

(2018) 10 KAR CK 0001

In the Karnataka High Court

Case No : Writ Petition Nos. 13681, Of 2017, 34948 Of 2017, C/W Writ Petition No. 356 Of 2017 (Gm-Drt)

Capt G R Gopinath

APPELLANT

Vs

Syndicate Bank

RESPONDENT

Date of Decision : 05-10-2018

Acts Referred:

Recovery of Debts due to Banks and Financial Institutions Act, 1993 — Section 21

Citation : (2018) 10 KAR CK 0001

Hon'ble Judges : Dinesh Maheshwari, Cj; Krishna S. Dixit, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

1. This set of two petitions involving the same parties and inter-related issues, having been considered together are taken up for disposal by this

common order.

2. The petitioners herein proposed to maintain an appeal against the order dated 31.05.2016 passed by the Debt Recovery Tribunal at Bengaluru

(â??DRTâ??) in O.A.No.267/2013, before the Debt Recovery Appellate Tribunal, Chennai (â??DRATâ??), being AIR No.316/2016. In view of the

requirement of pre-deposit as per Section 21 of The Recovery of Debts due to Banks and Financial Institutions Act, 1993, (â??the Act of 1993â??),

the petitioners filed an application I.A.No.313/2016 seeking waiver of such condition of pre-deposit. The DRAT, in its order dated 30.11.2016, looking

to the amended provisions of Section 21 of the Act of 1993 and the quantum of decretal debt in question, directed the petitioners - appellants to

deposit a sum of Rs.50,00,00,000/- (Rupees Fifty Crore) within one month while observing as under:

5. Considering the rival contentions and going through the submissions of Ld. Counsel for the parties, the pre deposit of 50% of the debt amount is necessary. The debt amount is Rs.155.06 Crores and odd. On convincing of good ground, it could be reduced only up to 25% of the debt amount. In view of the facts and circumstances of the case, I deem it to fit to fix Rs.50 Crores, as pre deposit required under Section 21 of the Act, to entertain the Appeal on merits.

6. Accordingly, the Appellants are directed to deposit Rs.50 Crores [Rupees Fifty Crores Only] in the name of the Registrar, DRAT, Chennai within one month from today. It is made clear that in case of non compliance of the above condition, the Application IA 313/2016 shall stand dismissed, and consequently, the Appeal AIR 316/2016 shall stand rejected.

7. List on 6.1.2017, for confirmation of the fact of pre deposit.

3. The aforesaid order dated 30.11.2016 passed by the DRAT is questioned in W.P.No.356/2017. This writ petition filed on 03.01.2016 was taken up for consideration on 05.01.2017 and the notices were ordered to be issued to the respondents but without any interim order.

4. The petitioners having not deposited the amount required by the order dated 30.11.2016, made another application being I.A.No.44/2017 for enlargement of time with the submissions that the matter was in challenge before this Court. The DRAT however found no justification to grant the application so moved and while dismissing the application also proceeded to reject the appeal by its order dated 06.01.2017, the relevant part whereof reads as under:

Vide order dated 30.11.2016, this Tribunal directed the Appellants to deposit a sum of Rs.50 Crores, within one month from that date. The

Appellants preferred IA 44/2017 for extension of time saying that the matter is challenged before Hon'ble High Court in Writ jurisdiction. On account of personal financial crunches and hardship, the extension of time is sought.

According to the provisions of Section 21 of the RDDB&FI Act, the DRAT can entertain the Appeal only after compliance of Order of pre deposit.

No good ground is made out by the Appellants for extension of time. Appellants have not complied with the Order dated 30.11.2016. IA 44/2017 is

dismissed. Accordingly, the Application for Waiver stands dismissed and

consequently, the Appeal is rejected.â??

