IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated :23.01.2018

Coram

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

W.P.No.16783 of 2017
and
W.M.P.Nos.18214 & 18215 of 2017

Karnataka Wire and Metal Corporation,
Rep. by its Prop. Benjamin Thejesvi,
5th Mile, Hennur Road Kalyan Nagar,
Bangalore - 560 043.

...Petitioner

Vs.

1. Kempegowda,
2. Suresh,
3. V.M.Chandraiah,
4. V.M.Eshwara,
5. V.M.Lokesh
6. Syndicate Bank,
   Lingarajapuram Branch,
   Bangalore - 560 084.

7. The Chief Manager,
   Assets and Recoveries,
   Syndicate Bank,
   Lingarajapuram Branch,
   Bangalore - 560 084.

8. The Chairperson,
   Debt Recovery Appellate Tribunal,
   Chennai.

...Respondents

Writ Petition has been filed under Article 226 of the Constitution of India, praying to issue a Writ of Certiorari, calling for the records relating to the impugned order passed by the 8th respondent, viz., Hon'ble Chairperson, Debt Recovery Appellate Tribunal, Chennai on 07.06.2017 in A.I.R.No.447 of 2013 and quash the same.

For Petitioner : Mr.G.Veerapathiran
For Respondents : Mr.N.R.R.Arun Natarajan

ORDER

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

This Writ Petition has been filed by the petitioner, to issue a Writ of Certiorari, praying to call for records relating to the impugned order passed by the 8th respondent on 07.06.2017 in A.I.R.No.447 of 2013 and to quash the same.

2. Brief facts of the case of the petitioner are as follows:-

(i) Mr.Benjamin Thejesvi, is the proprietor of the petitioner firm - Karnataka Wire and Metal Corporation, and the petitioner firm is the owner of the property, vacant land comprised in Survey No.30, New Survery Nos.112, 113, 114 and 115 of Hennur Village, 5th Mile Street, Thomas Town, Bangalore 560 084, ad-measuring 5 acres. The petitioner had availed a loan from the sixth respondent (Syndicate Bank) by mortgaging the said property. Since the petitioner has not repaid the said loan, the sixth respondent filed a Civil Suit in O.S.No.7391 of 1993 before the City Civil Court at Bangalore. Subsequently, the said suit was transferred to the Debt Recovery Tribunal, Bangalore and numbered as O.A.No.370 of 1995.

(ii) During the pendency of the O.A.No.370 of 1995, the petitioner had requested the sixth respondent (Syndicate Bank) for One Time Settlement. The same was also agreed and arrived at a sum of Rs.30,00,000/-. Since the petitioner was not able to mobilize the said amount immediately, the petitioner filed an application on 11.12.1996 to permit him to pay the amount by selling part of the said property ad-measuring 16,000 square feet out of the mortgaged property measuring 5 acres. The said application was allowed, as per the joint memo filed therein, and the Tribunal passed the following order:-

> "5. In the result, the application is allowed as per the joint memo directed the defendants to pay Rs.30,00,000 with interest from 16/12/1996 onwards till the date of recovery as per the agreed rate, i.e., 20.50% p.a.
>
> "6. The defendants are however, given liberty to search for a purchasers, who should pay the amount directly to the bank and have the documents of title delivered with a discharge shara and then get the sale deed executed by the defendants."

(iii) Subsequently, after finding a purchaser, the petitioner mobilized the funds and paid the amount to the sixth respondent (Syndicate Bank) on 24.03.1997, as full and final settlement of 'one time settlement' as already agreed. Subsequently, the petitioner firm has also obtained a letter from the sixth respondent bank on 25.05.2006 to the effect that "M/s. Karnataka Wire and Metal Corporation, Proprietor, Mr.S.P.Francis have settled their liabilities on 24/03/1997, by availing the facility of one time settlement and as on today, there is no liabilities in our books of accounts against them." Therefore, according to the petitioner, the entire loan was settled by the petitioner's father, Mr.S.P.Francis.

(iv) After the demise of his father, the petitioner became the proprietor of the firm. During the lifetime of his father Mr.S.P.Francis, he had entered into a joint development agreement with M/s.Vaswani Estate Developers Pvt. Ltd., and they have displayed their hoardings and at that time, respondents 1 to 5 suddenly attempted to trespass into the said land, for which a police complaint was given. The police authorities enquired both the parties and during enquiry, the petitioner came to know that there was a sale certificate issued by a Recovery Officer and that the same was registered stating that there was an auction and in the said auction, respondents 1 to 5 become the successful bidders. Sale certificate was issued by the Recovery Officer, Debt Recovery Tribunal, Bangalore on 21.08.2006.

