

(2020) 03 CAL CK 0013

In the Calcutta High Court

Case No : Civil Order/Misc.Cas (CO) No. 1037 Of 2019

Krishna Enterprise & Ors

APPELLANT

Vs

Axis Bank Limited & Anr

RESPONDENT

Date of Decision : 06-03-2020

Acts Referred:

Constitution Of India, 1950 — Article 227
Debts Recovery Appellate Tribunal (Procedure) Rules, 1994 — Rule 22
Securitisation And Reconstruction Of Financial Assets And Enforcement Of Security Interest Act, 2002 — Section 13, 13(2), 17, 18, 18(1), 18(2), 19(12)
Consumer Protection Act, 1986 — Section 14
Recovery Of Debts Due To Banks And Financial Institutions Act, 1993 — Section 20, 22, 22(2), 36, 254

Citation : (2020) 03 CAL CK 0013

Hon'ble Judges : Hiranmay Bhattacharyya, J

Bench : Single Bench

Advocate : Arindam Banerjee, Lal Ratan Mondal, Mainak Bose, Soni Ojha

Final Decision : Dismissed

Judgement

Â Hiranmay Bhattacharyya, J

The instant application under Article 227 of the Constitution of India is at the instance of a borrower and is directed against an order dated March 27,

2018 passed by the Learned Chairperson, Debts Recovery Appellate Tribunal at Kolkata (for short â??the Appellate Tribunalâ?) in Appeal No. 35 of

2018.

The case made out by the petitioner in a nutshell is as follows:

The Bank being the opposite party no. 1 herein sanctioned the cash credit facilities in favour of the petitioner. A notice of demand was issued in

exercise of powers under Section 13(2) of The Securitisation and Reconstruction

of Financial Assets and Enforcement of Security Interest Act, 2002

(for short "the Act of 2002") after classifying the loan account as a Non-performing Asset. The bank took possession of the immovable property

belonging to the petitioner no. 3. The sale notice was also published in the newspaper. The petitioners challenged the actions taken by the opposite

parties herein under Section 13 of the Act of 2002 by filing an application before the Debts Recovery Tribunal "III, Kolkata (for short "the

Tribunal") under Section 17 of the Act of 2002 which was registered as SA No. 484 of 2017.

The opposite parties contested the said Sarfaesi Application by filing an affidavit-in-opposition and denied the allegations contained therein. It was

specifically contended by the opposite parties that a mortgage was created over the immovable property by deposit of original title deeds. There was

huge outstanding in respect of the loan accounts. The petitioners have acknowledged their liability by writing a balance confirmation letter. The

account was classified as NPA as per the RBI guidelines. The possession of the immovable property was taken by the Bank since the outstanding

dues were not paid off and sale notice was also published.

The Learned Tribunal by an order dated February 15, 2018 allowed the Sarfaesi Application in part. The Learned Tribunal held that the classification

of the account as NPA was erroneous. The demand notice dated November 5, 2016 was quashed. Bank was directed to hand over the physical

possession of the property to the petitioners within one week from the date of the order.

The opposite parties herein preferred an appeal under Section 18 of the Act of 2002 before the Appellate Tribunal, being Appeal No. 35 of 2018

challenging the aforesaid order dated February 15, 2018 passed in SA No. 484 of 2017. In the appeal stay of operation of the impugned order was

prayed for.

The Learned Chairperson of the Appellate Tribunal by an order dated March 7, 2018 directed the petitioners to deposit a sum of Rupees one crore

within a period of four weeks. On deposit of the said sum, the physical possession of the property shall be handed over to the petitioner owner subject

to undertaking that in case if the appeal would be allowed, the physical possession would be handed over to the bank. It was further held that subject

to the said conditions, the operation of the order dated February 15, 2018 shall remain stayed.

Being aggrieved by the aforesaid order dated March 7, 2018 passed in Appeal No. 35 of 2018, the petitioners have preferred the instant application.