The aforesaid order dated 06.01.2017 is questioned in

5. The relevant background aspects of the matter could be taken in contentions as follows:

(a) The second Respondent-Deccan Cargo and Express Logistics Pvt. Ltd (hereafter â??Deccan Cargoâ?) way back in February 2010, had availed

from the first Respondent-Syndicate Bank, an initial loan facility of Rs.50 Crore which later came to be enhanced to Rs.150 Crore. The petitioners

were the sureties/guarantors for the re-payment of the said loan. The loan installments having fallen due, remained unpaid despite notice of demand

and therefore, the Loan Account came to be declared as Non performing Asset (NPA) with effect from 30.09.2011.

(b) The first Respondent-Syndicate Bank vide legal notice dated 03.10.2012 demanded of the second Respondent-Deccan Cargo and the petitioners,

for repayment of Rs.155.06 Crore. A Reply was sent on 10.10.2012 stating that the loan would be taken over by the fourth Respondent-Axis Bank. In

the meanwhile, Company Petition No.143/2011 was filed seeking winding up of the second Respondent-Deccan Cargo and this Court vide order dated

11.06.2013 ordered for the winding up.

(c) The first Respondent-Syndicate Bank filed a suit in O.A.No.267/2013 against the petitioners and the second Respondent-Deccan Cargo. The third

Respondent-State Bank of India and the fourth Respondent-Axis Bank were also arraigned as defendants. After a full fledged trial, the DRT, decreed

the O.A. on 31.05.2016, the relevant part whereof reads as under:

â??Defendant Nos.1 to 3 jointly and severally shall pay a sum of Rs.155,06,87,507.99 to the Appellant Bank as on 30.11.2012 together with further

interest there on from 01.12.2012 @ 19.75

% p.a., compounded monthly on a sum of Rs.73,57,92,240.07 and at the rate of 17.50 % p.a., compounded monthly on Rs.81,47,45,267.92â??.

The DRT also permitted the first Respondent-Syndicate Bank to proceed against the mortgaged properties of the borrower and sureties/guarantors

i.e., the petitioners.

6. As noticed, the petitioners being the sureties/guarantors laid the challenge to the aforesaid Order by way of Appeal in AIR No.316/2016 before the

DRAT. They had also filed an application in I.A.No.313/2016 seeking waiver of the condition for pre-deposit under Section 21 of the Recovery of

Debts due to Banks and Financial Institutions Act, 1993 (hereafter "Act").

The DRAT by its Order dated 30.11.2016 directed the petitioners to deposit a sum of Rs.50 Crore within one month as a pre-condition for entertaining

the appeal on merits; and, after dismissing the application dated 06.01.2017 seeking enlargement of the period fixed for making the deposit, rejected

the appeal. These two orders are the subject matter of challenge in these writ petitions.

7. Learned Senior Counsel appearing for the petitioners submits that the impugned order suffers from an error apparent on the face of the record

inasmuch as the DRAT has laboured under a misconception of law that the 2016 Amendment to Section 21 of the Act of 1993 was retrospective in

operation and governed the application seeking waiver of pre-deposit. He would submit that the right of appeal falling in the realm of substantive law

accrues to a litigant when the original proceedings are instituted although the same becomes exercisable after suffering an adverse order and,

therefore, O.A.No.267/2013 having been filed long before the 2016 Amendment, the DRAT ought to have invoked the proviso to Section 21 of the

Act as it stood before its Amendment. In support of his submission, the learned counsel has relied upon the decision of Apex Court in the case of

Hoosein Kasam Dada (India) Ltd Vs. The State of M.P. & Others reported in AIR 1953 SC 221.

8. Learned Senior Counsel has also contended that because of the mistake of the Lending Bank, the business of the second Respondent-Deccan

Cargo was badly affected and that the same resulted into the Company being ordered to be wound up; the petitioners to show that they do not have

any financial strength to comply with the condition of pre-deposit, had produced sufficient material which warranted the waiver of the said condition,

but the DRAT having been misdirected in law, refused to exercise discretion in favour of the petitioners contrary to the rules of reason and justice.

