

(2014) 08 DEL CK 0295
In the Delhi High Court
Case No : W.P.(C) 3896/2013

Kumar Aluminium Limited

APPELLANT

Vs

Asset Reconstruction Company India Limited

RESPONDENT

Date of Decision : 19-08-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 47 Rule 47, Order 7 Rule 11, 151
Constitution of India, 1950 — Article 14, 226
Recovery of Debts Due to Banks and Financial Institutions Act, 1993 — Section 22
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 13, 13(2), 13(4), 14, 17

Citation : (2014) 08 DEL CK 0295

Hon'ble Judges : V. Kameswar Rao, J;Sanjiv Khanna, J

Bench : Division Bench

Advocate : M. Dutta and Arvind Sharma, Advocate for the Appellant; Pratiti Rungta and Sumit Pargal, Advocate for the Respondent

Final Decision : Dismissed

Judgement

V. Kameswar Rao, J.—The challenge in this writ petition is to the order dated March 04, 2013 passed by the Debt Recovery Appellate Tribunal, Delhi (Appellate Tribunal, in short) in Misc. Appeal No. 39/2013 wherein, the application bearing No. 171/2013 filed by the petitioner for refund of the amount deposited in compliance of the requirement of the second Proviso to Section 18(1) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act, in short), was dismissed.

2. The brief facts are that certain credit facilities were granted to the petitioner for setting up of a plant to manufacture aluminium products by the Oriental Bank of Commerce (Bank in short) in July, 1999 and the said facility was enhanced and renewed in the month of June, 2000. On September 30, 2001, the account of the petitioner was declared Non Performing Asset (NPA in short) by the respondent No. 2-bank. The bank filed an Original Application i.e. OA No. 145/02 before the Debt Recovery Tribunal (DRT), which issued show cause notice to the

petitioner. The respondent No. 2-bank also issued a show cause notice dated January 31, 2003 to the petitioner u/s 13(2) of the SARFAESI Act. It may be noted that three associate companies/firms of the petitioner, which had also taken credit facilities had also been declared to be Non-Performing Assets, were also issued notices u/s 13(2) of the SARFAESI Act. The bank assigned the debts in all accounts including with respect to the petitioner to the respondent No. 1. The respondent No. 1 was allowed to be substituted before the proceedings before DRT. The applications u/s 14 of the Act (numbered as SA 525/2012 to SA 528/2012) were filed by the respondent No. 1 before the ACMM, who appointed Receiver in the accounts of the petitioner/associate companies/firms having some common properties. The Receiver served notice to take possession of immovable properties on September 29, 2012 and October 01, 2012. The petitioner and associate companies/firms filed four securitization applications challenging the action of the respondent No. 1 in respect of the common mortgage properties, the physical possession of which was being taken by the Receiver. The DRT did not grant any interim relief to the petitioner and its associate companies/firms, vide its order dated September 27, 2012.

3. The petitioner preferred an appeal against the order of DRT dated September 27, 2012, which came up for hearing on December 27, 2012, IA No. 701/2012 whereby the petitioner had sought waiver/reduction of amount of pre-deposit required under the second proviso to Section 18(1) of the SARFAESI Act for entertaining the appeal, the Appellate Tribunal, on the statement made by the learned counsel for the petitioner, has reduced the pre-deposit from 50% to 25% of Rs. 5,56,60,345/- to be deposited by way of FDRs in the name of the Registrar of the Appellate Tribunal. The statement made by the counsel for the petitioner reads as under:

"Mr. Dutta points out that the appellant/applicants had filed four separate applications (S.As) u/s 17 of SARFAESI Act against the measures taken by the respondent bank qua the different loan accounts and the learned tribunal below by taking all those four S.As together, by a common order, which has been impugned in this appeal, has declined to grant the interim protection sought for by the applicants. He submits that the total amount of Rs. 5,56,60,345/- was claimed by the respondent bank through four different demand notices issued u/s 13(2) of the said act to the applicants. He further submits that the applicant companies, which belong to one family, are ready to deposit 25% of the claimed amount. He also submits that the applicant M/s. Kumar Aluminium Ltd. is the lead company and the other companies are its sister companies and due to wrong classification of the loan account of the said lead company as NPA, the business activity of the said company was very adversely affected which had the adverse impact on other companies and its loan accounts had also become NPA".

