

(2018) 10 KAR CK 0002

In the Karnataka High Court

Case No : Writ Petition No. 22111, 16351 Of 2018 (Gm – Drt)

Dr. Vijay Mallya

APPELLANT

Vs

State Bank Of India

RESPONDENT

Date of Decision : 05-10-2018

Acts Referred:

Recovery of Debts due to Banks and Financial Institutions Act, 1993 — Section 19, 20, 21

General Clauses Act, 1897 — Section 6, 217(4)

Citation : (2018) 10 KAR CK 0002

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

Bench : Division Bench

Final Decision : Dismissed

Judgement

,

1. These two petitions between the same parties and involving inter-related issues, have been considered together; and are taken up for disposal by",

this common order.,

2. The petitioner-Dr.Vijay Mallya proposed to maintain an appeal before the Debt Recovery Appellate Tribunal, Chennai (â??DRATâ??), being AIR",

No.605/2017, against the order dated 19.01.2017, as passed by the Debt Recovery Tribunal, Karnataka, Bangalore (â??DRTâ??) in",

O.A.No.766/2013. The said appeal having been dismissed on 02.01.2018 for want of appearance and for non-compliance of office objections, the",

petitioner filed an application seeking its restoration and another application for condonation of delay whereupon, the DRAT, by its order dated",

28.03.2018, directed the petitioner to deposit a sum of Rs.3,101 Crore on or before 25.04.2018 and observed that in case of failure in compliance, the",

appeal will be liable to be dismissed automatically. This order dated 28.03.2018 has been challenged by the petitioner in W.P.No.16351/2018.,

3. The petitioner filed another application before the DRAT, being I.A.No.430/2018, seeking enlargement of time for making the deposit as fixed by",

the order dated 28.03.2018 with the submissions that the said order was under challenge in this Court. The DRAT, by its order dated 25.04.2018,"

dismissed the said application while observing that "there remain no substance in prayers made in appeal or in restoration or delay condonation,

whatsoever". This order dated 25.04.2018 has been challenged by the petitioner in W.P.No.22111/2018.,

The relevant facts and background:

4. Shorn of unnecessary details, the relevant facts and background aspects of the matter could be taken in comprehension as follows:",

(a) The respondent No.13-Kingfisher Airlines Ltd., a Public Limited Company incorporated under the Companies Act, 1956 and now under liquidation,"

(hereafter also referred to as "Kingfisher Airlines") had availed Working Capital and Term Loan Facilities from the Consortium of respondent-

Banks, way back in the year 2005. The said loan/credit facilities were re-structured pursuant to a MASTER DEBT RECAST AGREEMENT dated",

21.12.2010, accompanied by various other Supplementary Agreements as its corollaries. In relation to the credit facilities aforesaid, the respondent",

No.14-United Breweries (Holdings) Ltd. provided a Corporate Guarantee and the petitioner, being the Group Chairman of various Companies under",

the umbrella of the Group called "UB Group of Companies" furnished his Personal Guarantee.,

(b) The borrower Kingfisher Airlines committed default in repayment against the credit facilities aforesaid, which resulted into classifying the Loan",

Account as the Non Performing Asset ("NPA") by various notices issued during the period between 02.11.2011 and 31.03.2013. The,

respondent No. 1-State Bank of India, in its capacity as the Lenders' Agent, issued a Loan Recall Notice dated 02.04.2013 to the Kingfisher",

Airlines and to the Guarantors. The Personal Guarantee furnished by the petitioner was also invoked by calling upon him to make payment of a sum of,

Rs. 6,493.29 Crore. By way of the reply dated 17.04.2013, the petitioner denied his liability, while alleging, inter alia, that the Contract of Guarantee",

was vitiated by coercion/undue influence.,

(c) The Consortium of respondent-Banks with the respondent No. 1-State Bank of India as the Lenders Agent, in addition to invoking other modes of",

recovery, instituted O.A. No.766/2013 under Section 19 of the Recovery of Debts due to Banks and Financial Institutions Act, 1993, (â??the Act of",

1993â??) in the Debt Recovery Tribunal, Karnataka, Bangalore for recovery of the dues of Rs.6203,35,03,879.42 (Rupees Six Thousand Two",

Hundred and Three Crore, Thirty Five Lakh, Three Thousand,",

Eight Hundred and Seventy Nine and Paise Forty Two), as on 31.05.2013 with interest at the rate of 15.20 % per annum with monthly rests and for",

other consequential reliefs. This O.A. was resolutely opposed by the Borrower and Guarantors by filing the Written Statements.,

(d) The DRT, after advertng to the pleadings of the parties and after appreciating the material placed on record, entered a judgment and order dated",

