(2015) 03 BOM CK 0306

In the Bombay High Court

Case No : Writ Petition No. 5005 of 2012

Galvanotek Industries Private Limited	APPELLANT
Vs	
Coventry Spring and Engineering Company Private Ltd. and Others	RESPONDENT

Date of Decision : 09-03-2015

Acts Referred:

Recovery of Debts Due to Banks and Financial Institutions Act, 1993 — Section 2, 2(ha)
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 13, 13(2), 17, 18, 18(1)

Citation : (2015) 03 BOM CK 0306

Hon'ble Judges : B.P. Dharmadhikari, J;A.P. Bhangale, J

Bench : Division Bench

Advocate : M.G. Bhangde, Senior Counsel, for the Appellant; Umesh Shetty, Advocates for the Respondent

Judgement

A.P. Bhangale, J—Rule returnable forthwith. By consent, heard the rival submissions at the Bar. Perused the affidavits filed on record.

2. The questions posed before us in this petition is as to whether the appeal under Section 18(1) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as "the SARFAESI Act") is maintainable without compliance as to pre-deposit of 50% sum of the debt or minimum sum 25% thereof as may be ordered by the Debt Recovery Appellate Tribunal constituted under the said Act? And whether the Debt Recovery Appellate Tribunal can waive the statutory requirement as to pre-deposit of the portion of debt i.e. 50% or sum not less than 25% thereof to maintain the statutory appeal under Section 18(1) of SARFAESI Act. Our answer to both the questions has to be in the negative for the reasons mentioned below.

3. The facts canvassed before us, briefly stated are as under :

Respondent no. 1 took loan from the State Bank of India. Respondent nos. 2 to 6 stood as guarantors. Thus, as on 26-06-2007, Rs. Seven Crores were due from Respondent nos. 1 to 6. The S.B.I. assigned the debt to Respondent no.7. Notice under Section 13(2) was issued from ARCIL on 26-06-2007. During the recovery proceedings, possession of the Nagpur''s property was taken on 25-08-2007 and possession of Palanpur''s property was taken on 29-08-2007. An application bearing no.71 of 2007 was filed on 08-10-2007 before the Debt recovery Tribunal, Mumbai. It was dismissed on 3062011. In the meanwhile, on 23-10-2007, the Aalampur property was sold to the petitioner for Rs.4.80 crores and on 24-10-2007, the Nagpur property was sold for a sum of Rs. 2.80 crores to the petitioner. It was found that the Debt Recovery Tribunal at Mumbai had no jurisdiction to entertain the application and hence, it was returned.

4. Against dismissal of Application No. 71 of 2007 by the D.R.T. on 3.6.2011, an appeal was filed in the DRAT. On 11.4.2012, interim application for waiver of deposit was granted by the DRAT giving credit to the amount realised by the Creditor quoting Section 18(1) of the SARFAESI Act. The question was raised as to whether the waiver can be granted by the DRAT under Section 18 of the said Act. The order of waiver granted was recalled by the DRAT for reconsideration thereof. It is appropriate at this stage to refer relevant Sections which permit the statutory appeals for the borrower/Guarantor of the debt.

Section 17 Right to appeal :

(1) Any person (including borrower), aggrieved by any of the measures referred to in subsection (4) of section 13 taken by the secured creditor or his authorised officer under this Chapter, (may make an application alongwith such fee, as may be prescribed) to the Debts Recovery Tribunal having jurisdiction in the matter within forty-five days from the date on which such measures had been taken:

PROVIDED that different fees may be prescribed for making the application by the borrower and the person other than the borrower.

Explanation : For the removal of doubts, it is hereby declared that the communication of the reasons to the borrower by the secured creditor for not having accepted his representation or objection or the likely action of the secured creditor at the stage of communication of reasons to the borrower shall not entitle the person (including borrower) to make an application to the Debts Recovery Tribunal under this subsection.

(2) The Debts Recovery Tribunal shall consider whether any of the measures referred to in subsection (4) of section 13 taken by the secured creditor for enforcement of security are in accordance with the provisions of this Act and the rules made thereunder.

