IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 7/11/2017

C O R A M

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

Writ Petition No.28296 of 2017

1. S. Neeraja
2. S. Ashok
rep. By his Power Agent
Mr.Vikram Chari.

3. S. Vikram Chari. ... Petitioners

Vs

1. The Asset Reconstruction Company (India) Limited
(Assignee of Canara Bank)
A Company incorporated under the provisions of the Companies Act, 1956
rep. By its Managing Director
Having Office at "The Ruby"
10th Floor, No.29 Senapati Bapat Marg
Dadar (West)
Mumbai 400 028.

2. Alpha Amins Private Limited
A company incorporated under the provisions of the Companies Act, 1956
Having Office at F-93 & 94,
SIPCOT Industrial Complex Phase - I
Gummidipoondi
Tiruvallur 601 201.

S. Srinivasan (Deceased)

3. K.D.Pidhadia

Manju Srinivasan (Deceased)

S. Jayalakshmi (Deceased)

4. R. Pakshirajan
Director
Alpha Amins Private Limited
Tiruvallur 601 201.

5. Technology Development Board
Department of Science & Technology
Ministry of Science and Technology
Wing 'A' Ground Floor
Viswakarma Bhavan
Shaheed JeetSingh Marg
New Delhi 110 016.

6. ICICI Bank
A banking Company within the meaning of
Section 5 (c) of the Banking Regulation Act, 1949
rep. By its Branch Manager
Ambattur Industrial Estate
Ambattur. ... Respondents

Petition filed under Article 226 of the Constitution of India praying for the issuance of a writ of certiorarified mandamus to quash the order of the Hon'ble DRAT dated 12/10/2017 to take on file the Appeal filed in AIR 388/2017 and to direct the Hon'ble DRAT to take on file the Appeal filed in AIR 388/2017 without insisting upon the payment of pre-deposit amount.

For petitioners ... Mr.M.S.Krishnan
Senior Counsel
for M/s. Sarvabhauman Associates

O R D E R

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

Material on record discloses that Asset Reconstruction Company (India) Limited, Mumbai, has filed O.A.No.35 of 2010, on the file of the Debt Recovery Tribunal - I, Chennai, subsequently, renumbered as O.A.No.98 of 2015 and transferred to the file of Debts Recovery Tribunal - II, Chennai, against (i). Alpha Amins Private Limited, Thiruvallur/borrower, represented by the Official Liquidator, High Court, Madras, (ii). S. Srinivasan (Guarantor), (iii). S. Neeraja (Guarantor), (iv), K.D.Pidhadia (Guarantor), (v). Mrs.Manju Srinivasan (Guarantor) and (vi). Mrs.S.Jayalakshmi (Deceased), alleged to be a mortgagor of the subject property with Federal Bank, (vii). Mr.S. Ashok, other Guarantor, (viii). Mr.R.Pakshirajan, Director of Alpha Amins Private Limited, Tiruvallur, (ix). Technology Development Board, New Delhi, and (x). ICICI Bank, Ambattur.

2. During the pendency of the Original Application, second defendant therein, S.Srinivasan, died. As per the order made in I.A.No.284 of 2017, dated 18/4/2017, S.Vikramchari, has been impleaded as defendant No.11. S. Srinivasan and S.Jayalakshmi, described as guarantor and alleged mortgagor, respectively, in O.A.No.98 of 2015 are

husband and wife, respectively. Writ petitioners shown as defendants 3, 7 and 11, in O.A.No.98 of 2015, are the sons and daughter of Srinivasan/Guarantor and S.Jayalakshmi/mortgagor.

3. Material on record discloses that in O.A.No.98 of 2015, on the file of the Debt Recovery Tribunal - II, Chennai, D.1, 4, 5, 8 and 11 were set ex parte. D.9 and 10 were treated as formal parties. D.10/ICICI Bank, represented by its Branch Manager, Ambattur, is stated to have the first charge, on item No.8 of 'A' schedule property, mentioned in O.A.No.98 of 2015.