19.01.2017 holding the respondent No.13-Kingfisher Airlines Ltd., respondent No.14-United Breweries (Holdings) Ltd., respondent No.15-Kingfisher",

Finvest (India) Ltd., and the petitioner-Dr.Vijay Mallya, jointly and severally liable for the recovery of the said sum of Rs.6203,35,03,879.42 with",

interest at the rate of 11.50% with yearly rests, from the date of Application until the date of complete realisation. Other consequential reliefs were",

also granted.,

(e) The petitioner-Dr.Vijay Mallya, aggrieved by the aforesaid order of the DRT, preferred an appeal before the DRAT on 04.10.2017 under Section",

20 of the Act of 1993 and the same was registered as AIR No.605/2017. After scrutiny, the registry of DRAT notified certain objections in the Memo",

of Appeal so filed by the petitioner. The objections having not been complied with, the appeal came to be dismissed by the order dated 02.01.2018 for",

non-prosecution.,

(f) On 05.03.2018, the petitioner filed an application seeking restoration of the appeal with another application for condonation of delay in filing the",

restoration application. The petitioner claims that thereafter, i.e., on 21.03.2018, he had complied with the office objections raised in the main Appeal.",

(g) While dealing with the applications so moved by the petitioner, the DRAT, by its order dated 28.03.2018, directed him to deposit a sum of Rs.3,101",

Crore, on or before 25.04.2018 as a condition precedent for entertaining the

appeal as per the terms of Section 21 of the Act of 1993; and subject to",
the rider that in default, the appeal will stand dismissed automatically without reference to the Bench.",

(h) The petitioner did not make any deposit in terms of the aforesaid peremptory order dated 28.03.2018 and consequently, the appeal stood dismissed.",

Thereafter, the petitioner filed an application seeking restoration of the dismissed appeal; and another application for condonation of delay was also",

filed. The DRAT, by its order dated 25.04.2018, dismissed both these applications.",

(i) Hence, and in the backdrop of the facts and events aforesaid, the petitioner has preferred W.P.16351/2018 challenging the peremptory order dated",

28.03.2018; and W.P.22111/2018 challenging the order dated 25.04.2018, whereby the DRAT has dismissed his application seeking restoration of the",

appeal.,

Rival submissions:

5. The learned Senior Counsel Sri. K.G.Raghavan, appearing for the petitioner has assailed the impugned orders of the DRAT on the following",

contentions:

(a) That, the respondent-Banks had filed the O.A., inter alia, against the petitioner on 26.06.2013; the amendment to Section 21 of the Act of 1993,"

limiting the maximum waiver of the pre-deposit amount to 25% of the amount due under the DRT order impugned in appeal, being prospective in",

operation i.e., w.e.f. 01.09.2016, the DRAT could not have founded its orders on the said amendment inasmuch as the right of appeal accrues to the",

litigating party when the original proceedings are instituted, though it becomes exercisable only after an adverse order is made therein. According to",

the learned counsel, the right to seek waiver or reduction of pre-deposit for filing the appeal being a matter of substantive law, the 2016 Amendment to",

Section 21 of the Act of 1993 is only prospective in operation and does not apply to the appeal in question that arises out of the proceedings originally,

instituted before the said Amendment. Therefore, the DRAT has acted illegally in proceeding as if the Amended provisions apply and hence, in",

refusing to waive the condition of pre-deposit. The learned counsel has relied upon the decision in Ramesh Singh & Another vs. Cinta Devi & Others:,

(1996) 3 SCC 142.,

(b) The respondent Nos.14 & 15 having deposited a sum of about Rs.1,280 Crore under the very same loan transaction with the Registry of this Court",

in terms of various orders in various other proceedings initiated by the respondent-Banks, the DRAT is not justified in insisting upon the petitioner to",

deposit a sum of Rs.3,101 Crore and that too, when all the properties of the petitioner are under attachment by orders of the Courts in India and U.K.",

in connected/collateral proceedings. The DRAT ought to have evaluated both the elements of (a) prima facie, case and (b) of financial hardship, in",

view of the decision in Sterlite Technologies Limited vs. Union of India & Others: (2012) 2 Mh.L.J. 112.,

(c) The DRAT having had the discretion to grant complete waiver of pre-deposit under the unamended Section 21 of the Act of 1993, ought to have",

granted such waiver in view of the fact that petitioner's all the properties in India and abroad, have been subject to freezing order by the Courts in",

