(2009) 11 DEL CK 0069

In the Delhi High Court

Case No : Writ Petition (C) 13042 of 2009

Poonam Manshani — APPELLANT

Vs

J and K Bank Ltd. and Another — RESPONDENT

Date of Decision : 10-11-2009

Acts Referred:

Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 13(2), 13(4), 17, 18, 18(1)

Citation : AIR 2010 Delhi 28 : (2010) 6 RCR(Civil) 227

Hon'ble Judges : Veena Birbal, J;Badar Durrez Ahmed, J

Bench : Division Bench

Advocate : G.L. Rawal and Kuljeet Rawal, for the Appellant; Tanveer Ahmed Mir, for the Respondent

Judgement

Badar Durrez Ahmed, J.

Caveat No. 145/2009

Mr Tanveer Ahmed Mir appears. The caveat stands discharged.

WP (C) 13042/2009

1. With the consent of the Counsel for the parties this matter is taken up for final hearing.

2. This writ petition is directed against the order dated 15.10.2009 passed by the Debts Recovery Appellate Tribunal (hereinafter referred to as ''DRAT'') in Miscellaneous Application No. 441/2009 in Appeal No. 219/2009 arising out of S.A. 21/2008, which was disposed of by the Debts Recovery Tribunal by an order dated 30.06.2009. The said Miscellaneous Application No. 441/2009, which was disposed of by the impugned order passed by the DRAT, was one for waiver of pre-deposit. Section 18 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as ''the said Act''), which makes provision for an appeal to the Appellate Tribunal

from any order made by the DRT, reads as under:

18. Appeal to Appellate Tribunal. - (1) Any person aggrieved, by any order made by the Debts Recovery Tribunal u/s 17, may prefer an appeal to an Appellate Tribunal within thirty days from the date of receipt of the order of Debts Recovery Tribunal.

Provided that different fees may be prescribed for filing an appeal by the borrower or by the person other than the borrower.

Provided further that no appeal shall be entertained unless the borrower has deposited with the Appellate Tribunal fifty percent of the amount of debt due from him, as claimed by the secured creditors or determined by the Debts Recovery Tribunal, whichever is less.

Provided also that the Appellate Tribunal may, for the reasons to be recorded in writing, reduce the amount to not less than twenty-five per cent of debt referred to in the second proviso.

(2) Save as otherwise provided in this Act, the Appellate Tribunal shall, as far as may be, dispose of the appeal in accordance with the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993) and rules made thereunder.

The second proviso to Section 18(1) clearly indicates that no appeal should be entertained by the Appellate Tribunal unless the borrower has deposited with the said Appellate Tribunal, fifty percent of the amount of debt due from him, as claimed by the secured creditors or determined by the DRT, whichever is less. The third proviso to the said Section 18(1) gives further leeway to the Appellate Tribunal to reduce the amount of pre-deposit, but not below twenty five per cent of the debt referred to in the second proviso.

3. In the present case, the DRAT made the following order:

The applicant/appellant shall deposit an amount of Rs. 10.21 crores with the 1st respondent ? Bank by 15.11.2009 with an undertaking by way of an affidavit by 16.10.2009 before the Registrar of this Tribunal to do so. In case the said undertaking in the form of an affidavit is given before the Registrar of this Tribunal by 16.10.2009 by 4 p.m, then the confirmation of sale shall remain stayed till 15.11.2009. The matter shall come up before this Tribunal on 16.11.2009 for further appropriate orders depending upon the deposit/non-deposit of the above amount of Rs. 10.21 crores.

We may point out, at this stage, that the amount of debt shown due in the notice u/s 13(2) of the said Act, which was issued on 19.07.2007 to seven persons, including the petitioner, was to the extent of Rs. 40,87,65,819/-. We are also aware of the fact that pursuant to Section 13(4) proceedings, a collateral asset belonging to the principal borrower (the company), a sum of Rs. 8.60 crores was recovered through the sale of the same by the respondent No. 1 bank.

4. The DRAT has computed the figure of 25% of the debt amount to be Rs. 10.21 crores by taking the debt due to be Rs. 40,87,65,819/-. The DRAT has ignored the interest component which was claimed by the respondent No. 1 bank in the O.A. filed by it before the DRT. The DRAT has only gone by the amount as claimed in the Section 13(2) notice. However, the DRAT has declined to give any benefit to the petitioner in respect of the amount of Rs. 8.60 crores recovered by the bank from the sale of one property belonging to the principal borrower. The exact reasoning adopted by the DRAT is indicated in paragraph 13 of the impugned order which reads as under:

13. In view of the above discussion, even on ignoring the interest component, the applicant/appellant must be directed to make a deposit of twenty five per cent of the amount demanded in the notice u/s 13(2) of the SARFAESI Act by the Bank which works out to Rs. 10.21 crores as mentioned in earlier discussion. As guarantor, she has to stand on her own legs. She cannot claim any advantage of the amount recovered by the Bank by the sale of one property of the borrower. The learned Counsel for the applicant/appellant argued that the sale of the properties in question is scheduled for 19.10.2009 and the same should be stayed.