Mr. Banerjee, the Learned Advocate for the petitioners submitted that neither the Act of 2002 nor the Act of 1993 empowers the Appellate Tribunal

to pass an order of stay. He, thus, submits that the order dated March 7, 2018 passed by the Appellate Tribunal is without jurisdiction and the same is

liable to be set aside. He submitted that even if for argument's sake it is assumed that the Appellate Tribunal has the power to pass an order of

stay even then the Appellate Tribunal exceeded its jurisdiction by directing petitioners to deposit a sum of Rupees one crore as a condition for getting

back the physical possession of the immovable property when the Tribunal has set aside the demand notice. He further submitted that the operation of

an order having serious civil consequences must be suspended during pendency of the appeal. In support of such submission he relied upon a judgment

of the Supreme Court of India in the case of Mool Chand Yadav and Another versus Raza Buland Sugar Company Limited, Rampur and Others

reported at (1982) 3 SCC 484. He submitted that the said immovable property, is the only residential house in which the petitioners were residing till

possession of the same was taken by the bank and as such the petitioners will suffer irreparable loss and injury unless the possession of the property is

handed over to the petitioners.

Mr. Mainak Bose, the Learned Advocate for the opposite parties submitted that possession of the immovable property was taken as huge amount was

lying as outstanding with regard to the loan accounts of the petitioner. He further submitted that the petitioners herein, who were the respondents

before the Appellate Tribunal, at the time of hearing agreed to imposition of any condition for handing over possession of the immovable property in

favour of the petitioners over and above the undertaking to be given that the petitioner shall hand over possession of the property to the bank

peacefully after the appeal will be allowed. He submitted that the petitioners should not be permitted to contend before this Court in an application

under Article 227 of the Constitution of India that the Appellate Tribunal could not have directed deposit of Rupees one crore as a condition for

handing over possession of the immovable property to the petitioners. He also submitted that the petitioners herein had accepted the order passed by the Appellate Tribunal and after having failed to comply with the directions passed by the Appellate Tribunal have filed the instant application on March 14, 2019 i.e. after more than a year of passing of the impugned order by the Appellate Tribunal. He submitted that the instant application is liable to be dismissed on the ground of delay and laches. Mr. Bose relied on the judgments of the Supreme Court of India in the case of Industrial Credit and Investment Corporation of India Ltd. versus Grapco Industries Ltd. And Others reported at (1999) 4 SCC 710 and in the case of Allahabad Bank, Calcutta versus Radha Krishna Maity and Others reported at AIR 1999 SC 342 6 and a judgment of Delhi High Court in the case of ICICI Bank Ltd. versus Kapil Puri & Ors. reported at (2017) 238 DLT 685 (DB) in support of his submission that the Appellate Tribunal has the power to pass an order of stay.

I have heard the Learned Advocates of the respective parties and considered the materials on record.

The relevant provisions of the Act of 2002 and the Act of 1993 and the Rules framed thereunder may be first noticed in order to decide as to whether the Appellate Tribunal at all has the power to stay an order passed by the Tribunal.

Section 18(1) of the Act of 2002 gives the right of appeal to any person aggrieved by any order made by the Tribunal under Section 17 of the said Act. Section 18(2) provides that the powers of the Appellate Tribunal while dealing with such an appeal shall be in accordance with the provisions of the Act of 1993.

Section 20 of the Act of 1993 provides for the right of appeal under the said Act. Subsection 4 thereof provides that on receipt of an appeal, the Appellate Tribunal may, after giving the parties to the appeal, an opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or setting aside the order appealed against.

There can be no manner of doubt that neither the provisions of the Act of 2002 nor the provisions of the Act of 1993 and the rules framed thereunder have expressly conferred upon the Appellate Tribunal the power to pass an order of stay.

This takes us to the consideration whether the substantive power conferred upon the Appellate Tribunal to entertain and decide the appeal carries with it the power to pass an order of stay by necessary implication.

An identical issue cropped up before the Supreme Court whether the Income Tax Appellate Tribunal has the power to pass an order of stay of recovery during pendency of an appeal in the absence of any express provisions in the Income Tax Act to that effect.

Three Honâ??ble Judges of the Supreme Court of India in the case of Income Tax Officer, Cannanore versus M.K. Mohammed Kunhi reported at

AIR 1969 SC 430 held that the Appellate Tribunal must have the power to grant stay as incidental or ancillary to its appellate jurisdiction. In the said

reported decision it was further held that it is a firmly established rule that an express grant of statutory power carries with it by necessary implication

the authority to use all reasonable means to make such grant effective. The Supreme Court also held that the powers which have been conferred by

Section 254 on the Appellate Tribunal with widest possible amplitude must carry with them by necessary implication all powers and duties incidental

and necessary to make the exercise of those powers fully effective.

