

\$~30

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **W.P.(C) 9578/2019 & CM APPL.39431/2019 (stay)**

HASSAD FOOD COMPANY Q.S.C.

..... Petitioner

Through: Mr. Neeraj Kishan Kaul, Sr.
Advocate with Mr. Sumeet Kachwdha,
Mr. Samar Kachwdha, Ms. Ankit
Khushu and Mr. Aayush Marwah,
Advocates.

versus

RELIANCE ASSET RECONSTRUCTION COMPANY LTD.
AND ORS.

..... Respondents

Through: Mr. Shahrukh Inam with Ms. Usha
Singh, Advocates for R1.
Mr. Vipin Jai, Advocate for R4/BOI.
Mr. Adhish Rajvanshi with
Mr. V. Seshagiri, Advocates for R7.
Ms. Jagriti Ahuja, Advocate for
R8/HSBC.

CORAM:
JUSTICE S. MURALIDHAR
JUSTICE TALWANT SINGH

ORDER

%

04.09.2019

Dr. S. Muralidhar, J.:

1. The Petitioner, Hassad Food Company Q.S.C., which describes itself as being part of the Sovereign Wealth Fund of the State of Qatar (the Qatar Investment Authority, QIA) has filed this writ petition challenging an order

dated 7th August, 2019 passed by the Debts Recovery Appellate Tribunal (Delhi) [‘DRAT’] declining the prayer made by it in IA No.764 of 2019 in Appeal No.333 of 2019 for waiver of the requirement of pre-deposit under Section 21 of the Recovery of Debts and Bankruptcy Act, 1993 (‘RDB Act’).

2. The brief facts are that on 28th March, 2013 the Petitioner, through its subsidiary i.e. Hassad Netherlands B.V. acquired 69.5% shareholding in Bush Foods Overseas Pvt. Ltd. (‘Bush Foods’) Respondent No.2, whose promoter was Mr. Virkaran Awasty (Respondent No.3). It is stated that as part of the transaction, the Petitioner furnished a corporate guarantee in favour of a consortium of nine banks to the extent of 70% of the credit limit extended by the said banks to Bush Foods. It is stated that Bush Foods is currently under winding up and that a Provisional Liquidator has been appointed by this Court in Company Petition 267 of 2014. The consortium banks invoked the corporate guarantee furnished by the Petitioner which it duly honoured by making a total payment of Rs.442.64 crores and US Dollars 8.142 million to the consortium banks.

3. The case of the Petitioner is that the consortium banks were complicit in the fraud played by Bush Foods and had fraudulently procured the aforementioned corporate guaranteed from the Petitioner, knowing fully well the precarious financial conditions of Bush Foods. The Petitioner filed CS (OS) (COMM) No. 9 of 2018 in this Court seeking *inter alia* refund of the sums paid by it to the consortium bank members. An interim order dated 14th September 2018 was passed in the said suit, where *inter alia* it was

observed that “within 8 - 9 months of taking over Bush Foods, the Plaintiffs have lost Rs. 442 plus about Rs.800 crores of investment in a dead company i.e. about Rs.1242 crores. Prima facie it appears that that the Plaintiffs have been cheated”. The said order also noted that the payment of the amounts constituting 70% of the credit facilities advanced by the consortium banks to Bush Foods was not considered by the consortium bank to be a sufficient discharge of the amounts owed to them and that they had instituted proceedings before the Debt Recovery Tribunal (‘DRT’) for recovery of Rs.282 crores. The said interim order restrained the consortium banks from using any coercive methods against the Petitioner for recovery of the alleged dues. It further observed that in case the DRT were to pass a recovery certificate against the present Petitioner, the banks would be free to approach the Court seeking appropriate orders for the protection of their interest.

4. The Petitioner states that one of the consortium banks i.e. Kotak Mahindra Bank preferred an appeal against the above interim order in FAO (OS) (COMM) 283 of 2018 in this Court, which is pending.