4. It is noted that an application under Order 7 Rule 11 CPC was filed by the respondent No. 1, inter alia, stating that the petitioner had filed the S.A. No. 527/12 without the respondent No. 1 taking recourse to Section 13(4) or Section

14 of the SARFAESI Act pursuant to the notice u/s 13(2). It was also the case of the respondent No. 1 that it did not file any order of learned ACMM or any document to show that measures u/s 13(4) of SARFAESI Act were taken by the respondent No. 1 against the petitioner which is a condition precedent for approaching DRT u/s 17 of the SARFAESI Act. Meaningfully read, it was the case of the respondent No. 1 that the SA No. 527/12 filed by the petitioner was premature. The said application of the respondent No. 1 under Order 7 Rule 11 CPC was allowed and thereby the appeal No. 527/2012 was dismissed as no action u/s 13(4) of the SARFAESI Act has been taken by the respondent No. 1.

5. It is pursuant thereto, the petitioner herein has filed an application u/s 18(2) of the SARFAESI Act read with Section 22 of the Recovery of Debts Due to Banks and Financial Institutions Act and on the principles akin to Order 47 CPC read with Section 151 CPC before the Appellate Tribunal inter alia praying a direction to the Registrar of the Appellate Tribunal to refund 25% of the amount mentioned in the notice u/s 13(2) of the SARFAESI Act notice issued by the bank on January 31, 2003 and deposited by the petitioner. It is on this application that the impugned order has been passed on March 04, 2013.

6. Mr. M. Dutta, learned counsel for the petitioner would state that the order of the Appellate Tribunal is totally erroneous inasmuch as the Appellate Tribunal could not have denied the refund of the 25% of the total amount deposited by the petitioner. The said amount was deposited as condition precedent for hearing of the appeal. If the appeal has been treated as premature, then, in effect, there is no appeal which was required to be pursued by the petitioner. Hence, the pre-deposit which was made, was not required to be made at all. He would state that there is no authority of law for the Appellate Tribunal to deny the refund and the reasoning given by the Appellate Tribunal is unsustainable in law in view of the judgment of the Supreme Court in the case reported as; *Mardia Chemicals Ltd. Vs. Union of India (UOI) and Others Etc. Etc.,* . and related matters; (2) AIR 2009 Gujarat 98 *Babu Ganesh Singh Deepnarayan Vs. Union of India and Anr.; Suvidhe Ltd. Vs. Union of India,* ; and *Nelco Limited Vs. Union of India (UOI)*, in support of his contention.

7. Ms. Pratiti Rungta, learned counsel appearing for the respondent No. 1 would support the order of the Appellate Tribunal. According to her, the four appeals were filed by the petitioner and associate companies, the number being SA Nos. 525, 526, 527 and 528 of 2012. All accounts, with respect to the said companies, had been declared as NPA. She would state that in pursuance to the statement made by the learned counsel for the petitioner before the Appellate Tribunal that the order of deposit was reduced from 50% to 25%. In other words, it was a composite order with respect to all four accounts which claim was for Rs. 5,56,60,345/-. It is also her submission that even though the SA No. 527/12 filed by the petitioner was held to be premature, insofar as two other accounts are concerned (i.e. *Kuaan International Ltd. and Kumar Enterprises*), it was held that the accounts have been classified NPA as per RBI Guidelines and insofar as

one account i.e. Cookers India Domestic India Appliances P. Ltd is concerned, the same was not held to be a NPA as per RBI Guidelines. She would seek the dismissal of the writ petition.

