

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 14.07.2020

Delivered on : 28.07.2020

C O R A M

The Hon'ble Mr. A.P.SAHI, THE CHIEF JUSTICE
and
The Hon'ble Mr. Justice SENTHILKUMAR RAMAMOORTHY

W.P.No.6721 of 2020

N.Madhavan

Petitioner

...vs...

- 1.Union of India
Rep. by its Secretary,
Department of Financial Services,
Ministry of Finance,
3rd Floor, Jeevan Deep Building,
Sansad Marg, New Delhi - 110 001.
- 2.The Debt Recovery Appellate Tribunal,
4th Floor, Indian Bank Circle Office,
No.55, Ethiraj Salai, Chennai - 8.
- 3.The District Collector
Namakkal.
- 4.The Revenue Divisional Officer
Namakkal.
- 5.R.Karthic Raja
- 6.The Chief Manager and Authorised Officer,
Indian Bank, Ranga Sannathi Street,
Namakkal - 637 001.
- 7.M/s.Bhagavti Transports
Rep. by its Proprietor
P.K.Selvaraj,
No.205, Nadu Street,
Kalappa Naicken Patti Post,
Namakkal Taluk and District.

... Respondents

PRAYER : Petition filed under Article 226 of the Constitution of India, praying to issue a writ of declaration declaring the

provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 especially the provisions under Section 18(1) of the Act and the second proviso thereunder as unconstitutional and void ab initio and consequently direct the second Respondent to refund the payment of Rs.1.51 lakhs already paid as pre-deposit to the second Respondent vide Indian Bank DD No.992927 dated 21.01.2020 drawn in favour of the Registrar, DRAT, Chennai within a time frame as may be fixed by this Court.

For Petitioner : Mr.N.Subramaniyan

For Respondents : --

O R D E R

SENTHILKUMAR RAMAMOORTHY J.,

The Petitioner is admittedly a guarantor of his brother-in-law, Mr.P.K.Selvaraj, who availed credit facilities, including overdraft facilities, from the Indian Bank, the 6th Respondent herein. As security for such credit facilities, the Petitioner admittedly mortgaged the property at New S.F. No.47/5A, Plot No.23, Old Door No.4/A/23, New Door No.5/14 NGGO's Colony, Chinnamudalaipatti Village, Namakkal Taluk and District, ad-measuring about 2400 sq.ft. The Petitioner states that, upon default by the principal debtor, he did not receive the notice under Section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (the SARFAESI Act). Eventually, he came to know about the proceedings under the SARFAESI Act only upon receipt of communication dated 12.12.2010 from the 4th Respondent Bank stating that the property had been sold to the 5th Respondent herein by taking action under Section 13(4) of the SARFAESI Act. The said sale was challenged by filing SA.SR.No.558 of 2010 before the Debts Recovery Tribunal, Madurai (the DRT Madurai), which was dismissed for default. Subsequently, a restoration petition in I.A. Nos.1209 to 1212 of 2015 were filed, which were dismissed for non prosecution on 05.05.2015.

2. Meanwhile, proceedings had been initiated by the Indian Bank under Section 14 of the SARFAESI Act to obtain vacant possession of the property from the Petitioner and orders were passed in the said Section 14 proceeding by the District Magistrate and District Collector, Namakkal, on 27.04.2011. The said order dated 27.04.2011 was challenged by filing W.P. No.25758 of 2012, which was disposed of by order dated 03.04.2018 by a Division Bench of this Court granting liberty to the Petitioner herein to challenge the order dated 27.04.2011 by initiating action in a manner known to law. Pursuant thereto, SA.SR.No.8187 of 2018 was filed before the

DRT Madurai along with an application to condone delay. The said application to condone delay was dismissed by order dated 08.07.2019. An appeal was filed as against the order dated 08.07.2019 before the Debts Recovery Appellate Tribunal (the DRAT) under Section 18 of the SARFAESI Act on 18.07.2019. An application to waive the pre-deposit was filed by way of I.A. No.754 of 2019. The said waiver application was disposed of by holding that not less than 25% of the debt due should be pre-deposited and by directing the Appellant therein, who is the Petitioner herein, to deposit a sum of Rs.1.51 lakhs with the Registrar of the DRAT within four weeks from 30.09.2019.

