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**(2003) 05 KL CK 0021**

**In the High Court Of Kerala**

**Case No : O.P. No"s. 9157 and 9990 of 2003**

Bright Resorts (P) Ltd.

APPELLANT

Vs

Debt Recovery Appellate Tribunal

RESPONDENT

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**Date of Decision : 28-05-2003**

**Acts Referred:**

Recovery of Debts Due to Banks and Financial Institutions Act, 1993 — Section 10, 19, 21, 22, 9

**Citation : (2003) 3 BC 535 : (2003) 3 KLT 184**

**Hon'ble Judges : Pius C. Kuriakose, J**

**Bench : Single Bench**

**Advocate : Saiby Jose Kidangoor and Renjith B. Marar, for the Appellant; C.K. Karunakaran, C.E. Unnikrishnan and Rojo Joseph Thuruthipara, A.C.G.S.C., for the Respondent**

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## **Judgement**

Pius C. Kuriakose, J.—Defendants 1 to 4 in an Original Application filed by the 3rd respondent-Dhanalakshmi Bank before the 2nd respondent-Debts Recovery Tribunal for recovery of the amounts due to the Bank are impugning Ext.P2 order (in O.P.9157 of 2003) passed by the 1st respondent-Debts Recovery Appellate Tribunal, Chennai on various grounds including the ground that Section 21 of the Recovery of Debts Due to Banks & Financial Institutions Act, 1993 (Central Act 51 of 1993) (for short "the Statute") is ultra vires Articles 14, 19 and 21 of the Constitution of India.

2. The 2nd respondent-Debts Recovery Tribunal passed Ext.P1 order in the O.A. after turning down a request made on behalf of the debtor-petitioners for time to cross-examine the bank's witnesses. The petitioners filed an Original Petition before this Court under Articles 226 and 227 of the Constitution challenging Ext.P1 order. That Original Petition was disposed of on the view that the remedy of the petitioners is to prefer a regular appeal u/s 20 of the Statute to the Appellate Tribunal. Pursuant to that, the petitioners preferred an appeal along with a separate application seeking condonation of the delay. When it was noticed that notwithstanding the pendency of the appeal and the delay petition

the Recovery Officer issued demand notice and was keen on proceeding with recovery proceedings, the petitioners came to this Court filing O.P. No. 22133 of 2002 challenging the recovery proceedings. In that O.P. this Court issued an order of stay on condition that the petitioners pay a sum of Rs. 10,00,000/- towards their liability. Later, the stay was extended on condition that another sum of Rs. 5,00,000/- is paid towards the liability. Finally, the Original Petition was disposed of directing continuance of the stay for another three months on a further condition that towards the capital liability another sum of Rs. 5,00,000/- will be remitted. The Appellate Tribunal later on condoned the delay and considered the appeal. On considering the appeal the Appellate Tribunal passed Ext.P2 order u/s 21 of the Statute directing remittance of Rs. 30,00,000/- towards the liability within a period of four weeks. O.P.No. 9157 of 2003 is instituted for the quashment of Ext.P2 and also for a declaration that Section 21 of the Statute is unconstitutional.

3. A detailed counter-affidavit is filed on behalf of the 3rd respondent-Bank in the Original Petition and a reply-affidavit is filed by the Managing Director of the Debtor-Company in the context of the averments in the counter-affidavit.

4. While admitting O.P.9157 of 2003, I granted stay of operation of Ext.P2 order on condition that within one month from 18.3.2003 the petitioners will remit a sum of Rs. 5,00,000/- towards their liability.

5. O.P. No. 9990 of 2003 is filed by the very same petitioners arraying the Recovery Officer attached to the Debts Recovery Tribunal, Ernakulam as the 1st respondent and the Bank as the 2nd respondent. It appears that the petitioners did not comply with the condition imposed by this Court while granting stay in O.P.9157 of 2003 and the Recovery Officer accordingly continued with the recovery proceedings. The premise on which O.P.9990 of 2003 is filed is that the Debts Recovery Appellate Tribunal has not considered the stay petition and that continuance of the recovery proceedings pursuant to Ext.P3 demand notice during the pendency of the appeal and the stay petition before the Appellate Tribunal is illegal. The reliefs sought for in the O.P. are quashment of Ext.P3 recovery proceedings and a mandamus directing the Recovery Officer to keep in abeyance all further proceedings in pursuance to Ext.P3 pending disposal of the appeal. In this O.P. also, counter-affidavit and reply, affidavit have been filed on behalf of the Bank and the 1st petitioner respectively.