4. After considering the pleadings, the Debt Recovery Tribunal - II, Chennai, has framed the following points for consideration:-

> (i). Whether the applicant bank is entitled to recovery certificate as prayed for in the OA?
> (ii). Whether the applicant is entitled to interest @ 16.25% p.a., with monthly rests including penal interest @ 2% p.a., as prayed for in the OA?
> (iii). Whether D 6 is mortgagor and guarantor to the loan availed by D1?
> (iv). Whether D 6 is mortgagor and guarantor to the loan availed by D.1?

5. After adjudication, vide, order, dated 24/5/2017, Debt Recovery Tribunal - II, Chennai, in O.A.No.98 of 2015, ordered as hereunder:-

> "(a). the applicant bank to recover the sum of Rs.9,61,30,236/- (Rupees Nine Crores Sixty one lakhs thirty thousand two hundred and thirty six only) with interest @ 6% p.a (simple) from the date of institution of the OA till realisation and also costs of the OA from the defendants 1, 3, 4 & 5 jointly and severally and in case of default, to proceed against the schedule mentioned mortgaged/hypothecated properties (except the properties already sold under the SARFAESI Act) in terms of the charge held by applicant and in accordance with Section 326 of the Companies Act, 2013.
> (b). the amounts realised of Rs.11,77,000/- and Rs.15,80,000/- by Assignor bank by sale of properties described as item Nos.5 & 6 of Schedule 'A' to the OA be given credit towards the OA claim on the appropriate date of realisation and the balance be recovered.
> (c). D.3, 5, 7 11 are liable as legal

heirs of D 2 to the extent of mortgage properties and the estate inherited from deceased D 2 and D.6's mortgage and guarantee are valid and binding on the deceased D.6's legal heirs;

(d). D 7 is not personally liable to the OA claim

(e). D 9 & D 10 are formal parties and the OA is dismissed against D.8

(f). Issue Recovery Certificate in favour of the applicant bank in terms of this final order;

(g). Applicant is directed to file costs memo within two weeks of receipt of this order.

6. Being aggrieved, (1). S. Neeraja (D.3), (ii). S. Ashok (D.7) and S.Vikramchari (D.11), have filed an appeal in A.I.R.No.388 of 2017, against the order, made in O.A.No.98 of 2015, on the file of the Debt Recovery Appellate Tribunal, Chennai. I.A.No.1322 of 2017 has been filed for waiver. Before the Appellate Tribunal, learned counsel for the appellants/writ petitioners has contended that they are the successors of the guarantor, executant Jayalakshmi was blind and that the order impugned in O.A.No.98 of 2015, dated 24/5/2017, suffers from various illegalities, such as the deed has been signed on a non-working day, which itself is an indicative of fraud committed on the guarantor by the borrower in collusion with the Bank.

7. On the above submissions, waiver of pre-deposit has been sought for.

8. Per contra, before the Appellate Tribunal, learned counsel for the Asset Reconstruction Company (India) Limited, applicant in O.A.No.98 of 2015 has contended that no amount has been paid by the appellants/defendants 3, 7 and 11, after filing of O.A.

9. Having regard to the third proviso to Section 18 of the SARFAESI Act, 2002, vide proceeding dated 12/10/2017, in I.A.No.1320 of 2017, filed for waiver, Debt Recovery Appellate Tribunal, Chennai, has ordered, as hereunder:-

> "Whatever has been averred by the parties can be decided only at the time of final hearing in this case. For the purpose of this Appeal, I consider the debt amount to be Rs.9.61 crores and I hereby direct the appellant to make pre-deposit of Rs.2.41 crores with the Registrar of this Tribunal, out of which Rs.1.21 crores to be paid by the appellant within four weeks from today as first part of payment and second part of payment of Rs.1.20 crores will be paid by

another four weeks thereafter.

