

(2011) 07 BOM CK 0115

In the Bombay High Court

Case No : Writ Petition No. 4231 of 2011

National Polymers and Others

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 01-07-2011

Acts Referred:

Constitution of India, 1950 — Article 14, 226
Foreign Trade (Development and Regulation) Act, 1992 — Section 15(1)
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 13, 13(1), 13(2), 13(4), 17

Citation : (2012) 1 BC 97 : (2011) 4 BomCR 503 : (2011) 8 RCR(Civil) 1081

Hon'ble Judges : D.Y. Chandrachud, J;Anoop V. Mohta, J

Bench : Division Bench

Advocate : Pradeep Madhyan, instructed by Vimadalal and Co, for the Appellant; D.J. Khambata, ASG, Rohan Cama and Anamika Malhotra and Kedar Dighe, for the Respondent

Final Decision : Dismissed

Judgement

D.Y. Chandrachud, J.—Rule, by consent returnable forthwith. With the consent of Counsel and at their request the Petition is taken up for hearing and final disposal.

2. By an order dated 6 April 2001 the Debts Recovery Appellate Tribunal has directed the Petitioners to deposit an amount of Rs. 7 Crores. The Debts Recovery Appellate Tribunal was moved by the Petitioners for an order of waiver u/s 18 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. An application filed by the Petitioners u/s 17 was earlier dismissed by the Tribunal on 4 February 2011. Against the order of rejection, the Petitioners filed an appeal in which an application for waiver was made. The impugned order decides that application.

3. The Petitioners have challenged the constitutional validity of the provisions of

the first and second provisos to Section 18 of the Act on the ground that they are discriminatory. The submission is based on a comparison with the provisions of Section 21 of the Recovery of Debts due to Banks and Financial Institutions Act, 1993. According to the Petitioners while the Act of 1993 confers a discretion upon the Appellate Tribunal to allow a complete waiver of the pre-deposit, the discretion of the Appellate Tribunal, while entertaining an appeal u/s 18 of the Securitisation Act is curtailed. By the first proviso to Section 18(1) an appeal cannot be entertained unless the borrower has deposited an amount of 50% of the debt due as claimed by the secured creditor, or as determined by the Tribunal, whichever is less. By the second proviso, the Appellate Tribunal is empowered for reasons to be recorded in writing to reduce the amount to not less than 25% of the debt referred to in the second proviso.

4. Notice was issued to the Attorney General of India in view of the constitutional challenge. The learned Additional Solicitor General of India has appeared in the proceedings.

5. The constitutional challenge to the provisions of the second and third provisos of Section 18 must fail. An appeal, it is well settled, is a statutory creation. A statute which confers a right of appeal can condition the exercise of that right on the observance of conditions which the legislature may consider appropriate to impose. The Securitisation Act is an act to regulate securitisation and reconstruction of financial assets and enforcement of security interests. The Statement of objects and reasons accompanying the introduction of the Bill in Parliament sets out the background in which the law was enacted as follows:

The financial sector has been one of the key drivers in India's efforts to achieve success in rapidly developing its economy. While the 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 non-performing 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. These Committees, inter alia, have suggested enactment of a new legislation for securitisation and empowering banks and financial institutions to take possession of the securities and to sell them without the intervention of the Court. Acting on these suggestions, the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest

Ordinance, 2002 was promulgated on the 21 June, 2002 to regulate securitisation and reconstruction of financial assets and enforcement of security interest and for matters connected therewith or incidental thereto. The provisions of the Ordinance would enable banks and financial institutions to realise long term assets, manage problem of liquidity, asset liability mismatches and improve recovery by exercising powers to take possession of securities, sell them and reduce non-performing assets by adopting measures for recovery of reconstruction.