(3) If, the Debts Recovery Tribunal, after examining the facts and circumstances of the case and evidence produced by the parties, comes to the conclusion that any of the measures referred to in subsection (4) of section 13, taken by the secured creditor are not in accordance with the provisions of this Act and the

rules made thereunder, and require restoration of the management of the business to the borrower or restoration of possession of the secured assets to the borrower, it may by order, declare the recourse to anyone or more measures referred to in subsection (4) of section 13 taken by the creditors assets as invalid and restore the possession of the secured assets to the borrower or restore the management of the business to the borrower, as the case may be, and pass such order as it may consider appropriate and necessary in relation to any of the recourse taken by the secured creditor under subsection (4) of section 13.

(4) If, the Debts Recovery Tribunal declares the recourse taken by a secured creditor under subsection (4) of section 13, is in accordance with the provisions of this Act and the rules made thereunder, then, notwithstanding anything contained in any other law for the time being in force, the secured creditor shall be entitled to take recourse to one or more of the measures specified under subsection (4) of section 13 to recover his secured debt.

(5) Any application made under subsection (1) shall be dealt with by the Debts Recovery Tribunal as expeditiously as possible and disposed of within sixty days from the date of such application:

PROVIDED that the Debts Recovery Tribunal may, from time to time, extend the said period for reasons to be recorded in writing, so, however, that the total period of pendency of the application with the Debts Recovery Tribunal, shall not exceed four months from the date of making of such application made under subsection (1).

(6) If the application is not disposed of by the Debts Recovery Tribunal within the period of four months as specified in subsection (5), any party to the application may make an application, in such form as may be prescribed, to the Appellate Tribunal for directing the Debts Recovery Tribunal for expeditious disposal of the application pending before the Debts Recovery Tribunal and the Appellate Tribunal may, on such application, make an order for expeditious disposal of the pending application by the Debts Recovery Tribunal.

(7) Save as otherwise provided in this Act, the Debts Recovery Tribunal shall, as far as may be, dispose of the application in accordance with the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 and the rules made thereunder.

Section 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 alongwith 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.

(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 (51 of 1993) and rules made thereunder.

The provision for Statutory appeal under Section 18 does mention as condition precedent the mandatory deposit either 50% or not less than 25% minimum of the debt recoverable by the secured creditor.

5. It is submitted that the appeal under Section 18(1) of the SARFAESI ACT is required to be preferred within 30 days. It is maintainable subject to condition precedent of deposit in the sum of 50% of the debt amount subject to the sum reduced by a reasoned order at the discretion of the DRAT, not less than 25% of the debt amount. It is, therefore, submitted that the order granting waiver is bad in law and in violation of the mandatory provisions of Section 18 of the SARFAESI Act and hence, the same must be quashed and set aside.

6. On the other hand, it is contended that requirement of the pre-deposit will not come into play in the absence of any debt within the meaning of Section 2(ha) read with clause (g) of Section 2 of the RDBBI Act. According to the learned Advocate for the respondent, the Sale was confirmed and money was appropriated and hence, the requirement as to pre-deposit did not survive as no debt was due to the secured creditor. Assignment to the private party left no debt recoverable as on the date of impugned order. He submitted that the impugned order deserves to be upheld as there was no question of any pre-deposit in the absence of debt.

7. Mr.M.G. Bhangde, learned Senior Counsel submitted that since the alleged Sale is challenged and the matter being sub judice, appeal cannot be heard without the mandatory requirement as to minimum pre-deposit as contemplated under the proviso to Section 18 of the SARFAESI Act. It is emphatically contended that the mandatory requirements of section 18 as to pre-deposit of the amount can not be waived or condoned as no rewriting of the legal provision is permissible.