5. A separate OA No.347 of 2014 was filed in the DRT by ING Vysya Bank which had advanced a sum of Rs.50 crores to Bush Foods. Respondent No.1 herein is an assignee of the debt owed to ING Vysya Bank. The Petitioner points out that the above loan exposure is not covered by the corporate guarantee furnished by the Petitioner to the consortium banks since ING Vysya Bank was, at that point in time, not part of the consortium. Subsequently, it did become a member of the consortium by taking over a

Rs.60 crores loan obligation of two existing consortium bank members viz., EXIM Bank and Development Bank of Singapore ('DBS'). In the DRT proceedings, ING Vysya Bank sought from the Petitioner the entirety of its Rs.50 crores loan and the Rs.60 crores loan extended by EXIM Bank and DBS Bank. It was the case of the Petitioner that it could not be held liable for the sums that were not guaranteed by it. As far as the loans of EXIM Bank and DBS Bank were concerned, which ING Vysya Bank had taken over, the Petitioner's case was that it had already paid 70% of the loans of these banks and that therefore, nothing further was due from it under the corporate guarantee.

6. By an order dated 6th May, 2019 the DRT held that ING Vysya Bank was entitled to recover total sum of Rs.118.85 crores. It held the Petitioner to be liable for 70% of the said amount, after taking into account a sum of Rs.35.93 crores already paid by the Petitioner in relation to the loans of EXIM Bank and DBS Bank.

7. Aggrieved by the above order, the Petitioner filed before the DRAT Appeal No.333 of 2019 along with the aforementioned application IA No.764 of 2019 for waiver of the pre-deposit. By the impugned order dated 7th August 2019, the DRAT declined to grant a waiver of the pre-deposit and directed the Petitioner to deposit 50% of the amount decreed by the DRT by the order dated 6th May, 2019. However, the Petitioner was given 4 weeks' time for making the pre-deposit in accordance with law. It was further directed by the DRAT that in case such deposit was made, it would be kept in fixed deposit for a period which should fetch the maximum rate of

interest. Notice was issued in the appeal, subject to the Petitioner complying with the direction regarding pre-deposit.

8. Mr. N.K. Kaul, learned Senior Counsel appearing for the Petitioner, submits that it was unfair to call upon the Petitioner, which is a victim of fraud at the hands of the consortium banks, to pay any further sum to Respondent No.1, which is a successor-in-interest of ING Vysya Bank. He submitted that the Petitioner was a victim of cheating by Bush Foods in connivance with the consortium banks. The order of the DRT was plainly erroneous inasmuch as it made the Petitioner liable for a sum it did not owe in the first place. In the circumstances, the DRAT ought not to have imposed any pre-deposit requirement whatsoever on the Petitioner.

9. Mr. Kaul placed reliance on the decisions of the Division Benches ('DBs') of this Court in *Srishti Arogyadham Pvt. Ltd. v. Punjab National Bank* 2018 SCC OnLine Del 12716 and *Ambuj A. Kasliwal v. Kotak Mahindra Bank Pvt. Ltd.* 2019 SCC OnLine Del 9184. In the context of Section 129E of the Customs Act and the requirement of pre-deposit for appeals thereunder, he referred to the decision in *Sri Krishna v. Union of India* (1998) 104 ELT 325. In the context of Section 35F of the Central Excise Act, 1944 ('CE Act'), he referred to an order passed by the Supreme Court in *Mehsana Dist. Co-Op. Milk P.U. v. Union of India* 2003 (154) ELT 347 (SC) as well as the decision in *Benara Valves Ltd. v. Commissioner of Central Excise* (2006) 13 SCC 347.

10. The short question that arises in the present petition is whether the

DRAT was justified in declining the Petitioner's prayer for waiver of the pre-deposit?

11. Section 21 of the RDB Act reads as under:

“21. Deposit of amount of debt due, on filing appeal.

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 (fifty per cent) of the amount of debt so due from him as determined by the Tribunal under Section 19:

Provided that the Appellate Tribunal may, for reasons to be recorded in writing, (reduce the amount to be deposited by such amount which shall not be less than twenty-five per cent. of the amount of such debt so due) to be deposited under this section.”