6. The second and third provisos to Sub-section (1) of Section 18 were inserted by Amending Act 30 of 2004. The reasons for the amendment are explained in the Statement of objects and reasons. The statement adverts to the judgment of the Supreme Court in *Mardia Chemicals Ltd. Vs. Union of India (UOI) and Others Etc. Etc.*, which had declared as ultra vires a provision under which a deposit of 75% of the amount claimed was necessary before an appeal could be entertained. The amendment was brought about in view of the judgment of the Supreme Court and with a view to discourage borrowers from postponing the repayment of their dues and to enable secured creditors to speedily recover their debts, if required by enforcement of security or other measures specified in Sub-section (4) of Section 13 of the Act.

7. The constitutional validity of the provisions of Section 18(1) have been upheld by a judgment of a Division Bench of the Delhi High Court in *R.V. Saxena Vs. Union of India (UOI) and Others*, . Chief Justice Makandeya Katju (as His Lordship then was) speaking for the Division Bench held thus:

The right of appeal is not an inherent right but is a creature of the statute. The Legislature can impose conditions under which this is to be exercised. Moreover, the proviso to Section 18 does not require the entire amount to be deposited, but only 50% thereof which can be reduced to a minimum of 25% of the sum. We see no illegality in this proviso. There are similar provisions in many enactments and they are being upheld by the Supreme Court. For example, in the second proviso u/s 15(1) of the Foreign Trade (Development and Regulation) Act, 1992, it is provided that the appeal against an order imposing a penalty or redemption charges shall not be entertained unless the amount of the penalty or redemption charges have been deposited by the Appellant. Similarly in many other statutes, there are such similar provisions.

8. The Division Bench of the Delhi High Court inter alia relied upon the decisions of the Supreme Court in *Gujarat Agro Industries Co. Ltd. v. Municipal Corporation of the City of Ahmedabad* (1999) SCC 468, *Vijay Prakash D. Mehta and Another Vs. Collector of Customs (Preventive), Bombay*, , *The Anant Mills Co. Ltd. Vs. State of Gujarat and Others*, and *Shyam Kishore and others Vs. Municipal Corporation of Delhi and another*, .

9. Counsel appearing on behalf of the Petitioner, however, submitted that the object of both the Act of 1993 as well as of the Securitisation Act is the same viz.

to ensure the speedy recovery of debts due to banks and financial institutions. Hence, it was urged that it would be plainly discriminatory and violative of Article 14 for Parliament to legislate, that while the Debts Recovery Appellate Tribunal, when it considers an appeal under the Act of 1993, can grant a complete waiver of predeposit, the same Tribunal is precluded from granting a waiver in the entirety, when it considers an appeal under the Securitisation Act.

10. This argument is not open to the Petitioner to urge, in any event before this Court, in view of the fact that by a recent judgment of the Supreme Court the rationale for the provisions of Section 18 has been considered and determined in *Narayana Chandra Ghosh Vs. UCO Bank and Others*, . A Bench of two learned Judges of the Supreme Court while construing the provisions of the second and third provisos noted that the Appellate Tribunal has the power to reduce the amount, for reasons to be recorded in writing, to not less than 25% of the debt, referred to in the second proviso. The judgment of the Supreme Court lays down that the right of appeal being a creation of statute, it was open to Parliament to condition that right subject to an order of deposit and to restrict the discretion of the Appellate Tribunal in the matter of granting a waiver. The Supreme Court held as follows:

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.

11. The mandate of the third proviso has thus been held by the Supreme Court not to be onerous in its nature or character. These observations were undoubtedly not made in the context of a constitutional challenge. Nonetheless, they are significant because the Supreme Court in holding that the requirement is not onerous has indicated a view on the fairness and reasonableness of the provision.

12. There is a fundamental reason why the submission of the Petitioner cannot be accepted. The object and purpose of the Securitisation Act was to facilitate a recovery of the dues of the banks and financial institutions by a non-adjudicatory process. The Securitisation Act enables banks or financial institutions to enforce their security interests expeditiously without being required to move a Court or Tribunal. This was emphasized in the following observations of the Supreme Court in *Transcore v. Union of India* 2007(2) BJ 303.

