

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 19.09.2017

CORAM

THE HONOURABLE MR.JUSTICE S.MANIKUMAR
and
THE HONOURABLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

Writ Petition No.16796 of 2017
and
W.M.P.No.18243 of 2017

K.Radhakrishnan

.. Petitioner

Versus

- 1 Indian Bank
ERA Puram Branch
No.9 First Trust Link St
Mandavellipakkam
Chennai 28
- 2 The Authorized Officer
Indian Bank
Assets Recovery Management Branch
No.55 Ethiraj Salai
Egmore, Chennai 8
- 3 K.Pandarinathan
- 4 A.Leelavathi
- 5 Devaki Damodaran
- 6 K.Jayaraman
- 7 The Registrar
Debts Recovery Appellate Tribunal
No.55 Ethiraj Salai, Chennai 8.

... Respondents

Writ Petition has been filed under Article 226 of the Constitution of India praying for issuance of a Writ of Certiorarified Mandamus calling for the records relating to the proceedings dated 09.05.2017 in I.A No.475/2015 in AIR (SA) 385 of 2015 on the file of the Debts Recovery Appellate Tribunal, Chennai, and quash the same, consequently direct the 7th Respondent to number the AIR (SA) 385 of 2015 and decide the

Appeal on merit.

For Petitioner : Mr.M.Kalyanasundaram
Senior Counsel
for
Mr.A.Udayakumari
For Respondent- 1 : No appearance
For Respondent- 2 : Mr. John Kingslin
Respondents 3 to 6 : Given up

ORDER

(Order of the Court was delivered by V.BHAVANI SUBBAROYAN, J.)

The petitioner has come forward to challenge the order passed in I.A.No.475 of 2015 in AIR (SA) 385 of 2015 dated 09.05.2017 of Debts Recovery Appellate Tribunal, Chennai, and also sought direction to the seventh respondent to number the appeal in AIR (SA) 385 of 2015 and to decide the same on merits.

2. The brief facts of the case are as follows:-

The property bearing Old No.15, New No.23 A, Pycrafts 1st Street, Royapettah, Chennai -14 was owned by late Kamakshi Ammal, who died intestate on 1998 leaving behind her legal heirs, viz., the petitioner, K.Pandarinathan (third respondent herein) and three others. For the loan availed by the third respondent herein for his business purpose, the deceased Kamakshi Ammal stood as a guarantor by creating an equitable mortgage over the said property. The first respondent bank filed a suit in O.S.No.7789 of 1997 on the file of the City Civil Court claiming a sum of Rs.2,81,253/- against them and obtained an exparte preliminary decree and subsequently, filed O.A.No.35 of 2005 before Debt Recovery Tribunal-1, Chennai and obtained an exparte decree. Therefore, the petitioner filed petitions before Debt Recovery Tribunal-1 seeking to condone the delay (MA.208 of 2006), set aside the exparte decree (MA.209 of 2006), implead (MA.210 of 2006) and stay (MA.211 of 2006). The Debt Recovery Tribunal- I, Chennai, dismissed the petition to condone the delay. An appeal preferred against the order of Debt Recovery Tribunal- I, Chennai, has also been dismissed by the Debts Recovery Appellate Tribunal, Chennai. In the mean while, challenging the Possession Notice dated 07.03.2009, the petitioner preferred S.A.No.1 of 2010 before the Debt Recovery Tribunal-1, Chennai, and the same has been dismissed on 28.04.2005. Against which, the petitioner preferred an Appeal before the Debts Recovery Appellate Tribunal, Chennai, in AIR (SA) 385 of 2015 along with Waiver Application in I.A.No.475 of 2015. On Waiver Application, the Debts Recovery Appellate Tribunal, Chennai, vide its order dated 09.05.2017, has directed the petitioner to deposit Rs.10 lakhs with the Registrar of Debts Recovery Appellate Tribunal, Chennai, as a pre-condition to entertain the said Appeal. Challenging the same, the

petitioner is before this Court.

3. The learned senior counsel appearing on behalf of the petitioner would submit that either 13(2) demand notice dated 13.12.2008 or 13(4) Possession Notice dated 07.03.2009 were not issued on the legal heirs of the deceased Kamakshi Ammal, except on the legal heir, ie., Principal Borrower K.Pandarinathan. Non-issuance of 13(2) notice takes away the valuable rights of the other legal heirs to send a representation under Section 13 (A) of the SARFAESI Act. The mortgage was not at all created by the deceased guarantor in favour of the first respondent Bank. Since the notice issued, on third respondent, under Section 13 (2) dated 13.12.2008 has already been set aside by the Debt Recovery Tribunal - I in S.A.No.192 of 2010 dated 18.11.2015, the respondent bank cannot proceed further and the statutory requirement of pre-deposit under Section 18(1) of the SARFAESI Act may not arise.