8. Learned Counsel for respondent no.2 argued that, in the unreported case of Allahabad Bank vs. Debt Recovery Appellate Tribunal and Ors. in W.P. No. 2941 of 2012, decided on 20-01-2014, the Division Bench of this Court had refused to interfere with the waiver of pre-deposit in view of the confirmed Sale of secured

assets on the ground that the issue raised in that petition became academic. The order passed by the Division Bench of this Court was without touching the merits of the controversy in the petition before it and this Court had refused to enter into the merits of the petition before it. Facing problem of huge backlog of cases, we do pass many orders at pre-hearing or pre-admission stage of the Writ Petitions which are related to the facts and circumstances of each individual case. Such nonreportable order at pre-hearing stage passed before the admission stage of the Writ Petition cannot be relied upon as a binding judicial precedent unless the order is a reasoned one making a clear and conscientious statement of law. The rulings which, to our mind, are binding and making a clear statement of law, which are referred to in the course of submissions explaining the legal position on merits, are cited as below :-

a) Hon''ble Supreme Court in the ruling of Persn Medicinal Plants Pvt. Ltd. and Another Vs. Indian Bank and Others was pleased to direct that the amount with the Bank may be appropriated by it subject to decision of the appeal and in the facts and circumstances of that case, the Debt Recovery Appellate Tribunal (DRAT) was directed to expeditiously hear and dispose of the appeal on all questions of law.

b) In the case of Mardia Chemicals Ltd. Vs. Union of India (UOI) and Others Etc. Etc., AIR 2004 SC 2371 : (2004) 2 BC 397 : (2004) 120 CompCas 373 : (2004) 2 CompLJ 209 : (2004) 2 CTC 759 : (2004) 4 JT 308 : (2004) 138 PLR 271 : (2004) 4 SCALE 338 : (2004) 4 SCC 311 : (2004) 51 SCL 513 : (2004) 3 SCR 982 : (2004) 2 UJ 980 : (2004) AIRSCW 2541 : (2004) 3 Supreme 243 , in para 81, the Apex Court observed thus :

" 81. In view of the discussion held in the judgment and the findings and directions contained in the preceding paragraphs, we hold that the borrowers would get a reasonably fair deal and opportunity to get the matter adjudicated upon before the Debt Recovery Tribunal. The effect of some of the provisions may be a bit harsh for some of the borrowers but on that ground the impugned provisions of the Act cannot be said to be unconstitutional in view of the fact that the object of the Act is to achieve speedier recovery of the dues declared as NPAs and better availability of capital liquidity and resources to help in growth of economy of the country and welfare of the people in general which would subserve the public interest."

c) In M/s. Velaar Engineering Works Pvt. Ltd. vs. The Debts Recovery Appellate Tribunal, Chennai, it is observed thus :

The legal obligation cast upon the authority is that the property to be sold in such a manner that it may fetch best price. It is further held that when the statute provides for a particular procedure, the authority has to follow the same and it cannot be permitted to act in contravention of the same and to uncontroverted legal position that where a statute requires to do a certain thing in a certain way, the thing must be one in that way or not at all. It is further held that when the action of the State or its instrumentalities is not as per the rule or regulations and supported by the statute, the Court must exercise its jurisdiction to declare such an act to be illegal and invalid.

Though the transaction may have a character of a private contract, yet the question of great importance behind such transactions as a whole having far reaching effect on the economy of the country cannot be ignored, purely restricting it to individual transactions; more particularly, when financing is through banks and financial institutions utilizing the money of the people in general namely, the depositors in the banks and public money is at the disposal of the financial institutions. Therefore, wherever public interest to such a large extent is involved and it may become necessary to achieve an object which serves the public purposes, individual rights may have to be given way. Public interest has always been considered to be above the private interest. Interest of an individual may, to some extent, be affected, but it cannot have the potential of taking over the public interest having an impact in the socioeconomic drive of the country.

9. Second proviso of subsection (1) of Section 18 of the SARFAESI Act mandates that the Appellate Tribunal shall not entertain the appeal, unless the borrower has deposited fifty per cent of the amount due from him, as claimed by the secured creditors or determined by reasonable order by the Debts Recovery Tribunal, whichever is less. The third proviso to subsection (1) of Section 18 contemplates that the Appellate Tribunal may, for the reasons to be recorded in writing, reduce the amount of the deposit required to be not less than twenty-five per cent of the amount of debt referred to in the second proviso. The submission made by the learned Senior Counsel appearing for the petitioner that since no adverse order has been passed by the second Respondent against the petitioner, the question of pre-deposit under subsection (1) of Section 18 of the SARFAESI Act does not arise for consideration and, in our considered opinion, the same lacks merit and substance. As held in the case of Swastik Agency and Others Vs. State Bank of India, Main Branch and Others, AIR 2009 Ori 147 : (2009) 107 CLT 250 : (2009) 2 OLR 201 that when the statute provides for particular procedure, it is to be done in that way or not at all.

