

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED :: 12-09-2016

CORAM

THE HONOURABLE MR.JUSTICE S.MANIKUMAR

AND

THE HONOURABLE MR.JUSTICE N.AUTHINATHAN

WRIT PETITION No.20844 of 2016

and

W.M.P.No.17858 and 24469 of 2016

M/s.Shana Auto Laser Pvt. Ltd.
Rep by its Managing Director
A.Nambhi
No.22/A2, New No.2/551-7, 1st Floor
Durga Nagar, Anumepalli Agraharam
Zuruvadi Village, Hosur - 635 126
Krishnagiri ... Petitioner

-vs-

1.The Presiding Officer
Debts Recovery Tribunal-III
Spencers Plaza
Anna Salai, Chennai - 600 002

2.The Authorised Officer
Indian Overseas Bank Ltd.
Hosur I.C. Branch
Plot NO.130.A
SIPCOT INDL Complex
Hosur - 635 126
Krishnagiri

... Respondents

Prayer: Writ Petition filed under Article 226 of the Constitution of India, to issue a writ of certiorarified mandamus, calling for the records culminated in the impugned order dated 31.5.2016 made in M.A.No.22 of 2016 in S.A.No.297 of 2015 of the 1st respondent and quash the same and consequently, direct the 1st respondent to take up S.A.No.297 of 2015 on file and dispose of the same on merits.

For appellant : Mr.R.Prabhakaran
For respondent-2 : Mr.Benjamin George
For R1 : Tribunal

ORDER
(delivered by S.MANIKUMAR, J.)

Challenge in this writ petition is to an order made in M.A.No.22 of 2016 in S.A.No.297 of 2015. Demand notice dated 28.2.2015 demanding a sum of Rs.2,40,65,758/- issued under Section 13(2) of the SARFAESI Act, 2002 and possession notice dated 25.6.2015 issued under Section 13(4) of the SARFAESI Act, 2002 have been challenged in S.A.No.297 of 2015, by the petitioner.

2. On 24.7.2015, the DRT-III, Chennai, was pleased to grant interim stay of all further proceedings pursuant to the possession notice dated 25.6.2015, subject to the condition that the petitioner remitting a sum of Rs.50,00,000/- to the credit of the loan account on or before 12.9.2015. The Tribunal further contended that in the event of the petitioner failing to comply with the above condition, interim stay granted, shall stand automatically vacated and the bank would be at liberty to proceed further, in accordance with law. Notice to the bank through Registry of the Tribunal and private notice has been ordered. S.A.No.297/2015 has been directed to be posted on 15.9.2015 for reporting compliance, by filing an affidavit by the writ petitioner, and for filing counter and typed set of papers by the bank.

3. Pursuant to the said order, the petitioner has remitted a sum of Rs.5,00,000/- on 31.8.2015, another sum of Rs.4,00,000/- on 4.9.2015, and a further sum of Rs.1,00,000/- on 14.9.2015. As the entire amount has not been paid, the petitioner has filed I.A.No.1194/2015 seeking for extension of time for remitting the balance amount.

4. Vide order dated 15.9.2015, the Tribunal has granted extension of time and directed the petitioner to deposit Rs.20,00,000/- on or before 28.9.2015 and further deposit of Rs.20,00,000/- on or before 17.10.2015 to the loan account. The petitioner has remitted the said amount within the extended time. To that effect, a Memo dated 19.10.2015 has been filed, reporting compliance.

5. Indian Overseas Bank, Hosur, respondent in S.A.No.297/2015, has filed their counter affidavit, wherein, they have stated that the petitioner has availed (a) cash credit for Rs.20.00 Lakhs, (b) Term loan SSI for Rs.1.65 Crores and (c)

Term loan SSI for Rs.57.00 Lakhs, for which properties have been mortgaged, in addition to hypothecation of machineries. They have further stated that notwithstanding the compliance of the conditional order passed by the Tribunal, the petitioner has made payments of Rs.8.68 Lakhs, Rs.1.50 Lakhs and Rs.62,950/- only, as against the due of Rs.2.40 Crores.

6. Material on record further discloses that S.A.No.297/2015 was posted for hearing on 17.2.2016 and according to the petitioner, he could not give instructions to his counsel and the Tribunal, by order dated 17.2.2016, was pleased to order cost of Rs.3,000/-. Matter was directed to be listed on 8.3.2016. As there was no compliance, the Tribunal dismissed S.A.No.297/2015 for default in payment of costs. Thereafter, the petitioner has remitted the cost of Rs.3,000/- in favour of Tamil Nadu Kidney Research Foundation, Chennai - 17 and filed M.A.No.22/2016 to set aside the order of dismissal of the appeal dated 8.3.2016 and to restore S.A.No.297/2015, on file.