In the event of failure of any part of the amount, the appeal stands dismissed automatically without any reference by this Tribunal. IA is disposed of and closed.

List for confirmation of pre-deposit of 1st part of payment of appellant by 9/11/2017."

10. Assailing the correctness of the order of the Debt Recovery Appellate Tribunal, Chennai, instant writ petition has been filed, for a writ of certiorarified mandamus, to quash the order of the Debt Recovery Appellate Tribunal and to take on file the Appeal filed in AIR 388/2017, without insisting upon the payment of pre-deposit amount.

11. In support of the prayer sought for, Mr.M.C.Krishnan, learned Senior Counsel submitted that Ms.Jayalakshmi, shown as defendant No.6, in O.A.No.98 of 2015, was blind and aged. He admitted that writ petitioners/defendant Nos.3, 7 and 11 are the legal representatives of Mr.S.Srinivasan (since deceased), Guarantor for the loan availed by Alpha Amins Private Limited, Chennai/second respondent herein/first defendant in O.A.No.98 of 2015.

12. Inviting the attention of this Court, to the sanction memorandum, dated 8/1/2001 of Canara Bank, Chennai, Mr.M.S.Krishnan, learned Senior Counsel submitted that the subject property does not find place in the sanction order. Taking this Court to the letter of Mrs.S.Jayalakshmi, W/o. Srinivasan, dated 16/3/2003, said to have been addressed to the Manager, Canara Bank, Chennai, it is the submission of the learned Senior Counsel that the signature of the alleged mortgagor S.Jayalakshmi has been forged. According to him, the said letter has been created, on a non-working day.

13. As regards letter, dated 5/6/2008 of Canara Bank, Chennai, addressed to M/s. Alpha Amins Private Limited, Tiruvallur District, borrower, Mr.S.Srinivasan, since deceased Mrs.S.Jayalakshmi since deceased and others, including Ms.Neeraja and Ashok, shown as guarantors, Mr.M.S.Krishnan, learned Senior counsel for the petitioners submitted that when Canara Bank, Chennai, initiated proceedings under the provisions of SARFAESI Act, 2002 and the Bank had consciously not proceeded against the subject property involved in the instant lis. Learned Senior Counsel further submitted that the subject property (Royapettah property) has already been mortgaged by Mrs.Jayalakshmi, since deceased, with ICICI Bank, Ambattur/Defendant No.10 in O.A.No.98 of 2015/sixth respondent in the instant writ petition and after discharging the loan, document has been released by ICICI Bank.

14. Learned Senior Counsel for the writ petitioners

further submitted that when the original documents were with Mrs.Jayalakshmi (since deceased), Debts Recovery Tribunal - II, ought not to have entertained O.A.No.98 of 2015, on the basis of xerox copies of documents. When no certified/original documents are filed in support of the claim in O.A.No.98 of 2015 and when no explanation has been offered by the Asset Reconstruction Company (India) Limited, Mumbai, for producing the original, the Tribunal, ought not to have entertained O.A and passed orders fastening liability on the writ petitioners and others. According to the learned Senior Counsel, with respect to the subject mortgage, there is no mortgage in the eye of law.

15. Inviting the attention of this Court to the finding of Debt Recovery Tribunal - II, that signature and alignment vary from Ex.B.5 with Exs.A.11, 12, 51 and 125, and the observation that even if D.6/Jayalakshmi since deceased was affected by visual impairment, Mr.M.S.Krishnan, learned Senior Counsel submitted that the above said finding in the absence of any ex parte evidence is erroneous. Thus, on the basis of the averments made in the supporting affidavit and submissions advanced, learned Senior Counsel submitted that when appeal in AIR No.388 of 2017 has been filed before the Debt Recovery Appellate Tribunal, Chennai, assailing the correctness of the order made in O.A.No.98 of 2015, proceeding dated 12/10/2017, directing the writ petitioners/defendants 3, 7 and 11, to make pre-deposit of Rs.2.41 crores with the Registrar of Debt Recovery Appellate Tribunal, in two instalments, first of which of Rs.1.21 crores to be paid by the writ petitioners/appellants, within four weeks from 12/10/2017 and the second part of the payment of Rs.1.20 crores, within another period of four weeks, is erroneous and failure to exercise the jurisdiction conferred on the Appellate Tribunal.