The Honâ??ble Supreme Court of India in the case of Chief Executive Officer & Vice Chairman Versus Haji Daud Haji Harun Abu reported at

(1996) 11 SCC 23 while interpreting the provisions of the Consumer Protection Act, 1986 held that where substantive power is conferred upon a

Court or Tribunal, all incidental or ancillary powers necessary for an effective exercise of the substantive power have to be inferred.

Right of appeal is a substantive right. Both questions of fact and law involved in the order passed by the Tribunal are open to scrutiny by the Appellate

Tribunal. Thus, upon a conjoint reading of Section 18 of the Act of 2002 and Section 20 of the Act of 1993 it is evident that the Appellate Tribunal

while dealing with an appeal filed under Section 18 of the Act of 2002 has a very wide power in as much as it can pass such orders as it thinks fit. It

can confirm, modify or even set aside the order passed by the Tribunal after giving an opportunity of being heard to the parties to the appeal.

The substantive powers which have been conferred upon the Appellate Tribunal by Section 20 of the Act of 1993 by necessary implication also

includes the power to stay the order appealed against. If the Appellate Tribunal

does not have the power to stay the order appealed against, the entire purpose of the appeal may be defeated if ultimately the order passed by the Tribunal is set aside. Section 22 of the Act of 1993 deals with the procedure and powers of the Tribunal and the Appellate Tribunal. Subsection 1 thereof envisages that the Appellate Tribunal shall not be bound by the Code of Civil Procedure but shall be guided by the principles of natural justice. Thus, the Appellate Tribunal can travel beyond the Code of Civil

Procedure and the only fetter that is put on its power is to observe the principles of natural justice.

Subsection 2 of Section 22 of the Act of 1993 gives the Tribunal and the Appellate Tribunal the same powers as are vested in a Civil Court under the

Code of Civil Procedure in respect of matters specified therein. These powers relate to enforcing the attendance of witnesses, discovery and

production examination of witnesses on commission etc. or any other matter that may be prescribed.

In exercise of powers under Section 36 of the Act of 1993, the Debts Recovery Appellate Tribunal (Procedure) Rules, 1994 was framed. Rule 22 of

the said Rules provides that the Appellate Tribunal may make such orders or directions as may be necessary or expedient to give effect to its orders

or to prevent abuse of its powers or to secure the ends of justice.

The Appellate Tribunal is not a Court. The powers of the Appellate Tribunal while dealing with an appeal is identical and similar to the powers vested

in a civil court under the Code of Civil Procedure to secure the ends of justice. Thus, in an appropriate case, the Appellate Tribunal can pass an order

to secure the ends of justice.

Thus, Section 22 of the Act of 1993 read with Rule 22 of the 1994 Rules empowers the Appellate Tribunal to pass an order of stay to secure the ends of justice.

The Honâ??ble Supreme Court of India in Grapco (supra) while interpreting Section 22 of the Act of 1993 held that the Tribunal can travel beyond

the Code of Civil Procedure and the only fetter that is put on its powers is to observe the principles of natural justice. The Honâ??ble Supreme Court

in Allahabad Bank (supra) held that the Tribunal has the power to pass orders to secure the ends of justice. The issue involved in Kapil Puri (supra) is

entirely different from the issue involved in the instant case and as such the said

decision has no manner of application to the facts of the instant case.

In view of the observations made hereinabove, it is held that the Appellant Tribunal has the power to pass an order of stay.

Now it is to be considered whether the Appellate Tribunal was justified in passing an order of stay. It is evident from the order impugned that at the

time of hearing before the Appellate Tribunal the petitioners herein agreed to the imposition of any condition. The petitioners were directed to put in

the sum of Rupees one crore as a precondition for getting back possession of the immovable property. The petitioner did not deposit the said sum. The

petitioners allowed the time to deposit the said sum to expire. They also did not file any affidavit in opposition before the Appellate Tribunal. The

petitioners have admitted to have received a free copy of the impugned order on March 9, 2018 and claimed to have contacted their Learned

Advocate in the second week of April, i.e. after the expiry of the time to make such deposit and the date fixed for the hearing of appeal, to seek his

advice. There is also no explanation whatsoever as to what prevented the petitioners from applying for the certified copy of the impugned order prior

to March 1, 2019. Thus, from the conduct of the petitioners it is evident that they are not at all diligent in challenging the order impugned and also

getting back the physical possession of the immovable property.