7. After hearing the learned counsel for the parties, DRT-III, Chennai, in M.A.No.22/2016 in S.A.No.297/2015 dated 31.5.2016, has passed the following order:

" Both sides are present. MA No.22/16 is taken up. This is an application filed to restore SA 297/2015 which was dismissed by the orders of this Tribunal dated 8.3.2016. It is reported in the earlier adjournment that substantial payments would be made. No development since last adjournment. It appears from the records that the petitioner/applicant has been absent consistently and not made any progress ever since the matter is initiated. It is also observed that despite posting the matter on terms, only a compliance memo is filed but hte matter is not argued. Even after dismissal of the matter, this MA seems to have been filed only for statistical purpose and today also counsel appearing for the petitioner is not present and junior counsel sought further time to comply with their undertaking of making substantial payments. It is admitted that no payment has been made even after the dismissal of the SA.

The respondent bank did not file its counter and the junior counsel reported that the concerned Branch Manager is on medical leave from the last two weeks and so are unable to file their counter.

Perused the records. There are neither any merits in the application nor any genuineness

on the part of the applicants except for dragging on the litigation. In the result, MA No.22/2016 is dismissed, however without costs."

8. The said order is challenged in the writ petition on the grounds inter alia that the Tribunal has failed to take into consideration, the petitioner has raised substantial grounds in S.A.No.297/2015 filed under Section 17 of the SARFAESI Act and that the petitioner has also remitted Rs.50.00 Lakhs to the credit of the loan account, as directed, besides other payments made and therefore, the Tribunal ought not to have dismissed M.A.No.22/2016 filed to set aside the dismissal order dated 8.3.2016. On the contrary, considering the payments made and grounds of challenge in the appeal, the Tribunal ought to have allowed M.A.No.22/2016 and permitted the petitioner to prosecute the appeal on merits.

9. Writ petitioner has further submitted that when the respondent bank did not file any counter to M.A.No.22/2016 opposing the prayer to set aside the dismissal of S.A.No.297/2015 dated 8.3.2016 and for restoration of the same, on file, the Tribunal, in the interest of justice, ought to have condoned the delay in making the payment of costs Rs.3,000/- and directed restoration of the appeal.

10. Record of proceedings shows that while permitting notice to be taken by Mr.Benjamin George, on behalf of the Authorised Officer, Indian Overseas Bank, (respondent No.2), this court in W.P.M.P.No.17858/2016 in W.P.No.20844/2016, granted interim injunction for a period of eight weeks, subject to the condition that the petitioner pays another sum of Rs.1.00 Crore only, within a period of four weeks from the date of receipt of a copy of this order, failing which the interim injunction granted shall stand vacated automatically, without further reference to this court.

11. This court has directed the writ petition to be posted after eight weeks and thus it is listed today. Seeking modification of the order dated 20.6.2016 in W.P.No.17858/2016 in W.P.No.20844/2016 by extending the time to 18 months for payment of Rs.1.00 Crore to Indian Overseas Bank, Hosur, the petitioner has filed W.M.P.No.24469/2016 in W.M.P.No.17858/2016 in W.P.No.20844/2016.

12. Mr.R.Prabhakaran, learned counsel for the petitioner submitted that the borrower is a Small Scale Industry registered under the Companies Act, 1956. There are many staffs and workers working. There is a global recession and downward market fluctuation, besides, act of force majeure and due to several other factors, the petitioner could not make periodical payments

to the bank. Though the petitioner tried its level best to dispose of the properties, and to settle the dues to bank, their earnest efforts were not successful. Referring to the purpose for which Micro, Small and Medium Enterprises Development Act, 2006, was enacted to protect, and to facilitate the above industries to function and as per the procedure and modality framed by the Reserve Bank of India the principal monetary institution to the lending banks, learned counsel for the petitioner further submitted that Reserve Bank of India has framed guidelines and issued circulars that, amount outstanding below Rs.5.00 Crores, should not be seriously taken note of, and the lending banks should provide rehabilitation and restructure, and also to prescribe modalities for payment of the remaining amount, by installments even up to one year. Thus for the reasons stated supra, he prayed for modification of the order made in W.M.P. No.17858/2016 dated 20.6.2016 for extension of time from four weeks to 18 months.

13. On the contrary, Mr. Benjamin Geroge, learned counsel for the bank refuted the submissions of the petitioner on the aspect of the above quantum, and as to when the loan has to be classified as a Non Performing Asset. He further submitted that when interim injunction of all further proceedings was granted by this court on 20.6.2016 in W.M.P.No.17858/2016 in W.P.No.20844/2016, the petitioner ought to have paid the amount of Rs.1.00 Crores, within the stipulated time. He further submitted that when there is a default, the petitioner is not entitled either for extension or modification or for the interim Order. Placing reliance on the decision of the Hon'ble Supreme Court in Prestige Lights Ltd. vs. State Bank of India reported in (2007) 8 SCC 449., learned counsel for the respondent-bank submitted that failure to honour the interim order would amount to contempt and in such circumstances, the petitioner is not entitled to hearing.