(v) There were two sale certificates issued for 8000 square feet of land each, on the same date. The sale certificates were signed on 21.08.2006 by Mr.Lakshminarayana (Recovery Officer). But, on that day, the said Mr.Lakshminarayana was not the officer of the Bank or the Recovery Officer of the Debt Recovery Tribunal, and he has been repatriated to his parent Department of Income Tax, as early as, in the year 1999. Hence, the petitioner has contended that the alleged sale certificates issued by the Recovery Officer, as well as registered, is a clear fraud, committed by the respondents 1 to 5, with the connivance of the officer, Mr.Lakshminarayana and others. Therefore, the petitioner filed an appeal before the Debt Recovery Tribunal, Bangalore in A.O.R.No.7 of 2008 in D.C.P.No.126 in O.A.No.370 of 1955. The Tribunal dismissed the appeal on 23.04.2013. Against the same, the petitioner filed an appeal in A.I.R.No.447 of 2013 before the Debt Recovery Appellate Tribunal, Chennai. But, the Debt Recovery Appellate Tribunal, directed the petitioner to make pre-deposit of Rs.6,00,000/- (Rupees six lakhs only) within four weeks, for the purpose of entertaining the Appeal. Being aggrieved by the said order, the petitioner has preferred this Writ Petition before this Court stating that Debt Recovery Appellate Tribunal, has not applied its mind, before passing the impugned order, and it is liable to be quashed for the following among other grounds:-

a. Debt Recovery Appellate Tribunal ought to have allowed the Application on the ground that there is no decree at all and therefore, the question of pre-deposit of Rs.6,00,000/- does not arise for entertaining an appeal.

b. As per Section 21 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, if any recovery certificate is issued and subsequently an appeal is filed, then the question of deposit arises. In this case, no Recovery certificate has been issued and consequently, the question of deposit does not arise.

c. Debt Recovery Appellate Tribunal ought to have held that as no recovery certificate was issued, pre-condition of deposit for entertaining the appeal does not arise, and consequently, allowed the application for waiver.

d. Debt Recovery Appellate Tribunal, Chennai, has erred in passing an order of pre-deposit, not at all applicable to the case on hand, since appeal is filed against the complaint and also challenging the action of the Recovery Officer, and not against any order, passed by the Debt Recovery Tribunal.

3. Heard the learned counsel for the petitioner and the learned counsel for the respondents. Perused the materials available on record.

4. Learned counsel for the petitioner submitted that during the pendency of O.A.No.370 of 1995 before the Debt Recovery Tribunal, Bangalore (O.S.No.7391 of 1993 before City Civil Court, Bangalore) filed by the sixth respondent bank for recovery, One Time Settlement was requested by the petitioner firm and that the same was also agreed, at a sum of Rs.30 lakhs by the sixth respondent bank. Since the petitioner firm could not mobilize the said amount immediately, the petitioner filed an application on 11.12.1996, seeking permission to sell 16000 sq.ft, a portion of the mortgaged property, and that the said application was allowed on 27.12.1996, as per the joint memo filed therein. Subsequently, the petitioner firm mobilized the funds and paid the same to the sixth respondent bank on 24.03.1997 as full and final settlement of the agreed OTS amount and as on date, there was no due to the bank. In support of the said contention, learned counsel for the petitioner referred to a letter dated 25/05/2006 issued by the sixth respondent bank, to the petitioner firm, which reads as follows:

"TO WHOMSOEVER IT MAY CONCERN

This is to certify that M/s. Karnataka Wire and Metal Corporation, Proprietor, Mr.

> S.P.Francis have settle their liabilities on 24.03.1997 by availing the facility of one time settlement. As on today, there is no liabilities in our books of accounts against them. This letter is issued at their specific request."

5. Learned counsel for the petitioner would also submit that respondents 1 to 5 attempted to trespass into the subject property, on the strength of the sale certificates dated 21.08.2006 said to have been issued by one Mr.Lakshminarayana, as a Recovery Officer. Since the said Mr.Lakshminarayana, was not an officer of the Bank or Recovery Officer, appointed by the Debt Recovery Tribunal, the petitioner has filed an appeal in A.O.R.No.7 of 2008 before the Debt Recovery Tribunal, Bangalore. The said appeal was dismissed on 23.04.2013. Challenging the same, the petitioner has filed an appeal in A.I.R.No.447 of 2013 before the Debt Recovery Appellate Tribunal, Chennai. Learned counsel for the petitioner contended that the Debt Recovery Appellate Tribunal, without entering into the merits of case, directed the petitioner to make pre-deposit of Rs.6,00,000/- (Rupees six lakhs only) within four weeks, for the purpose of entertaining the Appeal.