5. Mr Rawal, the learned senior Counsel, appearing on behalf of the petitioner, submitted that since the DRAT directed the pre-deposit of Rs. 10.21 crores and the bank had already recovered a sum of Rs. 8.60 crores from the sale of the property belonging to the principal borrower, the petitioner, in the maximum, could be required to deposit only a sum of Rs. 1.62 crores (i.e., the difference between Rs. 10.21 crores and Rs. 8.60 crores). Mr Rawal also pointed out that the DRAT has erred in directing that the deposit of Rs. 10.21 crores is to be made to the respondent No. 1 bank, when Section 18 of the said Act clearly requires that the deposit be made with the Appellate Tribunal.

6. Mr Tanveer Ahmed Mir, appearing on behalf of the respondent No. 1 bank, fully supported the order passed by the DRAT. He also submitted that the liability of the guarantor was co-extensive with that of the borrower and, therefore, according to him, the Appellate Tribunal had rightly disallowed the petitioner''s claim of adjustment of the sum of Rs. 8.60 crores from the debt due, so as to reduce the amount of the pre-deposit required to be made by the petitioner (who is a guarantor).

7. Mr Mir further submitted that the conduct of the petitioner was such that this Court ought not to interfere with the order of the DRAT in exercise of its writ jurisdiction. Mr Mir also submitted that three co-lateral securities were offered by the borrower and the guarantors. One of them has already been liquidated in respect of which the bank has received Rs. 8.60 crores. Another security appears to have been acquired by the Government in 1994 prior to the mortgage and, therefore, there is no likelihood whatsoever of recovering any amount from that security. Consequently, it leaves only the security which is the subject matter of the present proceedings, which is the property belonging to the petitioner

(guarantor) and that property also, according to the respondent No. 1 bank, is valued at about Rs. 16 crores. Therefore, he submits that there is very little chance, if at all, of recovering the entire debt due to the respondent No. 1 bank as claimed by it in the Section 13(2) notice, alongwith interest thereon, from the remaining security that is available. He submitted that the order passed by the DRAT ought not to be interfered with and the petitioner be required to make the pre-deposit of Rs. 10.21 crores.

8. We have heard the Counsel for the parties and are of the view that the DRAT came to the conclusion of requiring a pre-deposit of Rs. 10.21 crores after considering three aspects of the matter. First of all, the Appellate Tribunal ignored the interest component and went by the amount claimed under the notice u/s 13(2). Secondly, the Appellate Tribunal was of the view that only 25% of the demanded amount be deposited by way of pre-deposit u/s 18. The third aspect of the matter, which was considered by the Appellate Tribunal, was that the amount of Rs. 8.60 crores, which was recovered from the borrower, cannot be adjusted in favour of the petitioner, who is a guarantor inasmuch as, according to the Appellate Tribunal, the guarantor (the petitioner herein) would have to stand on her own legs. She cannot claim any advantage of the amount recovered by the Bank by the sale of one property of the borrower.

9. We are not interfering with the first two aspects of the Appellate Tribunal''s consideration, but we find that insofar as the third aspect of the matter is concerned, the Appellate Tribunal has misdirected itself. After having rightly held in paragraph 10 of the impugned order that the liability of a guarantor is co-extensive with that of the principal debtor, the Tribunal could not have disallowed the advantage of recovery by the bank and the resultant reduction in the amount of debt due from the guarantor which advantage would have, in any event, been available to the principal debtor. When the principal debtor could have claimed advantage of the adjustment, there is no reason as to why a guarantor, whose liability is co-extensive, ought to be denied that advantage. At the same time, we do not agree with the submissions made by Mr Rawal that the sum of Rs. 8.60 crores ought to be adjusted from the amount of Rs. 10.21 crores. This is so because the expression used in Section 18 is "amount of debt due from him, as claimed by the secured creditors or determined by the Debts Recovery Tribunal, whichever is less". The amount of debt due, by ignoring the interest component, would be the amount specified in the notice u/s 13(2), less any recovery made by the bank thereafter. Since the respondent No. 1 bank has recovered 8.60 crores in the proceedings u/s 13(4), an adjustment would have to be made to arrive at the amount of debt due. Looked at in this manner, we feel that the amount of debt due would be Rs. 32.27 crores (Rs 40.87 crores ? Rs. 8.60 crores). Twenty five percent of that amount would come to Rs. 8.07 crores (approximately).

10. Therefore, we direct that the petitioner shall make a pre-deposit of the amount of Rs. 8.07 crores by 25.11.2009. We also direct that the pre-deposit

shall be made with the Appellate Tribunal and not with the respondent No. 1 bank as wrongly directed by the Appellate Tribunal. In case the pre-deposit of the said amount is not made with the Appellate Tribunal on or before 25.11.2009, the appeal before the Appellate Tribunal would be liable to be dismissed. We make it clear that we have not expressed any opinion on the merits of the matter. With these directions the writ petition stands disposed of.

