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(2010) 04 DEL CK 0122

In the Delhi High Court

Case No : Writ Petition (C) 13143 of 2009 and CM No. 5051 of 2010

Swadeshi Cement Limited APPELLANT

Vs

Asset Care Enterprises Limited RESPONDENT

Date of Decision : 30-04-2010

Acts Referred:

Constitution of India, 1950 — Article 226, 227
Foreign Trade (Development and Regulation) Act, 1992 — Section 15(1)
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 13(2), 13(4), 17, 18, 18(1)
Sick Industrial Companies (Special Provisions) Act, 1985 — Section 15(1)

Citation : (2010) 04 DEL CK 0122

Hon'ble Judges : Vikramajit Sen, J;A.K. Pathak, J

Bench : Division Bench

Advocate : Arvind K. Nigam, Arun Kathpalia and Vivek Malik, for the Appellant; Dushyant Dave Amarjit Singh, S.L. Gupta, Ram Gupta, Gaurav Dua and Shweta, for the Respondent

Final Decision : Dismissed

Judgement

A.K. Pathak, J.—Petitioner has filed this Petition under Article 226 and 227 of the Constitution of India praying therein that the Order dated 12th October, 2009 passed by the Debts Recovery Appellate Tribunal, Delhi (hereinafter referred to as "Appellate Tribunal") in Appeal No. 238/2009 be quashed.

2. It appears that a sum of Rs. 5284.08 lakhs was due and payable by the Appellant to Respondent No. 2 as on 30th September, 2007. Respondent No. 1 is assignee of Respondent No. 2. A notice u/s 13(2) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as "SARFAESI Act") was issued by Respondent No. 2. to the Appellant on 5th June, 2008 demanding the outstanding dues, as aforesaid; possession notice u/s 13(4) of SARFAESI Act was also issued. Appellant challenged these notices before the Debts Recovery Tribunal (hereinafter referred to as "DRT"). Said proceedings are still pending. An interim

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Application being I.A. No. 396/2009 was filed, inter alia, praying therein that a Receiver be appointed to prepare the list of assets including plant and machinery and to take possession thereof and to thereafter hand over the same to the Appellant. Application was disposed of by the DRT on 11th September, 2009 whereby Appellant was directed to deposit an amount of Rs. 10 crores within ten days and another sum of Rs. 10 crores within next ten days and subject to such deposits, Respondent No. 1 was directed not to proceed with the property in question.

3. Instead of depositing these amounts Appellant preferred an Appeal before Appellate Tribunal challenging the Order dated 11th September, 2009 passed by the DRT. An Application was filed for waiving the requirement of pre-deposit as envisaged under Sub-Section (1) of Section 18 of SARFAESI Act. Appellate Tribunal held that Appeal cannot be entertained without Appellant depositing 25% of the debt as claimed by the secured creditor i.e. 25% of Rs. 52.84 crores which worked out to be Rs. 13.25 crores. Though the Application seeking waiver of pre-deposit was dismissed by the Order impugned before us but Appellate Tribunal ventured to touch upon the merits of the case as well. Appeal was dismissed.

4. Section 18 of the SARFAESI Act reads as under:

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 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 percent 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.

5. Bare reading of aforesaid provision clearly shows that the Appeal cannot be entertained unless borrower deposits 50% of the amount of debt due from him. However, Appellate Tribunal is vested with the power to reduce this condition of deposit of 50% but is statutorily prohibited from venturing to less than 25% of the debt. The condition of pre-deposit is mandatory. Language employed in the

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proviso to Section 18(1) of SARFESI Act mandates that Appeal shall not be entertained unless 25% of the amount of debt due is deposited with the Appellate Tribunal. In this case Appellate Tribunal did reduce the condition of deposit to the extent of 25% but this amount had not been deposited. Thus, we are of the view that Appeal itself could not be entertained. A Division Bench of this Court has upheld this Constitution validity of the second proviso to Section 18(1) of the Act in R.V. Saxena Vs. Union of India (UOI) and Others, Speaking for the Bench, Hon''ble Mr. Justice Markandeya Katju observed as under:

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 statues, there are such similar provisions.

6. We do not find much force in the contention of learned senior Counsel for the Appellant that Appellant being a "BIFR Unit" complete dispensation of pre-deposit has to be made. Judgment titled as Parekh Platinum Ltd. v. Union of India 2008 (221) ELT 485 (SC), reliance whereupon has been placed by the learned senior Counsel for the Appellant, is of no help in the present case. On SARFESI Act coming into force Section 15(1) of the Sick Industrial Companies (Special Provision) Act, 1985 (hereinafter referred to as "SICA") was amended and the same reads as under:

15. Reference to Board - (1) When an industrial company has become a sick industrial company, the Board of Directors of the company, shall, within sixty days from the date of finalisation of the duly audited accounts of the company for the financial year as at the end of which the company has become a sick industrial company, make a reference to the Board for determination of the measures which shall be adopted with respect to the company:

Provided that if the Board of Directors had sufficient reasons even before such finalisation to form the opinion that the company had become a sick industrial company, the Board of Directors shall, within sixty days after it has formed such opinion, make a reference to the Board for the determination of the measures which shall be adopted with respect to the company:

Provided further that no reference shall be made to the Board for Industrial and Financial Reconstruction after the commencement of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, where financial assets have been acquired by any securitization company

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or reconstruction company under Sub-section (1) of Section 5 of that Act:

Provided also that on or after the commencement of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, where a reference is pending before the Board for Industrial and Financial Reconstruction, such reference shall abate if the secured creditors, representing not less than three-fourth in value of the amount outstanding against financial assistance disbursed to the borrower of such secured creditors, have taken any measures to recover their secured debt under Sub-section (4) of Section 13 of that Act.

7. In view of amendment in Section 15(1) of the SICA, on SARFESI Act coming into force, AAIFR held that reference filed under SICA by M/s Swadeshi Cement Ltd. (Appellant) had abated in view of proviso to Section 15(1) of SICA in view of the action taken by ACE (Respondent No. 1) u/s 13(4) of the SARFAESI Act on 23rd October, 2008. In this scenario, Appellant had shed its character of BIFR unit.

8. During the course of arguments, we enquired from the learned senior Counsel for the Appellant whether Appellant was willing to deposit 25% of the debt so that matter is considered by the Tribunal afresh on deposit so being made. However, learned senior Counsel responded by saying that Appellant is not inclined to deposit even 25% of the debt amount.

9. In view of above discussions, we find the writ petition devoid of merits. Dismissed.

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