14. Learned counsel for the bank further submitted that under Section 18 of the Act, any person aggrieved, by any order made by the DRT under Section 17, may prefer an appeal along with such fee, as may be prescribed, to the Appellate Tribunal, within 30 days from the date of receipt of the order of the DRT and as per the second proviso to the said section, no appeal shall be entertained unless the borrower has deposited with the Appellate Tribunal 50% of the amount debts due from him, as claimed by the secured creditors or determined by DRT, whichever is less. According to him, in the absence of a Presiding Officer in DRAT, writ petitions are being entertained against the order of the Tribunal passed under Section 17 and in such circumstances, imposition of a condition, directing the petitioner to pay Rs.1.00 Crore, to Indian Overseas Bank, Hosur, cannot be said to be arbitrary, in the light of the second proviso to Section 18 of the Act. At this juncture, he submitted

that notwithstanding the earlier directions of this court, the condition be modified to the extent of the petitioner making payment of Rs.50.00 Lakhs, within four weeks, and on payment of the said amount, within the said stipulated time, Tribunal may be directed to restore and dispose of S.A.No.297/2015, within a period of four months.

15. Without prejudice to submission on reduction of the amount, on the scope and powers of DRAT, learned counsel for the bank also invited the attention of this court to the decisions of the Hon'ble Apex Court in Narayan Chandra Ghosh vs. Uco Bank and others reported in (2011) 4 SCC 548 and Standard Chartered Bank vs.Dharminder Bhohi and others reported in (2013) 15 SCC 341, and submitted that the interim order of this court is in line with the second proviso to section 18 of the Act and prayed for a direction to the Tribunal to dispose of the appeal, within the time prescribed under the Act.

Heard the learned counsel for the parties and perused the material available on record.

16. Before advertng to the rival contentions, this court deems it fit to extract few provisions from SARFAESI Act, 2002.

" 17. Right to appeal

(1) Any person (including 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 under this Chapter, may make an application along with such fee, as may be prescribed to the Debts Recovery Tribunal having jurisdiction in the matter within forty-five days from the date on which such measure had been taken: PROVIDED that different fees may be prescribed for making the application by the borrower and the person other than the borrower.

Explanation : For the removal of doubts, it is hereby declared that the communication of the reasons to the borrower by the secured creditor for not having accepted his representation or objection or the likely action of the secured creditor at the stage of communication of reasons to the borrower shall not entitle the person (including borrower) to make an application to the Debts Recovery Tribunal under this sub-section.

(2) The Debts Recovery Tribunal shall consider whether any of the measures referred to in sub-section (4) of section 13 taken by the secured creditor for enforcement of security are in accordance with the provisions of this Act and the rules made there under.

(3) If, the Debts Recovery Tribunal, after

examining the facts and circumstances of the case and evidence produced by the parties, comes to the conclusion that any of the measures referred to in sub-section (4) of section 13, taken by the secured creditor are not in accordance with the provisions of this Act and the rules made thereunder, and require restoration of the management of the business to the borrower or restoration of possession of the secured assets to the borrower, it may by order, declare the recourse to any one or more measures referred to in sub-section (4) of section 13 taken by the secured creditors as invalid and restore the possession of the secured assets to the borrower or restore the management of the business to the borrower, as the case may be, and pass such order as it may consider appropriate and necessary in relation to any of the recourse taken by the secured creditor under sub-section (4) of section 13.

(4) If, the Debts Recovery Tribunal declares the recourse taken by a secured creditor under sub-section (4) of section 13, is in accordance with the provisions of this Act and the rules made thereunder, then, notwithstanding anything contained in any other law for the time being in force, the secured creditor shall be entitled to take recourse to one or more of the measures specified under sub-section (4) of section 13 to recover his secured debt.

(5) Any application made under sub-section (1) shall be dealt with by the Debts Recovery Tribunal as expeditiously as possible and disposed of within sixty days from the date of such application: PROVIDED that the Debts Recovery Tribunal may, from time to time, extend the said period for reasons to be recorded in writing, so, however, that the total period of pendency of the application with the Debts Recovery Tribunal, shall not exceed four months from the date of making of such application made under sub-section (1).

(6) If the application is not disposed of by the Debts Recovery Tribunal within the period of four months as specified in sub-section (5), any part to the application may make an application, in such form as may be prescribed, to the Appellate Tribunal for directing the Debts Recovery Tribunal for expeditious disposal of the application pending before the Debts Recovery Tribunal and the Appellate Tribunal may, on such application, make an order for expeditious disposal of the pending application by the Debts Recovery Tribunal.

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

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."

17. From the reading of sections 17 and 18 of the Act, it could be seen that when section 17, speaks about the fees, prescribed in contra distinction section 18 states about the deposit with the Tribunal, which the aggrieved party has to make, debt claimed or the amount determined by the Tribunal. In the case on hand, though the bank has claimed certain sum sum as debt, due from the writ petitioner, the Debts Recovery Tribunal, has not determined the same.

18. Record of proceedings shows that while entertaining the writ petition, this court in W.M.P.No.17858/2016 in W.P.No.20844/2016, has passed the following order:

"Mr.F.B.Benjamin George, learned standing counsel takes notice for the 2nd respondent-Authorised Officer, Indian Overseas Bank.

2. There shall be an order of interim injunction for a period of 8 weeks subject to condition that the petitioner pays another sum of

Rupees One Crore only within a period of 4 weeks from the date of receipt of a copy of this order, failing which, the interim injunction granted shall stand vacated automatically, without further reference to this court.

