

IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELANGANA AND THE STATE OF
ANDHRA PRADESH

* * * *

WRIT PETITION NO.45198 OF 2017

Between:

Porus Laboratory Private Limited ... Petitioner

and

Indian Bank, Asset Recovery Management
Branch, Hyderabad and another ... Respondents

DATE OF JUDGMENT PRONOUNCEMENT: 15th JUNE, 2018

SUBMITTED FOR APPROVAL:

THE HON'BLE SRI JUSTICE SANJAY KUMAR
AND
THE HON'BLE SRI JUSTICE P.KESHAVA RAO

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1. Whether Reporters of Local newspapers may be allowed to see the judgment? Yes/No
 2. Whether copies of the judgment may be marked to Law Reporters/Journals Yes/No
 3. Whether His Lordship wishes to see the fair copy of the judgment? Yes/No

SANJAY KUMAR, J

P.KESHAVA RAO, J

* THE HON'BLE SRI JUSTICE SANJAY KUMAR
AND
THE HON'BLE SRI JUSTICE P.KESHA RAO

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> Head Note:

! Counsel for petitioner : Sri S.Ravi and Sri A.P.Suresh

^ Counsel for respondent No.1 : Sri Ambadipudi Satyanarayana

^ Counsel for respondent No.2 : --



? CASES REFERRED:

1. 2010 (3) Calcutta High Court Notes 95= 2010 SCC OnLine Cal 1361= AIR 2010 Calcutta 138
2. 2004 (4) SCC 311
3. AIR 2007 SC 712
4. (2016) 1 SCC 444
5. 2015 SCC OnLine Kar 6971= AIR 2016 KAR 95
6. 2018 SCC OnLine SC 81
7. AIR 2017 SC 5013 = 2017 SCC OnLine SC 1245 = (2017) 205 Company Cases 417 (SC)
8. 2009(2) CTC 302 = (2009) 3 Madras Law Journal 1271

THE HON'BLE SRI JUSTICE SANJAY KUMAR
AND
THE HON'BLE SRI JUSTICE P.KESHA RAO

WRIT PETITION NO.45198 OF 2017

ORDER

(Per Sri Justice Sanjay Kumar)

The Indian Bank, Asset Recovery Management Branch, Hyderabad, the first respondent (*hereinafter*, 'the bank'), conducted auction sale of Acs.2.16 guntas in Survey No.452/A, Bibinagar Village and Mandal, Nalgonda District, on 21.08.2010, under the provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (*hereinafter*, 'the SARFAESI Act'). Pursuant thereto, sale certificate dated 05.10.2010 was issued by the bank in favour of the auction purchaser, the second respondent herein. The proceedings initiated by the bank under the SARFAESI Act and the resulting sale certificate were sought to be challenged by Porus Laboratories Private Limited, Hyderabad, the writ petitioner, before the jurisdictional Debts Recovery Tribunal (*hereinafter*, 'the Tribunal') at Hyderabad, in SAI R.No.126 of 2013, filed under Section 17(1) of the SARFAESI Act.

The claim of the petitioner company was that it had purchased Acs.2.21 guntas in Survey No.452/A of Bibinagar Village and Mandal, Nalgonda District, in an auction conducted by the Andhra Pradesh State Financial Corporation (APSFC) and the transaction was registered under sale deed No.4048 of 1998. Thereafter, it purchased 2,336 square yards (Ac.0.19 guntas) abutting the land purchased from the APSFC under registered sale deeds bearing Nos.3807 & 3808 of 2002 and 5829 of 2003. Another extent of Ac.2.13 guntas was purchased by it in Survey Nos.454/A and 353 of Bibinagar Village and Mandal, Nalgonda District, under registered sale deeds bearing Nos. 5852 of 2003, 218 of 2004 and 220 of 2004. The petitioner