12. A plain reading of the above provision indicates that there is an absolute bar on the DRAT entertaining an appeal, unless the pre-deposit is made with the DRAT by the Appellant of 50% of the amount due from such Appellant as determined by the DRT under Section 19 of the RDB Act. The proviso to Section 21 permits the DRAT to reduce the amount of pre-deposit up to 25% of the amount of such debt but not beyond that. In other words, the discretion of the DRAT is only to reduce the amount of pre-deposit from 50% of the amount of debt to 25% of the amount of debt, but not to waive the requirement of pre-deposit.

13. It should be noticed that appeals to the DRAT can be preferred not only

against order of the DRT under Section 19 of the RDB Act but also against the orders of the DRT under Section 17 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 ('SARFAESI Act'). The appeal to the DRAT from an order under the SARFAESI Act is in terms of Section 18 of the SARFAESI Act which 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.

14. It must be seen that Section 21 of the RDB Act is more or less identical to Section 18 of SARFAESI Act. In both provisions, for an appeal to be entertained before the DRAT, it is mandatory for the Appellant to make a pre-deposit of 50% of the amount of debt due from such Appellant. While under the RDB Act the amount of debt is that determined by the DRT, under the second proviso to Section 18(1) of the SARFAESI Act it could be 50% of the amount of debt as claimed by the secured creditors or determined by the DRT, whichever is less. In either instance there is no discretion with the DRAT to waive the pre-deposit.

15. This was explained by the Supreme Court in *Narayan Chandra Ghosh v. UCO Bank (2011) 4 SCC 548* where in para 8 it was held as under:

“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.” (emphasis supplied)

16. In that case, an argument was raised that since the DRT had not determined the debt that was due, the DRAT could not have insisted on the pre-deposit. It was observed in para 9 as under:

“9. The argument of learned counsel for the appellant that as the amount of debt due had not been determined by the Debts Recovery Tribunal, 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 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 proviso 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 appellant'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.”

17. In *Srishti Arogyadham Pvt. Ltd. v. Punjab National Bank* (*supra*), the DB of this Court was dealing with a challenge to an order of the DRAT which rejected an application by the Petitioner for waiver of pre-deposit in terms of Section 18 of the SARFAESI Act. This Court noticed the aforementioned judgment of the Supreme Court in *Narayan Chandra Ghose* (*supra*), but distinguished it since it was of the view that the Petitioner before it did not owe any amount whatsoever and that its dues had already been realised by the bank. Therefore, it was held that the judgment of the Supreme Court was not applicable. This is further made explicit in para 17 of the said Judgment which reads as under:

“17. It is a conceded case of the respondents that none of the eventualities exist as the amount due to the Bank has been recovered. The application has been opposed by the respondents and decided by the DRAT primarily on an apprehension that since, the petitioner has challenged the auction, the same may be set aside. In other words, the sale

remains in a nebulous stage and the sale will achieve finality/confirmed only when the legal proceedings come to an end.”

18. This Court, therefore, proceeded entirely on the basis that no amount was due from the Petitioner in that case and that this was also the ‘conceded case of the Respondents’.

19. In the present case, there is no such concession by any of the Respondents and in particular from Respondent No.1 that no amount is due from the present Petitioner. Consequently, the aforementioned decision is of no assistance to the Petitioner.

20. Turning now to the decision in ***Ambuj A.Kasliwal v. Kotak Mahindra Bank Pvt. Ltd.*** (*supra*), it again appears to have turned on its peculiar facts. There appears to have been an earlier round where “the Respondent bank had itself consented to hearing of the appeal without insisting on any further deposit”. Also, during the pendency of the O.A. before the DRT, the Respondent bank received a sum, which fact was not taken into account by the DRAT. The said judgment makes no reference to the interpretation of Section 21 of the RDB Act or to the decision of the Supreme Court in ***Narayan Chandra Ghosh*** (*supra*). The facts in the present case are different and, therefore, the said decision is again of no assistance to the Petitioner.