10. In the case of Narayan Chandra Ghosh vs. UCO Bank and others, (Civil Appeal No. 2681 of 2011 (arising out of S.L.P. (C) No. 5488 of 2011), the short question for consideration was as to whether the Appellate Tribunal has the jurisdiction to exempt the person, preferring an appeal under Section 18 of the Act from making any pre-deposit in terms of the said provision. The Apex Court observed thus:

" 8. Section 18(1) of the Act confers a statutory right on a person aggrieved by any order made by the Debts Recovery Tribunal under Section 17 of the Act to prefer an appeal to the Appellate Tribunal. However, the right conferred under Section 18(1) is subject to the condition laid down in the second proviso thereto. The second proviso postulates 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. However, under the third proviso to the subsection, the Appellate Tribunal has the power to reduce the amount, for the reasons to be recorded in writing, to not less than twenty-five per cent of the debt, referred to in the second proviso. Thus, there is an absolute bar to entertainment of an appeal under Section 18 of the Act unless the condition precedent, as stipulated, is fulfilled. Unless the borrower makes, with the Appellate Tribunal, a pre-deposit of fifty per cent of the debt due from him or determined, an appeal under the said provision cannot be entertained by the Appellate Tribunal. The language of the said proviso is clear and admits of no ambiguity. It is well settled that when a Statute confers a right of appeal, while granting the right, the Legislature can impose conditions for the exercise of such right, so long as the conditions are not so onerous as to amount to unreasonable restrictions, rendering the right almost illusory. Bearing in mind the object of the Act, the conditions hedged in the said proviso cannot be said to be onerous. Thus, we hold that the requirement of pre-deposit under subsection (1) of Section 18 of the Act is mandatory and there is no reason whatsoever for not giving full effect to the provisions contained in Section 18 of the Act. In that view of the matter, no court, much less the Appellate Tribunal, a creature of the Act itself, can refuse to give full effect to the provisions of the Statute. We have no hesitation in holding that deposit under the second proviso to Section 18(1) of the Act being a condition precedent for preferring an appeal under the said Section, the Appellate Tribunal had erred in law in entertaining the appeal without directing the appellant to comply with the said mandatory requirement."

11. The language used in Section 18 is very plain and clear, making it unambiguously clear that any person aggrieved by the order of the Debts Recovery Tribunal passed under Section 17 may prefer appeal to the Debts Recovery Appellate Tribunal by paying necessary fee and second proviso to subsection (1) makes it clear 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. However, under third proviso to subsection (1), power has been given to the Appellate Tribunal to reduce the deposit amount, for the reasons to be recorded in writing, to not less than twenty five percent of debt referred to in the second proviso. Thus, though a discretionary power has been conferred on the Debts Recovery Appellate Tribunal under third proviso to subsection (1), to determine the amount of deposit as a pre-condition for maintaining the appeal the discretion is not an absolute one, but a limited one. While exercising the discretion conferred on it, provided for under third proviso to subsection (1), the Appellate Tribunal has been mandated not to reduce the deposit amount to less than twenty five percent of the debt referred to in the second proviso.

12. In the ruling in Indian Bank Vs. Blue Jaggers Estates Ltd. and Others, AIR 2010 SC 2980 : (2010) 3 BC 694 : (2010) 158 CompCas 357 : (2010) 3 CompLJ

606 : (2010) 8 JT 395 : (2010) 8 SCC 129 : (2010) AIRSCW 4751 : (2010) 7 Supreme 620 and the decisions in the case of Narayan Chandra Ghosh (cited supra), it is clear that when the petitioner appellant had not complied with the conditions as stipulated under Section 18 of the SARFAESI Act and when the Section itself insists on payment of the amount due at 50% as per the second proviso and as per the third proviso, only discretion available to the Tribunal is to reduce the amount of deposit to the sum of money which is not less than 25% of the amount of the debt, all that the petitioner prayed for before the Tribunal was total waiver of the amount payable by it. Thus, when the prayer itself could not be sustained, the whole exercise of the appellant before the DRAT is misconceived, being impermissible under Section 18 of the Act. Second proviso to subsection (1) of Section 18 of the SARFAESI Act mandates the petitioner to deposit 50% of the amount of debt due from him and also vests discretion with the Appellate Tribunal to reduce the same but not less than 25% of the debt referred to under the second proviso to subsection (1) of Section 18 of the SARFAESI Act.