company claimed that it constructed a compound wall encircling the entire extent of Ac.5.13 guntas purchased by it and established a bulk drug factory therein. While so, the Tahsildar, Bibinagar Mandal, served notice dated 16.06.2012 upon the petitioner company proposing to conduct a survey of the land in Survey No.452/A of Bibinagar Village and Mandal, Nalgonda District. This survey was sought to be conducted at the behest of the bank, but the same was not within the knowledge of the petitioner company. The petitioner company made enquiries with the Tahsildar's office, but to no avail. It then filed W.P.No.20555 of 2012 before this Court assailing the proposed survey to be conducted by the Tahsildar's office. At that stage, the bank got impleaded in the said writ petition and staked a claim over the land in Survey No.452/A of Bibinagar Village and Mandal, Nalgonda District, under a mortgage, stating that recovery proceedings had been initiated by it on the strength thereof. The petitioner company claims that it was only then that it came to know of the SARFAESI proceedings initiated by the bank and the sale held by it in the year 2010.

It was in these circumstances that the petitioner company filed the subject securitization application in SAIR.No.126 of 2013 before the Tribunal under Section 17(1) of the SARFAESI Act. However, as the said provision requires such an application to be filed within 45 days from the date of the impugned measure taken under Section 13(4) of the SARFAESI Act, the petitioner company sought condonation of the delay on its part in filing the said SA. This petition was filed under Section 5 of the Limitation Act, 1963 (*for brevity*, 'the Act of 1963'), seeking condonation of the delay of 883 days in filing the SA and was numbered as I.A.No.1115 of 2013 therein. By order dated 24.02.2014, the Tribunal dismissed the said petition.

Perusal of this order reflects that the point for consideration, as framed by the Tribunal, was whether the delay of 883 days in filing the SA could be condoned under Section 5 of the Act of 1963. The Tribunal opined that the provisions of Section 5 of the Act of 1963 could be invoked for the purpose of extending time but sufficient cause must necessarily be shown therefor. The vital question, *per* the Tribunal, was whether the petitioner company had properly explained the delay. Taking note of the fact that the bank got itself impleaded as a party in W.P.No.20555 of 2012 filed by the petitioner company as long back as on 04.08.2012, the Tribunal opined that there was no reason as to why the petitioner company could not file the SA immediately thereafter. Concluding that there was no necessity for the petitioner company to wait till the disposal of the said writ petition on 31.01.2013 and a further twenty days thereafter, the Tribunal held against the petitioner company opining that it had not explained the delay with sufficient cause. The I.A. and, consequently, the S.A. were accordingly dismissed.

Aggrieved thereby, the petitioner company filed an appeal before the Debts Recovery Appellate Tribunal (*hereinafter*, 'the Appellate Tribunal') at Kolkata, in Appeal No.39 of 2017. The Appellate Tribunal however dismissed the appeal on 29.11.2017. The order passed by the Appellate Tribunal manifests that the argument adopted by the petitioner company was that limitation for filing the S.A. should commence from 31.01.2013, when W.P.No.20555 of 2012 was dismissed. The petitioner company contended that it was entitled to exclusion of the period during which the said writ petition was pending, under Section 14 of the Act of 1963. The Appellate Tribunal however opined that Section 14 of the Act of 1963 had no application, as the writ petition was filed by the petitioner company for a

different cause altogether and the period consumed by its pendency was therefore not liable to be excluded. Further, the Appellate Tribunal took note of the decision of the Calcutta High Court in AKSHAT COMMERCIAL PVT. LTD. V/ s. KALPANA CHAKRABORTY¹ and opined that Section 5 of the Act of 1963 would not apply to a securitization application filed under Section 17(1) of the SARFAESI Act. Holding so, the Appellate Tribunal dismissed the appeal. Aggrieved by the dismissal of its appeal, the petitioner company is before this Court by way of this writ petition. The order dated 29.11.2017 of the Appellate Tribunal and the order dated 24.02.2013 of the Tribunal are assailed.

Sri A.P.Suresh, learned counsel for the petitioner company, took out notice to the second respondent-auction purchaser by substituted service through publication of the notice in Andhra Jyothi Telugu Newspaper and The Indian Express English Newspaper on 16.05.2018. This would amount to deemed service of notice, but there is no representation for the said respondent.

Heard Sri S.Ravi, learned senior counsel representing Sri A.P.Suresh, learned counsel, and Sri Ambadipudi Satyanarayana, learned counsel for the first respondent-Indian Bank.