16. Heard the learned Senior Counsel for the petitioners and perused the materials available on record.

17. As per Section 18 of the SARFAESI Act, 2002,

> "Appeal to Appellate Tribunal - (1) Any person aggrieved, by any order made by the Debts Recovery Tribunal (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 (51 of 1993) and rules made thereunder."

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. Admittedly, the petitioners are the legal representatives of the borrower Mr.S.Srinivasan. Contention of the learned Senior Counsel that in the sanction order, dated 8/1/2001, subject property of the lis not being included and that in 2008, when Canara Bank proceeded to initiate action, under the provisions of the SARFAESI Act, 2008, by letter, dated 5/6/2008, subject property of lis, has been omitted to be included and that therefore, Asset Reconstruction Company (India) Ltd., Mumbai, cannot seek for any order against the said property is a matter to be urged before the Debt Recovery Appellate Tribunal, in A.I.R.No.388 of 2017 and that when the appeal has already been filed, this Court in exercise of powers, under Article 226 of the Constitution of India, cannot and should not record any finding of fact.

20. Contention of the learned Senior Counsel that the letter, dated 16/3/2003, stated to have been sent by M/s. Jayalakshmi, since deceased/sixth defendant in O.A.No.98 of 2015, to the Manager Canara Bank, Chennai, had been signed on a non-working day and forged, is also a matter to be gone

into, in the appeal.

21. Though attention of this Court was brought to the finding of Debt Recovery Tribunal - II, Chennai, in O.A.No.98 of 2015, dated 24/5/2017, that there is a slight variance in the signature and that it could be due to old age, but argued to be without any opinion of the ex parte, yet again when the said finding is challenged by way of an appeal in A.I.R.No.388 of 2017, same cannot gone into, at this juncture by this Court. Contention that there is no mortgage in the eye of law has to be adjudged only in A.I.R.No.388 of 2017.

22. Now what remains to be considered is whether the petitioners, admittedly the legal representatives of the borrower, and the alleged mortgagor Mrs.Jayalakshmi, since deceased, require to make a pre-deposit of 25% of the debt claim. At this juncture, we deem it fit to consider the definition of the word "borrower" in Section 2 (f) of the SARFAESI Act, 2002 (in this context, unless the context otherwise requires, "borrower" means any person who has been granted financial assistance by any bank or financial institution or who has given any guarantee or created any mortgage or pledge as security for the financial assistance granted by any bank or financial institution and includes a person who becomes borrower of a [asset reconstruction company] consequent upon acquisition by it of any rights or interest of any bank or financial institution in relation to such financial assistance [or who has raised funds through issue of debt securities].

23. Material on record discloses that in the letter, dated 16/3/2003, said to have been addressed by Ms.S.Jayalakshmi, since deceased/defendant No.6, in O.A.No.98 of 2015, subject Royapettah property has been included. When admittedly, the petitioners are the legal heirs of the borrower and alleged mortgagor, since deceased, and though they would not have directly borrowed any money from the Bank or assistance from any financial institution, the fact remains that the Asset Reconstruction Company (India) Limited/first respondent herein, has sought for relief against the defendants, as stated supra and the Debt Recovery Tribunal - II, Chennai, has issued recovery certificate, for a sum of Rs.9,61,30,236/-, with simple interest, at the rate of 6% p.a., from the date of institution of O.A, till realisation and also costs of the OA from the defendants 1, 3, 4 and 5, legal representatives are both the borrower/alleged mortgagor, jointly and severally and in case of default, may proceed against the schedule mentioned mortgaged/hypothecated properties (except the properties already sold under the SARFAESI Act), in terms of the charge held by applicant and in accordance with Section 326 of the Companies Act, 2013. The findings of the Debt Recovery Tribunal - II, Chennai, in O.A.No.98 of 2015, dated 24/5/2017, has been under challenge in A.I.R.No.388 of 2017. Debt Recovery Appellate Tribunal, in