9. Learned Standing Counsel for the Official Liquidator representing the second Respondent-Deccan Cargo in liquidation, has supported the contention

of the petitioners that the 2016 Amendment is prospective in operation and therefore, the DRT could not have invoked the same.

10. However, the learned panel Counsel for the first Respondent-Syndicate Bank has repelled the contention stating that although the right of appeal is

a substantive right, the condition which restricts the said right being procedural in nature, the 2016 Amendment is retrospective in operation and

therefore, no fault can be laid in the DRAT invoking the proviso of the Amended Section 21 of the Act.

11. The learned panel counsel for the first Respondent-Syndicate Bank has further contended that irrespective of the nature and effect of 2016

Amendment, the petitioners are not entitled to seek complete waiver of the condition of pre-deposit inasmuch as the amount due under the DRT order

now exceeds Rs.200 to Rs.300 Crore; and the petitioners, who are the sureties/ guarantors, are admittedly having agricultural land, whose material

particulars are not furnished; the DRAT having considered all aspects of the matter, has directed the petitioners to pay Rs.50 Crore which is less than

25 % of the amount due under the DRT Order and therefore, impugned orders of the DRAT cannot be found fault with.

12. Having given anxious consideration to the rival contentions and having examined the record with reference to the law applicable, we are clearly of

the view that these writ petitions, being bereft of substance, deserve to be dismissed.

13. The main plank of the submissions of the learned counsel for the petitioners in these matters has been that Section 21 of the Act of 1993 as it

stood prior to its amendment in the year 2016 would only apply to the appeal filed by the petitioners for the reason that the original proceedings

commenced before the DRT prior to such amendment of the Act of 1993 and a right of appeal came vesting in the petitioners. According to the

learned counsel, the amendment of Section 21 of the Act of 1993 in the year 2016, deals with substantive right of appeal and hence, is only

prospective in operation. The submissions have several shortfalls and shortcomings.

14. For the questions involved, appropriate it would be to take note of the provisions of Section 21 of the Act of 1993 as existing before the

amendment in the year 2016 and as existing after the amendment, as follows:

Before amendment After amendment

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

debt due, on filing appeal.- Where an appeal is preferred Where an appeal is preferred by any person from whom the by any person from whom the amount of debt is due to a amount of debt is due to a bank or a financial institution bank or a financial institution or a consortium of banks or or a consortium of banks or financial institutions, such financial institutions, such appeal shall not be appeal shall not be entertained by the Appellate entertained by the Appellate Tribunal unless such person Tribunal unless such person has deposited with the has deposited with the Appellate Tribunal seventy- Appellate Tribunal fifty per five per cent. of the amount of cent. of the amount of debt so debt so due from him as due from him as determined determined by the Tribunal by the Tribunal under section under section 19: 19:

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

Amendment of Section 21 of the Act of 1993 is retrospective:

15. Having regard to the subject matter and the submissions made, it is appropriate to take up for examination, in the first place, the fundamental question raised in these matters as regards the nature and effect of amendment to Section 21 of the Act of 1993 as brought about by the Amendment Act of the year 2016. Ordinarily, the amendment of substantive law is presumed to be prospective in operation and the amendment of procedural law is presumed to be retrospective in operation [vide Workmen vs. Firestone Tyre & Rubber Co., of India (P) Ltd., : (1973) 1 SCC 813].

16. The pre-amendment provisions of Section 21 of the Act 1993 required the appellant to deposit 75% of the decretal sum which the DRAT had the discretion to waive or reduce, depending upon the facts and circumstances of the individual case. The said Section came to be amended by substitution of certain expressions by Act 44 of 2016 w.e.f. 01.09.2016. By such amendment, the quantum of the amount of pre- deposit has been reduced to 50% in place of 75%; and the power of DRAT to waive has been restricted to the extent of 25%.