At the outset, it would be appropriate to understand the scheme of the SARFAESI Act in the context of the present controversy. Section 17(1) thereof makes it clear that any person, including a borrower, aggrieved by any of the measures taken by a secured creditor under Section 13(4) of the SARFAESI Act may make an application before the Tribunal within 45 days from the date on which such measures were taken. The ordinary time stipulation for presenting such an application is therefore clear. Section 17(7)

¹ 2010 (3) Calcutta High Court Notes 95= 2010 SCC OnLine Cal 1361= AIR 2010 Calcutta 138

of the SARFAESI Act however states to the effect that the Tribunal concerned shall, as far as may be, dispose of such an application in accordance with the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, presently renamed as the Recovery of Debts and Bankruptcy Act, 1993 (*for brevity*, 'the RDDB Act'), and the Rules made thereunder. Further, Section 37 of the SARFAESI Act states that the provisions of the said Act and the Rules made thereunder shall be in addition to and not in derogation of the RDDB Act or any other law for the time being in force.

In turn, Section 24 of the RDDB Act provides that the Act of 1963 shall, as far as may be, apply to an 'application' made to the Tribunal. Significantly, the term 'application' has not been defined in the SARFAESI Act. This was obviously because Section 17 thereof originally referred to the proceeding to be filed thereunder as an 'appeal' and not as an 'application'. Section 17 of the SARFAESI Act, as it initially stood, was titled 'Right to appeal' and provided to the effect that any person, including a borrower, aggrieved by any of the measures referred to in Section 13(4) taken by the secured creditor or his authorized officer under the said Chapter, may prefer an 'appeal' to the Tribunal having jurisdiction in the matter within 45 days from the date on which such measures had been taken. However, in its pioneering judgment in *MARDIA CHEMICALS LTD. V/ s. UNION OF INDIA*², the Supreme Court opined that proceedings under Section 17 of the SARFAESI Act were not appellate proceedings and that the title seemed to be a misnomer. The Supreme Court observed that this is the initial action which is brought before a forum, as prescribed under the SARFAESI Act, raising a grievance against the action or measures taken by the secured

² 2004 (4) SCC 311

creditor. It was after delivery of this judgment that Section 17 of the SARFAESI Act was amended with effect from 21.06.2002 by Act No.30 of 2004 whereby, though the title of the provision remained the same, *viz.*, 'Right to appeal', the body thereof was amended to the effect that any person, including a borrower, aggrieved by any of the measures referred to in Section 13(4) taken by the secured creditor or his authorized officer, may make an 'application' to the Tribunal having jurisdiction in the matter within 45 days from the date on which such measures had been taken. Thereafter, in *M/ s. TRANSCORE V/ s. UNION OF INDIA*³, it was again pointed out by the Supreme Court that a proceeding under Section 17 of the SARFAESI Act is in lieu of a suit, which remedy would have been ordinarily available but for the bar under Section 34 thereof. Further, after its amendment with effect from 01.09.2016, *vide* Act No.44 of 2016, the title 'Right to Appeal' also stood substituted and Section 17 of the SARFAESI Act is now titled 'Application against measures to recover secured debts'.

Section 2(b) of the RDDB Act defines an 'application' to mean the application made to the Tribunal under Section 19 thereof, but as such an application would only be made by the bank or financial institution concerned, the said definition cannot be extended to an application made by an aggrieved person, including the borrower, to the Tribunal under Section 17 of the SARFAESI Act. Further, an application under Section 19 of the RDDB Act is equivalent to a suit for recovery of money and Section 24 thereof makes the provisions of the Act of 1963 applicable, as far as may be, to such an application. Rule 4 of the Debts Recovery Tribunal (Procedure) Rules, 1993, framed by the Central Government under Section 36 of the RDDB Act, provides that an application under Section 19 thereof may be

