

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 13.12.2017

CORAM:

THE HON'BLE MR.JUSTICE S.MANIKUMAR
AND
THE HON'BLE MR.JUSTICE R.PONGIAPPAN

W.P.Nos.32439 & 32440 of 2017
and WMP Nos.35725 & 35726 of 2017

W.P.No.32439 of 2017
M/s.N.M.S.Hospitals (P) Ltd.,
Rep. by its Director, Mrs.R.Savithri ... Petitioner

vs.

1. Corporation Bank,
Rep. by its Branch Manager,
Mettupalayam - 641 301,
Coimbatore District.

2. M/s.Hindustan Educational and
Charitable Trust,
Rep. by its Managing Trustee,
Sri. T.S.R.Kannaiyan ... Respondents

Prayer in WP No.32439 of 2017: WRIT Petition filed under
Article 226 of the Constitution of India, praying for the
issuance of a writ of certiorari, calling for the records
pertaining to the order dated 03.10.2017 in AIR No.300 of 2017
passed by the DRAT, Chennai and quash the same.

W.P.No.32440 of 2017
M/s.N.M.S.Hospitals (P) Ltd.,
Rep. by its Director, Mrs.R.Savithri ... Petitioner

vs.

1. Corporation Bank,
Rep. by its Branch Manager,
Mettupalayam - 641 301,
Coimbatore District.

2. The Deputy General Manager,
Corporation Bank, Zonal Office,
Ranga's "Westend", T.S.No.12/20, 8th Cross,
NSR Road, Saibaba Colony, Coimbatore - 641 011.

3. The Chairman cum Managing Director,
Corporation Bank, Corporate Office,
Mangala Devi Temple Road,
Mangalore - 574 001.

4. M/s.Hindustan Educational and
Charitable Trust,
Rep. by its Managing Trustee,
Sri. T.S.R.Kannaiyan

... Respondents

Prayer in WP No.32440 of 2017: WRIT Petition filed under Article 226 of the Constitution of India, praying for the issuance of a writ of certiorari, calling for the records pertaining to the order dated 03.10.2017 in AIR No.74 of 2017 passed by the DRAT, Chennai and quash the same.

For Petitioner : Dr.S.R.Kalyani

For Respondents: Mr.N.Sivabalan (for R1 to R3)
for Mr.Sethuraman

COMMON ORDER

(Order of the Court was made by S.MANIKUMAR, J)

Mr.Sivabalan, learned counsel for the respondent bank, present in Court was put on notice and heard. With the consent of the parties, both the writ petitions have been taken up for hearing.

2. In W.P.No.32439 of 2017, M/s. NMS Hospitals (P) Limited, Coimbatore, has challenged the order dated 03.10.2017 in AIR No.300 of 2017, passed by DRAT, Chennai, by which the said appeal has been dismissed for the failure to make pre deposit of Rs.45 Lakhs, ordered in I.A.No.967 of 2017, filed for waiver.

3. In W.P.No.32440 of 2017, petitioner has challenged the order dated 03.10.2017, in AIR No.74 of 2017 in S.A.No.1 of 2013, passed by DRAT, Chennai, by which the said appeal has been dismissed, for the failure to make pre deposit of Rs.1.80 Crores with the Registrar of DRAT, Chennai.

4. In AIR No.300 of 2017, the petitioner has challenged the common order made in O.A.No.41 of 2013 and counter claim No.1 of 2013 dated 09.12.2016, by which DRT, Coimbatore has passed an order for recovery of Rs.1.31 Crores.

5. In AIR No.74 of 2017, the petitioner has challenged the order made in S.A.No.1 of 2013, filed against the sale notice.

6. As both the writ petitions relate to recovery of loan by the bank and challenge to auction sale notice by the borrower and in both the appeals viz., AIR No.300 of 2017 and AIR No.74 of 2017, conditional orders have been passed, failure of which, has resulted in dismissal of the said appeals, both the writ petitions are taken up together.

7. Material on record discloses that on 16.08.2012, Corporation Bank, Chennai, respondent in both the appeals has issued a notice under Section 13(2) of the SARFAESI Act, 2002, demanding a sum of Rs.4.08 Crores. OA has been filed for recovery of sum of Rs.4.40 crores. Counter claim No.1 of 2013, has been filed by the writ petitioner. Considering the rival submissions, vide order dated 09.12.2016, recovery certificate for Rs.1.31 Crores, has been issued.

8. Challenging the recovery certificate, AIR No.300 of 2017, has been filed. Though in I.A.No.967 of 2017 in AIR No.300 of 2017, submission has been made that bank has received substantial amount from and out of auction sale, and that therefore waiver be granted, DRAT, Chennai in I.A.No.967 of 2017 in AIR No.300 of 2017, has ordered that out of the debt amount of Rs.1.31 Crores, sum of Rs.45 lakhs, amount not less than 25% should be deposited, with the Registrar of DRAT, Chennai, for entertaining the appeal.

