

(2018) 11 DEL CK 0313

In the Delhi High Court

Case No : Writ Petition No. 12299 Of 2018, Civil Miscellaneous No. 47696 Of 2018

Srishti Arogyadham Pvt Ltd

APPELLANT

Vs

Punjab National Bank & Anr

RESPONDENT

Date of Decision : 27-11-2018

Acts Referred:

Security Interest (Enforcement) Rules, 2002 — Rule 8
Securitization And Reconstruction Of Financial Assets And Enforcement Of Security Interest Act, 2002 — Section 13(2), 17, 18, 20

Citation : AIR 2019 Delhi102 : (2018) 10 AD(Delhi) 565

Hon'ble Judges : Rajendra Menon, CJ;V. Kameswar Rao, J

Bench : Division Bench

Advocate : Rajeeve Mehra, Niti A. Sachar, Rajinder Wali, Sanjeev Sagar, Nazia Parveen

Final Decision : Disposed Of

Judgement

V. Kameswar Rao, J

1. The present petition has been filed by the petitioner challenging the order dated October 18, 2018 passed by the learned Debt Recovery Appellate Tribunal, Delhi (in short "DRAT") which rejected the M.A. No.630/2016, filed by the petitioner for waiver of the pre-deposit of 50% of the amount which had been demanded from the appellant by the respondent No.1 Bank or as determined by the DRT, whichever is less.

2. The facts as noted from the record are that the petitioner was sanctioned credit facility of Rs. 8.20 crores, whereas the Bank had disbursed only Rs. 7,76,62,288/- for the construction of super structure on the land admeasuring 27 Kanals 9 Marlas, (which was also mortgaged with the Bank). The project could not be completed as per schedule for various reasons. The petitioner applied for enhancement in loan, which was not responded by the Bank. The total repayment of Rs. 2.45 crore was made as on March 31, 2015. It appears that a

notice under Section 13(2) was issued on April 13, 2013 to which the petitioner had filed objections on June 06, 2013. The Bank had taken possession of the property. The petitioner approached the Bank after knowing that the property has been put to sale.

3. It is the case of the petitioner that the Bank had not published proper publication for sale of property. According to the petitioner, the same was in violation of Rule 8 of the SARFAESI Rules, as the respondent No.1 Bank has failed to give prior 30 days notice to the petitioner before fixing sale. The Bank hurriedly sold the property to a third party (respondent No.2, herein) at throw away price of Rs. 11.77 crores. The OTS proposal submitted by the petitioner was rejected. Suffice it to state that the petitioner filed an application under Section 17 of the SARFAESI Act challenging the sale of the property by the respondent No.1 Bank. The said SA No.120/2015 was dismissed by the DRT-I, Chandigarh on October 20, 2016, against the said order the petitioner had filed an appeal under Section 20 of the SARFAESI Act along with an application, M.A. 630/2016 for waiver of the condition of pre-deposit.

4. It is noted by the DRAT that the property in dispute already stands auctioned in favour of the respondent No.2 for a sum of Rs. 11.77 crores whereas the amount shown in the auction notice to be recoverable from the petitioner was Rs. 6,84,28,157.56/-. The case of the petitioner before the DRAT for waiver of pre-deposit was that since the property in dispute has already been sold and the bank has recovered Rs. 11.77 crores from the respondent No.2, the auction purchaser, there remains no requirement of pre-deposit at all and in fact the bank is liable to pay interest on the excess amount received and withheld by it. In other words, the auction money recovered by the bank is liable to be considered towards the compliance of the pre-deposit.

5. Reliance was placed on the judgment of this Court in W.P. (C) No. 13042/2009 decided on November 10, 2009 and two decisions of Punjab and Haryana High Court in CWP No. 9131/2012 and 10957/2012 decided on February 19, 2013. Some judgments of the Allahabad High Court were also relied upon by the learned counsel for the petitioner on the aspect of adjustment of sale proceeds of mortgaged property while calculating the amount of pre-deposit. There was one order by consent passed by the Supreme Court on February 25, 2011 in Civil Appeal No.2074-2078/2011 which was also relied upon.

