(2010) 11 BOM CK 0049

In the Bombay High Court

Case No : Writ Petition No. 8915 of 2010

Vinay Container Services Pvt. Ltd., Vilas J. Khaire and Mrs. Aruna Vilas Khaire — APPELLANT

Vs

Axis Bank — RESPONDENT

Date of Decision : 16-11-2010

Acts Referred:
Constitution of India, 1950 — Article 226
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 13, 13(10), 13(2), 17, 18(1)

Citation : AIR 2011 Bom 37 : (2011) 2 ALLMR 893 : (2011) 4 BC 191 : (2011) 5 BomCR 322 : (2011) 100 CLA 510 : (2011) 1 MhLj 882

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

Bench : Division Bench

Advocate : Rafeeq Peermohideen and Vijaya Mistry, for the Appellant; Dhirendra K. Sina and Rahul Totala, instructed by y, Vidhi Partners, for the Respondent

Final Decision : Dismissed

Judgement

D.Y. Chandrachud, J.—These proceedings under Article 226 of the Constitution of India arise out of an order passed by the Debts Recovery Appellate Tribunal at Mumbai on 29 October 2010. By the order of the Appellate Tribunal, the Petitioners have been directed to comply with the condition of pre-deposit u/s 18(1) of The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, ("the Act") in an Appeal arising out of an interlocutory direction of the Debts Recovery Tribunal. The main issue which has been canvassed before the Court is whether the requirement of pre-deposit u/s 18(1) of the Act would be attracted where the order that is challenged in an Appeal before the Appellate Tribunal is not a final order u/s 17, but an interlocutory order.

2. The facts that are necessary to appreciate the background of the petition are that the first Petitioner had availed of credit facilities from the Respondent in 2008. The second and the third Petitioners are guarantors and had created

mortgages in favour of the Bank. The accounts had become irregular and were treated as nonperforming assets in the books of the Bank as on 31 December 2009. The Respondent invoked the provisions of Section 13(2) of the Act while issuing a notice on 12 March 2010. Symbolic possession of the secured assets was taken over by the Bank on 18 August 2010 by invoking the provisions of Section 13(4). Aggrieved by the action of the Bank, the Petitioners filed an Appeal u/s 17 before the Presiding Officer of the Debts Recovery Tribunal at Mumbai on 17 September 2010. An Application for an interim relief was moved before the Tribunal. By its order dated 1 October 2010, the Tribunal directed the Bank not to take physical possession of the secured assets until the next date of hearing, but made its order conditional on a deposit of the sum of Rs. 1.78 crores by the Petitioners within four weeks. The Tribunal observed that the claim of the Bank was in excess of Rs. 17.18 crores with interest. Hence, while an order protecting the possession of the Petitioners was warranted, this was made subject to a condition of deposit.

3. The Petitioners have questioned the correctness of the order of the Tribunal in an Appeal before the Appellate Tribunal. By its order impugned in these proceedings, the Tribunal has held that the provisions of Section 18 have to be complied with even in the case of an interlocutory order. Accordingly, the first Petitioner has been directed to deposit twenty five per cent of the total claim of the Bank as a secured creditor in the amount of Rs. 4,29,50,000/- of which an amount of Rs. 1.50 crores was to be deposited by 16 November 2010 and the balance by 16 December 2010.

4. Counsel appearing for the Petitioners submits that under sub-section (1) of Section 18 of the Act, any person aggrieved, by any order made by the Tribunal u/s 17 is entitled to prefer an Appeal before the Appellate Tribunal. Under the second proviso, an Appeal cannot be entertained until the borrower has deposited with the Appellate Tribunal fifty per cent of the amount of the debt due, as claimed by the secured creditors or determined by the Debts Recovery Tribunal, whichever is less. The Appellate Tribunal is, however, empowered, for reasons to be recorded in writing, to reduce the amount to not less than twenty-five per cent of the debt referred to in the second proviso. The submission which has been urged on behalf of the Petitioner is that the requirement of pre-deposit before the Appellate Tribunal cannot apply to an interlocutory order passed by the Tribunal. The submission before the Court is that an order u/s 17, is an order which is passed finally by the Tribunal, after examining the facts and circumstances of the case and the evidence produced by the parties on the question as to whether the measures that were adopted by the secured creditors were in accordance with the provisions of the Act. An interim order, it has been submitted, is an order which is referable to Section 18(2) and not to Section 17 of the Act and hence the requirement of pre-deposit would not be attracted. In this regard, reliance was sought to be placed on the view taken in an Order dated 22 December 2006 passed by the Debts Recovery Appellate Tribunal at Mumbai in Appeal No. 493/2006 (C and M. Farming Limited v. Rupee Cooperative

Bank Ltd.).