6. Learned counsel for the petitioner would further submit that order impugned in this Writ Petition is an order passed on the application filed for waiver of pre-deposit. Normally, when an appeal is filed by the aggrieved person against the order of the Debt Recovery Tribunal, Section 21 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 applies. Section 21 of the Act contemplates pre-deposit, if debt is due to the Banks/Financial Institutions. When there is no decree to the effect that 'the amount is due to the bank', the question of pre-deposit for entertaining an appeal does not arise. When there is a decree to the effect that, there is due to the bank from the petitioner, then, 25% or 50% conditional deposit would arise. In this case, no debt is due to the bank and the Debt Recovery Tribunal, Bangalore has not determined any amount, as due the sixth respondent bank, as per Section 19 of the Act. Therefore, the question of pre-deposit does not arise. Moreover, the bank has already clarified and certified that no amount is due from the petitioner. Learned counsel for the petitioner would further submit that DRT proceedings were closed and no decree was passed with regard to payment of any amount.

7. Further, learned counsel for the petitioner submitted that no recovery certificate was issued by the Recovery Officer. When there is no recovery certificate, the question of pre-deposit does not arise. Further contention of the learned counsel for the petitioner is that, this is an appeal against the fraud committed by the respondents 1 to 5, with the

connivance of the Recovery Officer, and therefore, when an appeal is filed alleging fraud, the question of 25% as pre-deposit does not arise. Moreover, when no amount is due to the bank; all the accounts were settled by the petitioner; documents were returned to the petitioner, after cancellation of the mortgage; the mortgaged properties were already released and returned to the petitioner, the direction to make pre-deposit is erroneous. Therefore, when the appeal was filed, the petitioner filed an application to waive pre-deposit. Before the Debt Recovery Appellate Tribunal, learned counsel for the bank has very clearly stated that the bank has received the payment. In spite of the same, Debt Recovery Appellate Tribunal, has passed the following order:-

> "Without entering into merits of the case, in view of the fact that Debt Recovery Appellate Tribunal is duty bound to ensure the pre-deposit and for the purpose of this Appeal, I presume the debt amount to be Rs.20.73 lakhs and I hereby direct the Appellant to make a pre-deposit of Rs.6,00,000/- (Rupees six lakhs only) within four weeks.

8. Learned counsel for the petitioner submitted that in the above said circumstances, the order passed by the Debt Recovery Appellate Tribunal, Chennai dated 07.06.2017 in A.I.R.No.447 of 2013 is not valid in law and requires interference by this Court, in exercising its extra-ordinary equitable and discretionary jurisdiction, under Article 226 of the Constitution of India.

9. Learned counsel for the respondents 1 to 5 submitted that they are the bonafide purchasers of the property in dispute, by paying the entire amount to Recovery Officer, and sale was confirmed in their favour. It was their contention that, as per the joint memo filed by the sixth respondent Bank and the petitioner, it was agreed that the petitioner would pay Rs.30,00,000/- together, with interest from 16.12.1996 till the date of recovery ie., 20.50% per annum, and the petitioner was also given liberty to search for a purchaser, who would pay the amount, directly to the Bank and have the documents of title delivered, and thereafter a sale deed should be executed by the petitioner and his wife, and the said authority has directed the office to draw up a recovery certificate. As per the order, a recovery certificate was issued. When the petitioner did not hand over the amount, the purchaser Micheal Zacharia paid the amount by Account Payee cheques on 19.12.1995. The appeal memo of petitioner itself states that he sold the property to Zacharia and that he became the owner of property and therefore, the appellant has no locus standi. They also disputed the area which was entered into by way of joint development agreement

with M/s.Vaswani Estate Developer Private Ltd., Denial of knowledge regarding issuance of sale certificate is not correct and the disputed property sold with the consent of the petitioner and only 16,000/- sq.ft out of 5 acres of mortgaged property was sold and the appellant had knowledge of sale.

10. Learned counsel for the petitioner, as well as the learned counsel for the respondents, both cited a decision of the Hon'ble High Court of Bombay dated 18.11.2016 made in W.P.No.1315 of 2014 (Eskays Construction Pvt. Ltd., ..vs.. Soma Papers and Industries Ltd.,) in support of their respective contentions.