6. The respondent No.1 i.e. bank and the auction purchaser have opposed the application for waiver of pre-deposit. The DRAT observed that the Tribunal has already taken a view, relying upon a judgment of the Supreme Court in the case of Indian Bank vs. Blue Jaggers Estates Ltd. reported in 2010(3) Banker's Journal 9(SC), that auction money received by a bank from the successful auction purchaser of the mortgaged property cannot be considered towards compliance of the mandatory condition of pre-deposit when the defaulting borrower is not accepting the auction of his property and is challenging its legality in legal proceedings before the DRT. According to the DRAT, the pre-deposit has to be

made with the DRAT and that pre-deposit has to be returned back to the depositor only irrespective of the fact whether the appeal is allowed or rejected. When no deposit has been made with the DRAT then nothing would be there to be returned to the appealing borrower and the borrower would have succeeded in getting entertained his appeal and disposal of appeal on merits also without making a pre-deposit. It was held that in case the borrower challenges the auction sale in legal proceedings the sale remains in a nebulous stage and the sale will get finality / confirmed only when the legal proceedings come to an end. In other words, there is no confirmation of the sale of its property so far. The DRAT was of the view the aforesaid aspects were not considered in the judgments relied upon on behalf of the petitioner.

7. The DRAT relied upon the judgment of the Bombay High Court in W.P. No. 1315/2014 dated November 31, 2016, Eskays Construction Pvt. Ltd. vs. Sona Papers & Industries Ltd., wherein it was held that the auction money cannot be considered while calculating the amount of pre-deposit, when the auction sale itself is under challenge at the instance of the borrower.

8. That apart, the DRAT rejected the plea made on behalf of the petitioner that excess amount recovered by the Bank by sale of the property in dispute along with interest thereon which the Bank is liable to pay on that amount because of it having kept the same illegally, at least is liable to be adjusted while calculating the amount of pre-deposit. The Tribunal also held that it is not a good case where it should exercise the discretion in reducing the amount of pre-deposit even by 25%.

9. Mr. Mehra, learned Senior Counsel appearing for the petitioner submits that the DRAT fell in error in rejecting the MA filed by the petitioner for waiver of pre-deposit as according to him, the issue is no more res integra as the Supreme Court in Civil Appeal No. 2074-2078/2011 in Persn Medicinal Plants Pvt. Ltd. & Anr. vs. Indian Bank & Ors.(supra) decided on February 25, 2011, dealing with the question of pre-deposit under Section 18 of the SARFAESI Act allowed Indian Bank to appropriate the amount which is already with the Bank, as a condition precedent for hearing of the appeal filed by the appellant therein.

10. That apart, he has relied upon the following judgments on the propositions in support of his submissions:

S. No.

Case Law

Proposition

1.

Poonam Manshani vs. J&K Bank Ltd. & Anr. W.P. (C) 13042/2009 decided on November 10, 2005

Amount already recovered by the Bank of the Debt Due, the condition of

predeposit will not arise

2.

Mukerian Papers Ltd. & Anr. vs. DRAT, CWP No.9131/2012 decided on May 24, 2012

Amount deposited post 13(2) notice should be adjusted at the time of deciding the issue of predeposit under Section 18 of the SARFAESI Act, 2002

3..

S.R. Forging Limited vs. UCO Bank CWP No.10957/2012 decided on February 19, 2013

No requirement of predeposit when sufficient amount i.e. more than 50% of the amount due is recovered by the Bank in public auction

4.

Gopal Ji Gupta vs. Debts Recovery Appellate Tribunal, Allahabad & Others. AIR 2013 AII 175 decided on July 09, 2013

As the amount recovered is through auction is more than 50%, the purpose of the proviso stands satisfied

5.

Allahabad Bank vs. DRAT, WP. No.2941/2012 decided on January 20, 2014

No requirement of predeposit in the case where the sale is confirmed and the auction purchaser has deposited the entire outstanding amount

6.

Tride International vs. Bank of Baroda II (2016) BC 41 (DRAT)

No requirement of predeposit once the property taken as security has been sold and amount realized therefrom credited in the loan account of the petitioner. It would be highly unfair and unreasonable not to take this amount for the purpose of pre-deposit

7.