5. On the other hand, it has been submitted on behalf of the Respondents that (i) the Debts Recovery Tribunal, while passing an interim order has an undoubted jurisdiction to pass a conditional order which would include a condition for deposit of an amount which the Tribunal considers to be reasonable and proper; (ii) the provisions of Section 18 of the Act apply where a person is aggrieved by "any order made by the Debts Recovery Tribunal" u/s 17 and any order would comprehend both an interim order as well as a final order; (iii) In Mardia Chemicals Ltd. Vs. Union of India (UOI) and Others Etc. Etc., the Supreme Court expressly recognised that the Tribunal in exercise of its ancillary powers would have the jurisdiction to pass any stay or interim order subject to a condition as it may deem fit and proper to impose. The passing of an interim order is ancillary to the power conferred upon the Tribunal by Section 17. Hence, an Appeal which arises out of an interlocutory order of the Tribunal u/s 17 must be governed by the requirement of pre-deposit u/s 18 of the Act.

6. While considering the merits of the rival contentions, it would, at the outset, be necessary to define and elucidate the scope of some of the relevant provisions of the Act. Section 13 contemplates the enforcement of a security interest created in favour of a secured creditor, without the intervention of a Court or a Tribunal, by the secured creditor in accordance with the provisions of the Act. Under sub-section (2), the secured creditor is obligated to require a borrower, by furnishing a notice in writing, to discharge his liability to the secured creditor within sixty days from the date of notice, where any borrower, who is under a liability to a secured creditor, under a security agreement, makes any default in repayment of the secured debt or any installment thereof, and his account in respect of such debt is classified by the secured creditor as a nonperforming asset. u/s (3A), as inserted by Amending Act 30 of 2004, the borrower is empowered upon receipt of a notice under Sub-section (2) to make a representation or to raise an objection. The secured creditor is under a mandate by law to consider the representation or objection as the case may be and if it is not considered to be acceptable, to communicate the reasons for non-acceptance. The communication of these reasons does not by itself, confer a right upon the borrower to prefer an application u/s 17. Under Sub-section (4) of Section 13, the secured creditor is entitled to take recourse to one of the measures stipulated therein to recover the secured debt. Among them is a right to take possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset.

7. Section 17 provides in Sub-section (1) that any person, including a borrower, aggrieved by any of the measures referred to in Sub-section (4) of Section 13, taken by the secured creditor may make an application to the Debts Recovery Tribunal. Under Sub-section (2), the jurisdiction of the Debts Recovery Tribunal is to consider, whether any of the measures referred to in Sub-section (4) of Section 13 taken by the secured creditor for enforcement of security are in

accordance with the provisions of the Act and the rules. The jurisdiction of the Tribunal, in an appeal u/s 17, therefore, is to determine as to whether the measures that are taken by the secured creditor conform to the Act and the rules. Under sub-section (3) of Section 17, if the Tribunal comes to the conclusion, after examining the facts and circumstances of the case and the evidence produced by the parties, that the measures taken by the secured creditors u/s 13(4) were not in accordance with the provisions of the Act and the rules, the Tribunal may require restoration of the business to the borrower or of possession of the secured assets to the borrower. The Tribunal is empowered to pass such order as it may consider appropriate and necessary in relation to the recourse taken by the secured creditor under Sub-section (4) of Section 13.

8. Section 18 provides a right of appeal to a person aggrieved by any order made by the Debts Recovery Tribunal u/s 17. The right of appeal u/s 18 arises in respect of "any order made by the Debts Recovery Tribunal" albeit u/s 17. The section refers to any order and those words are comprehensive enough to include a final as well as an interlocutory order. There is no reason or justification for this Court to exclude an interlocutory order from the purview of Sub-section (1) of Section 18. The plain language of Section 18 must be interpreted and given effect to. A restriction not envisaged cannot be read into Section 18. The Court cannot rewrite legislation. An order u/s 17 of the Act undoubtedly includes an order finally disposing of the proceeding, on a proceeding questioning the measures taken by the secured creditor under Sub-section (4) of Section 13. But, equally, the Tribunal while exercising its power in an Appeal u/s 17 has the jurisdiction to pass interlocutory orders which are in aid of and ancillary to the exercise of the jurisdiction. That the Tribunal''s jurisdiction u/s 17 encompasses the passing of an interlocutory order as well is no longer res integra, but is now well settled by the judgment of the Supreme Court in Mardia Chemicals Ltd. Vs. Union of India (UOI) and Others Etc. Etc., While summarizing its conclusion, the Supreme Court observed as follows:

That the Tribunal in exercise of its ancillary powers shall have jurisdiction to pass any stay/interim order subject to the condition as it may deem fit and proper to impose.