3. The DRAT order dated 18.7.2019 was challenged in W.P. No.30324 of 2019 on the ground that the requirement of pre-deposit is not applicable because the appeal before the DRAT is against an order under Section 5 of the Limitation Act, 1963 (the Limitation Act), and not under Section 17 of the SARFAESI Act. The decision of the Hon'ble Supreme Court in *Mardia Chemicals Limited v. Union of India* (2004) 4 SCC 311 (*Mardia Chemicals*) was relied upon in support of the above contention. This writ petition was disposed of by a Division Bench of this Court on 23.10.2019 by directing the DRAT to pass appropriate orders in accordance with law. Pursuant thereto, by order dated 17.12.2019, the DRAT concluded that the Appellant therein/Petitioner herein should be treated at par with the borrower and therefore directed that a pre-deposit of Rs.1.51 lakhs should be made. A writ petition, W.P. No. 519 of 2020, was filed challenging the order dated 17.12.2019 of the DRAT directing pre-deposit of Rs.1.51 lakhs by, once again, contending that the DRAT erroneously treated it as an appeal against an order under Section 17 of the SARFAESI Act and that the second proviso to Section 18 of the SARFAESI Act is inapplicable as per the judgment in *Mardia Chemicals*. By a detailed order dated 20.01.2020, the Division Bench of this Court discussed the chronology of events extensively and concluded that the impugned order of the DRAT, in exercise of its discretion under Section 18 of the SARFAESI Act, does not warrant interference by this Court except to the limited extent of granting two weeks' time from the date of receipt of the order to make the pre-deposit of Rs.1.51 lakhs. After making the pre-deposit, the present writ petition challenging the constitutional validity of the Section 18(1) of the SARFAESI Act and the second proviso thereto has been filed in these facts and circumstances.

4. We heard Mr.N.Subramaniyan, the learned counsel for the Petitioner. Mr.Subramaniyan contended that the Petitioner is only a guarantor and not a borrower. He further contended that the Petitioner did not receive the notice under Section 13(2) of the SARFAESI Act and that, therefore, the measures taken under Section 13(4) thereof are illegal. In particular, the resort to Section 14 of the SARFAESI Act in

order to obtain physical possession of the property from the Petitioner is invalid. SA.SR.No.8187 of 2018 was filed in order to challenge the order dated 27.04.2011 of the District Magistrate and District Collector, Namakkal. The said SA.SR.No.8187 of 2018 was filed pursuant to the liberty granted by this Court under order dated 03.04.2018 in W.P. No.25758 of 2012. However, the Petitioner had exceeded the limitation period of 45 days and therefore was constrained to file I.A. No.2712 of 2018 so as to condone the delay. The said I.A. was rejected by order dated 30.09.2019. This order was challenged in W.P. No. 30324 of 2019. By order dated 23.10.2019 in W.P. No.30324 of 2019, a Division Bench of this Court directed the DRAT to pass an appropriate order in the application for waiver of pre-deposit. Nevertheless, the DRAT, by order dated 17.12.2019, reiterated its earlier order and directed the Petitioner to pre-deposit a sum of Rs.1.51 lakh. According to the learned counsel for the Petitioner, the direction to pre-deposit a sum of Rs.1.51 lakhs violates the decision of the Constitution Bench of the Hon'ble Supreme Court in *Mardia Chemicals* because the Petitioner challenged an order under Section 5 of the Limitation Act and not under Section 17 of the SARFAESI Act. To put it differently, it is in the nature of a proceeding before a court of first instance. He further contends that Section 18(1) of the SARFAESI Act and the second proviso thereto are unconstitutional in as much as a pre-deposit is being insisted upon without differentiating between appeals against final orders under Section 17 of the SARFAESI Act and orders in applications to condone delay. Therefore, Section 18(1) and the second proviso thereto infringes Article 14 of the Constitution and contravenes the judgment in *Mardia Chemicals*.