3. Post the matter after 8 weeks."

19. Admittedly, the condition imposed at the time of granting interim order has not been complied with. The petitioner has filed W.M.P.No.24469/2016 for modification of the interim order dated 20.6.2016, for the reasons stated supra. The issue as to whether the respondent-bank has followed the procedure, as contemplated under the guidelines of the Reserve Bank of India and if the outstanding loan amount is less than Rs.5.00 Crores, and therefore, the bank ought not to have declared the same as NPA and consequently, the respondent-bank can initiate proceedings under the Recovery of debts due to Banks and Financial Institutions Act, 1993 and SARFAESI Act, 2002, as the case may be, can be raised only in the appeal filed before DRT-III, Chennai.

20. It is also noted that the respondent has refuted the above said contentions. Therefore, while testing the correctness of the order impugned before us i.e. dismissal of a miscellaneous application No.22/2016 in S.A.No.297/2015, filed to set aside the order of dismissal of S.A.No.297/2015 and restore the same on file, we are of the view that it would be inappropriate at this juncture to delve into the merits of the appeal, and therefore, we refrain from doing so.

21. On the submissions of Mr.Benjami George, learned counsel for the respondent-bank that there is a violation of the interim order and therefore, the writ petitioner has committed contempt, and not entitled to be heard, this court deems it fit to consider the judgment of the Hon'ble Supreme Court in Prestige Lights Limited's case reported in (2007) 8 SCC 449. On the facts and circumstances of the said case, at paragraph Nos.20, 22, 24 and 26, the Hon'ble Apex Court held as follows:

" 20. But, there is an additional factor also as to why we should not exercise discretionary and equitable jurisdiction in favour of the appellant. It is contended by the learned counsel for the respondent Bank that having obtained interim order and benefit thereunder from this Court, the appellant Company has not paid even a pie. The appellant is thus in contempt of the said order. The Company has never challenged the condition as to payment of amount as directed by this Court. Thus, on the one hand, did not comply with it and failed to pay instalments as

directed. Neither it raised any grievance against the condition as to payment of instalments nor made any application to the Court for modification of the condition. It continued to enjoy the benefit of stay ignoring and defying the term as to payment of money. The Company is thus in contempt of the order of this Court, has impeded the course of justice and has no right of hearing till it has purged itself of the contempt.

22. From the above order, it is clear that notice was issued to the other side and stay granted earlier was ordered to continue on the appellant's depositing a sum of Rs.20 lakhs per month in this Court. It was also made clear that first of such payment should be made by 6.6.2015 and subsequent payments by 6th of each succeeding month. A default clause was also introduced in the order that if such payment would not be made, the stay would stand vacated. It is an admitted fact that the order has not been complied with and no payment as per the order has been made by the appellant company to the respondent bank. The said fact has also been reflected in the order of this court passed on 25-7-2007, wherein it was stated:

" It is recorded that the stay is transgressed by reason of the admitted non-compliance with the order dated 6-5-2005."

24. An order passed by a competent court- interim or final- has to be obeyed without any reservation. If such order is disobeyed or not complied with, the court may refuse the party violating such order to hear him on merits. We are not unmindful of the situation that refusal to hear him on the proceedings on merits is a "drastic step" and such a serious penalty should not be imposed on him except in grave and extraordinary situations, but sometimes such an action is needed in the larger interest of justice when a party obtaining interim relief intentionally and deliberately flouts such order by not abiding by the terms and conditions on which a relief is granted by the court in his favour.

26. That, however, does not mean that in each and every case in which a party has violated an interim order has no right to be heard at all. Nor will the court refuse to hear him in all circumstances. The normal rule is that an

application by a party will not be entertained until he has purged himself of the contempt. There are, however, certain exceptions to this rule. One of such exceptions is that the party may appeal with a view to setting aside the order if it is alleged that having regard to the meaning and intendment of the order which he is said to have disobeyed, his actions did not constitute a breach of it."

22. It is true that the petitioner has obtained an order of interim injunction on 20.6.2016 and not complied with the same, within the time provided for payment. The Hon'ble Supreme Court has observed that the appellant, therein was in contempt of the said order, when he had not questioned the interim order or sought for modification. But, on the facts and circumstances of this case, it could be seen that expressing difficulty in generating money, for compliance of interim order dated 20.6.2016, that the properties sought to be disposed of, for settling the dues could not be sold, despite best efforts and for the reason that there is global recession and downward market fluctuation and of the fact that the petitioner being small scale industry unit in Hosur with many staff and workers, not able to recuperate the business, despite efforts to sell the assets and to close the loan account once for all, the petitioner has sought for modification of the interim order made in W.M.P.No.17858/2016 dated 20.6.2016.

23. In Prestige Lights Ltd.'s case, the appellant therein neither raised any grievance against the condition, as to the payment of installments nor made any application to the court for modification of the condition, and continued to enjoy the benefit of interim order, ignoring and defying the promise, as to payment of money and in such circumstances, the Hon'ble Apex Court observed that the appellant therein was in contempt of the order and consequently, has no right of hearing till he purged out of contempt. On the facts and circumstances of the case on hand, it is not a promise made by the writ petitioner to pay rupees one crore, when this court, passed the interim order. On the contra, it is the order of this court. True that if any promise had been made and dishonoured, the reported judgment would be applicable.

