

\$~29 & 30

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **W.P.(C) 9554/2019 & CM APPL. 39256/2019**

M/s. SHEENA EXPORTS AND ORS. Petitioners
Through: Mr Tanmaya Mehta, Mr Sameer
Rohtagi, Mr Pushpinder Singh and
Mr Akshit Pradhan, Advocates.

versus

M/S ASSETS CARE AND RECONSTRUCTION
ENTERPRISES LTD. AND ORS. Respondents
Through: Mr Rajeev Mehra, Senior Advocate
with Mr R.P. Agarwal, Mr Nitish
Kumar and Mr Ratnesh Sharma,
Advocates.

+ **W.P.(C) 9563/2019 & CM APPL. 39305/2019**

M/s. SHEENA EXPORTS AND ORS. Petitioners
Through: Mr Tanmaya Mehta, Mr Sameer
Rohtagi, Mr Pushpinder Singh and
Mr Akshit Pradhan, Advocates.

versus

M/S ASSETS CARE AND RECONSTRUCTION
ENTERPRISES LTD. AND ORS. Respondents
Through: Mr Rajeev Mehra, Senior Advocate
with Mr R.P. Agarwal, Mr Nitish
Kumar and Mr Ratnesh Sharma,
Advocates.

CORAM:
JUSTICE S.MURALIDHAR
JUSTICE TALWANT SINGH

ORDER
12.09.2019

%

Dr. S. Muralidhar, J.:

1. These two petitions arise out of similar set of facts and seek similar reliefs

and are being disposed of by this common judgment.

2. W.P.(C) No.9554/2019 by M/s. Sheena Exports and five others challenges an order dated 23rd July, 2019 passed by the Debt Recovery Appellate Tribunal, Delhi ('DRAT'), rejecting the Petitioners' Appeal No. 64/2019 for failure to comply with the condition of pre-deposit. The said Appeal No. 64/2019 arose out of an order dated 14th November, 2017 passed by the Debt Recovery Tribunal-II, Delhi ('DRT-II'), dismissing a Review Application filed by the present Petitioners against an order dated 27th October, 2016 passed by the DRT, allowing the aforementioned OA No.475/2014 filed by is against M/s. Assets Care and Reconstruction Enterprises Limited ('ACRE') (Respondent No.1).

3. As far as W.P.(C) No. 9563/2019 is concerned, it has again been filed by M/s. Sheena Exports and five others challenging a separate order dated 23rd July, 2019, rejecting Appeal No. 63 of 2019. The said appeal was directed against an order dated 14th November, 2017 passed by the DRT-II, dismissing the Petitioners' review application against an order dated 27th October, 2016 passed by the DRT, allowing OA No.474/2014, filed by ACRE against the Petitioners.

4. The background facts, as stated by the Petitioners are that the Petitioner No.1 is a partnership firm engaged in the manufacture and export of home furnishing items, such as towels, linen, etc. It secured various credit facilities from two banks i.e. Citi Bank (Proforma Respondent No.2 in both petitions) and HSBC Bank (Proforma Respondent No.3 in both petitions) for its

business operations.

5. On account of the defaults committed by the Petitioner No.1, a Memorandum of Understanding ('MoU') was entered into by the Petitioners, separately with HSBC and Citi Bank. In terms of the MoU dated 25th June, 2010, entered into between the Petitioners and HSBC, it was agreed that against HSBC's claim of Rs.17,37,34,522.10, a settlement amount of Rs.7.00 crores would be paid in the following manner:

- (i) At the execution of the MoU - Rs.1.00 crore.
- (ii) On 31st August, 2010 - Rs. 1.00 crore.
- (iii) On 30th September, 2010 - Rs.1.00 crore.
- (iv) On 31st December, 2010 - Rs.4.00 crore.

6. Likewise on 21st March, 2011, the Petitioners and Citi Bank executed an MoU. As against the outstanding claim of Rs.19,72,30,405/-, it was agreed that a settlement amount of Rs.7.50 crores would be paid in the following manner:

- (i) At the execution of the MoU - Rs.1.00 crore.
- (ii) On 21st March, 2011 - Rs. 3.50 crore.
- (iii) On or before 15th June, 2011 - Rs.4.00 crores.

