IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 03.11.2017

CORAM:

THE HON'BLE MR.JUSTICE S.MANIKUMAR
AND
THE HON'BLE MR.JUSTICE R.SURESH KUMAR

W.P.No.28166 of 2017
and
WMP No.30301 of 2017

P.Anbukarasan ... Petitioner

vs.

1. The Authorised Officer,
Asset Management Branch,
[2125] No.328, Thambu Chetty Street,
Chennai - 600 001.

2. The Branch Manager,
UCO Bank, Pondicherry Main Branch,
Rue Mahe De Labourdonnais,
Pondicherry - 6605 001.

3. M.Bharathi

4. Chair Person,
Debt Recovery Appellate Tribunal,
4th Floor, Indian Bank Circle Office,
55, Ethiraj Salai,
Chennai - 600 008. ... Respondents

WRIT Petition filed under Article 226 of the Constitution of India, praying for the issuance of a writ of Certiorarified Mandamus, calling for the records of the DRAT 4th respondent order dated 10.10.2017 passed in I.A.No.1393 of 2017 in AIR (SA) No.485 of 2017 and quash the same and order waiver of pre-deposit because the petitioner is not covered under SARFAESI Act, 2002.

For Petitioner : Mr.S.Namasivayam

ORDER

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

Proceedings impugned in the instant writ petition dated 10.10.2017 in AIR (SA) No.485 of 2017 on the file of the Debts Recovery Appellate Tribunal, Chennai, is extracted hereunder.

PROCEEDINGS DATED 10.10.2017

Ld. Counsel Mr.S.Namasivayam for Appellant present.

Proof of service is produced. R1 and R2 Bank served. No representation for them. R3 returned as intimation delivered.

Heard on IA-1393/2017 application for waiver of pre deposit.

Appellant has challenged the order dated 11.7.2017 of DRT-III, Chennai, by which S.A.No.587/2016 of Appellant was dismissed.

Ld. Counsel for Appellant submits that Respondent Bank has issued a notice under Section -13(2) of SARFAESI Act on 1.6.2016 for recovery of Rs.1.27 Crores against the borrower and guarantors. Ld.Counsel submits that Appellant is the owner of the property on the basis of the Will and Original Will is lying with him, hence, no mortgage has been created on the property for want of original Will. Further submits that his uncle borrower and Respondent bank had colluded together and misused the averments of his property in Will and enhanced the loan limits time to time without information and knowledge of the Appellant. Hence, SARFAESI actions are illegal and bad at its face value and prays for total waiver.

Appellant further submits that this case is nothing but a clear instance of collusion between the banker and the real borrower and they are deliberately avoiding this Tribunal from not making appearance.

In view of the fact that DRAT cannot entertain the Appeal of any aggrieved person without ensuring the pre-deposit of 50% of the debt amount, which cannot be reduced to less than 25% in any case, I hereby direct the Appellant to make a pre-deposit of Rs.32,00,000/- (Rupees Thirty Two Lakhs only) in two instalments. Out of which, first instalment of Rs.16 lakhs shall be deposited with the Registrar of this Tribunal within four weeks from today and second instalment of Rs.16 lakhs shall be deposited in next four weeks thereafter. In case of failure to deposit the first instalment within stipulated period, it is made clear that this Appeal shall automatically stand dismissed without reference to the Board.

IA-1393/2017 waiver application is disposed of.

List for confirmation of first instalment pre-deposit of Rs.16 lakhs on 7.11.2017."

2. On the basis of the supporting affidavit, seeking to quash the abovesaid proceedings, Mr.S.Namasivayam, learned counsel for the petitioner submitted his paternal uncle has defrauded the petitioner and obtained a loan from UCO Bank, Pondicherry Main Branch, Pondicherry, pledging the commercial property in No.13 & 13A, Jawaharlal Nehru Street, Puducherry, in R.S.No.129 Pt, Town Survey No.8, Ward C, Block 20, Puducherry City, measuring 427.50 sq.ft. According to him, petitioner has stood as guarantor only to an extent of Rs.15 Lakhs and that the same was not renewed.

3. Inviting the attention of this Court to the record of proceedings in O.A.No.13 of 2015 dated 20.03.2017, learned counsel for the petitioner submitted that only the photocopies of the registered Will, executed in favour of the 2nd defendant therein / writ petitioner dated 10.10.2015, subject matter of the property mortgaged for the loan availed, have been marked and that the original Will is with the writ petitioner. He also invited the attention of this Court to the observation of the Debts Recovery Tribunal-III, Chennai, in S.A.No.587 of 2016, preferred by the writ petitioner challenging the possession notice wherein, the tribunal had erred in observing that the bank had proved its case by filing the original application. According to him, such an observation is erroneous.