24. Therefore, judgment in Prestige Lights Ltd.'s case can be distinguished for the reason that in the case on hand, expressing difficulties in adhering to the conditional order, the petitioner has come up with a modification petition for extension of time up to 18 months. For the reasons considered in the latter portion of this judgment, duration of time, sought for by the petitioner to pay Rs.1.00 Crore to the bank cannot be

granted.

25. In *Narayan Chandra Ghosh vs. Uco Bank and others* reported in (2011) 4 SCC 548, the Hon'ble Apex Court considered the correctness of the order of the Tribunal, as to whether the Tribunal has jurisdiction to exempt a person preferring an appeal under Section 18 of the Act to the Tribunal, from making any deposit in terms of the said provision. At paragraph Nos.7 and 8 of the judgment, the Hon'ble Apex Court held as follows:

" 7. Section 18(1) of the Act confers a statutory right on a person aggrieved by any order made by the Debts Recovery Tribunal under Section 17 of the Act to prefer an appeal to the Appellate Tribunal. However, the right conferred under Section 18(1) is subject to the condition laid down in the second proviso thereto. The second proviso postulates 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. However, under the third proviso to the sub-section, the Appellate Tribunal has the power to reduce the amount, for the reasons to be recorded in writing, to not less than twenty-five per cent of the debt, referred to in the second proviso. Thus, there is an absolute bar to the entertainment of an appeal under Section 18 of the Act unless the condition precedent, as stipulated, is fulfilled. Unless the borrower makes, with the Appellate Tribunal, a pre-deposit of fifty per cent of the debt due from him or determined, an appeal under the said provision cannot be entertained by the Appellate Tribunal. The language of the said proviso is clear and admits of no ambiguity.

8. It is well-settled that when a statute confers a right of appeal, 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. Bearing in mind the object of the Act, the conditions hedged in the said provision cannot be said to be onerous. Thus, we hold that the requirement of pre-deposit under sub-section (1) of Section 18 of the Act is mandatory and there is no reason whatsoever for

not giving full effect to the provisions contained in Section 18 of the Act. In that view of the matter, no court, much less the Appellate Tribunal, a creature of the Act itself, can refuse to give full effect to the provisions of the statute. We have no hesitation in holding that deposit under the second proviso to Section 18(1) of the Act being a condition precedent for preferring an appeal under the said section, the Appellate Tribunal had erred in law in entertaining the appeal without directing the appellant to comply with the said mandatory requirement."

26. Admittedly, there is no Presiding Officer in DRAT and thus the High Court is constrained to entertain writ petitions. At this juncture, we wish to state that the scheme of the Act, which envisages, a final fact finding authority, the Tribunal should not be dysfunctional, because of the fact that, there is no Presiding officer. Central Government should take steps to appoint a suitable person, otherwise High Court would be burdened. An order under Section 17 of the DRT has to be challenged under Section 18 of the SARFAESI Act, 2002, and as per the second proviso, the appellant has to deposit with the Tribunal, 50% of the amount of debt due from him. The third proviso, to section 18 states that the Appellate Tribunal, may, for the reasons to be recorded in writing, reduce the amount and not less than 25% of the debt referred to in the second proviso. Though citing the second proviso to section 18 of SARFAESI Act, Mr. Benjami George, learned counsel for the respondent bank submitted that the interim order, passed by this court, is on the lines of second proviso to Section 18 of the SARFAESI Act, by treating the writ petition, as an appeal under Section 18 of the Act. In the absence of a Presiding Officer in Debts Recovery Appellate Tribunal, on the facts and circumstances of this case, we are not inclined to accept the said submission, for the reason that for non payment of cost of Rs.3,000/- in time, the writ petitioner, should not be mulcted with such a huge liability to deposit 50% of the amount claimed by the bank.

27. As stated supra, under the third second proviso to Section 18 of the Act, even the Tribunal, for the reasons to be recorded in writing, can reduce the amount to not less than 25% of the debt referred to in the second proviso. Powers of the High Court under Article 226 or 227 of the Constitution of India are wider than the powers under Section 18 of the SARFAESI Act and while exercising the powers under Articles 226 and 227 of the Constitution of India, High Courts, in the interest of justice, determine the amounts to be paid or deposited with the Tribunal, on the facts and circumstances of the case.

28. In *Standard Chartered Bank vs. Dharminder Bhoi and others* reported in (2013) 15 SCC 341, after extracting the objects and reasons of the SARFAESI Act and the earlier decisions, the Hon'ble Supreme Court, at paragraph Nos.16 to 20, held as follows:

"16. In this context, we may fruitfully refer to the Objects and Reasons of the SARFAESI Act. The relevant part of it reads as follows: -

"The financial sector has been one of the key drivers in India's efforts to achieve success in rapidly developing its economy. While the banking industry in India is progressively complying with international prudential norms and accounting practices there are certain areas in which the banking and financial sector do not have a level playing field as compared to other participants in the financial markets in the world. There is no legal provision for facilitating securitisation of financial assets of banks and financial institutions. Further, unlike international banks, the banks and financial institutions in India do not have power to take possession of securities and sell them. Our existing legal framework relating to commercial transactions has not kept pace with the changing commercial practices and financial sector reforms. This has resulted in slow pace of recovery of defaulting loans and mounting levels of non-performing assets of banks and financial institutions. Narasimham Committee I and II and Andhyarujina Committee constituted by the Central Government for the purpose of examining banking sector reforms have considered the need for changes in the legal system in respects of these areas."