6. Sri. Saiby Jose Kidangoor, learned counsel for the petitioners as well as Sri. C.K. Karunakaran, learned counsel for the Bank addressed me elaborately. Heard the learned Central Government Standing Counsel on behalf of the Recovery Officer, the Debts Recovery Tribunal and the Debts Recovery Appellate Tribunal.

7. Even though Sri. Saiby Jose Kidangoor in his submissions challenged this order passed by the Debts Recovery Tribunal on the Original Application on various reasons including the reason that the same has been passed in blatant violation of the principles of natural justice, I do not propose to consider those

arguments, in view of the obvious position that pursuant to this Court's disinclination to entertain such challenges, the petitioners have already moved the Appellate Tribunal and that the said Tribunal has, upon condonation of the delay caused in the matter of filing the appeal, now registered the appeal as a regular appeal. More serious among the submissions of Sri. Saiby were those he made in the context of the constitutionality of Section 21 of the Statute. According to the learned counsel, the conditions presently imposed by the Debts Recovery Appellate Tribunal u/s 21 are so onerous that in effect the petitioners are even prevented from pursuing the appeal. According to the learned counsel, Section 21 of the Statute is highly arbitrary and liable to be declared as void. According to Sri. Saiby, the discretion which seems to have been conferred upon the Appellate Tribunal for reducing or waiving the statutory pre-deposit of 75% mentioned in Section 21 was absolute and arbitrary in the sense that no guidelines as to the manner in which the discretion should be exercised had been provided for in the Statute or in any rules made thereunder. Sri. Saiby submitted that conferment of such a discretion not qualified by specific guidelines regarding the exercise of discretion renders Section 21 itself ultra vires Articles 14 and 19 of the Constitution. Pointing out that Ext.P2 order imposing payment of Rs. 30,00,000/- as a condition for the entertainment of the appeal had been actually passed by the Appellate Tribunal on the basis of a submission by the Bank's counsel that the total liability due to the Bank was Rs. 1 crore, the learned counsel submitted that the said submission was not correct and that even assuming the same to be correct, the Appellate Tribunal obviously passed Ext.P2 on the reason that the profitability of banking business will be affected unless speedy recoveries are ensured. Expounding this argument further Sri. Saiby submitted that bank's customers who often figure as defendants in suits filed by the bank before the Debts Recovery Tribunal are also businessmen and the Appellate Tribunal ought to have remembered that compelling such customers to part with the entire working capital towards liquidation of the liability which was subject to the appeal clearly violates Article 14. In Sri. Saiby's arguments, a just balance should have been struck by the Appellate Tribunal between interests of the bank and the debtor and the Appellate tribunal should have taken into account the remittances already made by the petitioners pursuant to the conditions imposed by this Court in the previous Original Petition. Compliance with the condition presently imposed by the Appellate Tribunal under Ext.P2 will create a situation under which the petitioners will be compelled to close down their business once and for all and thus the rights guaranteed to the petitioners under Article 19 of the Constitution for pursuing lawful avocations will be taken away. All these are according to Sri. Saiby because of the absence of guidelines and stipulations either in the Statute or in the rules regarding the manner in which the Appellate Tribunal shall exercise its power to waive or reduce the statutory maximum deposit to be made u/s 21 by a debtor. The learned counsel invited my attention to the decision of the Supreme Court in Kailash Chand Sharma Vs. State of Rajasthan and Others, in support of his argument that even when the State takes policy-decisions, those decisions have to pass the tests of