4. Added further, having regard to the profession of the writ petitioner, Chartered Accountant, completed only in the year 2013 and financial hardship in complying with the directions of pre-deposit of Rs.32 Lakhs, being 25% of the amount claimed viz. Rs.1.27 Crores, under Section 13(2) of the SARFAESI Act, 2002, dated 01.06.2016, prayed for indulgence of this Court to order complete waiver of the said amount.

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

6. According to the petitioner, he stood as guarantor only for Rs.15 Lakhs and not renewed the guarantee. It is the further contention of the petitioner that property mortgaged with the respondent bank for the loan of Rs.40,00,000/- has been bequeathed by Mr.R.Murugesan, to an extent of 1087 sq.ft situated at Door No.13 & 13A, Jawaharlal Nehru Street, Puducherry in R.S.No.239 Pt, T.S.No.8, Ward-C, Block-20, Puducherry Town, in favour of the writ petitioner and his brother.

7. Bank has filed O.A.No.13 of 2015 on the file of Debts Recovery Tribunal-III, Chennai for recovery of Rs.1,51,20,766.13p and that the same is stated to be pending. Description of the immovable property mentioned both in notice

dated 01.06.2016 under Section 13(2) of the SARFAESI Act, 2002 and possession notice dated 27.09.2016 issued under Section 13 (4) of the SARFAESI Act, 2002, is as follows:

> "One commercial plot [of area 427 1/2 sq.ft.] with building Ground Floor 427 1/2 sq.ft & first floor 427 1/2 sq.ft., situated at 13 & 13A, Jawaharlal Nehru Street, Puducherry, in R.S.No.239 Pt, T.S.No.8, Ward C, Block 20, Puducherry town
>
> Boundaries:
>
> North: Jawaharlal Nehru Street
> South: Property of Manicakkamal
> East: Pedro Kanagaraya Mudaliar Street
> West: Property of Anbu @ Jankiraman"

8. As per the notice issued under Section 13(2) of the SARFAESI Act, dated 01.06.2016, bank has demanded the petitioner to remit a sum of Rs.1,27,01,330.13p as on 01.11.2013.

9. As per the possession notice dated 21.09.2016, bank has demanded a sum of Rs.1,27,01,330.13p inclusive of interest upto 01.11.2013 with further interest and incidental expenses, costs, charges, etc.

10. Possession notice dated 27.09.2016 has been challenged in SAR Application No.587 of 2016 on the file of Debts Recovery Tribunal-III, Chennai.

11. After considering the rival submissions and material on record, SA No.587 of 2016, filed challenging possession notice has been dismissed by Debts Recovery Tribunal-III, Chennai as hereunder:

> "Heard Ld. counsels for both sides. It is the case of the appellants that there is no creation of equitable mortgage by deposit of title deeds by the appellant herein over the schedule mentioned property as it is his express case that the original Will under which the property devolved upon him is very much in his possession and therefore the bank cannot claim any mortgage rights over the property in the absence of the title deed under which appellant had acquired a title over the property and therefore no action under SARFAESI Act can sustain in view of absence of security interest created in the property by its lawful owner.
>
> Whereas it is the case of the respondent bank that there are two extents of property that devolved upon two grandsons from their grandfather and that one of the grandson had executed a valid equitable mortgage in favour of the respondent bank which is now being subjected to the course of recovery through SARFAESI Act and as there is a valid security interest created by the other grandson, the actions of the respondent bank are valid and

sustainable and in fact the respondent bank had initiated OA No.13/2015 against the defendants where under it had filed all its documents and established the security created in its favour by demonstrating the equitable mortgage that is executed by the borrowers and therefore submits that it is not true and correct for the appellant to take the stand that there is no security interest for the respondent bank to proceed further under SARFAESI Act.

Except for the above contentions with regard to the subsistence of a valid mortgage and consequently a security interest in the property, there are no other infirmities in alleged by the appellant in this appeal.

Since the respondent bank had already, proved its case and contentions by filing the original application and also marked the security documents evidencing the loan, this appeal is without merits and whatever contentions that are raised here by the appellant can be exclusively raised in the OA thus resulting that there are no merits in the present appeal. As the appellant failed to establish any infirmities in the procedure adopted by the respondent bank while taking possession of the subject impugned immovable property, the possession notice is held to be valid and tenable under law. Therefore, the appeal is liable to be dismissed.

Accordingly, this SA stands dismissed, however without costs."

12. Being aggrieved by the dismissal of challenge to the possession notice, petitioner has filed AIR (SA) No.485 of 2017 before the DRAT, Chennai. I.A.No.1393 of 2017 has been filed for waiver of pre-deposit. Before the appellate tribunal, the petitioner/appellant has contended that Respondent Bank has issued a notice under Section -13(2) of SARFAESI Act, 2002 on 1.6.2016 for recovery of Rs.1.27 Crores against the borrower and guarantors. Petitioner/appellant is the owner of the property on the basis of the Will and that the Original Will is lying with him, and hence, no mortgage has been created on the property for want of original Will and further contended that his uncle borrower and Respondent bank had colluded together and misused the Will and enhanced the loan limits time to time, without information and knowledge of the petitioner/appellant. Hence, SARFAESI actions are illegal and bad at its face value and prayed for total waiver. Petitioner/appellant has further submitted that this case is nothing but a clear instance of collusion between the bank and the borrower and they are deliberately avoiding the Tribunal, from making appearance.

