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Calcutta High Court (Appellete Side)

Case No: W.P.A. No. 22314 Of 2023

Archana Nirman Pvt. Ltd. And Another		APPELLANT
	Vs	
IIFL Home Finance Limited Corporate Office And Others		RESPONDENT

Date of Decision: Jan. 15, 2024

Acts Referred:

- Code Of Civil Procedure, 1908 - Order 41 Rule 5
- Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 - Section 13(2), 17, 17(2), 18, 18(1)

Hon'ble Judges: Sabyasachi Bhattacharyya, J

Bench: Single Bench

Advocate: Amarnath Sen, Malay Dhar, Biswajit Sarkar, Subhangi Panigrahi, Soni Ojha, Sambrita B. Chatterjee, Sonia Nandy

Final Decision: Dismissed

Judgement

Sabyasachi Bhattacharyya, J

1. The short question which has arisen for consideration is whether an appellant under Section 18 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as, “the SARFAESI Act”) is mandatorily required to deposit the pre-requisite of 50 per cent (reducible up to 25 per cent) of payable debt even when the challenge is against an interlocutory order not touching the merits of the case and not deciding the rights of parties.

2. The writ petitioners are borrowers against whom SARFAESI action has been taken. In the said proceeding, a subsequent purchaser from the auction purchaser was impleaded, against which order the petitioners sought to prefer an appeal. The Appellate Tribunal directed the petitioners to deposit the pre-requisite 50 per cent and fixed a time-limit for the same. Having not done so, the appellants” appeal was

dismissed on such ground.

3. Learned counsel appearing for the petitioners argues that the provision of making prior deposit would be rendered absurd and oppressive in the event an aggrieved person has to pay such amount at every stage of the proceeding, even while preferring appeals against interlocutory orders by which no rights of parties are decided effectively and/or which are not on merits. Otherwise, an appellant may have to approach the Appellate Tribunal against several interlocutory orders at different stages of the proceeding and ultimately against the final order; if at each stage the entire deposit of 50 per cent has to be made by the appellant, ultimately the total amount paid would be much more than the debt itself. The same would be thus an absurd proposition and would render the right of appeal nugatory.

4. Learned counsel cites Mardia Chemicals Ltd. Vs. Union of India and Ors., reported at 2004 (3) Supreme 243 where the Supreme Court had inter alia struck down the provisions of Section 17 of the Act as oppressive, onerous and arbitrary insofar as the same stipulated a condition of deposit of 75 per cent of the amount claimed before entertaining an appeal under Section 17 of the then sub-section (2) of Section 17 of the SARFAESI Act.

5. Learned counsel next cites Directorate of Enforcement Vs. Deepak Mahajan and Another, reported at AIR 1994 SC 1775, where the Supreme Court, quoting Maxwell on Statutes, observed that where the language of a statute leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity, hardship or injustice, presumably not intended, a construction may be put upon it which modifies the meaning of the words, and even the structure of the sentence. It was held that a Judge must not alter the material of which the Act is woven, but he can and should iron out the creases.

6. Learned counsel for the petitioners next cites Dr. (Major) Meeta Sahai Vs. State of Bihar and others, reported at (2019) 20 SCC 17 where the Supreme Court observed that it is the responsibility of the courts to interpret the text in a manner which eliminates any element of hardship, inconvenience, injustice, absurdity or anomaly.

7. Learned counsel next relies on Sarla Goel and others vs. Kishan Chand, reported at (2009) 7 SCC 658, where it was held by the Supreme Court that the question as to whether a statute is mandatory or directory depends upon the intent of the legislature and not upon the language in which the intent is clothed.

8. Learned counsel next cites an unreported Division Bench judgment of the Madras High Court in WP No. 22981 of 2019 [M/s. Ashok Wood Works and Another Vs. Indian Overseas Bank] where it was observed that since the order of the Debts Recovery Tribunal challenged before the Appellate Tribunal therein was only on an interlocutory application seeking to lodge the counter-claim by the borrowers, such an order would not require any pre-deposit since the position of law had been clarified by the co-ordinate Bench of the said Court, with which the Bench agreed.