21. In ***Benara Valves Ltd. v. Commissioner of Central Excise*** (*supra*) the Supreme Court was considering the scope and extent of the discretionary power of the Customs Excise Service Tax Appellate Tribunal (‘CESTAT’)

under Section 35F of the CE Act. It must be noticed at the outset that Section 35F of the CE Act reads as under:

“35F. Deposit, pending appeal, of duty demanded or penalty levied.-

Where in any appeal under this Chapter, the decision or order appealed against relates to any duty demanded in respect of goods which are not under the control of Central Excise authorities or any penalty levied under this Act, the person desirous of appealing against such decision or order shall, pending the appeal, deposit with the adjudicating authority the duty demanded or the penalty levied:

Provided that where in any particular case the Commissioner (Appeals) or the Appellate Tribunal is of opinion that the deposit of duty demanded or penalty levied would cause undue hardship to such person, the Commissioner (Appeals) or, as the case may be, the Appellate Tribunal, may dispense with such deposit subject to such conditions as he or it may deem fit to impose so as to safeguard the interest of revenue :

Provided further that where an application is filed before the Commissioner (Appeals) for dispensing with the deposit of duty demanded or penalty levied under the first proviso, the Commissioner (Appeals) shall, where it is possible to do so, decide such application within thirty days from the date of its filing.”

22. Thus, unlike Section 21 of the RDB Act, the first proviso to Section 35F of the CE Act requires the Commissioner (Appeals) or the CESTAT to consider if the deposit of duty demanded or penalty levied ‘would cause undue hardship to such person’ and gives the power to the Commissioner (Appeals) or the CESTAT ‘to dispense with such deposit subject to such conditions as he or it may deem fit to impose so as to safeguard the interest of the revenue.’ This discretionary power to waive the deposit is missing in

Section 21 of the RDB Act. The decision in *Benara Valves Ltd. v. Commissioner of Central Excise* (*supra*) in fact interprets the expressions ‘undue hardship to such person’ and to ‘safeguard the interest of the revenue’ and points out that “the rival stands have to be examined in detail with the reference to the material on record and that the Tribunal while dealing with the application has to consider materials to be placed by the assessee relating to undue hardship and also to stipulate condition as required to safeguard the interest of revenue.”

23. Likewise the decision in *Mehsana Dist. Co-Op. Milk P.U. v. Union of India* (*supra*) also concerned an order of pre-deposit under Section 35F of the CE Act, which stands on an entirely different footing. These decisions, therefore, are also of no assistance to the Petitioner which is seeking a complete waiver of the pre-deposit under Section 21 of the RDB Act, when that provision does not give any discretion to the DRAT in that regard.

24. The Court notes from the impugned order of the DRAT that while considering whether the pre-deposit could be reduced below 50% (and above 25%), the DRAT enquired of the Petitioner whether it was in any financial hardship. The following passage in the impugned order makes this clear:

“The learned counsel for the appellant has submitted that already the appellant is a victim of fraud. When it was put to learned counsel for the appellant if financial position of appellant is such that it is not in a position to comply with the requirement of pre-deposit the answer was simply, the appellant was a victim of fraud and if still, it is to be called, upon to make any pre-deposit it will suffer irreparable loss and

irretrievable injury.

Considering the submission made and averments in the waiver application, I do not find any good reasons to grant waiver of the requirement of pre-deposit for the entertainment of this appeal. This prayer made in this application is accordingly declined.”

25. Even before this Court, no plea was advanced about the Petitioner being in any financial hardship and not being able to make the pre-deposit of 50% of the amount found due by the DRT. In the circumstances, the Court is unable to find any error having been committed by the DRAT in declining to grant a waiver of the pre-deposit.

26. Consequently, there is no merit in this petition and it is dismissed as such. The pending application is also dismissed.

CM APPL.39432/2019 (exemption)

27. Allowed, subject to all just exceptions.

28. Order be issued *dasti* under signature of the Court Master.

S. MURALIDHAR, J.

TALWANT SINGH, J.

SEPTEMBER 04, 2019

tr