Articles 14 and 16 of the Constitution. The learned counsel relied very much on the decision of the Supreme Court in *A.N. Parasuraman v. State of Tamil Nadu* ((1989) 4 SCC 683) in order to drive home his point that when statutory provisions confer power it is obligatory that Legislature itself should lay down adequate guidelines or conditions for the exercise of power by the delegate. The learned counsel argued that in as much as no guidelines have been provided either in Section 21 of the Statute or in any of the Rules framed thereunder regarding the manner in which the power of waiver or reduction is to be exercised and regarding the parameters which should weigh with the Tribunal while exercising the power, Section 21 was liable to be struck down. According to the learned counsel, formulation of the rule of conduct is an essential legislative function, which cannot be delegated and the ultimate task of implementation of the legislative object could be delegated only after the Legislature lays down adequate guidelines for the exercise of power. Referring to the decision of the Supreme Court in *State of Kerala and Others Vs. M/s. Travancore Chemicals and Manufacturing Co. and Another*, which was rendered on an appeal filed by the Government against the judgment of this Court striking down Section 59A of the Kerala General Sales Tax Act, Sri. Saiby argued that the reasons which weighed with this Court as well as the Supreme Court for striking down Section 59A are good reasons to strike down Section 21 of the Statute also. According to the learned counsel, the absence of any obligation on the side of the Government to hear the dealer before it takes a decision regarding the rate of tax leviable on the sales or purchase of goods, conferment of absolute power on the Government to decide the question regarding the rate of tax, conferment of too wide and unbridled powers on the Government ignoring the interest of one of the parties to the lis altogether were reasons which weighed with this Court and the Supreme Court. u/s 21 of the Statute as it presently stands, the Debts Recovery Appellate Tribunal could take a decision on waiver or reduction of the predeposit solely on the basis of the creditor-bank's allegation regarding the amounts due to it. The learned counsel also invited my attention to the decision of the Supreme Court in *M/s. Style (Dress Land) Vs. Union Territory Chandigarh and Another*, in support of his submission that absence of rules or guidelines regarding the manner in which power is conferred by a Statute upon an authority itself will invalidate the conferment of power. Arguing that any provision which does not insist on a decision based on reasons while exercising a particular power will have to be struck down on the ground of arbitrariness and as offending Article 14, the learned counsel relied on the decision of the Supreme Court in *Kumari Shrilekha Vidyarthi and Others Vs. State of U.P. and Others*, . The unusually wide discretion conferred upon the Debts Recovery Appellate Tribunal u/s 21 of the Statute in the matter of waiving or reducing the statutory maximum predeposit of 75% itself was justification for judicial review, Sri. Saiby argued on the authority of the Supreme Court in *The Consumer Action Group and Another Vs. State of Tamil Nadu and Others*, .

8. Meeting the arguments of Sri. Saiby very ably, Sri. C.K. Karunakaran, learned

counsel for the Bank would point out that the petitioners were invoking the extraordinary constitutional jurisdiction of this Court under Articles 226 and 227 for each and everything. He will mention O.P.9990 of 2003 as an instance of abuse of legal process by the present petitioners. The learned counsel would invite my attention to the various decisions of the Supreme Court wherein that Court has in unequivocal language ruled that Statute 51 of 1993 has been introduced to achieve the legislative objective of having a fast track procedure for recovery of the debts that are due to banks and constitutional courts should be slow in interfering with the orders passed by the Tribunals constituted under the Statute. Mr. Karunakaran would submit that there was no illegality, arbitrariness or unconstitutionality about Section 21 of the Statute and according to him no specific ground has been raised in the O.P. making out a case for even doubting the constitutional vires of Section 21. The learned counsel submitted that the right of appeal given to debtors who were aggrieved by orders passed by the Debts Recovery Tribunals by virtue of Section 20 was only a statutory right and cannot be said to be a vested right. The right of appeal conferred under a statutory provision will be available only subject to the conditions set out in the Statute itself. Section 20 is qualified by Section 21 and the right of appeal given to the debtors is to prefer an appeal u/s 20, subject to the liability to make the predeposit u/s 21. The learned counsel very much relied on the decision of the Supreme Court in Kamala Devi (Smt) and Others Vs. Collector of Central Excise, Bangalore and Others, and Vijay Prakash D. Mehta and Another Vs. Collector of Customs (Preventive), Bombay, in support of his argument that while dealing with provisions which are in pari materia with Section 21, the Supreme Court had approved of the constitutionality of those provisions.

9. Section 21 of the Statute is extracted hereunder:-

"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 seventy-five per cent of the amount of debt so due from him as determined by the Tribunal u/s 19:

Provided that the Appellate Tribunal may, for reasons to be recorded in writing, waive or reduce the amount to be deposited under this section."