³ AIR 2007 SC 712

presented as nearly as possible in Form I appended to the said Rules. Clause 4 of Form I application deals with limitation and reads to the effect that the applicant must declare that the application is within the limitation prescribed under Section 24 of the RDDB Act. Though no time limit is prescribed for presentation of such an application under the RDDB Act separately, by virtue of Section 24 of the RDDB Act, the limitation prescribed under the Act of 1963 for filing a recovery suit is imported into the scheme of the RDDB Act, as is clear from Clause 4 in Form I. On the other hand, an application under Section 17 of the SARFAESI Act must be presented within 45 days of the impugned measure taken by the secured creditor under Section 13(4) thereof. There is therefore a fundamental difference between these two applications. The application under Section 19 of the RDDB Act is like a suit governed by the ordinary law of limitation unlike an application under Section 17 of the SARFAESI Act, which is only akin to a suit to the extent that it is an original proceeding, but the ordinary limitation prescribed under the Act of 1963 with regard to filing of applications would not govern its filing as Section 17 itself prescribes the ordinary time frame for its presentation.

However, when it comes to appeals, Section 20(3) of the RDDB Act, as it presently reads, provides that appeals from orders of the Tribunal may be preferred to the Appellate Tribunal within thirty days from the date of the communication of such orders. The *proviso* thereto however states that in the event an appeal is preferred beyond the prescribed period of thirty days, it would be within the power of the Appellate Tribunal to condone the delay in such presentation if sufficient cause is shown to its satisfaction. On the other hand, Section 18 of the SARFAESI Act, which provides for an appeal to the Appellate Tribunal from any order made by the Tribunal under Section

17, states that such appeal should be filed within thirty days from the date of receipt of such order. There is no provision in Section 18, similar to the *proviso* to Section 20(3) of the RDDB Act, empowering it to condone the delay in the presentation of the appeal beyond the prescribed period of thirty days. However, in *BALESHWAR DAYAL JAISWAL V/ s. BANK OF INDIA*⁴, considering the fact that Section 18(2) of the SARFAESI Act makes it clear that the appeal shall be disposed of, as far as may be, in accordance with the provisions of the RDDB Act, the Supreme Court held that the Appellate Tribunal would have the power to condone delay in presentation of appeals under Section 18 even beyond the prescribed period of thirty days, by taking recourse to the power vesting in it under the *proviso* to Section 20(3) of the RDDB Act.

The principle laid down in *BALESHWAR DAYAL JAISWAL*⁴ was applied to an application under Section 17 of the SARFAESI Act by the Karnataka High Court in *BHUWALKA STEEL INDUSTRIES V/ s. INDIAN OVERSEAS BANK*⁵.

It is therefore manifest that an application filed under Section 17(1) of the SARFAESI Act, though unlike an application under Section 19 of the RDDB Act, has to be dealt with in accordance with the provisions of the RDDB Act, as per Sections 17(7) and 37 of the SARFAESI Act. Therefore, Section 24 of the RDDB Act which makes the Act of 1963 applicable to an 'application' would come into play as it cannot be denied that what is presented to the Tribunal under Section 17 of the SARFAESI Act is also an 'application'. It is therefore amply clear that the provisions of Section 5 of the Act of 1963 would be applicable to a belated 'application' made under Section 17 of the SARFAESI Act.

⁴ (2016) 1 SCC 444

⁵ 2015 SCC OnLine Kar 6971= AIR 2016 KAR 95

Be it noted that in AKSHAT COMMERCIAL PVT. LTD.¹, the Calcutta High Court observed that although in a proceeding under Section 17(1) of the SARFAESI Act, the provisions of the Act of 1963 apply in general, as far as may be, yet Section 5 of the Act of 1963, in particular, has no application in view of the fact that the proceeding is original in nature like a suit and Section 5 of the Act of 1963 has no application to a suit. It was therefore concluded that Section 5 of the Act of 1963, at least, would not apply to an application under Section 17(1) of the SARFAESI Act which should be treated as a suit, although other relevant provisions of the Act of 1963 may apply. It is this view that weighed with the Appellate Tribunal to hold that Section 5 of the Act of 1963 would not apply to an application filed under Section 17(1) of the SARFAESI Act.

