the Seventh Schedule of the Constitution of India."

18. In *Municipal Committee, Patiala v. Model Town Residents Assn. and others*, (2007) 8 SCC 669, it has been held thus:

"27. It is so well settled and needs no restatement at our hands that the legislature is supreme in its own sphere under the Constitution subject to the limitations provided for in the Constitution itself. It is for the legislature to decide as to when

and in what respect and of what subject-matter the laws are to be made. It is for the legislature to decide as to the nature of operation of the statutes.”

In view of our aforesaid analysis, the prayer made on this score is absolutely unsustainable and is hereby rejected.

19. The next limb of challenge of the learned counsel for the petitioners is that the order dated 28th June, 2010 requiring him to deposit a sum of 25% is totally unjustified. It is not in dispute that the appellants had preferred an appeal before the Debts Appellate Recovery Tribunal. The tribunal, while entertaining the application for waiving, has followed the language appearing in the second proviso to Section 8. The said proviso clearly lays down that the appellate tribunal may, for reasons to be recorded in writing, reduce the amount to not less than twenty-five per cent of the debt referred to in the second proviso. On a bare reading of the aforesaid provision, it becomes clear that the tribunal has no jurisdiction to reduce the amount below 25% of the debt. Thus, the tribunal could not have travelled beyond the said provision as such travel would have clearly amounted to transgression of the provision. The tribunal is required to act within the statutory parameters. The prayer made by the learned counsel for the petitioners, in fact, requires the tribunal to go beyond the statutory command. The same is impermissible. Thus, we find no fallacy in the order of the tribunal.

20. Consequently, the inevitable result is dismissal of the writ petition which we direct. However, we extend the time for pre-deposit till 31st

October, 2010. In the facts and circumstances of the case, there shall be no order as to costs.

CHIEF JUSTICE

MANMOHAN, J

SEPTEMBER 13, 2010

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