Basically, the Securitisation Act is enacted to enforce the interest in the financial assets which belong to the bank / financial institution by virtue of the contract between the parties or by operation of common law principles or by law. The very object of Section 13 of Securitisation Act is recovery by non-adjudicatory process. A secured asset under Securitisation Act is an asset in which interest is

created by the borrower in favour of the bank / financial institution and on that basis alone the Securitisation Act seeks to enforce the security interest by non-adjudicatory process. Essentially, the Securitisation Act deals with the rights of the secured creditor. The Securitisation Act proceeds on the basis that the debtor has failed not only to repay the debt, but he has also failed to maintain the level of margin and to maintain value of the security at a level is the other obligation of the debtor. It is this other obligation which invites applicability of Securitisation Act. It is for this reason, that Section 13(1) and 13(2) of the Securitisation Act proceed on the basis that security interest in the bank / financial institution needs to be enforced expeditiously without the intervention of the Court / Tribunal; that liability of the borrower has accrued and on account of default in repayment, the account of the borrower in the books of the bank has become non-performing. For the above reasons, Securitisation Act states that the enforcement could take place by non-adjudicatory process and that the said Act removes all fetters under the above circumstances on the rights of the secured creditor.

(emphasis supplied)

13. These observations of the Supreme Court emphasize at more than once place that the Securitisation Act allows enforcement by a non-adjudicatory process. The Act removes fetters on the rights of the secured creditor. The Securitisation Act has therefore been held to create an additional remedy. Consistent with the object of Parliament of facilitating the enforcement of security interests by a non-adjudicatory process, Parliament could conceivably impose a condition by which it could require the making of a deposit as a condition precedent to the maintainability of an appeal u/s 18. Such a condition has been imposed under the second proviso to Sub-section (1) of Section 18 by which an appeal cannot be entertained unless the borrower has deposited with the Appellate Tribunal 50% of the amount debt due as claimed by the secured creditor, or as determined by the Tribunal, whichever is less. Parliament conferred upon the Appellate Tribunal a discretion to reduce the amount required to be deposited, but while conferring that discretion on the Appellate Tribunal restricted it by stipulating that the Appellate Tribunal may reduce the amount to not less than 25% of the debt referred to in the second proviso. This is consistent with the parliamentary intent of ensuring that basically the Securitisation Act must follow an efficacious non-adjudicatory process for the enforcement of a security interest. The interposition of an adjudicatory function in the Securitisation Act must, therefore, be confined to those areas as legislated upon by Parliament and subject to the restrictions imposed by the Parliament while so legislating. Therefore, we find that there were valid reasons why Parliament made a different provision in the Securitisation Act in the matter of the discretion of the Appellate Tribunal u/s 18(1) in dispensing with the requirement of predeposit. It was open to Parliament, while conferring a discretion on the Appellate Tribunal to restrict the exercise of the discretion to reduce the quantum of deposit to not less than 25% of the debt due under the

second proviso to Section 18(1).

14. In the present case, the amount which was claimed in the notice u/s 13(2) was Rs. 24.72 Crores while as on the date of the order of the Appellate Tribunal the amount outstanding was Rs. 31 Crores. The Appellate Tribunal has duly considered the submissions which were urged on behalf of the Petitioners and having regard to the discipline mandated by the second and the third provisos to Section 18(1) directed the Petitioner to deposit an amount of Rs. 7 Crores. The exercise of that discretion does not require any interference under Article 226 of the Constitution and in any event neither the Appellate Tribunal nor this Court would be justified in granting a waiver in excess of the amount as mandated by the third proviso to Section 18(1). For these reasons, we see no merit in the Petition. The Petition is accordingly dismissed. There shall be no order as to costs.

15. Time to effect deposit is extended by a further period of six weeks from today. Counsel appearing on behalf of the Bank states that since the Court has extended time for effecting deposit by a period of six weeks from today, the bank shall maintain status quo in respect of the secured assets for that period.