7. According to the Petitioners, as far as the MoU with HSBC is concerned, it paid three instalments, but was unable to pay the last instalment of Rs. 4.00 crores. It accordingly approached ACRE for a loan. By a letter dated 11th June, 2011, the Petitioners informed HSBC that ACRE would be paying Rs. 3.00 crores towards the settlement amount. According to the Petitioners,

unknown to them, by an assignment deed dated 10th October, 2011 arrived at between HSBC and ACRE, HSBC assigned the dues of the Petitioner No. 1 to ACRE.

8. As far as the monies owing to Citi Bank were concerned, again Petitioner No.1 approached ACRE for a bridge loan. According to the Petitioners, Citi Bank confirmed by its letter dated 10th June, 2011, permitting ACRE to acquire the outstanding dues of Citi Bank, subject to a payment of Rs. 4.00 crores by 14th June, 2011, i.e. the date fixed in the MoU. According to the Petitioners, unknown to them, Citi Bank and ACRE entered into an assignment deed dated 13th June, 2011, whereby Citi Bank assigned the dues of the Petitioner No. 1 to ACRE.

9. According to the Petitioners, their liability towards HSBC and Citi Bank had already been reduced to Rs. 3.00 crores and Rs. 4.00 crores respectively, and in that background, on 19th June, 2012, a Deed of Settlement was entered into with ACRE, whereby the Petitioner No. 1 agreed to pay the aforementioned outstanding principal amount, together with interest, in ten instalments, after a moratorium of one year.

10. Since Petitioner No. 1 was unable to honour its commitments, ACRE on 15th April, 2013 revoked the Settlement Deed. It issued a notice to the Petitioner No. 1 on 24th May, 2013, calling upon it to make a payment of Rs.48.80 crores, followed by another notice dated 6th January, 2014, demanding a payment of Rs.53.90 crores.

11. This was followed by ACRE filing two OAs before the DRT. In OA No.474 of 2014, ACRE prayed for the recovery of Rs.31,90,64,818/-, along with future interest @ 15.5% per annum, till the realization of the aforesaid sum from the Petitioner Nos. 1 to 5, jointly and severally. This pertained to the original loan transaction with HSBC Bank.

12. Likewise, OA No. 475 of 2015 was filed by ACRE against the Petitioners before the DRT for recovery of Rs.29,40,28,891/-, together with future interest @ 14% per annum, compounded quarterly, from the Petitioner Nos. 1 to 5, jointly and severally. This pertained to the original loan transaction with Citi Bank.

13. By separate orders dated 27th October, 2016, the DRT allowed both the aforesaid OAs. Following this, the Petitioners filed review applications being RA 15 of 2016 (arising out of OA No.474 of 2014) and RA 16 of 2016 (arising out of OA No.475/2014). Both the review applications were dismissed by orders dated 14th November, 2017. Thereafter, the Petitioners challenged the aforementioned orders before the DRAT by filing two appeals i.e. Appeal Nos. 63 and 64 of 2019. It is stated that the Registry refused to register the appeals till they were accompanied by a pre-deposit of 25% of the decreed amount. Both these appeals were dismissed by the DRAT on 25th April, 2018 on account of no one appearing for the Appellants.

14. The Petitioners claimed that they learnt of the above dismissal of appeals only when they interacted with the officials of ACRE and subsequently filed

applications before the DRAT for restoration of the appeals.

15. By the impugned orders, the DRAT has, while restoring the appeals, dismissed them on the ground of failure by the Petitioners to make the pre-deposit. The orders in both appeals are identical and it is therefore sufficient to extract the order passed, dismissing Appeal No.63 of 2019, which reads as under:

“This appeal being an appeal against a final order in the O.A of the ARC in which the recovery certificate stands issued against the appellant, for the entertainment of this appeal, appellant is supposed to comply with the requirement of pre-deposit of 50% of the amount of debt adjudicated against it vide impugned order of DRT. Counsel for the appellant has today, very candidly submitted that appellant will not be in a position to make pre-deposit of even 25% of the amount of debt determined, which is the minimum amount of pre-deposit which even this Tribunal can permit. Which according to learned counsel for the appellant if, were to be made will work out to three times the principal amount (which submission is being refuted by the learned senior counsel for the respondent).