5. We considered the submissions of the learned counsel for the Petitioner and examined the records. Upon perusal of the chronology of events in this case, we find that this is the third writ petition filed by the Petitioner herein with regard to the pre-deposit of the sum of Rs.1.51 lakhs. By W.P. No. 30324 of 2019, the order dated 30.09.2019 of the DRAT was challenged on the ground that it violates the judgment in *Mardia Chemicals* in as much as the Petitioner is still at the threshold and the appeal before the DRAT was equivalent to a proceeding before a court of first instance. The same contention was raised in W.P. No.519 of 2019 by again relying on *Mardia Chemicals* and by contending that the Petitioner's appeal is against an order under Section 5 of the Limitation Act and not under Section 17 of the SARFAESI Act. By order dated 20.01.2020, a Division Bench of this Court rejected the said contention and exercised discretion to the limited extent of granting two weeks time from the date of receipt of the order dated 20.01.2020 to make the pre-deposit. The present writ petition is filed in these facts and circumstances. On

each of the two previous occasions, the fact situation was that the Petitioner had been directed to make the pre-deposit as a condition precedent to maintain the appeal. The fact situation prevailing, at this juncture, remains unchanged except to the limited extent that the Petitioner has remitted the pre-deposit. Thus, in the two earlier writ petitions, the Petitioner could have challenged the constitutional validity of Section 18(1) of the SARFAESI Act and the second proviso thereto but chose not to do so. In sum, the Petitioner is contending for the third time that the DRAT order is an order in a Section 5 application and not in an application under Section 17 of the SARFAESI Act. The only difference in the present case is that the Petitioner also challenges the constitutional validity of Section 18(1) of the SARFAESI Act and the second proviso thereto albeit on grounds raised on two earlier occasions.

6. In *K.K.MODI Vs. K.N.MODI AND OTHERS* (1998) 3 SCC 573, the Hon'ble Supreme Court dealt with re-litigation as an example of abuse of process and held as under:

"44. One of the example cited as an abuse of process of the court is re-litigation. It is an abuse of the process of the Court and contrary to justice and public policy for a party to re-litigate the same issue which has already been tried and decided earlier against him. The re-litigation may or may not be barred as *res judicata*. But if the same issue is sought to be re-agitated, it also amounts to an abuse of the process of the Court. A proceeding being filed for a collateral purpose, or a spurious claim being made in litigation may also in a given set of facts amount to an abuse of process of the court. Frivolous or vexatious proceedings may also amount to an abuse of the process of the court especially where the proceedings are absolutely groundless. The Court then has the power to stop such proceedings summarily and prevent the time of the public and the court from being wasted. Undoubtedly, it is a matter of the Court's discretion whether such proceedings should be stopped or not; and this discretion has to be exercised with circumspection. It is a jurisdiction which should be sparingly exercised, and exercised only in special cases. The Court should also be satisfied that there is no chance of the suit succeeding."

7. Similarly, in *HUNTER v. CHIEF CONSTABLE OF THE WEST MIDLAND POLICE* [1982] A.C. 529, the House of Lords speaking through Lord Diplock, at page 541, held as follows on abuse of

process:

"The abuse of process which the instant case exemplifies is the initiation of proceedings in a court of justice for the purpose of mounting a collateral attack upon a final decision against the intending plaintiff which has been made by another court of competent jurisdiction in previous proceedings in which the intending plaintiff had a full opportunity of contesting the decision of the court by which it was made."

8. In the above judgment, Lord Halsbury's speech in REICHEL v. MAGRATH (1889) 14 App.Cas.665 was cited where he held, inter alia, as under:

"...I think it would be a scandal to the administration of justice if the same question having been disposed of by one case, the litigant were to be permitted by changing the form of the proceedings to set up the same case again."