13. Having regard to the above submissions, DRAT, Chennai vide proceedings dated 10.10.2017 in I.A.No.1393 of 2017, in AIR (SA) No.485 of 2017, passed the following order.

"In view of the fact that DRAT cannot entertain the Appeal of any aggrieved person without ensuring the pre-deposit of 50% of the debt amount, which cannot be reduced to less than 25% in any case, I hereby direct the Appellant to make a pre-deposit of Rs.32,00,000/- (Rupees Thirty Two Lakhs only) in two instalments. Out of which, first instalment of Rs.16 lakhs shall be deposited with the Registrar of this Tribunal within four weeks from today and second instalment of Rs.16 lakhs shall be deposited in next four weeks thereafter. In case of failure to deposit the first instalment within stipulated period, it is made clear that this Appeal shall automatically stand dismissed without reference to the Board.
IA-1393/2017 waiver application is disposed of.
List for confirmation of first instalment pre-deposit of Rs.16 lakhs on 7.11.2017."

14. Though, Mr.S.Namasivayam, learned counsel for the petitioner reiterated the abovesaid grounds and expressing hardship to a budding Chartered Accountant alleged to have been defrauded by his paternal uncle in mortgaging the subject matter of the property by availing a huge loan, to which the petitioner never stood as a guarantor, except to a limited extent of Rs.15 Lakhs, which guarantee also has not been renewed and that therefore, the Debts Recovery Tribunal-III, Chennai, erred in dismissing SA No.587 of 2016, filed challenging the challenging the possession notice and in the light of the above, sought for waiver of pre deposit, by exercising the extraordinary jurisdiction of this Court, under Article 226 of the Constitution of India, we are not inclined to accept such submissions for the reason that the Hon'ble Supreme Court of India in Narayan Chandra Ghosh vs. Uco Bank & Ors. reported in AIR 2011 SC 1913, at paragraph No.8 of the judgment, has categorically held that pre deposit contemplated in Section 18 of the SARFAESI Act, 2002 is mandatory and on the facts and circumstances of the said case, further observed that the appellate tribunal had erred in entertaining the appeal without directing the appellant therein to comply with the said mandatory requirement.

15. Having regard to the categorical pronouncement of the Hon'ble Supreme Court, as regards pre deposit, though, the petitioner has expressed hardship, that he is a budding Chartered Accountant, we cannot find fault with the order of the appellate tribunal, which has directed pre deposit of only 25% of the amount claimed under the notice issued under Section 13(2) of the SARFAESI Act, 2002. We deem it fit to extract paragraph No.8 of the judgment in Narayan Chandra Ghosh's case [cited supra].

"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."

16. During the course of hearing, Mr.S.Namasivayam, learned counsel for the petitioner fairly admitted that the grounds of challenge to S.A.No.587 of 2016 made in the instant writ petition, have already been raised in AIR (SA) No.485 of 2017, filed before DRAT, Chennai. That being the case, writ Court cannot adjudicate the facts, and record any finding, when an appeal is stated to have been filed.

17. Going through the material on record and having regard to the decision of the Hon'ble Supreme Court in Narayan Chandra Ghosh's case [cited supra], order of the Debts

Recovery Appellate Tribunal, Chennai, in directing the petitioner to deposit only 25% of the debt claimed, in two equated instalments of Rs.16 Lakhs, cannot be said to be manifestly illegal warranting intervention. Prayer sought for, cannot be granted. For confirmation of the 1st instalment of predeposit of Rs.16 Lakhs, Registry of DRAT, Chennai, has been directed to list the matter on 07.11.2017.

18. Considering the totality of the case, we are only inclined to extend the time to make pre-deposit by eight weeks from the date of receipt of a copy of this order.

19. Order of DRAT, Chennai is sustained with the above directions. Writ petition is disposed of. No costs. Consequently, the connected Writ Miscellaneous Petition is closed.

Sd/-
Assistant Registrar(CS VIII)

//True Copy//

Sub Assistant Registrar

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To

1. The Authorised Officer,
Asset Management Branch,
[2125] No.328, Thambu Chetty Street,
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2. The Branch Manager,
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Rue Mahe De Labourdonnais,
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Chennai - 600 008.

+1cc to Mr.S.Namasivayam, Advocate SR.No.78438

W.P.No.28166 of 2017
and WMP No.30301 of 2017

RV(CO)
GN(06/11/2017)