proceeding, dated 12/10/2017, has considered the statutory provision, third proviso to Section 18 of the SARFAESI Act, 2002 and the submissions of the learned counsel for the appellants therein/writ petitioners that legal representatives of the successor/guarantor/executant have filed the appeal, and ordered pre-deposit.

24. Though Asset Reconstruction Company (India) Limited, has sought for recovery of Rs.9,61,30,236/-, with interest, at the rate of 16.25% p.a., with monthly rests from the date of application till the date of realisation and costs, Debt Recovery Tribunal - II, Chennai, has ordered recovery of the said sum, with simple interest at 6% p.a. As per second proviso to Section 18 of the SARFAESI Act, 2002, no appeal shall be entertained unless the borrower has deposited with the Appellate Tribunal, 50% of the amount of debt due from him, as claimed by the secured creditors or determined by the Debts Recovery Tribunal, whichever is less.

25. As per third proviso, Appellate Tribunal may, for the reasons to be recorded in writing, reduce the amount to not less than 25% of debt referred to in the second proviso.

26. Though the Appellate Tribunal is required to record reasons in writing, for reduction of the amount to not less than 25% of the debt referred to, the Debt Recovery Appellate Tribunal, has exercised its discretion, directing the deposit of 25% of the debt amount, claimed in O.A.No.98 of 2015, on the facts and circumstances of the case, though reasons are not recorded, exercise of such discretion, cannot be said to be erroneous, warranting interference by this Court.

27. In the light of the above discussion and decision of the Hon'ble Supreme Court in Narayan Chandra Ghosh vs. Uco Bank & Ors. reported in AIR 2011 SC 1913, we find no illegality in the order impugned, warranting interference. Accordingly, this writ petition is dismissed.

28. After the order of dismissal of the writ petition, Mr.M.S.Krishnan, learned Senior Counsel, prayed for extension of time, by eight weeks, from today.

29. Submission of the learned Senior counsel is placed on record. While sustaining the order impugned, eight weeks time is granted, enabling the petitioners to make pre-deposit of Rs.2.41 crores. First instalment of Rs.1.21 crores, be deposited with the Registrar, Debt Recovery Appellate Tribunal, Chennai, within four weeks from today and the second instalment of Rs.1.20 crores be deposited with the Registrar, Debt Recovery Appellate Tribunal, Chennai, within four weeks thereafter. Petitioners are at liberty to file a memo, to the Debt Recovery Appellate Tribunal, Chennai, for suitable orders.

No costs. Consequently, the connected Miscellaneous Petitions are closed.

Sd/-
Assistant Registrar(CO)

//True Copy//

Sub Assistant Registrar

To

1. The Managing Director
Asset Reconstruction Company (India) Limited
(Assignee of Canara Bank)
A Company incorporated under the provisions of the Companies Act, 1956
Having Office at "The Ruby"
10th Floor, No.29 Senapati Bapat Marg
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3. The Branch Manager
ICICI Bank
A banking Company within the meaning of Section 5 (c) of the Banking Regulation Act, 1949
Ambattur Industrial Estate
Ambattur.

4. The Registrar,
Debt Recovery Appellate,
Tribunal, chennai.

+2cc to Mr.Sarvabhuman Associates, Advocate, S.R.No.79237

Writ Petition No.28296 of 2017

VGI(CO)
GN(09/11/2017)