M/s Akash Ganga Airlines Ltd. vs. Debt Recovery Appellate Tribunal, (2016) 1 BC 306

In a given situation where an amount more than the amount due from the borrower had already been realized by auction sale, insistence on the deposit referred to under proviso to section 18 would be contrary to the legislative intent as also the express provision as is evident from the use of the words "50% of the amount of debt due from him"

8.

Smt. Sarla Devi Mishra vs. Debts Recovery Appellate Tribunal, Allahabad in WP No.45995/2015 decided on August 20, 2015

Sum recovered by the Bank is more than 100% of the debt claimed from the petitioner, therefore, the petitioner is not required to deposit any sum under section 18 of the Act to maintain the appeal

9.

Nathi Lal Rathore vs. DRAT, Allahabad, WP No. 32026/2016 decided on October 05, 2016

Amount deposited post 13(2) notice should be adjusted at the time of deciding the issue of predeposit under Section 18 of the SARFAESI Act, 2002.

11. According to him, in view of the position of law above, the petitioner is not required to make any pre-deposit.

12. On the other hand, Mr. Sanjeev Sagar, learned counsel appearing for the respondent No.2 has vehemently opposed the writ petition by stating that the DRAT was justified in rejecting the M.A. filed by the petitioner for waiver of pre-deposit. According to him, the Supreme Court in the case of Axis Bank vs. SBS Organics Private Limited and Another (2016) 12 SCC 18 has in clear terms stated by referring to Section 18 of the SARFAESI Act that for the Tribunal to entertain the appeal, the aggrieved person has to make a deposit of 50% of the debt due from him as claimed by the secured creditor or determined by the DRT which ever is less.

13. In other words, according to him, in view of the mandate of Section 18, the petitioner is required to make the pre-deposit. Mr. Rajinder Wali, learned counsel appearing for the Bank also relied upon the judgment of the Bombay High Court reported as I (2017) BC 461 (DB) Bom.) in Eskays Construction Pvt. Ltd. vs. Soma Papers and Industries Ltd. & Anr. to contend that if the borrower is allowed to adjust / given credit for the sale proceeds received from the sale of the subject property in the application for waiver of pre-deposit and at the very same time allowed to challenge the sale of the subject property then the same would defeat the very purpose for which Section 18 was enacted, which is to curb unnecessary and frivolous litigation. He seeks the dismissal of the writ petition.

14. Having heard the learned counsel for the parties, the admitted facts are that the property in question has been auctioned by the Bank and purchased by the respondent No.2 for an amount of Rs. 11.77 crores, whereas the notice under Section 13(2) to be recovered from the borrower / petitioner was Rs. 9,25,11,879.56 (page 507 of the paper book). Pursuant to the sale, as seen from the reply filed by the respondent No.1 Bank (at page 507 of the paper book), the sale certificate has been issued in favour of the respondent No.2, and even a sale deed has been executed in favour of respondent No.2. Physical possession of the property has also been given to the said respondent. The petitioner has challenged the auction sale. The ground is also that the amount for which the

property has been sold is very less. The ground for seeking waiver of pre-deposit is that the Bank has recovered the debt due and in fact excess money is lying with it and the amount received / recovered can be considered towards the requirement of pre-deposit envisaged under Section 18 of the SARFAESI Act. The issue that needs to be decided in the facts of this case is whether for entertaining the appeal by the Appellate Tribunal, the petitioner is required to deposit 50% of the amount of debt due from the petitioner as claimed by the secured creditors or determined by the Recovery Tribunal, in terms of second proviso to Section 18 of the SARFAESI Act.

15. To answer the question, it is necessary to reproduce hereunder Section 18 of the SARFAESI Act:

"18. Appeal to Appellate Tribunal.-(1) Any person aggrieved, by any order made by the Debts Recovery Tribunal [under section 17, may prefer an appeal along with such fee, as may be prescribed] 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 borrow has deposited with the Appellate Tribunal fifty per cent. 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."