4. Learned senior counsel appearing on behalf of the petitioner would further submit that the Debt Recovery Tribunal-I, Chennai, reserved orders in February 2012 and delivered judgment on 28.04.2015, after a lapse of 3 years and 2 months; therefore, the long delay in delivering the judgment itself is sufficient to set aside the judgment of Debt Recovery Tribunal-I. In support of the above contention, the learned counsel relied on the decision of the Hon'ble Supreme Court reported in (2003) 1 SCC 430 (Kanhaiyalal and others ..vs.. Anupkumar and others).

5. Learned counsel for the respondent bank would submit that the bank issued demand notice, possession notice and sale notice to the borrower, guarantor and mortgagor. In view of the order of the Debt Recovery Tribunal - I in S.A.No.192 of 2010 dated 18.11.2015 setting aside Section 13(2) notice dated 13.12.2008, the Appeal filed by the petitioner becomes infructuous. The respondent bank challenged the order of the Debt Recovery Tribunal - I made in S.A.No.192 of 2010 dated 18.11.2015. The petitioner is liable to adhere with the pre-condition deposit stipulated under Section 18(1) of the SARFAESI Act, which is the condition precedent for preferring an appeal before the Appellate Tribunal. To substantiate his above contention, the learned counsel cited the decision of the Hon'ble Apex Court reported in (2011) 4 SCC 548 (Narayan Chandra Ghosh ..vs.. UCO Bank).

6. Heard the learned senior counsel appearing on behalf of the learned counsel on record for the petitioner and the learned counsel for the respondent bank and perused the affidavit of the petitioner, counter affidavit of the respondent bank and other materials available on record.

7. The petitioner has come forward to challenge the order passed in I.A.No.475 of 2015 in AIR (SA) 385 of 2015 dated 09.05.2017, wherein, the Debts Recovery Appellate Tribunal, Chennai, has directed the petitioner to deposit Rs.10 lakhs with the Registrar of Debts Recovery Appellate Tribunal, Chennai, which is the part of debt amount of Rs.39,90,000/-.

8. The grounds on which the petitioner has assailed the order of the appellate Tribunal is that the Debts Recovery Appellate Tribunal, Chennai, ought to have exercised its inherent power to waive the pre-deposit as contemplated under Section 18 of the SARFAESI Act.

9. The learned senior counsel appearing on behalf of the petitioner vehemently contended that the Appellate Tribunal ought to have considered the case on merits. He relied on the decision of the Hon'ble Supreme Court reported in (2003) 1 SCC 430 (Kanhaiyalal and others ..vs.. Anupkumar and others), and submitted that long delay in delivering the judgment itself is sufficient to set aside the judgment impugned before the Appellate Tribunal. The relevant portion in the said decision reads as follows:

"9. In the light of what is stated above, in our view, the impugned judgments cannot be sustained. Further, as stated above, the arguments were heard in November, 1990 and the High Court pronounced the judgments on 7th May, 1993. This Court in Bhagwandas Fatechand Daswani and Ors. v. HPA International and Ors., dealing with the contention that the long delay in delivery of judgment is sufficient to set aside the judgment under appeal without going into this broad question, set aside the judgment under appeal on the ground of delay in delivery of judgment without expressing any opinion on the merits of the case and remitted the case to the High Court for deciding the appeal afresh on merits. While doing so this Court observed,

"However, it is correct to this extent that a long delay in delivery of judgment gives rise to unnecessary speculations in the minds of parties to a case. Moreover, the appellants whose appeals have been dismissed by the High Court may have the apprehension that the arguments raised at the Bar have not been reflected or appreciated while dictating the judgment - nearly after five years..... We, therefore, on this short question, set aside the judgment under

appeal."

In this view also the judgment of the High Court under challenge cannot be sustained.

10. In the circumstances, the impugned judgments are set aside. The appeals are allowed. We remit these matters to the High Court for disposal in accordance with law, keeping in view the observations made above."

The said plea was raised because the Debt Recovery Tribunal-I, Chennai, reserved orders in February 2012 and delivered judgment on 28.04.2015, after a lapse of 3 years and 2 months. The said decision cited by the learned counsel for the petitioner has no relevance to the present case on hand, as the said decision pertains to delay in delivering the judgment, wherein, the Hon'ble Supreme Court has dealt with the long delay in delivery of judgment and effect of the same. However, the present case pertains to waiver of deposit amount, as contemplated under Section 18 the SARFAESI Act, 2002.