India and U.K. The DRAT having not adverted to this important fact, has made the impugned orders, which amount to the DRAT's refusal to",

exercise discretion when the same was warranted by the factual matrix of this case. In fact, financial hardship pleaded by the petitioner has not been",

adverted to at all.,

(d) The act of DRAT in mandating the deposit of a sum of Rs.3,101 Crore as a condition precedent for entertaining the appeal constitutes an onerous",

condition on the petitioner and unreasonably restricts his statutory right of appeal, particularly when his properties stand freezed under different orders",

passed by different Court/Authorities. Such an aspect, having not been adverted to by the DRAT, there is total non-application of mind and vitiates the",

order impugned.,

(e) The DRAT could not have made the order for pre-deposit inasmuch only the applications for condonation of delay and for recall of the earlier,

order dated 02.01.2018 dismissing the appeal for non-prosecution were under consideration; and in view of the stage and nature of proceedings that,

were being treated by the DRAT, there was no justification in making the order for pre-deposit and in rejecting the appeal for non-compliance of this",

unjustified order requiring pre-deposit.,

6. Sri. S.S.Naganand, the learned Senior Counsel appearing for the Consortium of respondent-Banks has refuted the contentions aforesaid; and has",

made the following submissions in support of the orders impugned:

(a) The culpable conduct of the petitioner, which is self-evident in the orders of the Courts in India and in U.K, disentitles him to the grant of",

discretionary remedy at the hands of this Court in its extraordinary jurisdiction under Articles 226 and 227 of the Constitution of India. Learned,

counsel has relied upon the decision of the Supreme Court in the case of Prestige Lights Ltd., vs. State Bank of India: (2007) 8 SCC 449.",

(b) Although it is true that the right of appeal, having accrued to a party when the original proceedings are instituted, becomes exercisable after",

suffering an adverse order later; and amendment of law relating to right of appeal is ordinarily prospective in operation unless otherwise indicated but,

then, the 2016 Amendment to Section 21 of the Act of 1993, limiting waiver of pre-deposit to the extent of 25%, is retrospective in operation since it",

does not impinge upon the substantive right of appeal as such, but touches only the condition of pre-deposit for entertaining the Appeal and therefore,",

falls within the domain of procedural law. Learned counsel has relied upon the decision in Board of Control for Cricket in India Vs. Cochi Cricket Pvt.,

Ltd & Etc.: 2018 SCC Online SC 232.,

(c) The contention that the Borrowers and the Guarantors have already deposited a considerable amount in the Registry of this Court in terms of,

various orders in various proceedings instituted by the respondent-Banks under the very same loan transactions, apart from being untrue, is legally",

untenable. The said argument is liable to be rejected for lacking in material particulars such as what sums of money, by which order of the Court,",

arising from which case and by whom are deposited in this Court. This apart, these contentions were not urged before the DRAT.",

(d) The contention that the requirement of pre-deposit of 50% of the decretal sum virtually amounts to unreasonably whittling down the petitioner's,

substantive right of appeal by the course of procedure adopted by the DRAT, is legally untenable; the Parliament in its legislative wisdom has granted",

the right of appeal subject to conditions and the DRAT has, in the sound exercise of its discretion, made the impugned order requiring the pre-deposit",

for entertaining the appeal. This apart, a little before the DRT passed the impugned judgment and order on 19.01.2017, the petitioner had huge money",

and disposable properties both in India and abroad that were not subject of any

freezer order at the relevant point of time. Moreover, petitioner had",
also received a huge sum of US\$ 40 million; he had other huge monetary transactions but all these facts were withheld from Courts and the petitioner,
fraudulently transferred enormous amount of money to the Trusts created for the benefit of his children. These facts are mentioned in the orders,
passed by the Apex Court in relation to the petitioner. Therefore, the petitioner is not even entitled to suggest any ground of the alleged financial",
hardship.,

(e) The contention that the DRAT could not have made the order for pre-deposit when it was considering the petitioner's application for recalling the,
order of dismissal of appeal is too technical and is without substance. The DRAT has made the said order not as a pre-condition for recalling the,
dismissal order but for entertaining the appeal itself. An argument to the contrary cannot be made without straining the intent and content of the order,
impugned in the writ petition.,

7. Having heard learned counsel for the parties at length and having perused the material placed on record, including the copies of the orders of the",

Courts in U.K., we are clearly of the view that these petitions remain bereft of substance and deserve to be dismissed.",

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

8. 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]. 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%.,

9. The provisions of Section 21 of the Act of 1993, before and after amendment, could be taken note of as follows:",

Before amendment, After amendment

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
under section 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.", "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.