16. On a perusal of the second proviso to Section 18, it is clear that the same pre-supposes two eventualities; (i) that debt is due from the petitioner as claimed by the respondent No.1 Bank or; (ii) debt has been determined by the Debt Recovery Tribunal, and the same is liable to be paid / recovered on the date when the appeal is entertained by the DRAT. In either of the eventualities 50% of the amount of debt need to be made as pre-deposit. We may state here that the Supreme Court in *Narayan Chandra Ghosh vs. UCO Bank and Others* reported as (2011) 4 SCC 548, has inter alia held that the requirement of pre-deposit is a mandatory provision and need to be complied with. There cannot be any dispute on the said proposition and the same is binding upon this Court. In the said case, the argument of the petitioner therein was, that the debt has not been determined by the DRT. The Supreme Court rejected the plea by holding, if the debt has not been determined by the DRT, the borrower is liable to pay 50% of

the debt due from him as claimed by the secured creditors. The facts being at variance, as there is no amount due from the borrower i.e. petitioner herein when more than due amount has already been realized by the Bank the judgment has no applicability.

17. It is a conceded case of the respondents that none of the eventualities exist as the amount due to the Bank has been recovered. The application has been opposed by the respondents and decided by the DRAT primarily on an apprehension that since, the petitioner has challenged the auction, the same may be set aside. In other words, the sale remains in a nebulous stage and the sale will achieve finality / confirmed only when the legal proceedings come to an end.

18. Surely such an apprehension as noted above, cannot govern the interpretation of Section 18 of the SARFAESI Act, 2002. The Section is clear and contemplates a situation stated in the earlier paragraph and the same has to be interpreted in the manner it exist, by giving a plain meaning.

19. We are conscious of the fact that the amount of pre-deposit has to be made in DRAT and not in the Bank. But still when no amount is due from the petitioner whether the pre-deposit can still be insisted upon. The argument can be made that the condition of pre-deposit is to discourage frivolous litigation which if permitted, would defeat the very purpose of the enactment of early settlement of the disputes. The argument is appealing but the same shall not hold good in the facts of the case with which we are concerned. Otherwise, the provision of appeal for persons / entities like the petitioner, shall become otiose / illusory. In fact, the insistence of pre-deposit shall be inequitable in the facts. Nothing precludes DRAT while deciding the appeal, if it finds that the appeal filed by the petitioner is frivolous, to impose such cost as deemed fit, to be recovered from the excess amount already lying deposited with the Bank.

20. Further, the Supreme Court in Axis Bank (supra), has clearly held that pre-deposit is not a secured asset and on the disposal of the appeal either on merits or on withdrawal or on being rendered infructuous in case the appellant makes a prayer for refund of the pre-deposit, the same has to be allowed. This conclusion of the Supreme Court also signifies that even if the auction is set aside, and the Bank has to return the money to the auction purchaser, the pre-deposit cannot be appropriated by the Bank. It shall go to the borrower.

21. The judgment of Eskays Construction Pvt. Ltd. (supra) as relied upon by Mr. Rajinder Wali, and more particularly para 15, to contend that on a similar issue the Bombay High Court has inter alia held that the pre-deposit is mandatory except that the Tribunal has a discretion to reduce the pre-deposit to 25%. We find that in the said judgment the High Court was of the view that the provision of pre-deposit is to secure the debt due from the borrower / guarantor. This conclusion of the High Court is at variance with the ratio of the judgment of the Supreme Court in Axis Bank case (supra).

22. The DRAT in the impugned order has referred to the judgment of the Supreme Court in Indian Bank vs. Blue Jaggers Estates Ltd. reported in 2010(3) Banker's Journal 9(SC), wherein a similar issue arose before the Supreme Court. In the said case, it has come on the record that even though, the mortgaged property was put to auction, the appellant i.e. Indian Bank had not been able to realise the amount because the sale was yet to be confirmed by the Appellate Tribunal. In fact, the Supreme Court rejected the contention raised on behalf of the respondent i.e. Blue Jaggers Estate Ltd. by stating that the sale was yet to be confirmed by the Appellate Tribunal as per the directions of the High Court.