The present case, undoubtedly, constitutes re-litigation. Nonetheless, we choose to take the path of circumspection and restraint for two reasons: (a) full disclosure of facts is made in the affidavit and the relevant documents are enclosed; and (b) a constitutional challenge is mounted in the third round.

9. We, therefore, proceed to deal with the constitutional challenge. In this case, the challenge is to the imposition of a pre-deposit in appellate proceedings before the DRAT. The provision under challenge, namely, Section 18(1) of the SARFAESI 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 the 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."

10. Upon examining Section 18(1), we find that the first proviso indicates that different fees would be prescribed for filing of appeals by borrowers and by persons other than borrowers. This proviso has been inserted because an appeal under Section 18 may be filed by any aggrieved person. By way of illustration, a lessee, a person, other than the borrower, claiming title over the mortgaged/charged property, or any any other person affected by the measures under Section 13(4) of the SARFAESI Act could be an aggrieved person. Thus, such aggrieved persons are not always borrowers. Consequently, the second proviso regarding pre-deposit applies only when the appellant is a borrower. The word "borrower" is defined in Section 2(f) as under:

"borrower means any person who has been granted financial assistance by any bank or financial institution or who has given any guarantee or created any mortgage or pledge as security for the financial assistance granted by any bank or financial institution and includes a person who becomes borrower of a asset reconstruction company consequent upon acquisition by it of any rights or interest of any bank or financial institution in relation to such financial assistance or who has raised funds through issue of debt securities".

As is evident from the above definition, the word "borrower" is defined in such a manner as to include a guarantor. This stands to reason inasmuch as a guarantor's liability is co-extensive with that of the principal debtor under Section 128 of the Indian Contract Act, 1872. Under the second proviso to Section 18(1) of the SARFAESI Act, a borrower is required to pre-deposit 50% of the amount of the debt due from him either as claimed by the secured creditor or as determined by the DRT, whichever is less. The third proviso empowers the DRAT to reduce the pre-deposit to an amount not less than 25% of the debt for reasons to be recorded in writing.

11. In Mardia Chemicals, the Hon'ble Supreme Court was dealing with the requirement of a pre-deposit for initiating proceedings under Section 17 of the SARFAESI Act before the DRT. The DRT is a court of first instance for an

aggrieved borrower, guarantor or any other aggrieved person who intends to challenge measures taken under Section 13(4) of the SARFAESI Act. In that context, the Hon'ble Supreme Court concluded that the imposition of the pre-deposit requirement of 75% of the debt was onerous and liable to be interfered with. Given the fact that the pre-deposit requirement, which is challenged herein, is contained in Section 18, which deals with the filing of an appeal, we find that it is distinguishable from Mardia Chemicals which dealt with pre-deposit before a court of first instance. This is evident from paragraphs 59 and 64 of Mardia Chemicals. The said paragraphs are as under:

"59. We may like to observe that proceedings under Section 17 of the Act, in fact, are not appellate proceedings. It seems to be a misnomer. In fact it is the initial action which is brought before a forum as prescribed under the Act, raising grievance against the action or measures taken by one of the parties to the contract. It is the stage of initial proceeding like filing a suit in civil court. As a matter of fact proceedings under Section 17 of the Act are in lieu of a civil suit which remedy is ordinarily available but for the bar under Section 34 of the Act in the present case. We may refer to a decision of this Court in Ganga Bai v. Vijay Kumar [(1974) 2 SCC 393] where in respect of original and appellate proceedings a distinction has been drawn as follows: (SCC p. 397, para 15)

"There is a basic distinction between the right of suit and the right of appeal. There is an inherent right in every person to bring a suit of civil nature and unless the suit is barred by statute one may, at one's peril, bring a suit of one's choice. It is no answer to a suit, howsoever frivolous to claim, that the law confers no such right to sue. A suit for its maintainability requires no authority of law and it is enough that no statute bars the suit. But the position in regard to appeals is quite the opposite. The right of appeal inheres in no one and therefore an appeal for its maintainability must have the clear authority of law. That explains why the right of appeal is described as a creature of statute."