17. In *Mardia Chemicals Ltd. And others v. Union of India and others* reported in (2004) 4 SCC 311, after referring to the Statement of Objects and Reasons this Court dealt with the submission that existing rights of private parties under a contract cannot be interfered with, more particularly, putting one party in an advantageous position over the other. In that context, the three-Judge Bench observed thus: -

"66.....As discussed earlier as well, it may be observed that though the transaction may have the character of a private contract yet the question of great importance behind such transaction as a whole having far-reaching effect on the economy of the country cannot

be ignored, purely restricting it to individual transactions, more particularly when financing is through banks and financial institutions utilizing the money for the people in general, namely, the depositors in the banks and public money at the disposal of the financial institutions. Therefore, wherever public interest to such a large extent is involved and it may become necessary to achieve an object which serves the public purposes, individual rights may have to give way. Public interest has always been considered to be above the private interest. Interest of an individual may, to some extent, be affected but it cannot have the potential of taking over the public interest having an impact on the socio-economic drive of the country. The two aspects are intertwined which are difficult to be separated."

18. In the said case, it was further rules thus: (Mardia Chemicals Ltd. case) -

"81. In view of the discussion held in the judgment and the findings and directions contained in the preceding paragraphs, we hold that the borrowers would get a reasonably fair deal and opportunity to get the matter adjudicated upon before the Debts Recovery Tribunal. The effect of some of the provisions may be a bit harsh for some of the borrowers but on that ground the impugned provisions of the Act cannot be said to be unconstitutional in view of the fact that the object of the Act is to achieve speedier recovery of the dues declared as NPAs and better availability of capital liquidity and resources to help in growth of the economy of the country and welfare of the people in general which would subserve the public interest."

19. In Indian Overseas Bank v. Ashok Saw Mill (2009) 8 SCC 366, though in a different context, the Court has expressed thus:-

"33. It is clear that while enacting the SARFAESI Act the legislature was concerned with measures to regulate securitization and reconstruction of financial assets and enforcement of security interest. The Act enables the banks and financial institutions to realize long-term assets, manage problems of liquidity, asset liability mismatches and improve recovery by

exercising powers to take possession of securities, sell them and reduce non-performing assets by adopting measures for recovery of reconstruction."

Thereafter, the Bench proceeded to state thus: -

"36. The intention of the legislature is, therefore, clear that while the banks and financial institutions have been vested with stringent powers for recovery of their dues, safeguards have also been provided for rectifying any error or wrongful use of such powers by vesting the DRT with authority after conducting an adjudication into the matter to declare any such action invalid and also to restore possession even though possession may have been made over to the transferee."

20. In *United Bank of India v. Satyawati Tondon and others* (2010) 8 SCC 110, this Court restated the purpose of bringing the SARFAESI Act and in that context observed the role of the tribunal as under: -

"23. Sub-section (2) of Section 17 casts a duty on the Tribunal to consider whether the measures taken by the secured creditor for enforcement of security interest are in accordance with the provisions of the Act and the Rules made thereunder. If the Tribunal, after examining the facts and circumstances of the case and evidence produced by the parties, comes to the conclusion that the measures taken by the secured creditor are not in consonance with sub-section (4) of Section 13, then it can direct the secured creditor to restore management of the business or possession of the secured assets to the borrower. On the other hand, if the Tribunal finds that the recourse taken by the secured creditor under sub-section (4) of Section 13 is in accordance with the provisions of the Act and the Rules made thereunder, then, notwithstanding anything contained in any other law for the time being in force, the secured creditor can take recourse to one or more of the measures specified in Section 13(4) for recovery of its secured debt.

24. Sub-section (5) of Section 17 prescribes the time-limit of sixty days within which an application made under Section 17 is

required to be disposed of. The proviso to this sub-section envisages extension of time, but the outer limit for adjudication of an application is four months. If the Tribunal fails to decide the application within a maximum period of four months, then either party can move the Appellate Tribunal for issue of a direction to the Tribunal to dispose of the application expeditiously."

29. There cannot be any quarrel over the proposition of law laid down by the Hon'ble Apex Court. It is always open to the respondent bank, to place the decision in Standard Chartered Bank's case before the Tribunal, which is binding, and it is not necessary to issue any directions.