On the plain language of the Section, deposit of an amount equivalent to 75% of the amount of debt determined by the Debts Recovery Tribunal u/s 19 as due from the appellant is obligatory for the entertainment of the appeal by the Appellate Tribunal. To the relief of the debtors, the proviso to Section 21 does empower the Appellate Tribunal to waive or reduce the amount to be deposited u/s 21. Sections 9 and 10 respectively deal with the composition of the Appellate Tribunal and qualifications for appointment as Chairperson of the Appellate Tribunal under the Statute. Under the statutory scheme the Presiding Officer or Chairperson of the Appellate Tribunal will be sufficiently learned and experienced

in justice administration. In the case on hand, Ext.P2 order is passed by the Presiding Officer of the 1st respondent-Appellate Tribunal who has been a High Court Judge at the time of his appointment as Chairperson of the Appellate Tribunal. Under the proviso which qualifies Section 21, the Appellate Tribunal while exercising its powers to waive or reduce the amount to be predeposited u/s 21 has to give reasons recorded in writing. Necessarily, the Appellate Tribunal is expected to give reasons in writing if it refuses to waive or reduce the amounts to be deposited u/s 21 irrespective of an application in that regard filed by the debtor-appellant. Sri. Saiby is correct in his submission that neither in the Statute nor in any of the rules which govern the procedure to be followed by the Appellate Tribunal, specific guidelines or parameters have been provided in respect of the considerations which should weigh with the Appellate Tribunal while exercising powers of waiver and remission. But in my view it does not need much elaboration to state that the Presiding Officer of the Appellate Tribunal who is mandated to give reasons in writing is expected to give reasons judicially settled as sound and reasonable on identical situations.

10. The power which has been conferred upon the Debts Recovery Appellate Tribunal under the Statute to waive or reduce the statutory predeposit of 75% u/s 21 cannot be said to be so unbridled as to entail itself of being struck down for the reasons mentioned in *State of Kerala and Others Vs. M/s. Travancore Chemicals and Manufacturing Co. and Another*, . So also, the situation which obtains in the context of Central Act 51 of 1993 is entirely different from the situation which was noticed by the Supreme Court in *A.N. Parasuraman v. State of Tamil Nadu* ((1989) 4 SCC 683). Unlike the delegated authority in *AM Parasuraman* (supra), the Debts Recovery Appellate Tribunal is or has been a High Court Judge and at any rate a person sufficiently learned and experienced in our system of justice delivery. When such a person has to give reasons, it follows that the reasons expected to be given are good and reasonable ones. It is pertinent to note that Section 22 of Act 51 of 1993 specifically provides that the Tribunal and the Appellate Tribunal constituted under the Statute shall be guided by the principles of natural justice.

11. The challenge to the vires of Section 21 in the context of Article 14 on the basis of *Shrilekha Vidyarthi* (supra) and other decisions cited before me by Sri. Saiby should fail since the reasons stated in those decisions will not be relevant in the context of Section 21.

12. *Kamala Devi* (supra) cited by Sri. CK. Karunakaran was a case in respect of an appeal preferred under Central Excise Act, 1944. u/s 35F of that Statute it is obligatory that a person desirous of appealing shall make a predeposit of the duty demanded or the penalty levied. The appellate authority, whether the Commissioner (Appeals) or the Appellate Tribunal, is given the power to dispense with such deposit if the said authority is of the opinion that insistence of predeposit "would cause undue hardship to such person". It is seen from the said decision that the constitutionality of Section 35F of the Central Excise Act, 1944

was not a question before the Supreme Court. Therefore, that decision will be of assistance to this Court only in the matter of deciding as to what all can be the considerations which should weigh with the Appellate Tribunal while deciding to waive or not to waive the predeposit.

13. Vijay Prakash D. Mehta (supra) was a case which arose before the Supreme Court under the Customs Act, 1962. Chap.XV of the said Act deals with appeals. Section 129 deals with the composition of Appellate Tribunal. It is clear on a reading of Section 129 that the Judicial Member of the Appellate Tribunal constituted under the Customs Act shall be as qualified and experienced in judicial work (if not more) as the Chairperson of the Appellate Tribunal constituted under Act 51 of 1993 Section 129E of the Customs Act reads as follows:-

"Where in any appeal under this Chapter, the decision or order appealed against relates to any duty and interest demanded in respect of goods, which are not under the control of the customs 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 proper officer the duty and interest 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 and interest 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 as to safeguard the interests of revenue."