However, the Calcutta High Court failed to note the distinction between an application under Section 19 of the RDDB Act and an application under Section 17(1) of the SARFAESI Act. As already stated *supra*, an application under Section 19 of the RDDB Act is practically equivalent to a recovery suit governed by the ordinary law of limitation as per the Act of 1963 but the same is not the case with an application under Section 17(1) of the SARFAESI Act. Failure to recognize this difference led to the misguided extension of the norm that Section 5 of the Act of 1963 would not apply to a time-barred suit to a belated application under Section 17(1) of the SARFAESI Act. What is presented to the Tribunal under Section 17(1) of the SARFAESI Act is, all said and done, an 'application' and the Act of 1963, including Section 5 thereof, is made applicable to such an 'application' by virtue of Section 24 of the RDDB Act.

Though Sri Ambadipudi Satyanarayana, learned counsel, would place reliance on BENGAL CHEMISTS & DRUGGISTS ASSN. V/ s. KALYAN

CHOWDHURY⁶, we find that the said judgment has no relevance. That was a case under Section 421 of the Companies Act, 2013, wherein not only the period for filing of an appeal but also the outer limit, beyond which delay in the presentation of the appeal could not be condoned, was stipulated. It was in such circumstances that the Supreme Court held that Section 5 of the Act of 1963 could not be invoked for condonation of further delay.

Further, the recent judgment of the Supreme Court in INTERNATIONAL ASSET RECONSTRUCTION COMPANY OF INDIA LTD. V/ s. THE OFFICIAL LIQUIDATOR OF ALDRICH PHARMACEUTICALS LTD.⁷ is also of guidance. In this case, the issue raised was as to whether Section 5 of the Act of 1963 could be invoked to condone the delay in presenting an appeal under Section 30(1) of the RDDB Act before the Tribunal against the order of a Recovery Officer. An appeal under Section 30(1) of the RDDB Act normally has to be preferred by the aggrieved party before the Tribunal within thirty days. The argument advanced before the Supreme Court was that by virtue of Section 29(2) of the Act of 1963, the provisions of Section 5 thereof could be made applicable to a belated appeal filed under Section 30 of the RDDB Act. The Supreme Court however noted that an 'application' as defined under Section 2(b) of the RDDB Act was only the application filed under Section 19 thereof and observed that the Tribunal cannot condone delay unless expressly conferred with such power by the statute. Observing that an application under the RDDB Act is one made under Section 19 thereof and an appeal would lie against the order passed thereon by the Tribunal to the Appellate Tribunal under Section 20 of the RDDB Act, the Supreme Court noted that specific provision was made for condonation of the delay in the presentation of such

⁶ 2018 SCC OnLine SC 81

⁷ AIR 2017 SC 5013 = 2017 SCC OnLine SC 1245 = (2017) 205 Company Cases 417 (SC)

an appeal beyond the stipulated period under the *proviso* to Section 20(3) of the RDDB Act. However, when a person is aggrieved by an order of the Recovery Officer, he has to prefer an appeal before the Tribunal under Section 30(1) and this appeal is distinct and separate from the appeal preferred before the Appellate Tribunal under Section 20. The Supreme Court pointed out that Section 24 of the RDDB Act manifestly made the provisions of the Act of 1963 applicable only to 'original applications' and the same could not be extended to an appeal filed under Section 30 of the RDDB Act. It was therefore concluded that the scheme of the RDDB Act made it clear that the legislature provided for application of the Act of 1963 to original proceedings before the Tribunal under Section 19 only and the Appellate Tribunal has been conferred with power to condone the delay only under Section 20(3) of the RDDB Act. Application of Section 5 of the Act of 1963 to an appeal under Section 30(1) of the RDDB Act, by taking recourse to Section 29(2) of the Act of 1963, was therefore held to be improper.

Though the aforesaid judgment dealt only with the provisions of the RDDB Act, the Supreme Court categorically held therein that by virtue of Section 24 thereof, the Act of 1963 would have application to 'original proceedings' before the Tribunal. In consequence, there can be no doubt that a belated application under Section 17(1) of the SARFAESI Act, being one such original proceeding before the Tribunal, would attract the provisions of Section 5 of the Act of 1963, by virtue of Section 17(7) and Section 37 of the SARFAESI Act read with Section 24 of the RDDB Act.