10. On perusal of the documents filed by way of typed set, it is clear that the Debt Recovery Tribunal-1, Chennai, by its order dated 15.06.2007 has dismissed the application filed by the petitioner seeking condonation of delay of 671 days in preferring an application to set aside the exparte decree passed in O.A.No.35 of 2005, wherein preliminary decree has been passed as early as on 04.04.2002. The petitioner has also filed Securitisation Appeal under Section 17(1) of the SARFAESI Act, 2002 in S.A.No.1 of 2010 before the Debt Recovery Tribunal-1, Chennai, challenging the possession notice dated 07.03.2009. The Debt Recovery Tribunal-1, Chennai, by its order dated 28.04.2015 has dismissed the said appeal stating that the respondent bank have not contravened any of the provisions of the SARFAESI Act / Rules while issuing the possession notice impugned therein. Challenging the said order, the petitioner preferred the Memorandum of Appeal M.A.(S.A).No.385 of 2015 under Section 18 of the SARFEASI Act, 2002, in which the petitioner has filed an application in I.A.No.475 of 2015 praying an order from the Tribunal for waiver of pre-condition deposit. The Debts Recovery Appellate Tribunal, Chennai, while considering the submissions made by the petitioner as well as the respondent bank has exercised its power to reduce the pre-deposit from 50% to 25% and directed the petitioner to make pre-deposit of Rs.10,00,000/- while determining the debt amount at Rs.39,90,000/-.

11. It would be appropriate to examine Section 18 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 - the powers conferred on the Appellate Tribunal, while entertaining the

Appeal from any order made by the Debt Recovery Tribunal, which reads as follows:-

"18. Appeal to Appellate Tribunal.--

(1) Any person aggrieved, by any order made by the Debts Recovery Tribunal 20[under section 17, may prefer an appeal along with 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 and rules made thereunder."

Therefore, it is evidently clear from the above Section that the Appellate Tribunal has power to reduce the amount, however for the reasons to be recorded in writing, but the provision enables the Tribunal to reduce the amount not less than 25% of the debt as determined by the Tribunal.

12. While dealing with the present case, the decision of the Hon'ble Apex Court reported in (2011) 4 SCC 548 (Narayan Chandra Ghosh ..vs.. UCO Bank), throws light on this.. The relevant paragraphs are as under:-

"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 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 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. 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.

9. The argument of learned counsel for the appellant that as the amount of debt due had not been determined by the Debts Recovery Tribunal, appeal could be entertained by the Appellate Tribunal without insisting on pre-deposit, is equally fallacious. Under the second proviso to sub-section (1) of Section

18 of the Act the amount of fifty per cent, which is required to be deposited by the borrower, is computed either with reference to the debt due from him as claimed by the secured creditors or as determined by the Debts Recovery Tribunal, whichever is less. Obviously, where the amount of debt is yet to be determined by the Debts Recovery Tribunal, the borrower, while preferring appeal, would be liable to deposit fifty per cent of the debt due from him as claimed by the secured creditors. Therefore, the condition of pre-deposit being mandatory, a complete waiver of deposit by the appellant with the Appellate Tribunal, was beyond the provisions of the Act, as is evident from the second and third proviso to the said Section. At best, the Appellate Tribunal could have, after recording the reasons, reduced the amount of deposit of fifty per cent to an amount not less than twenty five per cent of the debt referred to in the second proviso. We are convinced that the order of the Appellate Tribunal, entertaining appellant's appeal without insisting on pre-deposit was clearly unsustainable and, therefore, the decision of the High Court in setting aside the same cannot be flawed.

10. It is stated before us that in the notice issued to the appellant under Section 13 (2) of the Act, the debt due from the appellant as on 25th September, 2006 was `52,42,474/-. Since in the present case Debts Recovery Tribunal had not determined the debt due, we direct that on appellant's depositing with the Appellate Tribunal an amount of `15 lakhs within a period of four weeks from today, his appeal shall be entertained and decided on merits. We direct that till the Appellate Tribunal takes a final decision in the appeal, the bank shall maintain status quo in respect of the property of which physical possession is stated to have been taken by it.

11. Needless to add that if the appellant fails to make the said deposit within the time granted, his appeal before the Appellate Tribunal shall stand dismissed and it will be open to the respondent bank to take further steps in the matter in accordance with law."

The said decision squarely applies to the case on hand. Hence,

guided by clear unambiguous provisions in the Act and the case decided by the Hon'ble Supreme Court, We are of the view that the order of the Debt Recovery Appellate Tribunal dated 09.05.2017 made in I.A No.475/2015 in AIR (SA) 385 of 2015 has to be sustained.

13. Under these circumstances, We find no merit in the Writ Petition and the Writ Petition is dismissed. The petitioner may approach the Debt Recovery Appellate Tribunal and make pre-deposit within a period of four weeks from the date of receipt of a copy of this order and agitate all the factual aspects placed before the Tribunal. No costs. Consequently, connected Miscellaneous Petition is closed.

-s/d-

Assistant Registrar (CS-IV)

True Copy

Sub-Assistant Registrar

mr

To

1. The Registrar
Debts Recovery Appellate Tribunal
No.55 Ethiraj Salai, Chennai 8.

+1 cC to Mr.S.A. Udayakumari, Advocate sr 68264.

+1 Cc to Mr.J. John Kingsli, Advocate sr 68332.

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and

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SP(14/11/2017)

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