14. In Vijay Prakash D. Mehta's case an argument was addressed before the Supreme Court that insistence of predeposit for the entertainment of the appeal virtually takes away the right of appeal itself and it was argued on the authority of Hoosein Kasam Dada (India) Ltd. Vs. The State of Madhya Pradesh and Others, that Section 129E is bad. The Supreme Court observed in the context of the right of appeal u/s 129 of the Customs Act as follows:-

"8. The aforesaid observations, in our opinion, have no application to the instant case. Here the right that was granted, was a right held with a condition. There was no question of change of that right. In the instant case, the only substantive right is the right of appeal as contemplated under Sections 129A and 129E of the Act and that right is a conditional one and the Legislature in its wisdom has imposed that condition. No question of whittling down that right by an alteration of procedure arises in this case.

9. Right of appeal is neither an absolute right nor an ingredient of natural justice the principles of which must be followed in all judicial and quasi-judicial adjudications. The right to appeal is a statutory right and it can be circumscribed by the conditions of the grant."

XXX XXX XXX 13. It is not the law that adjudication by itself following the rules of natural justice would be violative of any right-constitutional or statutory without any right of appeal, as such. If the Statute gives a right to appeal upon certain conditions, it is upon fulfilment of those conditions that the rights becomes vested and exercisable to the appellant. The proviso to Section 129E of the Act gives a discretion to the Tribunal in cases of undue hardships to condone the obligation to deposit or to reduce. It is a discretion vested in an obligation to act judicially and properly."

The reasons which weighed with the Supreme Court in Vijay Prakash D. Mehta's case (supra), according to me, are excellent reasons for answering the issue before me. The right of appeal given to an aggrieved party u/s 20 will be subject to the conditions for predeposit set out in Section 21. The discretion given to the Appellate Tribunal to reduce or waive the amount to be deposited u/s 21 is a judicial discretion. An important parameter for the exercise of that discretion is indicated by the Supreme Court itself in Vijay Prakash D. Mehta's case, i.e. avoidance of undue hardship for the appellant. There can be other parameters also. The extent of the liability involved, the attitude of the debtor towards liquidation of the liability as could be seen from his performance borne out by the account copies relied on by the Debts Recovery Tribunal, merits of the appeal to the extent discernible from the nature of the contentions raised, quality of evidence adduced by the debtor in substantiation of his contentions, the grounds of appeal are to mention only a few. Right of appeal given u/s 20 of Act 51 of 1993 is only a statutory right which is circumscribed by Section 21. Exercise of discretion given to the Appellate Tribunal under the proviso to Section 21 for waiving or reducing the predeposit amount should be exercised honestly, bonafide and in an objective manner, keeping in mind the parameters mentioned above.

15. Coming to the merits of the present case, it is seen that as against a total liability of Rs. 1 crore determined by the Debts Recovery Tribunal, the Appellate Tribunal has fixed the amount payable by way of predeposit at Rs. 30 lakhs. It could have been as high as Rs. 75 lakhs. Taking into account the payment made in pursuance to the conditional order passed by this Court, the liability would perhaps have been only about Rs. 80 lakhs. Even then, the amount to be deposited u/s 21 would have been about Rs. 55 to Rs. 60 lakhs. It is obvious that the Appellate Tribunal has exercised its discretion in the matter of waiving or relaxing the amount of predeposit u/s 21 in a just and proper manner. However, having regard to the submissions of Sri. Saiby Jose that as a matter of fact the present financial position of his clients will not permit them to raise a sum of Rs. 30 lakhs immediately, purely on considerations of indulgence, I am inclined to reduce the amount to Rs. 25 lakhs inclusive of the sum of Rs. 5 lakhs which has been reportedly deposited after the passage of Ext.P2.

In the result; the challenge to the constitutionality of Section 21 of Act 51 of 1993 fails. The Original Petitions are disposed of refixing the total amount to be

deposited by the petitioners u/s 21 of the Act at Rs. 25 lakhs inclusive of the sum of Rs. 5 lakhs paid in response to the directions issued by this Court in O.P. No. 9157 of 2003. The petitioners are given three more weeks" time to pay the balance amount. The Debts Recovery Appellate Tribunal will consider and dispose of the appeal on its merits, if a memo regarding remittance of Rs. 20 lakhs with the Bank is filed before 20.6.2003. No costs.