30. Reverting to the facts on hand, we are of the view that it could be seen that the petitioner has availed a) cash credit for Rs.20.00 Lakhs, (b) Term loan SSI for Rs.1.65 Crores and (c) Term loan SSI for Rs.57.00 Lakhs. He has already made payment of Rs.10,80,950/-. When demand notice dated 28.2.2015 and possession notice dated 25.6.2015 were challenged in S.A.No.297/2015, the Tribunal was pleased to grant interim stay of all further proceedings on condition that the petitioner should remit a sum of Rs.50.00 Lakhs to the credit of the loan account on or before 12.9.2015 and subsequently, in I.A.No.1194/2015, time has been extended for remitting the said sum on or before 17.10.2015 to the loan account, which the petitioner has complied with and accordingly filed a Memo dated 19.10.2015. For availing, a total amount of Rs.2.42 Crores credit and other term loans, besides mortgaging the properties, the petitioner has also hypothecated machineries with the bank. On 17.2.2016, the Tribunal has directed the petitioner to pay cost of Rs.3,000/- payable to Tamil Nadu Kidney Research Foundation, Chennai - 17. According to the petitioner, there was a talk of settlement with the respondent bank and hence they could not give instructions to their counsel. The said fact was also brought to the notice of the Tribunal. But, they were set ex-parte on 8.3.2016 and S.A.No.297/2015 was dismissed. Subsequently, though belatedly the petitioner has paid Rs.3,000/- costs to Tamil Nadu Kidney Research Foundation, Chennai - 17 and filed M.A.No.22/2016 to set aside the dismissal and prayed for restoration of S.A.No.297/2015. According to the petitioner, when M.A.No.22/2016 was taken up for hearing, the Tribunal insisted for payment and that their junior counsel sought for time, to make substantial payment. Not satisfied with the above, the Tribunal has dismissed the miscellaneous application by observing that there is no development, since the last adjournment and it appears from the records that the

petitioner has been absent continuously, and not made any progress, ever since the matter was initiated. The Tribunal has also observed that despite the matter being posted on terms, only the compliance memo has been filed, but the matter was not argued. Though the junior counsel has sought for further time to comply with the undertaking for making substantial payment, it has not been done, even after the dismissal of the SARFAESI Appeal. The above said observations and reasons for dismissal of the miscellaneous application No.22/2016 in S.A.No.297/2015 only indicates that the Tribunal was insisting only on payment to be made to the bank, and that the Tribunal has not considered the reasons as to whether the petitioner has made out any prima facie case, for setting aside the exparte order of dismissal of the SARFAESI Appeal No.297/2015. Though payment of costs of Rs.3,000/- imposed by the Tribunal has been made belatedly, the Tribunal by accepting the memo has observed that a compliance memo has been filed, but the matter was not argued. In such circumstances, in our considered view, the Tribunal, at best, could have allowed the miscellaneous application, asked the learned counsel to argue the appeal or posted the appeal for arguments.

31. Section 22 of the Recovery of Debts due to Banks & Financial Institutions Act, 1993, deals with the procedure and powers of the Tribunal and the Appellate Tribunal. Sub clause (2) (f) and (g) of the said section reads thus:

(2) The Tribunal and the Appellate Tribunal shall have, for the purposes of discharging their functions under this Act, the same powers are vested in a Civil Court under the Code of Civil Procedure, 1908 (5 of 1908), while trying a suit, in respect of the following matters, namely:-

(a) to (e)

(f) dismissing an application for default or deciding it ex parte;

(g) setting aside any order of dismissal of any application for default or any order passed by it ex parte;

32. In Manohar Singh vs. D.S.Sharma, reported in (2010) 1 SCC 53, the Hon'ble Supreme Court held as hereunder:

"When section 35B states that payment of such costs on the date next following the date of the order shall be a condition precedent for further prosecution, it clearly indicates that when the costs are levied, it should be paid on the next date of hearing and if it is not paid, the consequences mentioned therein shall follow. But the said provision will not come in the way of the court, in its discretion extending the time for such payment, in exercise of its general power to extend time under section 148 of CPC. Having regard to

the scheme and object of section 35B, it is needless to say that such extension can be only in exceptional circumstances and by subjecting the defaulting party to further terms. No party can routinely be given extension of time for payment of costs, having regard to the fact that such costs under section 35B were itself levied for causing delay. "

33. For non-payment of Rs.3,000/- in time, it would not be appropriate for the Tribunal to insist that the petitioner should make substantial payments, and on that score dismiss the petition filed to set aside the order of dismissal and restore the appeal on file. The Tribunal has observed that matter was not argued. The question of arguing the appeal arises only when the delay is condoned.

34. Accepting the reasons assigned in the modification petition in W.M.P.No.24469/2016 and the submission of Mr.Benjamin George, learned counsel for the respondent-bank that the amount mentioned in W.M.P.No.17858/2016, can be reduced to Rs.50.00 Lakhs and having regard to the third proviso to section 18 of the Act that the Tribunal may, for the reasons to be recorded in writing, reduce the amount to not less than 25% of the debt referred to in second proviso to Section 18 of the Act, and accepting the reasons assigned in the modification petition in W.M.P.No.24469/2016, we are inclined to reduce the amount to Rs.50.00 Lakhs.