Earlier, the Madras High Court also held to this effect in *PONNUSAMY AND SMT.P.SHANTHI V/s THE DEBTS RECOVERY TRIBUNAL*⁸. Therein, it was pointed out that Section 17 of the SARFAESI

⁸ 2009(2) CTC 302 = (2009) 3 Madras Law Journal 1271

Act did not stipulate any outer time limit for the Tribunal to condone the delay as in other enactments where the power to condone delay is restricted by a further time limit. Referring to Section 17(7) of the SARFAESI Act, the Madras High Court extended Section 24 of the RDDB Act to an application under Section 17 of the SARFAESI Act and held that Section 5 of the Act of 1963 would apply to such an application made before the Tribunal.

More importantly, it may be noted that if an aggrieved person, including a borrower, is prevented from availing the statutory remedy provided under Section 17(1) of the SARFAESI Act merely because the application thereunder was not presented within the stipulated 45 days, the hierarchy of remedies provided under the SARFAESI Act would be denied to him and rendered nugatory on that short ground. Such an aggrieved person would then be left with no remedy but to invoke the extraordinary jurisdiction of the High Court under Article 226 of the Constitution. As the very purpose of creating statutory Tribunals and Appellate Tribunals is to provide efficacious alternative means of resolution of disputes so as to lessen the burden that would otherwise be visited upon the High Court in exercise of its extraordinary jurisdiction under Article 226, the statutory remedy provided under Section 17(1) of the SARFAESI Act cannot be interpreted in such a narrow and pedantic compass. Be it noted, by virtue of the *proviso* to Section 20(3) of the RDDB Act, the Appellate Tribunal has been held to have the power to condone the delay in the presentation of an appeal under Section 18 of the SARFAESI Act beyond the 30 day period stipulated therein. There is no logic or rationale in not extending the same power to the Tribunal while entertaining a belated application under Section 17 of the SARFAESI Act, by taking recourse to Sections 17(7) and 37 of the SARFAESI Act read with Section 24 of the RDDB Act.

On the above analysis, this Court finds that the law laid down by the Calcutta High Court in AKSHAT COMMERCIAL PVT. LTD.¹ does not constitute good law for the reasons stated above and in the light of the principles spelt out by the Supreme Court in BALESHWAR DAYAL JAISWAL⁴ and INTERNATIONAL ASSET RECONSTRUCTION COMPANY OF INDIA LTD⁷. The provisions of Section 5 of the Act of 1963 would therefore be very much applicable to an application filed beyond time under Section 17(1) of the SARFAESI Act. The Tribunal rightly held so but the Appellate Tribunal seems to have misguided itself on the strength of the decision of the Calcutta High Court. Further, as the application filed by the petitioner company before the Tribunal was under Section 5 of the Act of 1963, the mere fact that it projected Section 14 thereof before the Appellate Tribunal did not dilute the character of the condone delay petition filed before the Tribunal. As the Tribunal had found, on facts, that the petitioner company did not make out sufficient cause for condonation of delay in the presentation of the application under Section 17(1) of the SARFAESI Act, the appeal by the petitioner company before the Appellate Tribunal necessarily required adjudication on this aspect. However, the Appellate Tribunal did not adjudicate upon the findings of the Tribunal as to the petitioner company failing to substantiate sufficient cause for condonation of the delay under Section 5 of the Act of 1963. As this was the subject matter of the appeal and as the Appellate Tribunal failed to take note of the same and adjudicate accordingly, the order passed by the Appellate Tribunal on 29.11.2017 in Appeal No.39 of 2017 is set aside and the matter is remitted to the file of the Appellate Tribunal at Kolkata for consideration afresh of the appeal on merits keeping in mind the observations made hereinbefore.

The writ petition is accordingly allowed to the extent indicated above.
Pending miscellaneous petitions, if any, shall stand closed in the light of this
final order. No order as to costs.

SANJAY KUMAR,J

P.KESHAHA RAO,J

15th JUNE, 2018

NOTE: L.R. Copy to be marked.
(B/ O) PGS