"64. The condition of pre-deposit in the present case is bad rendering the remedy illusory on the grounds that: (i) it is imposed while approaching the adjudicating authority of the first instance, not in appeal, (ii) there is no determination of the amount due as yet, (iii) the secured assets

or their management with transferable interest is already taken over and under control of the secured creditor, (iv) no special reason for double security in respect of an amount yet to be determined and settled, (v) 75% of the amount claimed by no means would be a meagre amount, and (vi) it will leave the borrower in a position where it would not be possible for him to raise any funds to make deposit of 75% of the undetermined demand. Such conditions are not alone onerous and oppressive but also unreasonable and arbitrary. Therefore, in our view, sub-section (2) of Section 17 of the Act is unreasonable, arbitrary and violative of Article 14 of the Constitution."

In fact, in *Mardia Chemicals*, the Supreme Court noticed earlier judgments such as *Anant Mills Co. Ltd. v. State of Haryana* (1975) 2 SCC 175; *Seth Nand Lal v. State of Haryana* 1980 (Supp.) SCC 574; *Ganga Bai v. Vijay Kumar* (1974) 2 SCC 393; and *Shyam Kishore v. Municipal Corporation of Delhi* (1993) 1 SCC 22, wherein pre-deposit requirements in appellate proceedings were upheld by distinguishing between original proceedings and appellate proceedings, which are created by statute and can be availed of only subject to conditions prescribed by the statute concerned. Indeed, a Division Bench of this Court in *T. Chitty Babu v. Union of India*, W.P. No.29933 of 2019, Order dated 20.03.2020, upheld the validity of Section 43(5) of the Real Estate (Regulation and Development) Act, 2016, which imposes a pre-deposit requirement as a condition precedent to entertain an appeal before the Appellate Tribunal under the aforesaid enactment. In the said Order, after considering several judgments of the Hon'ble Supreme Court, including the above-mentioned judgments, this Court concluded that the pre-deposit requirement in respect of an appeal filed by a promoter is not an onerous condition and that it did not render the right of appeal as illusory. Consequently, it was held to be intra vires the Constitution. The principles laid down therein are, undoubtedly, applicable to this case.

12. We find that the pre-deposit provision (the second and third proviso) in Section 18 is applicable only to borrowers, as defined in the SARFAESI Act. In addition, the DRAT is vested with the discretion to reduce such pre-deposit to not less than 25% of the debt. Hence, the provision cannot be said to be arbitrary, onerous or unreasonable. Mr. Subramaniyan had also contended that his appeal before the DRAT was in respect of the dismissal of an application under Section 5 of the Limitation Act and, therefore, the order of the DRT should not be construed as an order under Section 17 of the SARFAESI Act. In our view, this contention is tenuous. Once the Section 5 application is rejected, it is tantamount

to a rejection by the DRT of the Section 17 application and a refusal to interfere with the measures taken by the secured creditor under Section 13(4). Thereafter, the only statutory recourse available to the borrower is to appeal under Section 18 to the DRAT, which functions as an appellate forum and not as a court of first instance. Therefore, we find no reason to strike or even read down Section 18(1) of the SARFAESI Act and the second proviso thereto. Hence, we uphold the validity thereof.

13. For reasons set out above, the writ petition is dismissed. No costs.

Sd/-

Assistant Registrar

//True Copy//

Sub Assistant Registrar

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To

- 1.The Secretary, Union of India,
Department of Financial Services,
Union of India, Ministry of Finance,
3rd Floor, Jeevan Deep Building,
Sansad Marg, New Delhi - 110 001.
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W.P.No.6721 of 2020

BR(CO)
CB(23/09/2020)