In these circumstances, there is no purpose in keeping this appeal alive and therefore, the same is rejected as not entertainable for want of compliance of the condition of pre-deposit. It is rejected accordingly.”

16. There are two prayers in the present petitions. The prayers in both these petitions are for a writ of certiorari to call for the records, culminating the impugned order dated 23rd July, 2019, passed by the DRAT and for quashing the said order. A further prayer in W.P.(C) No.9563/2019 is to “allow the Petitioners to contest the Appeal No.63/2019 arising out of OA No.474/2014 (DRT-II), Delhi on merits.

17. When these writ petitions were listed for hearing first on 2nd September, 2019, the following order was passed by this Court:

“3. Mr. Tanmaya Mehta, learned counsel appearing for the Petitioner states that according to the Petitioner what was owed to the Respondent No. 1 is the sum of Rs. 13,55,69,863/- as on 2nd September, 2019, less a sum of Rs.1.5 crores already paid by them. Mr. Rajeev Mehra, learned senior counsel appearing for the Respondent No.1 disputes the above figure and submits that dues of the Petitioner are above Rs.80 crores.

4. Nevertheless, without prejudice to the rights and contentions of the parties, Mr. Mehta offers that the Petitioners will locate a buyer / buyers for the properties, which according to the Petitioners, can fetch (at the valuation already done at the instance of the Petitioner for such properties) the above sum of Rs.13,55,69,863/-, by filing the valuation certificates and the affidavits of such prospective buyer (s) before this Court before the next date. The affidavits of such prospective buyers, will explain the sources of their funds, and indicate their readiness to pay the entire sum forthwith.

5. At the request of Mr Mehta, list on September, 2019.

6. Mr. Mehra, learned Senior counsel for Respondent No.1 states on instructions that in view of the above statement made by the Petitioners no steps for bringing the properties to sale by public auction will be taken till the next date. The said statement on behalf of Respondent No.1 is placed on record.”

18. Today, Mr Mehta tendered to the Court an affidavit dated 11th September, 2019, of Mr. Ram Prakash Chugh, one of the partners of the Petitioner No.1, who himself is the Petitioner No. 4. He states in paragraphs 2 to 7 of the affidavit as under:

“2. That in compliance of the order dated 02.09.2019 as per the undertaking given in the Court, I tried to find out the buyer of

the properties.

3. That there is a slump in the market, therefore, the selling of such a big properties which involves huge amount is not a small task.

4. That the Petitioners found the investor namely M/s Kapil Khanna & Sons (HUF), Kapil Khanna son of Shri Kharati Lal Khanna, resident of House No. R-578, New Rajinder Nagar, Near Manavsthal School, Delhi – 110060, who invest in the business of the Petitioners. That one of the statements of accounts showing worth of Rs.67,059,814/- of Mr Kapil Khanna is annexed with this affidavit for the perusal of this Hon'ble Court.

5. That the investor is a renowned businessman having business in various cities in India and having capacity to pay the amount to the Respondent No.1.

6. That the investor need some more time to visit the location of the properties and have to finalize the properties as security and to give his full and final consent.

7. That the deponent undertakes before this Hon'ble Court that they will complete the process within eight weeks and file a further affidavit before this Hon'ble Court which includes the details of properties against which the investor will pay the money to the Respondent No.1 in the meanwhile the Petitioners will also locate another investors.”

19. The aforementioned order of this Court clearly sets out two requirements that needed to be met. One was to file a valuation certificate of the properties of the Petitioners, which according to the Petitioners, could fetch the aforementioned sum of Rs.13,55,69,863/-. The second was to file the affidavit of the prospective buyer, explaining the sources of their funds.

Neither of the above requirements has been fulfilled. In other words, the Petitioners have failed to file any valuation certificate. Further, the affidavit filed today is not of the prospective buyer, but of the Petitioner No.4.