9. Learned counsel also seeks to argue, by placing reliance on an unreported Division Bench judgment of the Chattisgarh High Court, that the debt on the basis of which the pre-deposit was to be made was the claim mentioned in Section 13(2) of the SARFAESI Act.

10. Learned counsel for the petitioner, in his usual fairness, also points out the judgments against the petitioners which were also relied on substantially by the Appellate Tribunal.

11. In the first such judgement, reported at 2023 LiveLaw (SC) 11 [M/s. Sidha Neelkanth Paper Industries Private Limited & Another Vs. Prudent ARC Limited & others], it fell for consideration whether while calculating the amount to be deposited as pre-deposit under Section 18 of the SARFAESI Act, 50% of which amount the borrower is required to deposit as pre-deposit and whether while calculating the amount of "debt due", the amount deposited by the auction purchaser on purchase of the secured assets is required to be adjusted and/or appropriated towards the amount of pre-deposit to be deposited by the borrower. It is, thus, submitted that the said decision was on a different issue altogether.

12. Insofar as the unreported judgment of the learned Single Judge of the Kerala High Court in A.P. Varghese Vs. The Chief Manager (Authorised Officer) and Others is concerned, it is submitted that the Bench held that the requirement of pre-deposit is a statutory condition which is a prelude to the entertainment of an appeal by the appellate authority and hence has to be fulfilled. In the said case, it is argued, it never fell for consideration of the Court whether pre-deposits are required to be made in appeals against interlocutory orders not touching the merits of the case.

13. Insofar as the Division Bench judgment of the Bombay High Court in M/s. Vinay Container Services Pvt. Ltd. and others Vs. Axis Bank, Mumbai, reported at AIR 2011 Bom 37 is concerned, it is argued that the Division Bench had observed in general that the requirement of pre-deposit under Section 18(1) of the SARFAESI Act is also attracted in case of an interlocutory order, even if it is not a final order under Section 17. However, the said judgment dealt with interlocutory orders in general and did not lay down any ratio on the distinction between interlocutory orders deciding the rights of parties and rendered on merit and those which did not.

14. Lastly, learned counsel for the petitioner seeks to distinguish Narayan Chandra Ghosh Vs. UCO Bank and others, reported at (2011) 4 SCC 548, on the ground that the Supreme Court merely observed that when a statute confers a right of appeal, 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. It is argued that in the present case the right would be illusory if the requirement of pre-deposit is applied to interlocutory orders not touching the merits of the case.

15. Upon a consideration of the judgments cited, certain features can be culled out.

16. The Division Bench of the Bombay High Court in M/s. Vinay Container Services (supra), in no uncertain terms, observed that the statutory condition of pre-deposit under Section 18(1) of the SARFAESI Act is applicable equally to interlocutory and final orders. Thus, no distinction has been carved out between interlocutory orders on merits and those not on merits. In order to distinguish the same, it is required to draw a line of distinction which would not be uniform, since then it would be left to the arbitrary discretion of the Court in each case whether to apply or not to apply the requirement of pre-deposit.

17. In M/s. Sidha Neelkanth Paper Industries (supra), however, the question was different. In the said case, the auction purchaser had deposited an amount on purchase of secured asset and the question arose whether the same would be adjusted and/or appropriated towards the amount of pre-deposit by the borrower under Section 18, which issue is different and distinct from the present issue.

18. The learned Single Judge of the Kerala High Court in A.P. Varghese (supra) merely observed that the requirement of pre-deposit is statutory and a prelude to entertainment of an appeal and hence has to be fulfilled, without deciding the ratio which has fallen for consideration herein. Thus, the said judgment is not apt for the present consideration.

19. The Supreme Court, however, in Narayan Chandra Ghosh”s case, had clearly observed that when a statute confers a right of appeal the legislature can impose conditions for exercise of such rights. The exception was carved out when the conditions are onerous and unreasonable restrictions, rendering the right almost illusory.