Section 35 of the Act runs thus :

" 35. The provisions of this Act to override other laws :

The provisions of this Act shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law."

For speedier steps for recovery of the debts it is legislative command that the Tribunals established under the Act acts within bounds of the SARFAESI Act to prevent delay in expeditious recovery of nonperforming assets of the Banks and financial institutions.

13. While such is the legal mandate, in our view, when the debtor or guarantor as the case may be, if he prefers the statutory appeal under Section 18 of the SARFAESI Act, he cannot be allowed to shirk his statutory liability as he must be ready and willing to obey and comply with the order as to pre-deposit of the amount as a pre-condition to maintain the appeal. We find in the impugned order that the first respondent/Appellate Tribunal has misguided itself on clear mandate of the law while it wrongly granted complete waiver of the pre-deposit amount to the appellants/respondent, which has not been contemplated under law.

14. The purpose of enacting the SARFAESI Act would be self-evident from the Statement of Objects and Reasons for the enactment which reads as under :

"The financial sector has been one of the key drivers in India''s efforts to achieve success in rapidly developing its economy. While banking industry in India is progressively complying with the international prudential norms and accounting practices, there are certain areas in which the banking and financial sector do not have a level playing field as compared to other participants in the financial markets in the world. There is no legal provision for facilitating securitisation of financial assets of banks and financial institutions. Further, unlike international banks, the banks and financial institutions in India do not have power to take possession of securities and sell them. Our existing legal framework relating to commercial transactions has not kept pace with the changing commercial practices and financial sector reforms. This has resulted in slow pace of recovery of defaulting loans and mounting levels of nonperforming assets of banks and financial institutions. Narasimham Committee I and II and Andhyarujina Committee constituted by the Central Government for the purpose of examining banking sector reforms have considered the need for changes in the legal system in respect of these areas."

15. In the interpretation of statutes, the Courts always presume that the legislature inserted every part thereof with a purpose and the legislative intention is that every part of the statute should have obedient effect. The legislature is deemed not to waste its words or to say anything in vain. By an interpretative process, the Court cannot reach a conclusion which makes it impossible for faster remedies provided for under the law to be worked out. The purposive interpretation requires that any interpretation which is unjust or absurd must be eschewed and the Court must adopt principles of reasonable and harmonious construction in consonance with the avowed statutory purpose. The SARFAESI Act was enacted to curb the menace of growing nonperforming assets (NPAs). It affects the banks and financial institutions which is ultimately against the public interest. Due to non-recovery of the dues the banks also run out of the financial resources which are public money with the Bank to enable them further carry on the financial activity and to meet the need and requirement of its other depositors and clients. Liquidity of finance and flow of money is essential for Banks and financial institutions. Hence, normally there should be a presumption in favour of validity of legislative provision more so in regard to the mandatory provision of law aiming to facilitate the economic and financial matters and a few instances here and there of any harsh results would not be a valid consideration to invalidate or disregard the mandate of law. Hence, the impugned order passed by the first respondent/Appellate Tribunal is absolutely bereft of any statutory power granted to it and therefore, the same needs to be set aside. The impugned order is, therefore, quashed and set aside. Parties shall appear on 15.4.2015 before the Debt Recovery Appellate Tribunal for redressal of their grievance as to non-deposit of the portion of the debt as a pre-condition to lodge a statutory appeal under Section 18(1) of the SARFAESI Act and to invite appropriate reasoned order as to pre-deposit of sum in accordance with law as a mandatory pre-condition to maintain the appeal.

Rule is made absolute accordingly. No order as to Costs.