HOB'BLE SRI JUSTICE V. RAMASUBRAMANIAN
AND
HON'BLE SRI JUSTICE P. KESHAVA RAO

WRIT PETITION No.32021 of 2018

ORDER: (Per the Hon'ble Sri Justice P. Keshava Rao)

Mr. K. Lakshman, learned Assistant Solicitor General takes notice for the 1st respondent and Mr. R. Rajendra Prasad, learned counsel takes notice for the 2nd respondent. Notice to the other respondents is dispensed with.

Heard the learned counsel.

The present writ petition came to be filed against the order of the Debts Recovery Tribunal – I, Hyderabad, (for short, "the Tribunal") directing the petitioner to deposit Rs.2 crores to the credit of O.A. within three weeks from the date of the order apart from Rs.1,000/- and Rs.5,000/- towards costs and Prime Minister National Relief fund respectively and etc.

The petitioner is a company incorporated under the provisions of the Companies Act, 1956. It is carrying on business of manufacturing drugs, chemicals and other allied products. In the course of business, it has availed loans from the banks and financial institutions by providing security. Since the petitioner failed to repay the said loan amounts, O.A.No.40 of 2015 came to be filed by one of the creditors i.e., the 2nd respondent herein before the Tribunal for recovery of an outstanding amount of Rs.14.5 crores towards principal amount, interest and penalties. The above said O.A. has come up for hearing on 20.03.2018. Since the petitioner failed to file written statement, the Tribunal passed orders forfeiting its right to file the written statement and posted the matter to 02.04.2018 for defendants' evidence.

In those circumstances, the petitioner was constrained to file an application in I.A.No.2297 of 2018 to set aside the orders dated 20.03.2018 to enable it to file the written statement and contest the O.A. In the affidavit filed in support of the application, the Managing Director of the petitioner has stated that he went out of station for long a period on business work and he could not contact his counsel in time. He was under the impression that his counsel would take care of the above said O.A. Non-appearance and non-filing of the written statement on 20.03.2018 is not intentional, but it is only due to the reason stated supra. If the said order is not set aside, the petitioner's rights and interest would be seriously prejudiced and they will be put to irreparable loss and great hardship.

After hearing, the Tribunal allowed the said application by orders dated 09.08.2018 subject to certain conditions, which include deposit of Rs.2 crores by the petitioner to the credit of O.A. within three weeks from the date of the order. Against the said order, the present writ petition came to be filed.

Having heard learned counsel for the petitioner, learned Assistant Solicitor General for the 1st respondent and the learned counsel for the 2nd respondent and from a perusal of the material on record, it is evident that the O.A. is at the threshold i.e., at the stage of filing of written statement by the petitioner. In the affidavit filed in support of the application, the Managing Director of the petitioner specifically stated that he went out of station for a long period on business work and as such he could not contact its counsel. When the application is at the stage of completion of pleadings and when there is no adjudication of the disputes involved in the O.A., the Tribunal cannot impose the condition of the petitioner depositing Rs.2 crores to the credit of the O.A. within three weeks from the date of the order.

It is relevant that when an application is filed to set aside an *ex parte* order, the same can be ordered on payment of costs. However, the petitioner cannot be directed to deposit Rs.2 crores as if the petition is filed to set aside an *ex parte* decree or a final order, which is passed after adjudication of all issues on merits.

The aspect of setting aside an *ex parte* order and *ex parte* decree has been dealt with by the Apex Court and this Court on number of occasions. The Apex Court in **Tea Auction Ltd. vs. Grace Hill Tea Industry and another**[1] while discussing the aspect of imposition of total cost in a suit to set aside an *ex parte* decree held as under:

> "Order IX Rule 13 of CPC did not undergo any amendment in the year 1976. The High Courts, for a long

[1] (2006) 12 SCC 104

> time, had been interpreting the said provision as conferring power upon the courts to issue certain directions which need not be confined to costs or otherwise. A discretionary jurisdiction has been conferred upon the court passing an order for setting aside an ex parte decree not only on the basis that the defendant had been able to prove sufficient cause for his non-appearance even on the date when the decree was passed, but also on other attending facts and circumstances. It may also consider the question as to whether the defendant should be put on terms. The court, indisputably, however, is not denuded of its power to put the defendants to terms. It is, however, trite that such terms should not be unreasonable or harshly excessive. Once unreasonable or harsh conditions are imposed, the appellate court would have power to interfere therewith. But, it would not be correct to hold that no error has been committed by the Division Bench in holding that the learned Single Judge did not possess such power. The learned Single Judge exercised its discretionary jurisdiction keeping in view that the matter has been disposed of in fact finally at the interim stage at the back of defendant and it was in that view of the matter a chance was given to it to defend the suit, but, then the learned Single Judge was not correct to direct securing of the entire sum of Rs.37 lakhs in the form of bank guarantee or deposit the sum in cash. The condition imposed should have been reasonable. What would be reasonable terms would depend upon facts and circumstances of each case."

In **Rajeswara Industries, a Partnership Firm, D4 Unit, Industrial Estate, Karimnagar and others vs. State Bank of Hyderabad, Karimnagar Branch, rep., by its Branch Manager**[2], this Court held as under:

> "From a reading of the aforesaid provision of Order IX Rule 13, C.P.C. it is clear that the court shall make an order setting aside the decree if sufficient cause is established, upon such terms as to costs, payment into the Court or otherwise as it thinks fit. But the court cannot, even before going into the merits of the application filed under Order IX Rule 13, C.P.C impose conditions upon the defendants for depositing the costs or part or whole of the suit amount as a condition precedent for entertaining the said I.A. under Order IX Rule 13. The law in this behalf is well settled more than 50 yeas ago in *Narayanan v. Chidambaram (AIR 1940 Mad. 585).* There a Division Bench of the Madras High Court consisting of Burn and Lakshmana Rao, JJ. held that the court had no power to order pending trial of an application under Order IX, Rule, 13, C.P.C. the defendants to deposit the costs of the suit or furnish security for the decretal amount. Following the aforesaid decision, we allow the above C.M.A. and C.R.P."

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[2] 1991 (II) A.L.T. 365

In view of the law laid down by the Apex Court and this Court, this Court is of the opinion that the condition imposed by the Tribunal directing the petitioner to deposit Rs.2 crores is unsustainable in law and is liable to be set aside.

Accordingly, the writ petition is allowed. The docket order dated 09.08.2018 is set aside only insofar as imposition of the first condition imposed by the impugned order is concerned. In other words, the first condition imposed upon the petitioner to pay Rs.2 crores within three weeks alone is set aside. Condition Nos.2 and 3 imposed by the impugned order shall be complied with on or before 07.01.2019. The petitioner shall also file its written statement, affidavit in lieu of defense and documents, on or before 07.01.2019. If the petitioner fails to comply with these three conditions, it will not have the benefit of this order. There will be no order as to costs.

Miscellaneous petitions, if any, shall stand closed.

V. RAMASUBRAMANIAN, J

P. KESHAVA RAO, J

Date: 19.12.2018.
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