20. Faced with the above situation, Mr. Mehta sought some more time to comply with the order dated 2nd September, 2019. The Court is, however, not inclined to do so. The Petitioners were required to demonstrate their bonafides and that is the reason why the above indulgence was shown at the first hearing. They have failed to do so.

21. It is pointed out by Mr. Rajeev Mehra, learned Senior Counsel appearing for ACRE that the Petitioners had failed to challenge the original orders dated 27th October, 2016 of the DRT, allowing the two OAs filed by ACRE. What was sought to be challenged in the appeals before the DRAT were only the orders of the DRT dated 14th November, 2017, dismissing the review petitions. He relied upon the judgment of the Madras High Court dated 21st December, 2018 in W.P.(C) 14553 of 2017 (*M/s. Parsn Medicinal Plants Pvt. Ltd. v. Indian Bank*) to urge that under Section 22 (2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ('SARFAESI Act'), the appeal against an order dismissing the review petition was not appealable before the DRAT. He pointed out that the said decision of the Madras High Court was affirmed by the Supreme Court with the dismissal of SLP (C) 5971 of 2019 by an order dated 8th March, 2019. Review Petition (C) 1467 of 2019 seeking review of the aforementioned order dated 8th March, 2019 of the Supreme Court was dismissed by the Supreme Court on 9th July, 2019.

22. Indeed, in the present case it is seen that the proceedings initiated by ACRE before the DRT were under the SARFAESI Act and, therefore, the aforementioned decision would squarely apply in the facts and circumstances of the case. Without there being any challenge to the original order dated 27th October, 2016 of the DRT allowing the two OAs, the appeals filed by the Petitioners before the DRAT challenging only the orders passed by the DRT dismissing the review petitions were not even maintainable in the first place.

23. Further, the Court finds that the DRAT was fully justified in dismissing the two appeals for failure by the Petitioners to make the pre-deposit in terms of Section 18 of the SARFAESI Act. Section 18 of the Act reads as under:

“18. 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 an Appellate Tribunal within thirty days from the date of receipt of the order of Debts Recovery Tribunal under section 17, may prefer an appeal along with such fee, as may be prescribed to an 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.”

24. In *Narayan Chandra Ghosh v. UCO Bank (2011) 4 SCC 548* the Supreme Court explained the mandatory nature of the above provision in the following words:

“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 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 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. 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.”

25. It is contended by Mr. Mehta that in the present case since according to the Petitioners, no further sum than the aforementioned sum of Rs.13,55,69,863/- was owed to ACRE, they were not obliged to make any pre-deposit. This submission is plainly untenable.

26. Recently, this Court in an order dated 4th September, 2019 in W.P.(C) 9578 of 2019 (*Hassad Food Company Q.S.C. v. Reliance Asset Reconstrucation Company Ltd.*) rejected a similar prayer for waiver of pre-deposit in the context of Section 21 of the Recovery of Debts and Bankruptcy Act, 1993 (‘RDB Act’) which is in *pari materia* with Section 18 of the SARFAESI Act.

27. Finally, Mr. Mehta contended that even if the appeals before the DRAT were required to be dismissed because of the failure of the Petitioners to make the mandatory pre-deposit, the Petitioners could still challenge the orders of the DRT in this Court and this Court would be obliged to examine the correctness of those orders in exercise of the powers of judicial review under Article 227 of the Constitution.

28. The Court notes that the prayers in both writ petitions are directed against the orders of the DRAT and not against the orders of the DRT. In any event, with the SARFAESI Act providing a statutory remedy against the orders of the DRT, the Court does not consider it expedient, in the facts and circumstances of the case, to allow the present petitioners to bypass that statutory remedy by seeking a remedy under Article 227 of the Constitution. This is irrespective of the fact that there is indeed no such prayer in either of the writ petitions.

29. The Court accordingly finds no merit in either of these petitions and they are dismissed as such with no order as to costs. The applications are also disposed of.

S. MURALIDHAR, J.

TALWANT SINGH, J

SEPTEMBER 12, 2019

tr