9. When challenge to the order in S.A.No.1 of 2013 dated 09.12.2016 was made, along with waiver petition I.A.No.424 of 2017 in AIR No.74 of 2017, taking note of the demand of Rs.4.08 Crores, mentioned in the notice issued under Section 13(2) of the SARFAESI Act, 2002, DRAT, Chennai has considered the debt amount as Rs.4.08 Crores and accordingly, directed the writ petitioner to make pre deposit of Rs.1.80 Crores with the Registrar of DRAT, sum not less than 25% of the debt claimed.

10. Perusal of the recovery proceedings in DRC No.13 of 2017, in OA No.41 of 2017, shows that amount payable as on 31.10.2017, was Rs.1,53,30,624/-. While that be so, prima facie, we are of the view that the direction of the DRAT, Chennai in I.A.No.424 of 2017 in AIR No.74 of 2017, filed for waiver, that debt amount is Rs.4.08 Crores is not correct.

11. DRAT, Chennai has considered the amount mentioned in the notice issued under Section 13(2) of the SARFAESI Act, 2002 dated 16.08.2012. DRAT, Chennai has failed to consider that though, a sum of Rs.4.40 Crores was claimed in O.A.No.41 of 2013, Debts Recovery Tribunal, Coimbatore has decreed only for a sum of Rs.1.31 Crores.

12. As per Section 18 of the SARFAESI Act, 2002, 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".

13. Though, a sum of Rs.4.08 Crores was claimed in the notice dated 16.08.2012 issued under Section 13(2) of the SARFAESI Act, 2002, and thereafter, a sum of Rs.4.40 Crores in OA.No.41 of 2013, on the file of DRT, Coimbatore, vide order dated 09.12.2016 in OA.No.41 of 2013 and counter claim No.1 of 2013, DRT, Coimbatore, has granted a decree, only for a sum of Rs.1.31 Crores.

14. While that be the case, we are of the view that DRAT, Chennai in I.A.No.424 of 2017 in AIR No.74 of 2017, has committed an error, in considering the debt amount as Rs.4.08 Crores, solely on the basis of the demand notice, de hors, the recovery certificate issued in O.A.No.41 of 2013. DRAT, Which heard both the appeals AIR No.300 of 2017 filed against O.A.No.41 of 2013 dated 09.12.2016 and AIR No.74 of 2017 filed against order in S.A.No.1 of 2013, dated 09.12.2016, ought to have considered that as per the 3rd proviso to Section 18 of the SARFAESI 2002, appeal can be entertained, by deposit of 25% of the debt referred to in 2nd proviso to Section 18 of the SARFAESI Act, 2002, which means the amount claimed or determined by the Debts Recovery Tribunal, whichever is less.

15. In the foregoing paragraphs, we have recorded that as on 31.10.2017, the amount payable by the appellant/writ petitioner, was only Rs.1,53,30,624/-. Having directed the writ petitioner in I.A.No.967 of 2017 in AIR No.300 of 2017 to make pre deposit of Rs.45 Lakhs with the Registrar of DRAT, Chennai, there is absolutely no necessity to make another order in I.A.No.424 of 2017 in AIR No.74 of 2017, to make a further pre deposit of Rs.1.80 Crores, with the Registrar of DRAT, Chennai, solely based on the amount mentioned in the notice dated 16.03.2012, issued under Section 13(2) of the SARFAESI Act, 2002, which has culminated into an order in O.A.No.41 of 2013, dated 09.12.2016, for a sum of Rs.1.31 Crores only.

15. Statute mandates pre deposit for entertaining an appeal. Only on such deposit, appeal could be entertained and arguments could be advanced on the merits of the case.

16. For the amount demanded i.e., Rs.4.08 Crores in the notice issued under Section 13(2) of the SARFAESI Act, 2002 dated 16.08.2012 there is a conditional order to deposit Rs.1.80 Crores. For the amount determined that is Rs.1.31

Crores, there is another order of pre deposit of Rs.45 Lakhs. There cannot be two orders. Language of 2nd proviso is very clear, that is, debt claimed or determined, whichever is less.

17. Dismissal of I.A.No.424 of 2017 in AIR No.74 of 2017 filed for waiver and dismissal of appeal in AIR No.74 of 2017 on 03.10.2017, is erroneous and consequently, both the orders are set aside. W.P.No.32440 of 2017 is allowed. No Costs. Consequently, the connected Writ Miscellaneous Petition is closed.

18. In Narayan Chandra Ghosh vs. Uco Bank & Ors. reported in AIR 2011 SC 1913, the question posed before the Hon'ble Apex Court was, whether the requirement of the pre-deposit under Section 18(1) is mandatory or not? Going through Section 18 of the SARFAESI Act, 2002 and the provisos therein, the Hon'ble Apex court, at paragraph No.8 of the said judgment, held as follows:

"8. 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 percent 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 percent of the debt, referred to in the second proviso. Thus, there is an absolute bar to 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 percent 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. 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 proviso 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."

