**(2018) 08 MP CK 0124**

**In the Madhya Pradesh High Court**

**Case No :** Writ Petition No.3432 Of2018

M/S Bharti Infratel Ltd APPELLANT

Vs

Union Of India RESPONDENT

**Date of Decision :** 14-08-2018

**Acts Referred:**

Building and Other Construction Workers’ Welfare Cess Act, 1996 — Section 11, 13(1), 13(2), 13(4)
Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 — Section 17, 17(2)
Building and Other Construction Workers' Welfare Cess Rules, 1998 — Rule 14

**Citation :** (2018) 08 MP CK 0124

**Hon'ble Judges :** Hemant Gupta, CJ;Vijay Kumar Shukla, J

**Bench :** Division Bench

**Final Decision :** Dismissed

# Judgement

1. The challenge in the present writ petition is to an order passed by Cess Assessing Authority cum Assistant Labour Commissioner, Jabalpur on

30.12.2017 whereby, a sum of Rs. 45 Lakhs was assessed to be due from the petitioner and demanded to be deposited within 30 days towards Cess in

terms of the Building and Other Construction Workersâ?? Welfare Cess Act, 1996 (for short, â??the Actâ??).

2. An appeal against such order is maintainable in terms of Section 11 of the Act read with Rule 14 of the Building and Other Construction Workers'

Welfare Cess Rules, 1998.

3. Learned counsel for the petitioner contends that remedy of appeal is not efficacious remedy as the petitioner is required to deposit total amount

demanded by the Assessing Authority before availing the remedy of appeal. The reliance is placed upon Supreme Court judgment reported as Mardia

Chemicals Ltd vs Union of India (2004) 11 SCC 311, to contend that the condition of pre-deposit of the amount is onerous and cannot be insisted

upon. The relevant part of the order reads as under :-

â??46. We are holding that it is necessary to communicate the reasons for not accepting the objections raised by the borrower in reply to notice under

Section 13(2) of the Act, more particularly for the reason that normally in the event of non- compliance with notice, the party giving notice approaches

the court to seek redressal but in the present case, in view of Section 13(1) of the Act the creditor is empowered to enforce the security himself

without intervention of the Court. Therefore, it goes with logic and reason that he may be checked to communicate the reason for not accepting the

objections, if raised and before he takes the measures like taking over possession of the secured assets, etc.

47. This will also be in keeping with the concept of right to know and lender's liability of fairness to keep the borrower informed particularly the

developments immediately before taking measures under sub-section (4) of Section 13 of the Act. It will also cater to the cause of transparency and

not secrecy and shall be conducive in building an atmosphere of confidence and healthy commercial practice. Such a duty, in the circumstances of the

case and the provisions, is inherent under Section 13(2) of the Act. xxx xxx

64. The condition of pre-deposit in the present case is bad rendering the remedy illusory on the grounds that: (i) it is imposed while approaching the

adjudicating authority of the first instance, not in appeal, (ii) there is no determination of the amount due as yet, (iii) the secured assets or their

management with transferable interest is already taken over and under control of the secured creditor, (iv) no special reason for double security in

respect of an amount yet to be determined and settled, (v) 75% of the amount claimed by no means would be a meager amount, and (vi) it will leave

the borrower in a position where it would not be possible for him to raise any funds to make deposit of 75% of the undetermined demand. Such

conditions are not alone onerous and oppressive but also unreasonable and arbitrary. Therefore, in our view, sub-section (2) of Section 17 of the Act is

unreasonable, arbitrary and violative of Article 14 of the Constitution.â??

4. On the other hand, Shri Seth relies upon a Division Bench decision in the case of State of M.P. vs M/s Suvida Services : Writ Appeal No.686/2017

 

decided on 18.04.2018 wherein, this Court while relying upon various other judgments of the Supreme Court reported as Ganga Bai vs Vijay Kumar

AIR 1974 SC 1126; Anant Mills Company Limited vs State of Gujarat AIR 1975 SC 1234; Seth Nand Lal vs State of Haryana AIR 1980 SC 2097

and Shyam Kishore vs Municipal Corporation of Delhi (1993) 1 SCC 22, held as under :

â??23. We find that the order passed by the learned Single Bench is not a precedent to be followed in all cases, it being passed in peculiar facts of the

said case. Though in terms of the judgment in Maruti Udyog Limitedâ??s case (supra) or in the matter of Shyam Kishoreâ??s case (supra), in writ

petition this Court can pass an order to waive of the onerous condition of pre-deposit of Tax, but such order can be passed as mentioned in M/s

Emerald Internationalâ??s case, in the rarest of rare case. The statutory provision cannot be ignored at the mere asking. There has to be strong

plausible reasons, which may weigh with the writ Court to soften the rigour of the statutory provision.

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26. In view of the aforesaid, we find that the order of the learned Single Bench to waive the pre-deposit of Tax is not sustainable, as there is no

circumstance on record which may warrant such concession to be granted to the writ petitioner. The writ petitioner is bound to comply with the

statutory conditions before availing the remedy of appeal.

27. Consequently, we set aside the order of the learned Single Bench to the extent that â??condition of pre-deposit of tax has been waivedâ??.

Therefore, the present appeals are allowed. However, we grant liberty to the writ petitioner to deposit the Tax and/or penalty amount within a period

of one month. If the amount is paid within one month, the appellate authority shall decide the appeal on merits in accordance with law.â??

5. Mardia Chemicals Ltd is a case which dealt with under the Securitisation and Reconstruction of Financial Assets and Enforcement of Securities

Interest Act, 2002 (for short, the SARFAESI Act), wherein, there was a condition of pre-deposit of 75% of the amount claimed by the secured

creditor while availing the remedy under Section 17 of the SARFAESI Act. The Court found that before availing the remedy under Section 17, there

is no adjudication of the amount due and that such condition has been introduced while approaching the adjudicating authority of the first instance and

that no special reason for double security in respect of an amount yet to be determined and settled and when the possession of the secured assets are

already taken over and under control of the secured creditor. The said Judgment arising out of SARFAESI Act is an altogether different scheme of

recovery of the amount due to the secured creditor out of the secured assets.

6. However, the present is a case of recovery of the amount of Cess payable under the Act which has been arrived at by the Assessing Authority.

Therefore, the amount stands adjudicated upon by the Assessing Authority. Such condition in the statute is required to be complied with before the

remedy under the Act is to be availed of. The statutory provision cannot be bypassed by raising an argument that the condition of pre-deposit is

onerous.

7. We do not find that the reliance placed by the petitioner on the decision in Mardia Chemicals Ltd (supra) is anyway applicable to the facts of the

present case.

8. It may be mentioned that in an another judgment reported as Narayan Chandra Ghosh vs UCO Bank (2011) 4 SCC 548 wherein, while examining

the provision of SARFAESI Act, the Court held as under :

â??8. 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 predeposit under

sub-section (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.â??

 

9. In view of the above, we do not find any merit in the present writ petition. The same is dismissed.

10. The petitioner may avail alternative remedy of appeal as prescribed under the Act and the Rules made thereunder in accordance with law.

 