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.",

14. 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.",

15. The decision in the case of Ramesh Singh (supra) concerning the change of Scheme of the Motor Vehicles Act, 1939 in the new Act of 1988",

whereunder the condition of pre-deposit was inserted for the first time has no application to the questions involved in the present case, as therein, the",

condition of pre-deposit was not existing in the old enactment and the new Act did not expressly or by necessary implications make the relevant,

provisions retrospective; and further, Section 217(4) of the new Act preserved general application of Section 6 of the General Clauses Act. The said",

decision, in our view, would not apply to the different Scheme of the Act of 1993 and the nature of the amendment in question.",

Justification in DRAT's approach:,

16. The contention of the petitioner that the DRAT could not have directed the petitioner to deposit a huge sum of Rs.3,101 Crore as a pre-condition",

for allowing his application for restoration of the appeal that was dismissed for non-compliance of office objections and for non-prosecution appears to,

be too technical and without substance. The appeal was filed on 04.10.2017; the appeal was dismissed on 02.01.2018 for non-compliance of office,

objections and non-prosecution; the application for restoration was filed on 05.03.2018; the office objections in the appeal were rectified on,

21.03.2018. These admitted facts gave rise to a legitimate doubt as to the bona fide of the proceedings and seriousness of the petitioner in pursuing,

his remedies. Keeping these factors in view, the DRAT, in its discretion, had directed the petitioner to make the pre-deposit. This requirement cannot",

be construed as a pre-condition for restoring the appeal but has to be understood as the requirement of Section 21 of the Act for maintaining the,

appeal. An argument to the contrary would fall foul of law and justice. Noticeable

it is that even before this Court, the petitioner did not come forward",
to deposit any amount to show his bona fide. Therefore, it cannot be said that the approach of the DRAT is flawsome. For the very same reason, the",
discretionary order subsequently made by the DRAT on 25.04.2018 dismissing petitioner's application in IA No.430/2018 for extension of time,
also cannot be faltered. In the given set of facts and circumstances, the observations in Sterlite Technologies Limited case (supra) do not enure to the",
benefit of the petitioner.,

As to the conduct of the petitioner,

17. The next contention of the petitioner that a considerable amount is lying in deposit in the Registry of this,

Court in various proceedings arising out of the very same loan transaction, is liable to be rejected for want of material particulars thereof. The",

petitioner has not furnished the list of cases wherein there were directions to make deposit and of various sums of money allegedly deposited in,

compliance thereof and also the status of the said cases and the said deposits. In fact, even the DRT in its impugned order has provided for filing of",

memo of calculation which the petitioner had not chosen to file. This Court, in the absence of relevant material cannot form any opinion as to the",

effect of the deposits allegedly having been made in the Registry of this Court. Even assuming that the said contention is true, the same does not",

amount to compliance of the statutory condition of pre-deposit, regard being had to the whoppingly huge amount due under the impugned order of the",

DRT.,

18. The next contention of the petitioner that all his properties and moneys have been under attachment/freezing orders of Courts in India and in U.K.",

does not avail to him. The DRT made the money decree on 19.01.2017. As per the material placed on record, in the meantime, the petitioner is said to",

have received US\$ 40 million from Diageo (approximately above Rs.260 crores). The Commercial Court in U.K in its freezing order dated,

16/17.04.2018 has further mentioned that the petitioner had bought a Ferrari 246 GTS with an estimated value of GBP 4,80,000 (approximately",

Rs.4,17,60,000/-); he had entered into a Hire Purchase Agreement dated 12.08.2016 which records a payment of GBP 1,35,000 (approximately",

Rs.1,17,45,000/-). As on the date of passing of the order by the DRT, there was

no Freezing Injunction Order by the Courts in U.K. This Freezing",
 Order was first made only on 24.11.2017 i.e., about ten months after the DRT made its order. These facts prima facie discredit the petitioner's",
 version that he does not have any money to deposit.,

19. The learned Senior Counsel appearing for the Consortium of Banks has submitted that the Commercial Court in U.K. has made a Freezing, Injunction Order dated 24.11.2017 which is affirmed in appeal; the said Order mentions about questionable transactions involving transfer of huge, sums of money made by the petitioner before and after the DRT Order; the said Order also mentions about the Supreme Court Order dated, 09.05.2017 finding the petitioner guilty of contempt of Court. The Supreme Court in its order dated 26.04.2016 observed that the petitioner, clandestinely did not disclose his assets abroad despite its direction dated 07.04.2016 and that there was no bona fide in petitioner's offer for, Settlement of the claim in question; and lastly, the Court vide order dated 20.10.2016 in a Contempt Case directed the petitioner's personal, appearance but, the petitioner disobeyed this order also. We do not intend to deliberate much on this aspect of the matter.",

Conclusion,

20. In the above circumstances, these Writ Petitions being devoid of merits, stand dismissed.",

No costs.,