11. Learned counsel for the petitioner would accept that Section 21 of the RDDBFI Act, 1993 stipulates that no appeal filed by any person shall be entertained by the Debt Recovery Appellate Tribunal, unless such person approaching the Debt Recovery Appellate Tribunal deposits 75% of the amount of debt due from him, as claimed from the secured creditor or as determined by the Debt Recovery Tribunal, whichever is less. However, his main contention is that when there is no due from the petitioner to the bank, the secured creditor; when Debt Recovery Tribunal, Bangalore, has not determined any amount, as due to the respondent bank as per Section 19 of the Act, when there is no certificate issued by the Recovery Officer, the question of payment of 75% or 50% as pre-deposit for entertaining an appeal, does not arise; but, Debt Recovery Appellate Tribunal, erred in invoking the power conferred under the proviso to Section 21 presuming the debt amount as Rs.20,73,000/-, and directed the petitioner to pay 25% of Rs.20,73,000/- and further directed the petitioner to make a pre-deposit of Rs.6,00,000/- within a period of four weeks, to entertain the appeal, which is illegal.

12. To deal with the present issue on hand on the argument of the petitioner, it would be appropriate to set out Section 21 of the RDDBFI Act, 1993.

> "21.Deposit of amount of debt due, on filing appeals.
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> Where an appeal is preferred by any person from whom the amount of debt is due to a bank or a financial institution or a consortium of banks or financial institutions, such appeal shall not be entertained by the Appellate Tribunal unless such person has deposited with the Appellate Tribunal seventy-five per cent of the amount of debt so due from him as determined by the Tribunal under Section 19:
>
> Provided that the Appellate Tribunal,

for reasons to be recorded in writing, waive or reduce the amount to be deposited under this Section."

13. Section 21 of the RDDBFI Act, 1993 clearly stipulates where an appeal is preferred by a person, such appeal shall not be entertained by the Appellate Tribunal unless such person has deposited with the Tribunal 75% of the amount of debt due from him, as determined by the Tribunal. Proviso to Section 21 provides that if the said deposit is not made, then the Debt Recovery Appellate Tribunal has no jurisdiction to entertain the appeal of such person.

14. While dealing with similar Section under SARFAESI Act, viz., Section 18 (1) of the SARFAESI Act, in a case reported in (2011) 4 SCC 548 {Narayan Chandra Ghosh ..vs.. UCO Bank}, the Hon'ble Supreme Court held that the provision of Section 18, more particularly, 2nd and 3rd proviso thereto, are mandatory in nature and Debt Recovery Appellate Tribunal has no power to grant full waiver of deposit. Relevant paragraphs of the above Judgment are extracted hereunder:-

> "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 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 theAct 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 the learned counsel for the appellant that as the amount of debt due had not been determined by the Debts Recovery Tribunal, the 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 an 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 provisos 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 the appellantâ??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.” (emphasis supplied)

15. In the light of the above decision by the Hon'ble Supreme Court, the impugned order dated 07.06.2017 directing the petitioner to deposit Rs.6,00,000/-, out of the presumed debt amount of Rs.20.73 lakhs, is justifiable.

16. When a similar argument was canvassed before the Hon'ble Division Bench of Bombay High Court, in the case of R.G.Dalpatrai and Co. ..vs.. Bank of Baroda, the same was emphatically repelled. Relevant paragraph reads thus:-

> “5. In our view, it will not be possible for us to interfere with the impugned order passed by the DRAT while exercising our writ jurisdiction under Article 226 of the Constitution of India. It is a well settled position in law that the amount which is received by the Bank in the sale of the immovable property cannot be adjusted in the application for waiver of pre-deposit, unless the sale is accepted and confirmed by the borrower. In the present case, Petitioner has challenged the said sale after taking out separate application. We are, therefore, not inclined to entertain this Petition. Petition is dismissed in limine.?”
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> (emphasis supplied)

17. Entire amount whether received by the bank or not and that there was no due, to the bank, as claimed by the petitioner, cannot be gone into, in this Writ Petition, filed under Article 226 of the Constitution of India. It would be appropriate for the petitioner to approach the Debt Recovery Appellate Tribunal and, to put forth all the facts on record and the contentions raised herein and agitate the same, before the Debt Recovery Appellate Tribunal. For the above said reasons, the order passed by the Debt Recovery Appellate Tribunal is sustained.

18. In the result, the Writ Petition is dismissed. No costs. Consequently, connected Miscellaneous Petition is closed. For making pre-deposit, four weeks time is granted from the date of receipt of a copy of the order.

s/d-
Assistant Registrar(CS-V)

True Copy

Sub-Assistant Registrar

raja/mra

To

1. Syndicate Bank,
Lingarajapuram Branch,
Bangalore 560 084.

2. The Chief Manager,
Assets and Recoveries,
Syndicate Bank,
Lingarajapuram Branch,
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3. The Chairperson,
Debt Recovery Appellate Tribunal,
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+1 CC to Mr.G. Veera Pathiran, Advocate sr 5162.
+1 CC to Mr.N.R.R. Arun Natarajan, advocate sr 5179.

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PA(CO)
SP(17/02/2018)