The petitioners having agreed to imposition of any condition for getting back possession of the immovable property over and above furnishing an

undertaking before the Tribunal for vacating the property, cannot now contend before this court that they had not agreed to imposition of such

condition at the time of hearing of the stay application before the Appellate Tribunal. It is the settled law that the recording in the order as to what

transpired at the hearing before the Appellate Tribunal is sacrosanct. This court under Article 227 of the Constitution should not enquire into as to

what transpired during the hearing before the Appellate Tribunal. As such after having agreed to imposition of condition of a deposit for getting back

possession of the property in question cannot now turn around and challenge the impugned order insofar as the direction to deposit is concerned.

A supplementary affidavit has been filed to bring to the notice of the Court that the secured creditor has published a sale notice dated 16.01.2020. The

secured creditor has the authority under the statute to take possession of the

secured asset. The petitioner after agreeing to the imposition of condition of deposit of Rupees one crore did not comply with the same. They filed the instant Civil Order on 14.03.2019 and sat tight over the matter for almost about 11 months. In the instant case it cannot be held that the action of the secured creditor in publishing the sale notice is bad.

In Mool Chand (supra) the Supreme Court of India passed an order of stay to protect the existing possession of the appellant during the pendency of the appeal. The Honâ??ble Supreme Court observed that if the appeal is allowed the appellant would be entitled to continue in possession but if the order under appeal is not stayed the appellant would have to vacate the room.

In the instant case bank took possession of the property before the initiation of the proceeding under Section 17 of the Act of 2002. If the appeal is allowed the bank would be entitled to continue in possession. The petitioners might be encouraged to take steps for implementation of the order of Tribunal unless the same was stayed. The petitioners should not be permitted to take possession of the property during the pendency of the appeal as the Court cannot permit a swinging pendulum continuously taking place during the pendency of the appeal. Thus, the judgment of Mool Chand (supra) does not help the petitioner in the instant case.

Mr. Banerjee relied on the judgment in the case of Morgan Stanley Mutual Fund versus Kartick Das reported at (1994) 4 SCC 22 5and submitted that the three Honâ??ble judges of the Supreme Court of India while interpreting Section 14 of the Consumer Protection Act, 1986 held that there is no power under the said Act to grant any interim relief or even an ad interim relief. Only a final relief could be granted. He submits that though in Grapco (supra) the decision in Morgan Stanley (supra) was referred to but it failed to consider the effect of the said judgment. He, thus, submitted that the decision of the Supreme Court in Grapco Industries (supra) is a decision per incuriam and no reliance should be placed on that decision.

Though, as held in Morgan Stanley (supra) that the Act of 1986 do not empower the Consumer Forum to pass an order of injunction, the Act of 1993 more particularly Section 19(12) thereof empowers the Tribunal to pass an order of injunction. In Grapco (supra) the Supreme Court while dealing with the powers of the Tribunal under the Act of 1993 held that Section 22 of the said Act empowers the Tribunal to make an interim order by way of

an injunction or stay even ex parte, if it is so in the interest of justice and as per the requirements as spelt out in the judgment of Morgan Stanley

(supra). In Grapco (supra) the case of Morgan Stanley (supra) was taken into consideration and as such it cannot be said that the decision in Grapco

(supra) was passed in ignorance of the decision of Morgan (supra).

In the instant case we are, however, concerned with the power of the Appellate Tribunal to pass an order of stay which and not whether the

Appellate Tribunal can pass an injunction. So the judgment of Morgan Stanley (supra) is not applicable to the facts of the instant case.

For the reasons as aforesaid I am of the view that the impugned order does not suffer from any infirmity warranting interference under Article 227 of

the Constitution of India.

CO No. 1037 of 2019 is thus dismissed without however, any order as to costs.

This court is informed by the Learned Advocate for the opposite party that the hearing of the appeal is fixed before the Appellate Tribunal on April 14,

2020. The Appellate Tribunal is requested to take up the hearing of the said appeal and to dispose of the same as expeditiously as possible without

granting any unnecessary adjournments to either of the parties.

Urgent photostat certified copies, if applied for, be supplied to the parties upon compliance of all formalities.