
(2014) 11 CAL CK 0026

In the Calcutta High Court

Case No : C.O. No. 2639 of 2012 and C.A.N. No. 11138 of 2014

Arabinda Saha

APPELLANT

Vs

Authorised Officer, Central Bank of India

RESPONDENT

Date of Decision : 28-11-2014

Acts Referred:

Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 17 18 18(1)

Citation : (2015) 2 CHN 753

Hon'ble Judges : Sanjib Banerjee, J

Bench : Single Bench

Advocate : Sukrit Mukherjee and S.R. Kankaria, Advocate for the Appellant;
Biswambhar Jha, Advocate for the Respondent;

Final Decision : Disposed off

Judgement

Sanjib Banerjee, J.

1. The ambiguous language in which some statutes are drafted these days not only leaves room for conflicting interpretations but it may, at times, be an impediment to arresting the mischief which was sought to be achieved by the enactment. Section 18 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 in its first limb uses the expression "by any order", which implies that every order passed by the Debts Recovery Tribunal under section 17 of the said Act would be appellable, provided the appellant can demonstrate that he is a person aggrieved by such order. However, the second proviso to section 18(1) of the said Act mandates that a pre-deposit be made as a condition precedent to the receipt of the appeal and the third proviso gives the Appellate Tribunal the discretion to reduce the pre-deposit from 50 per cent of the amount claimed by the secured creditor or determined by the Debts Recovery Tribunal, whichever is less, to 25 per cent of such amount. It is necessary to notice the entirety of section 18 of the said Act:

"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:

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 and rules made thereunder."

2. It cannot be said that the second and third provisos operate only in respect of the final orders passed by the Debts Recovery Tribunal under section 17 of the Act and would not apply to interlocutory orders carried in appeal. The wording of the provisos precludes such interpretation. Yet, there are interlocutory orders of considerable significance that involve complex legal issues, and a bona fide appeal may be carried therefrom by any person aggrieved thereby without such person aggrieved being conclusively identified as the borrower within the meaning of the word in the said Act, or when the amount claimed from such person has not yet been determined by the Debts Recovery Tribunal and it is demonstrated that a substantial part of the claim has been discharged by payment or realised from the sale of one or more of the secured assets.

3. The petitioners herein obtained credit facilities from the opposite party bank. Following the bank's demand for repayment and steps taken under the said Act of 2002, the mortgaged property or hypothecated goods have been sold and some further amount repaid by the petitioners to the bank. From the order of the Debts Recovery Tribunal passed on November 14, 2011, it cannot be gauged as to what may be the sum due from the petitioners to the bank, as would appear from the last two pages of such order. The question as to what would be the exact amount due from the petitioners to the bank, after adjusting the sale proceeds and taking into account the money repaid, did not fall for consideration in course of the order of the Tribunal dated November 14, 2011. The Tribunal noticed that the bank had claimed a sum in excess of Rs. 55 lakh from the petitioners herein; but the Tribunal was of the opinion that such amount would not be due, though some money could be due.

4. The observation of the Tribunal was in the context of the sale of the

mortgaged property or hypothecated assets having been completed and some money having been repaid by the petitioners herein to the bank.

5. An appeal was sought to be carried to the Debts Recovery Appellate Tribunal and the Appellate Tribunal found the petitioners herein to be persons aggrieved by the relevant order and entitled to institute an appeal therefrom. In assessing the quantum of pre-deposit to be made by the petitioners herein in terms of the second and third provisos to section 18(1) of the said Act of 2002, the Appellate Tribunal took the figure of about Rs. 55 lakh indicated in the Debt Recovery Tribunal's order of November 14, 2011 as the basis and required the petitioners herein to deposit 30 per cent of such amount instead of 50 per cent by the order impugned dated June 22, 2012.

6. The petitioners contend that the order of the Debts Recovery Tribunal of November 14, 2011 cannot be read to imply that the sum of Rs. 55 lakh as claimed by the bank was due and it would be evident from the drift of the discussion in the Debts Recovery Tribunal order that only a small amount of money remained due. They assert that the Appellate Tribunal erred in requiring a sum of about Rs. 18 lakh to be deposited as condition precedent for the appeal being taken up on merits. It is the petitioners' suggestion that they are entitled to a refund in excess of Rs. 30 lakh from the bank.

7. It is evident that the matter has been delayed upon the petitioners seeking an involved assessment on irrelevant considerations. It is not unknown for good minds to tweak the direction of the consideration by sending all and sundry barking up the wrong tree.

8. What is relevant for the purpose of considering whether a pre-deposit should be made or not, for a person aggrieved to be entitled to institute or pursue an appeal, is the hardship involved in making the pre-deposit. It is utterly irrelevant that the borrower, in the context of section 18(1) of the said Act of 2002, would cite the fact that the entire amount due to the secured creditor had been repaid to seek a remission of the pre-deposit. The authority under the third proviso to section 18(1) of the Act is to reduce the quantum of pre-deposit and not waive it altogether.