23. In other words, in the said case, the sale had taken place, but the same had not been confirmed. In such a situation, it can be said that the sale remains in a nebulous stage whereas in the case in hand, as noted above, after the sale has taken place, the sale deed has been executed in favour of the respondent No.2 purchaser and the possession of the property has also been handed over. To that extent the judgment in the case of Indian Bank vs. Blue Jaggers Estates Ltd. (supra) is distinguishable.

24. Mr. Mehra in support of his submission has relied upon the judgment of the Allahabad High Court in the case of M/s Akash Ganga Airlines Ltd. vs. Debt Recovery Appellate Tribunal, Allahabad and Others 2015 SCC OnLine All 8084, wherein the facts are identical to the facts of this case and the Court by noting the position of law as referred to above has allowed the petition and directed the DRAT to reconsider the application of waiver of the petitioner therein by setting aside the earlier order of the DRAT insisting on the pre-deposit. We concur with the view taken by the Allahabad High Court and a similar view as also taken by the Division Bench of Punjab and Haryana High Court in S.R. Forging Limited vs. UCO Bank 2013 SCC OnLine P&H 3902, wherein it was held as under:

"Challenge in the present petition is to the orders passed by the Debts Recovery Appellate Tribunal Delhi (for short the 'Tribunal') dated 30.4.2012 (Annexure P-14) and dated 13.7.2012 (Annexure P-15), whereby the appeal filed by the petitioners-herein was not entertained for failure to comply with the requirement of law i.e. the deposit of 50% of the due amount before entertainment of the appeal.

Challenge in the appeal was to the sale proceedings whereby a bid of Rs. 17.75 crores as against the reserved price of Rs. 17.17 crores was received in respect of the property of the petitioners herein. It is the case of the petitioners that the total amount due and payable by the petitioners was Rs. 18.24 crores. Once, the substantial amount has been received by the Bank in pursuance of the auction conducted, the requirement of pre-deposit in terms of the proviso to Section 18 of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short the 'Act') stands satisfied as the substantial loan amount has already been received by the Bank. The condition of pre-deposit in these circumstances, over and above the sale price received by the Bank, will in fact lead to undue enrichment in the hands of the Bank when substantial

amount to the loan amount stands liquidated by virtue of the auction.

At this stage, we find that out of total due amount of Rs. 18.24 crores, Rs. 17.75 crores have been received by the Bank in a public auction. Therefore, the deposit of 50% of the amount due prior to sale from the petitioner would be wholly unjustified. The proviso to Section 18 of the Act restricts the entertainment of the appeal unless the borrower deposits 50% of the amount of the debt claimed by the secured creditors. Once Rs. 17.75 crores have been received by the secured creditors, that is more than 50% of the debt due from the petitioners, the purpose of the proviso stands satisfied.

Consequently, we set aside the orders dated 30.4.2012 and 13.7.2012 passed by the Tribunal and direct the Tribunal to decide the appeal on merits.

Disposed of."

25. We also note that the DRAT has placed reliance on a judgment of this Court in M/s SNF Alloys Pvt. Ltd. and Anr. vs. Punjab and Sind Bank in W.P. (C) 9503/2018, decided on September 11, 2018. The said judgment has no applicability in the facts of this case. It is seen that in the said judgment the amount of Rs. 5 crore (after adjustment, Rs. 85 lakhs), was held due and payable by the DRT in its judgment deciding the Original Application.

26. The question arose whether the amount of Rs. 70.50 lakhs received as proceeds of the sale of the mortgaged asset needs to be adjusted. The petitioner therein relied upon the order of the Division Bench of this Court in W.P. (C) 11312/2017 dated December 19, 2017. This Court held that the order dated December 19, 2017 nowhere states that the amount of Rs. 70.50 lakhs be treated as pre-deposit for the purpose of hearing of the appeal. Even otherwise, it is a case where in terms of the judgment of the DRAT, the money was due and payable to the Bank. The judgment is distinguishable.

27. Even though, Mr. Mehra has relied upon some other judgments in support of his contention, we need not go into the same, in view of our aforesaid conclusion. Accordingly, we set aside the order dated October 18, 2018 and direct the DRAT to hear the appeal on merits in accordance with law.

28. The writ petition stands disposed of.

CM No. 47696/2018

Dismissed as infructuous.