8. Having heard the learned counsel for the parties, we note that the order dated December 27, 2012 clearly reveals that the petitioner through his counsel had, keeping in view the fact that all the petitioner and its associate companies/firms, belong to one family and the counsel desired to deposit in total 25% of the total claimed amount; the Appellate Tribunal had passed the order on December 27, 2012. We note that the counsel for the petitioner had pleaded financial hardships as a reason to enable to deposit 50% of the claimed amount and requested the Appellate Tribunal to reduce the pre-deposit from 50% to 25%. A statement/concession made/given by the counsel for the petitioner to pre-deposit 25% of the claimed amount as one consolidated amount with regard to all the appeals/accounts, which has been accepted by the Appellate Tribunal, the petitioner cannot now resile out of the statement/concession. In other words, there was no segregation of the amount claimed against the four accounts, the details of which are as under:

It is also noted, but, for a concession, the Appellate Tribunal could have maintained as pre-deposit 50% of the claimed amount. Even if the submission of the learned counsel for the petitioner is accepted to exclude the account with regard to the petitioner company herein, we note, even against the three accounts, the total liability is of Rs. 3,48,44073/- and 50% of the said amount would still be Rs. 1,74,22036.50/- which is also much more than the amount deposited by the petitioner against the four accounts in terms of order of the Appellate Tribunal. Even assuming, that, out of the three accounts, one account has not been held as NPA, then also, the total liability in the other two accounts is Rs.2,23,42,600/-, which amount is much more than the amount of Rs.1,39,25000/- deposited by the petitioners pursuant to order of the Appellate Tribunal dated December 27, 2012. It is also a fact that the SAs filed against the other three accounts, were properly maintainable appeals unlike SA No. 527/2012. In other words, the submission of the petitioner is to divide/bifurcate the deposit, such bifurcation and division cannot and should not be permitted. The amount deposited was lump sum payment, quite possible after taking into consideration strength and weaknesses of the four appeals. To attribute and divide payments in four proportionate amounts, should not be permitted, in view of the fact that NPA amounts payable exceed the total deposits.

9. Further, we note, the Appellate Tribunal in the impugned order has given three reasons for dismissing the applications filed by the petitioner for refund. The cumulative effect of all three reasons having weighed with the Tribunal to dismiss the said applications keeping in view the peculiar facts of the present case, more particularly, when liability against two Accounts has been decided against associate companies/firms of the petitioner, we are of the view that this Court, in exercise of its power under Article 226 of the Constitution would not like to

interfere with the impugned order.

10. Insofar as the judgment of the Supreme Court in *Mardia Chemicals Ltd.*'s case (supra) is concerned, the Supreme Court has held, that 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 sold. The Court has held that the stipulation that the borrower has to deposit 75% of the amount claimed by the secured creditor before his appeal can be entertained in Section 17(2) of the Act (pre-amended) was unreasonable, arbitrary and violative of Article 14 of the Constitution.

The said Sub-Section has been replaced by way of an amendment, empowering the DRT to consider whether, any measure referred to in Sub-Section 4 of Section 13 by the secured creditor are in accordance with the provisions of the Act and the Rules made thereunder. Be that as it may, we have already justified the impugned order in the peculiar facts of the present case. In view of our above conclusion, the reliance placed by the learned counsel for the petitioner in *Mardia Chemicals Ltd.*'s case (supra) may not be relevant.

11. Insofar as the judgment of the Gujarat High Court in *Babu Ganesh Singh Deepnarayan*'s case (supra) is concerned, the Court was more concerned with the validity of the second proviso to Section 18 of the SARFAESI Act. The Gujarat High Court relying upon the judgment of this Court in *R.V. Saxena Vs. Union of India (UOI) and Others*, , upheld the proviso, which requires pre-deposit of the debt amount as a condition precedent for hearing of the appeal. The validity was upheld. In para 6, the High Court has observed that there is no provision in the Statute enabling the secured creditor to adjust or appropriate the amount deposited by the borrower to prefer an appeal u/s 18(1) of the SARFAESI Act but this would not help the petitioner, since in this case, the Appellate Tribunal reduced the pre-deposit from 50% to 25% on the total amount claimed by the respondent No. 1 on the statement made by the counsel for the petitioner and the fact that two Accounts have been held to be NPA in accordance with the RBI Guidelines and claim of the respondent No. 1 having been established, reliance placed by the counsel for the petitioner on the aforesaid judgment of the Gujarat High Court would be of no relevance.

12. Similar are the other two judgments in *Suvidhe Ltd.* and *Nelco Ltd.*'s cases (supra) relating to the provisions of Central Excise and Salt Act, 1944 and would not be really relevant while dealing with a case under the SARFAESI Act, more particularly, in view of the our conclusion in para 8 above.

13. The writ petition is accordingly dismissed.

14. No costs.