17. True it is that the right of appeal is a matter of substantive law; this right may be absolute or conditional, as may be provided by law that creates

the said right; it is also well settled that the right of appeal although accrues to a party when the litigation originally commences, the same becomes

exercisable after an adverse order is made against him, but this aspect of the matter is beside the point.

18. The 2016 Amendment to the provisions of Section 21 of the Act of 1993, in substance, relates not to the right of appeal as such, but to the

condition subject to which the said right becomes exercisable; ordinarily such conditions fall within the domain of procedure especially when the

alteration of said conditions is not substantial, inasmuch as even after amendment, discretion is left with the DRAT to reduce the amount of pre-

deposit, although not below 25% of the decretal amount. Therefore, the law by which such conditions are varied cannot be construed to be

substantive law but shall remain within the realm of procedural law. The Supreme Court in the case of Shiv Shakti Coop. Housing Society, Nagpur vs.

Swaraj Developers and Others: (2003)

6 SCC 659 has observed (in paragraph 32):

“No person has a vested right in a course of procedure. He has only the right of proceeding in the manner prescribed. If by a statutory change

the mode of procedure is altered, the parties are to proceed according to the altered mode, without exception, unless there is a different stipulation.”

Therefore, the contention of the petitioner that the amendment is prospective in effect, is not acceptable.

19. Alternatively, for the sake of argument even if the Amendment Act 2016 that takes away the discretion of the DRAT to waive the condition of

pre-deposit is assumed to be that of substantive law, the Amendment being by way of substitution, has to be construed as being of retrospective

effect. Substitution of a provision of law or the words in a provision of law results in replacement by the new provision when new words are

substituted in place of existing ones; therefore, the amended provision should be read as if it existed from the inception of the enactment. The Supreme

Court in the case of Shamrao Vs. Parulekar & Others : AIR 1952 SC 324 has expounded on these principles as under:-

“...the Rule is that when a subsequent Act amends an earlier one in such

a way as to incorporate itself, or a part of itself, into the earlier, the earlier Act must thereafter be read and construed (except where that would lead to a repugnancy, inconsistency or absurdity), as if the altered words had been written into the earlier Act with pen and ink and the old words scored out so that thereafter there is no need to refer to the Amending Act at all.

20. The question whether an amendment by way of substitution would have retrospective effect had fallen for consideration of the Full Bench of this

Court in the case of *The Hassan Co-operative Milk Producers Societies Union Ltd., and Others vs. State of Karnataka, Department of Co-operative*

Societies and Others: ILR 2014 KAR 4257.

The Court, after considering a catena of decisions, has ruled that such amendments are retrospective in operation in the following:-

21. We would also like to examine the effect of amendment by way of substitution and to find out whether amendment by Act No.3 of 2013, by

way of substitution would have retrospective operation. It is true that substitution of a provision results in repeal of the earlier provision and its

replacement by the new provision. When the Legislature amends the old provision by way of substitution it intends to keep alive the old provision. The

Supreme Court in *ZILE SINGH* (supra), while dealing with such situation observed that having regard to the totality of the circumstances centered

around the issue the Court can hold that the substitution has the effect of just deleting the old provision and making the new provision operative. The

Supreme Court in *STATE OF RAJASTHAN vs. MANGILAL PINDWAL*, upheld the legislative practice of an amendment by substitution being

incorporated in the text of a statute which had ceased to exist and held the substitution would have the effect of an amending operation of law during the

period in which it was in force. Similarly, in *KOTESWAR VITTAL KAMATH vs. K.RANGAPPA BALIGA*, the three Judge Bench of the

Supreme Court emphasized the distinction between supersession of rule and substitution of a rule and held that the process of substitution consists of

two steps: first, the old rule is made to cease to exist and, next, the new rule is brought into existence in its place. Thus, what emerges from the

aforesaid judgments of the Supreme Court is that an amendment which has the effect of substitution of a provision has the effect of replacing the old

provision by the substituted provision and in the absence of repugnancy, inconsistency and absurdity, must be construed as if it has been incorporated in the Act right from abinitio. In other words, an amendment by way of substitution has retrospective operation.â??

