(2004) 09 BOM CK 0115

In the Bombay High Court

Case No : Writ Petition No. 3766 of 2004

Kidland and Others APPELLANT

Vs

Indusland Bank Limited RESPONDENT

Date of Decision : 29-09-2004

Acts Referred:

Maharashtra Co-operative Societies Act, 1960 — Section 101, 154(2A)
Recovery of Debts Due to Banks and Financial Institutions Act, 1993 — Section 21
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 17

Citation : (2005) 2 ALLMR 512 : (2005) 1 MhLj 531

Hon'ble Judges : S.U. Kamdar, J;A.P. Shah, J

Bench : Division Bench

Advocate : K.R. Dhanuka, instructed by V.M. Talreja, for the Appellant; Prakash Shinde, instructed by Dhruv and Asso., for the Respondent

Judgement

S.U. Kamdar, J.—In these two writ petitions, the petitioners are challenging a common order passed by the D.R.A.T. Mumbai in Misc Application No. 414 of 2003 in Appeal No. 150 of 2003 and Misc. Application No. 415 of 2003 in Appeal No. 174 of 2003. By the said common order dated 12th January, 2004 he D.R.A.T. Mumbai has directed the petitioners to deposit 40% of the decretal amount as and by way of pre-deposit u/s 21 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993. It is this order dated 12th January 2004 which is challenged by filing the present two writ petitions.

2. A short point of law which has been raised by the learned counsel appearing for the petitioners is that the provisions of Section 21 of the Act in so far as it provides for pre-deposit is ultra vires, arbitrary and the same is liable to be struck down. In support of the aforesaid contention, learned counsel for the petitioners has relied upon the judgment of the Hon''ble Supreme Court of India in the case of Mardia Chemicals Ltd. Vs. Union of India (UOI) and Others Etc. Etc., . It has been contended by relying on the aforesaid judgment that the Hon''ble Supreme Court has struck down similar provisions u/s 17 of the

Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. It is therefore contended that having regard to the aforesaid judgment of the Supreme Court of India in Mardia Chemicals Ltd (supra) provisions of Section 21 of the Act which also provides for pre-deposit should be struck down.

3. Similar arguments were advanced before us by the petitioner in W.P. No. 5065 of 2004 by contending that the pre-deposit provided u/s 154(2A) of the Maharashtra Cooperative Societies Act, 1960 is ultra vires and arbitrary. The petitioner in that case also placed reliance on the aforesaid judgment of Mardia Chemicals Ltd (supra). We have by our judgment in Writ Petition No. 5065 of 2004 in the case of Smt. Kaushalya Sampat v. The Vasant Sahakari Bank Ltd, decided on 22nd July, 2004 upheld the constitutional validity of the said Sub-section 2A of Section 154 of the Maharashtra Cooperative Societies At, 1960 which also provides for pre-deposit of 50% amount of the Recovery Certificate issued u/s 101 of the Maharashtra Cooperative Societies Act, 1960. While considering the validity of the aforesaid provision, we have held that the judgment of the Supreme Court of India in the case of Mardia Chemicals Ltd does not apply in cases where the pre-deposit is prescribed at the appellate stage of the proceedings. In para 8 of the aforesaid judgment, we have held as under:

8. The reliance placed by the learned Counsel in the case of Mardia Chemicals Ltd and Ors v. Union of India and Ors. (supra) is in our view, misconceived for the simple reason that the proceedings u/s 17 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 are not proceedings in the nature of appeal and/or revision but are original initiation of the proceedings. The Supreme Court while considering the said Section 17 of the said Act has itself in paragraph 60 of the judgment held as under:

"60. The requirement of pre-deposit of any amount at the first instance of proceedings is not to be found in any of the decisions cited on behalf of the respondent. All these cases relate to appeals. The amount of deposit of 75% of the demand at the initial proceeding itself sounds unreasonable and oppressive more particularly when the secured assets/the management thereof along with the right to transfer such interest has been taken over by the secured creditor or in some cases property is also sold. Requirement of deposit of such a heavy amount on the basis of a one-sided claim alone, cannot be said to be a reasonable condition at the first instance itself before start of adjudication of the dispute. Merely giving power to the Tribunal to waive or reduce the amount does not cure the inherent infirmity leaning one sided in favour of the party who so far has along been the party to decide the amount and the fat of default and classifying the dues as NPAs without participation/association of the borrower int eh process. Such an onerous and oppressive condition should not be left operative in expectation of reasonable exercise of discretion by the authority concerned. Placed in a situation as indicated above where it may not be possible for the borrower to raise any amount to make the deposit his secured assets having already been taken possession or sold such a rider to approach the Tribunal at the first instance of proceedings, captioned as appeal renders the remedy illusory and nugatory."

4. In the aforesaid judgment, we have also considered similar provision of pre-deposit under various Acts and have come to the conclusion that the provisions of Sub-section 2A of Section 154 of the Maharashtra Cooperative Societies Act, 1960 are intra vires. For the reasons set out in the said judgment in Writ Petition No. 5065 of 2004 in the case of Smt Kaushalya Sampat v. 1. The Vacant Sahakari Bank Ltd and Ors. (supra). We reject the aforesaid contention of the petitioner in the present case.

5. Apart from the aforesaid contention pertaining to the provision of Section 21, the learned counsel for the petitioner contended that even on merits, the petitioner should be given a chance to defend the appeal without pre-deposit. It is the case of the petitioner that negotiations between the parties are in progress and a proposal for settlement is for lessor amount than what is directed by the D.R.A.T. to deposit and therefore this Court should entertain the writ petitions and set aside the order passed by the D.R.A.T. It has been also contended that the petitioner has a good case on merits and therefore also there should be no deposit order for prosecuting the appeal before the Tribunal. We have perused the order passed by the learned Chairperson of the Appellate Tribunal. We have also perused the record of the case and we find that the finding given by the learned Tribunal on merits that no case whatsoever is made out is justified and even in support of contention of financial hardships there is no averment in the application giving details thereof. The tribunal has given the findings as under:

"However, even a cursory glance through the impugned judgment and order would reveal that the appellants do not appear to have prima facie case in their favour. As far as financial constraints of the appellants are concerned, there is not a single convincing averment to support their plea. No supporting documents are annexed to substantiate what they have stated in their application for waiver of deposit. It is simplicitor stated that the appellants have a good case on merits and in the interest of justice, waiver of pre-deposit amount be kindly granted."

6. In the aforesaid circumstances, we find no merit in the present writ petitions. We however extend the time to deposit the said amount of 40% by further period of two months and if such amount as directed by the tribunal under the impugned order is so deposited then the petitioner will be entitled to prosecute both said appeals on merits. We also make it clear that we have not gone into the merits of the case and the same is left to the tribunal to decide as and when occasion arises. In the meantime, in view of the fact that we have extended the time for a period of eight weeks, the respondent-Bank shall not execute the decree till expiry of the said period. We dispose of the present writ petition with the aforesaid directions with no order as to costs.