9. The second proviso to Section 18 postulates that no appeal shall be entertained unless the borrower 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. The Appellate Tribunal has the power to reduce the amount, for reasons to be recorded in writing, to not less than twenty-five per cent of the debt referred to in the second proviso. Under the second proviso, the amount of fifty per cent which is required to be deposited by the borrower, is computed either with reference to (i) the amount of debt due from him as claimed by the secured creditors or (ii) the amount of debt due from him as determined by the Debts Recovery Tribunal. The lesser of the two amounts has to be deposited as a condition precedent to the

appeal being entertained. In a situation where the amount of the debt is yet to be determined by the Debts Recovery Tribunal, obviously, the second limb can have no application. As already noted earlier, the scope of an appeal u/s 17, where a measure has been adopted by the secured creditor u/s 13(4) is the determination as to whether the measure has been adopted in accordance with the provisions of the Act and the rules. Where the amount of the debt is yet to be determined by the Tribunal and an appeal is preferred before the Appellate Tribunal by the borrower, the condition of pre-deposit would continue to apply by virtue of Sub-section (1) of Section 18. In such a situation, the borrower would be liable to deposit fifty per cent of the amount of debt due from him inasmuch as there is no determination at that stage by the Tribunal of the amount of the debt.

10. The view which we are inclined to take is consistent with the judgments of the High Courts of Delhi and Madras to which a reference would briefly now be made.

11. In Indian Bank v. Hamosons Apparels Private Limited (WP No. 3958/2007 and connected matters), a Division Bench of the Madras High Court construed the provisions of Section 18(1). The Division Bench rejected the submission that an order of pre-deposit cannot be passed where an appeal is preferred against an interim order of the Tribunal or against an order of the Tribunal declaring interim relief. The submission before the Madras High Court was that an order of pre-deposit cannot be passed for the reason that there is no determination of the debt due. The Division Bench has observed as follows:

In a case where appeal u/s 18 is preferred against interim order or for non-grant of interim order, the aggrieved persons, while praying for interim injunction to stall the proceeding, cannot allege that no determination has been made by DRT with regard to the claim. It cannot blow hot and cold by moving in appeal u/s 18 against interim order or non-grant of interim order, for the purpose of getting an appropriate interim order in appeal u/s 18 and allege non-determination of claim by Tribunal, which at best can be determined at the time of final hearing of the case, that too in a case where if any dispute is raised by party u/s 19 of DRT Act, 1993 or bank files an application u/s 13(10) of NPA Act. Therefore, the effect and correct meaning to give to the sentence "the amount of debt due from him as claimed by secured creditor or determined by Debts Recovery Tribunal, whichever is less" as mentioned under 2nd proviso to Section 18(1), a harmonious reading has to be made, which may fit in all situations. Therefore, we hold that the 2nd proviso to Section 18(1) stipulates pre-deposit of 50% due as claimed by the secured creditor or determined by the Debts Recovery Tribunal whichever is less, and in absence of a determination by; the Tribunal, the person has to deposit 50% of the amount claimed by the secured creditor, subject to waiver under 3rd proviso to Section 18(1).

12. A Division Bench of the Delhi High Court considered a similar question in M/s. Swadeshi Cement Limited v. Asset Care. Enterprises Limited (WP (Civil) No.

13143/2009 decided on 30.04.2010). In the case before the Delhi High Court an amount of Rs. 52.84 crores was payable by the borrower. Following a notice u/s 13(2) a possession notice was issued u/s 13(4) .On an interim application, the Debts Recovery Tribunal passed a conditional order directing the borrower to deposit a certain amount subject to which, the secured creditor was directed not to proceed with the disposal of the property. The borrower filed an appeal before the Appellate Tribunal, which directed the borrower to deposit twenty-five per cent of the debt claimed by the secured creditor. The judgment of the Delhi High Court holds that the requirement of pre deposit would be attracted where the borrower had preferred an appeal before the Appellate Tribunal against an interlocutory direction of the Tribunal. The Delhi High Court observed as under:

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 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.

13. For the aforesaid reasons, we hold that the requirement of pre-deposit under Sub-section (1) of Section 18 of the Act would also apply where an appeal is filed before the Appellate Tribunal against an interlocutory order passed by the Debts Recovery Tribunal u/s 17 of the Act. The power of the Tribunal to pass an interlocutory order is ancillary to its jurisdiction u/s 17 in view of the judgment of the Supreme Court in Mardia Chemicals Limited (supra). The provisions of Section 18(2) cannot be so interpreted to mean that an interlocutory order passed by the Tribunal is not referable to the provisions of Section 17. Indeed, it is in the context of proceedings u/s 17 that the Tribunal assumes jurisdiction and it is in aid of that jurisdiction that the Tribunal can pass an interlocutory order. This position is consistent with the judgment of a Division Bench of this Court in AIR 2009 138 (Bom.) .

14. Hence, we are of the view that there was no infirmity in the order passed by the Appellate Tribunal in the facts and circumstances of the present case. However, having regard to the interests of justice, we extend the time for making the deposit as directed by the Tribunal by a further period of four weeks from today on a request made to the Court on behalf of the Petitioners.

15. Subject to what is observed above, the petition is dismissed. There shall be no order as to costs.