20. However, the petitioners in the present case do not challenge the pre-deposit condition altogether but seek to draw distinction between cases of interlocutory orders not touching the merits and other interlocutory orders and/or final orders. If such a distinction is to be made, again, there would not be any uniformity in applicability of the provision. It would be reading something into the statute which the Legislature never intended.

21. The ratio laid down in Mardia Chemicals Ltd (supra) was rendered in a different context than the present case. A challenge under Section 17 of the SARFAESI Act, as opposed to an appeal, is an original application and, if accompanied by a rider to deposit 75 per cent of the claim, would render the remedy nugatory, which was the ground for setting aside the mandatory pre-requisite of deposit of 75 per cent of the claim.

22. There are certain distinctions between the said consideration and the present. First, the requirement was 75 per cent as opposed to the present 50 per cent which is, again, amenable to a reduction up to 25 per cent.

23. Secondly and more importantly, the said provision in Section 17 interdicted the approach of an aggrieved person to the Tribunal altogether whereas in the present case, having obtained the benefit of adjudication by the first forum, the appellant seeks to test the same before a second forum. Thus, the Legislature, in its wisdom, although leaving it open for a person to challenge the claim before the first forum, might impose reasonable restrictions to further challenges in order to expedite the litigation.

24. Thirdly, at the stage of a challenge under Section 17, no previous adjudication would have taken place and it was the perceived claim of the Bank/financial institution which would be the sole yardstick of determining the pre-deposit. As opposed to such a scenario, in case of an appeal under Section 18, there has already been an adjudication by a competent first forum which is assailed before an Appellate Authority. Thus, the premise of calculating the pre-deposit was not the claim amount, which could be arbitrary, but the amount which has been actually adjudicated and vindicated by a competent authority. Thus, the principle laid down in Mardia Chemicals Ltd (supra) cannot be applicable to the present case.

25. In Directorate of Enforcement (supra), the Supreme Court held that if there is an absurdity, hardship or injustice presumably not intended, a court can construe a provision of law which modifies the meaning of the words. It was also observed that a Judge can and should iron out the creases. The premise of the said judgment is that there has to be absurdity, hardship or injustice presumably not intended, which calls for ironing out the creases. However, the said concept does not apply to the conscious exercise of its wisdom by the Legislature, which imposes a fetter in preference of an appeal.

26. In Dr. (Major) Meeta Sahai (supra), the Supreme Court had observed that the courts have a responsibility to interpret the text of a statute in a manner which eliminates any element of hardship, inconvenience, injustice, etc. The said ratio would apply provided there is an injustice, which would be presently explored by this Court.

27. Sarla Goel”s case lays down a different proposition altogether and holds that whether a statute is mandatory or directory depends upon the intent upon the legislature. In the present case, there cannot be any applicability of such ratio. The petitioners themselves seek a selective distinction between final orders and other interlocutory orders on the one hand and interlocutory orders not touching the merits on the other. Thus, it cannot be said that the provision-in-question is selectively directory and mandatory in other aspects. The vires of the third proviso to Section 18(1) has not been challenged but, its application in certain cases has been.

28. The Division Bench of the Madras High Court in M/s. Ashok Wood Works (supra) made an observation in the context of Section 21 of the Recovery of Debts due to

banks and financial institutions act where it was observed that in an appeal against an interlocutory order, the pre-deposit condition would not be applicable. The said provision is distinct and different from the present and as such, cannot be a yardstick for consideration. Moreover, in the light of the decisions of the Supreme Court in the cases discussed above, there cannot be any manner of doubt that in general, the condition of pre-deposit in Section 18 of the SARFAESI Act is mandatory.

29. In the backdrop of the above judgments, let us now consider the relevant provision of law. The entire scheme of the SARFAESI Act is to ensure speedy recovery of debts in order to facilitate economic growth of the country. The thrust, therefore, is on the early disposal of recovery proceedings to give a fillip to the banking system. Considered in such context, the requirement of a pre-deposit for preferring an appeal is not an instrument of oppression against the appellant but one of the checks and bounds to curtail the tendency to prefer frivolous appeals. Hence, the said provision operates as a deterrent to unscrupulous litigants preferring appeals indiscriminately to delay the recovery proceedings, apart from being a safety net for the financial institutions and banks if ultimately the appeal is dismissed.