35. As per the demand notice dated 26.2.2015, the outstanding loan amount is Rs.2,40,65,758/-. Even as per the version of the respondent-bank, the petitioner has paid a sum of Rs.8.68 lakhs, Rs.1.50 Lakhs and Rs.62,950/-, which works out to Rs.10,80,950/-. That apart, complying with the orders of the Tribunal, the petitioner has remitted a sum of Rs.50.00 Lakhs to the loan account, in all totalling to Rs.60,80,950/-. If the third proviso to Section 18 is applied, remittance/payment made to the bank would represent 25% of the outstanding loan amount of Rs.2,40,65,758/-.

36. However, on the facts and circumstances of the case, it could be seen that the money paid by writ petitioner on their own, is meager, considering the amount Rs.2.42 Crores borrowed. As per the orders of the Tribunal, a sum of Rs.50.00 Lakhs has already been remitted. We have taken note of the reasons assigned in the modification petition and submissions of the learned counsel for the respondent-bank for reduction, in the light of the decisions of the Hon'ble Apex Court, extracted supra, to strike out a balance between the parties, we are of the considered view that the interest of justice would be met, if the writ petitioner is ordered to make a further sum of

Rs.50.00 Lakhs, to the respondent bank.

37. From the record of proceedings of the Tribunal, it could be seen that though initially on 24.7.2015, the Tribunal directed the petitioner to remit a sum of Rs.50.00 Lakhs, to the credit of the loan account on or before 12.9.2015, subsequently, for remittance time has been extended up to 17.10.2015, which the petitioner had complied with within 84 days. On the facts and circumstances of this case, we are of the considered view that the petitioner should be provided with opportunity to argue the appeal. We only wish to state that proceedings before the Tribunal, should not be coercive, de hors the procedure, for recovery.

38. In the light of the above discussion and decisions, we set aside the order of the DRT-III, Chennai dated 31.5.2016 made in M.A.No.22/2016 in S.A.No.297/2015, on condition that the petitioner shall remit to the loan account a sum of Rs.50.00 Lakhs within a period of 12 weeks from the date of receipt of a copy of this order. On the remittance of the above said sum, within the period stipulated supra and filing of an affidavit or memo, as the case may be, to that effect. The Tribunal shall restore the appeal, hear the appeal on merits and pass orders in accordance with law, without insisting for further payment. The writ petitioner shall not protract the hearing of the appeal, without just and bonafide cause.

With the above observations, the writ petition is disposed of. However, there shall be no order as to cost. Consequently, the connected writ miscellaneous petitions are closed.

-s/d-
Assistant Registrar

True Copy

Sub-Assistant Registrar

Asr

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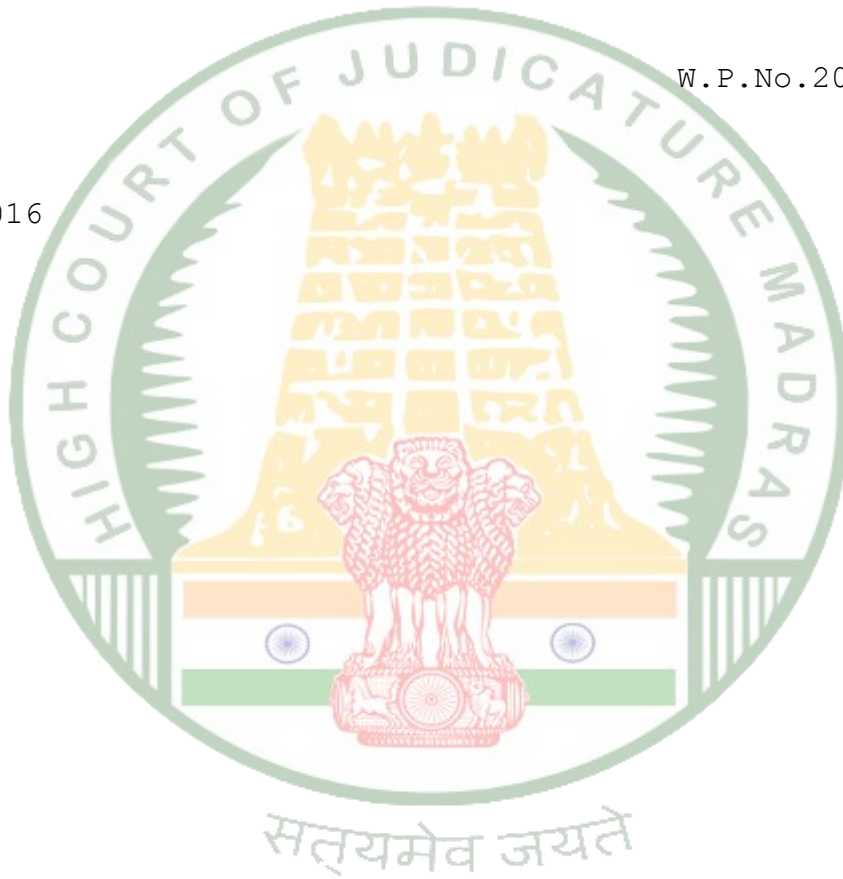
Copy to

The Presiding Officer
Debts Recovery Tribunal-III
Spencers Plaza
Anna Salai, Chennai - 600 002

+1 cc to Mr.F.B.Benjamin George Advocate sr 51893/16

W.P.No.20844 of 2016

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