9. In most cases, when an appeal is carried under section 18(1) of the said Act of 2002 from an interlocutory order, the amount due from the borrower may not have been determined, though the amount claimed by the secured creditor may have been substantially discharged either by repayment or upon the secured asset or a part thereof being sold in the interregnum. The assessment as to the quantum of pre-deposit required to be made by a would-be appellant does not require any detailed consideration or any mathematical precision in the calculation thereof.

10. The right of appeal is a statutory right. If the right is hedged with conditions, such conditions have to be met in order to avail of the right. It would appear from the tenor of section 18 of the said Act that the legislature perceived that

appeals would be carried primarily from final orders adjudicating petitions instituted under section 17 thereof. However, since the opening limb of section 18(1) of the said Act refers to "any order", all orders passed in course of proceedings under section 17 of the said Act—whether interlocutory or final—must be seen to be amenable to appeal under section 18 thereof. Ordinarily, if it is an interlocutory order which has been appealed against, the determination of the amount due, if any, from the appellant would not have been completed.

11. The second and third provisos to section 18(1) of the Act make it mandatory for a pre-deposit to be made as a condition precedent to the appeal being entertained, provided the appeal is by a borrower as defined in the said Act. It goes without saying that if the appellant is not a borrower, the pre-deposit would not be required to be made. And as to whether the appellant is a borrower or not would depend on whether a claim has been made on such person by the secured creditor, whereupon such person would, for the purpose of the relevant provisos, be regarded as a borrower; or, if the appellant has been determined to be a borrower by the Debts Recovery Tribunal in course of the proceedings under section 17 of the said Act, the pre-deposit would be required to be made by the appellant irrespective of any contention raised that the appellant has been erroneously found to be the borrower.

12. An appeal from an interlocutory order passed under section 17 of the said Act would, ordinarily, imply that if any money is claimed from the appellant by the secured creditor, the determination has not been completed by the Debts Recovery Tribunal. Thus, in such a case, the second alternative in the second proviso to section 18(1) of the said Act would not come into play; and, the pre-deposit would have to be assessed on the basis of the amount claimed to be due from the appellant by the secured creditor, irrespective of any case run to the contrary by the appellant.

13. Section 18 of the said Act is silent as to the ultimate fate of the pre-deposit upon the conclusion of the appeal. That would imply that the Appellate Tribunal would be required to assess the issue, *prima facie* or conclusively depending on whether the order under appeal is interlocutory or final, whether or not the deposit has been made by the appellant under protest. It is possible that upon the appeal being decided, the Appellate Tribunal may direct the pre-deposit to be returned to the appellant. It must be remembered that it is only a deposit that is required to be made and not an amount that the appellant has to pay at the time of the institution of the appeal.

14. In the instant case, the Debts Recovery Tribunal did not determine the quantum that was due from the appellant to the secured creditor. Needless to say, such consideration would arise at a later stage of the pending proceedings under section 17 of the said Act. Before the Appellate Tribunal, the second alternative envisaged in the second proviso to section 18(1) of the said Act did not present itself. The only aspect that the Appellate Tribunal could have taken into consideration was the amount that had been claimed by the secured creditor

against the appellant as acknowledged in the order under appeal. The Appellate Tribunal, thus, committed no error of jurisdiction, nor did it act with material irregularity, in basing its assessment as to the quantum of pre-deposit on the amount claimed by the secured creditor.

15. The provisos to section 18(1) of the said Act that fall for consideration herein are not unique. Such condition, as the requirement of a deposit being made to avail of the right to appeal against an order, is there in several enactments, particularly fiscal statutes. When the appellate forum has been vested with a discretion to waive a part or the entirety of the pre-deposit required to be made to maintain an appeal, it is the hardship or inconvenience of the appellant which has to be the basis for the exercise of the discretion and, ordinarily, not any prima facie view as to the merits of the appeal.

16. Since the point urged in questioning the order impugned is as to the quantum which may be due from the petitioners and not the hardship or inconvenience that may be faced by the petitioners in making the pre-deposit, it is evident that a completely irrelevant consideration has been attempted to be put forward in the assessment of the quantum of pre-deposit. The Appellate Tribunal has exercised a discretion vested in it by law. In exercising such discretion, the Appellate Tribunal has taken relevant considerations into account including the material observations in the order of November 14, 2011 challenged before the Appellate Tribunal. Since the order does not suffer from any error of jurisdiction or perverse exercise of discretion, the same cannot be interfered with.

17. CO 2639 of 2012 is dismissed with costs assessed at Rs. 1 lakh. It is however, observed that in the event the petitioners succeed in the appeal, an appropriate adjudication should be reflected in the relevant order as to whether the pre-deposit would be returned to the petitioners or otherwise dealt with.

18. In view of the above, CAN 11138 of 2014 is of no relevance and is disposed of without costs.

19. After the order is made, the petitioners seek an extension of the time to put in the pre-deposit before the Appellate Tribunal. In view of such submission, the petitioners are permitted to put in the pre-deposit in terms of the order dated June 22, 2012 within a period of three weeks from date and the costs awarded against the petitioners stand reduced to Rs. 25,000/-. Urgent certified website copies of this order, if applied for, be made available to the parties upon compliance of the requisite formalities.