19. In the light of the above discussion and decision, order made in I.A.No.967 of 2017 in AIR No.300 of 2017 dated 03.10.2017, cannot be said to be erroneous and the said orders are sustained. W.P.No.32439 of 2017 is dismissed. No Costs. Consequently, the connected Writ Miscellaneous Petition is closed.

20. However, Dr.S.R.Kalyani, learned counsel for the petitioner submitted that a sum of Rs.45 Lakhs directed to be made as pre deposit in AIR No.300 of 2017, would be made within three weeks from today. Submission is placed on record.

21. Challenge to the order made in AIR No.300 of 2017 dated 03.10.2017 cannot be interfered with. Considering the submission of the learned counsel for the petitioner that pre deposit would be made within the above said period, we grant liberty to the writ petitioner, to deposit the said sum within the said period. On such deposit being made, Registry of DRAT, Chennai is directed to assign regular appeal numbers to AIR Nos.74 of 2017 and 300 of 2017, respectively, if the appeal papers are otherwise in order.

22. Though, Dr.S.R.Kalyani, learned counsel for the petitioner sought for stay of the auction scheduled on 18.12.2017, such order cannot be granted when the appeal itself is yet to be numbered. However, taking note of the orders passed in the instant writ petitions, bank is directed to consider the request of the borrower, whose statutory right of appeal, is protected by this Court, by extending the time to make pre deposit by three weeks.

Sd/-

Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

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To

1. Branch Manager,
Corporation Bank,
Mettupalayam - 641 301,
Coimbatore District.

2. The Deputy General Manager,
Corporation Bank, Zonal Office,
Ranga's "Westend", T.S.No.12/20, 8th Cross,
NSR Road, Saibaba Colony, Coimbatore - 641 011.

3. The Chairman cum Managing Director,
Corporation Bank, Corporate Office,
Mangala Devi Temple Road,
Mangalore - 574 001.

4. The Presiding Officer,
Debt Recovery Appellate Tribunal,
Chennai-600 002.

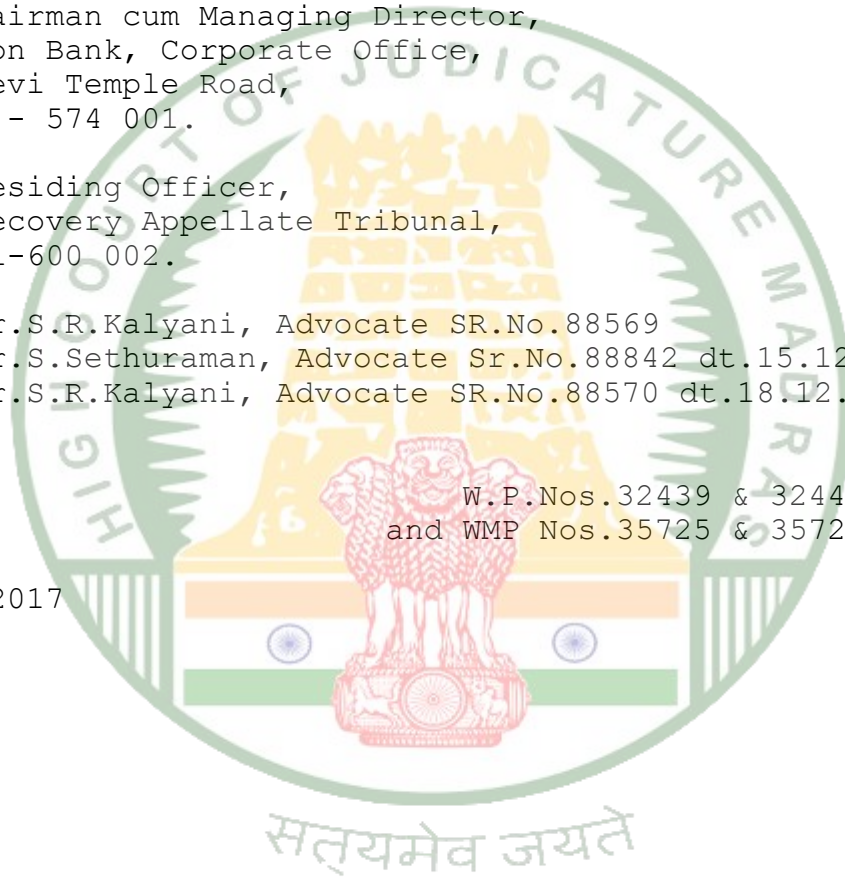
+1cc to Dr.S.R.Kalyani, Advocate SR.No.88569

+1cc to Mr.S.Sethuraman, Advocate Sr.No.88842 dt.15.12.2017

+1cc to Mr.S.R.Kalyani, Advocate SR.No.88570 dt.18.12.2017

W.P.Nos.32439 & 32440 of 2017
and WMP Nos.35725 & 35726 of 2017

PPA(CO)
sm:14.12.2017



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