Therefore, the contention that the amendment in question is prospective in operation, is liable to be rejected.

21. Another aspect of the matter also needs consideration. It is not that prior to the 2016 amendment, the Act of 1993 had given to the appellant

before the DRAT an absolute and unconditional right of appeal; the proviso to Section 21 of the Act of 1993 had vested the discretion in the DRAT to

waive or limit the requirement of pre-deposit. The amendment has only restricted the discretion to reduce the requirement of pre-deposit not below

25% of the decretal sum. Thus, admittedly, even after amendment, the substance of the proviso to Section 21 is retained and what is trimmed is the

condition subject to which the right of appeal is to be exercised. The trimming of condition, in essence, relates to the law of procedure, which is

normally retrospective in operation. Therefore, the contention of the petitioner that the amendment is prospective in effect, is not well founded.

22. The judgment of the Apex Court in the case of Hoosein Kasam Dada (India) Ltd Vs. The State of M.P. & Others, reported in AIR 1953 SC 221

at paragraphs 13 & 16 arguably held that the amended provision of law imposing conditions for exercising right of appeal is ordinarily prospective in

operation. However, noticeable it is that the provision under consideration before the Supreme Court in the aforesaid case was of the nature that

before amendment, the right of appeal was almost an unfettered right and the assessee was only required to deposit such amount of tax and/or penalty

that he may admit to be due; but by way of amendment, it was enjoined upon the appellant â?" assessee to make payment of the entire amount of the

tax with penalty in respect of which the appeal was preferred. The Supreme Court found that the amendment had placed a substantial restriction on

the right of appeal, where the entire assessed amount was required to be deposited. In that context, it was observed that a provision calculated to

deprive the appellant of the unfettered right of appeal cannot be regarded as mere alteration in procedure.

23. However, as noticed, in the present case, the amendment has only trimmed the requirements of pre-deposit and waiver and else, the substratum of

Section 21 is retained. In fact, in the principal provision, where earlier the requirement was of deposit to the extent of 75%, has been reduced to that of 50% and correlated with that, the power of the Appellate Tribunal to waive the condition of pre-deposit has been restricted to 25%. The

amendment in question, for its nature and for the reasons indicated above, in our view, is required to be taken as retrospective in operation and

applicable to all appeals to be filed before the DRAT.

24. The contention advanced on behalf of the first Respondent-Syndicate Bank that the amount due under the DRT Order is approximately Rs.250

Crore and the direction to deposit Rs.50 Crore falls short of 25 % of the amount due appears to be prima facie correct in the view of the material on

record. Therefore, even the premise apparently operated by the DRAT that there is a statutory ceiling limit of 25% under the 2016 Amendment does

not come to the aid of the petitioners.

25. Yet another reason for not granting indulgence in these writ petitions is that, the first petitioner in support of his application in I.A.No.1 for waiving

the condition of pre-deposit has filed a supporting affidavit dated 25.07.2016, and paragraph 8 thereof reads as under:

“I submit that I have certain agricultural properties. There is severe restriction on the purchase of agricultural property in Karnataka by the

provisions of the Karnataka Land Reforms Act. They are not easily transferable even if I intend to sell them. Even on the said agriculture property

State Bank of India has obtained an injunction in a separate proceedings before the DRT, Bangalore”.

26. This had apparently been an evasive stand; the material particulars as to the nature and extent of agricultural land, the details of their identification,

the particulars of DRT Case in which the State Bank of India has obtained injunction, have not been furnished. The very text of this paragraph gives

rise to a thick ring of doubt as to the bonafide of the petitioners.

27. In the above circumstances, the Writ Petitions being devoid of merits, are dismissed.

No costs.