30. The legislature, in its wisdom, introduced the said provision. The pre-deposit accompanies preference of an appeal against an adjudication which has already been done by the first forum. Thus, it cannot be said that the provision is intrinsically oppressive, onerous or absurd. The adjudication involved is in the nature of a money-claim. Even Order XLI Rule 5 of the Code of Civil Procedure provides for imposing conditions of securing the claim in case stay is granted regarding money decrees in connection with a regular civil appeal. Thus, there is nothing implicitly onerous in the said stipulation of pre-deposit.

31. Also, the stipulation of 50 per cent of the amount of debt due, which is reducible to not less than 25 per cent, cannot be said to be so oppressive as to render the remedy illusory.

32. In any event, the petitioners have not argued in general that the condition itself is onerous but assail the applicability of the same under certain circumstances, in appeals against interlocutory orders not touching the merits of the matter.

33. However, such selective application of the provision would defeat the very purpose of the same. It would be introducing a discrimination in applicability of the provision which was not intended by the legislature in the first place. Such a „reading down" of the provision is not necessitated from the general scheme of the Section. A statute is only read down in order to give maximum effect to the intention of the legislature in enacting the same, as gathered from the composite reading of the entire Act and to crease out absurdities. In the present case, however, nothing in the rest of the statute justifies such a reading down, since the intention of the legislature in promulgating the Act is not curbed but enhanced by imposition of the

pre-condition since the object and purpose of the statute is primarily to streamline the recovery proceeding and expedite the same against unscrupulous borrowers.

34. Another aspect of the matter is to be factored in while undertaking the present examination. The petitioners plead injustice to a challenger who is required to prefer several appeals at the interlocutory stage and subsequently against the final order, in which case, he has to make the pre-deposit several times over. However, precisely for such cases a discretion has been conferred on the Appellate Tribunal to reduce the pre-deposit (for reasons to be recorded in writing), so much so as to direct pre-deposit of half of the originally contemplated 50 per cent. Such a massive reduction to half of the original is put in place keeping in consideration such exceptional cases, to counter balance the rigours of the stipulation in fit cases.

35. The said rider in the third proviso to sub-section (1) of Section 18 of the SARFAESI Act is a handy tool in the hands of the Appellate Tribunal to grant relief in deserving cases. The same can be applied, for example, in cases of indigent appellants as well as cases as the present one, where an innocuous order has been challenged, which does not pertain to the merits of the case and/or conclusively decide any right or issue, provided the appellant is otherwise fit for such reduction. Although it is well within the discretion of the Appellate Tribunal to exercise such power in selectively deserving cases, such an exercise has to be visited by reasons in writing, which puts a check on unbridled exercise of the same. Even then, the fact remains that the safety-valve sought by the petitioner in cases where a reduction in the pre-deposit is deserved, is sufficiently taken care of by the discretion provided to the Appellate Tribunal in the third proviso to Section 18(1).

36. It is also important to note that if a further sub-class is sought to be carved out by the court for interlocutory orders not touching the merits or deciding rights, it would be an unnecessary and unwanted tinkering with the Legislative intent by judge-made law where it is not called for. The Constitutional scheme of separation of powers ought not to be breached for the asking.

37. Hence, in view of the above considerations, the challenge thrown by the petitioners to the universal application of the second proviso to Section 18(1) of the SARFAESI act with regard to pre-deposit cannot be sustained. In any event, the third proviso conferring jurisdiction on the Appellate Tribunal to reduce the pre-deposit amount in deserving cases on reasons in writing being recorded sufficiently takes care of exceptional cases where the full rigour of the pre-deposit needs to be mellowed down.

38. Hence, WPA NO. 22314 of 2023 is dismissed on contest without any order as to costs.

39. Urgent certified server copies, if applied for, be issued to the parties upon compliance of due formalities.