(2016) 10 AHC CK 0107

ALLAHABAD HIGH COURT

Case No: Writ C. No. 32026 of 2016.

Nathi Lal Rathore - Petitioner
@HASH The Debts Recovery Appellate Tribunal And 2 Others — APPELLANT

Vs

RESPONDENT

Date of Decision: Oct. 5, 2016

Acts Referred:

- Enforcement of Security Interest Act, 2002 - Section 18(1)

Citation: (2016) 10 ADJ 527 : (2017) 169 AIC 953 : (2017) 1 AllLJ 39 : (2016) 6 AllWC 5468 : (2016) 119 ALR 677 : (2017) 1 BC 684 : (2017) 1 DCR 781 : (2017) 1 DRTC 325 : (2017) 134 RD 214 : (2016) 2 RJ 1724

Hon'ble Judges: Ashwani Kumar Mishra, J.

Bench: Single Bench

Advocate: Shailendra Kumar Pandey, Advocate, for the Petitioner; Satish Chaturvedi, Advocate, for the Respondent

Final Decision: Dismissed

Judgement

Ashwani Kumar Mishra, J. - This petition is directed against an order passed by Debts Recovery Appellate Tribunal, dated 25.5.2016, upon an application filed by the petitioner for waiver, from pre-deposit of amount under second proviso to Section 18(1) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as "SARFAESI Act"). The Tribunal has determined an amount of Rs. 19,82,768.98/- as debt due and payable. By invoking jurisdiction under third proviso, 25% of debt due has been directed to be deposited, after adjusting a sum of Rs. 2 lacs already deposited earlier with the Tribunal, so that appeal be entertained on merits.

2. Facts, in brief, are that cash credit was extended to M/s. Thakur Brand and Company for an amount of Rs. 20,00,000/-. To secure this credit, petitioner offered

his residential house as a equitable mortgage. It is not in dispute that credit remained over drawn and declared as non-performing asset. A notice under Section 13 (2) of the Act was thus issued on 9.2.2010 for an amount of Rs. 21,52,382/-, with future interest and incidental charges. Admittedly, this demand was not met and consequently, possession notice was issued exercising power under Section 13 (4) of the Act on 23rd March 2011. An auction sale notice was issued on 18.2.2012, for auctioning the mortgage property. A Securitization Appeal No. 111 of 2011 under Section 17 (1) of the SARFAESI Act was filed by the petitioner. This appeal came to be rejected by the Tribunal on 7.12.2015. Aggrieved by it, an appeal under Section 18 of the Act has been preferred by the petitioner, which got registered as Securitization Appeal No. 4 of 2016. It is in this appeal that an application has been filed for waiving the condition of pre-deposit of amount in terms of proviso to Section 18(1).

3. It was asserted by the petitioner that notice under Section 13(2) required deposit of a sum of Rs. 21,52,382/-, whereas a sum of Rs. 15,92,000/- has already been deposited after 13 (2) notice with the bank. A further sum of Rs. 2,00,000/- has been deposited with the Appellate Tribunal along with the appeal. Contention advanced before the Appellate Tribunal was that with such deposit, no requirement existed for any further deposit to be made by the petitioner towards pre-deposit of amount.

4. Application for waiver has been opposed by the respondents on the ground that after adjusting the amount already deposited earlier, an amount of Rs. 19,82,768.95/- remains outstanding as the debt due. A notice dated 23.9.2015 is on record of the proceedings, determining the amount as debt due, to be deposited within 30 days, failing which petitioner''s possession over the property would be taken.

5. The waiver application has been allowed requiring the petitioner to deposit 25% of debt due in place of 50%. Relying upon the amount of debt due as on 23.9.2015, the Tribunal has required the petitioner to deposit 25% of such amount after adjusting Rs. 2,00,000/-, deposited with the Tribunal within 30 days. An interim protection against coercive action has also been granted while fixing the matter for 14.7.2016. It is this order which is assailed in the present writ petition.

6. Learned counsel for the petitioner states that requirement of pre deposit has to be with reference to the amount claimed by secured creditor, or determined by the Debt Recovery Appellate Tribunal, whichever is less. It is contended that the sum quantified under Section 13 (2) notice alone has to be reckoned, and any subsequent accrual of interest upon it has to be ignored.

7. Reliance has been placed upon a decision of this Court in **Gopal Ji Gupta v. DRAT, Allahabad and Ors. in Civil Misc. Writ Petition No. 36314 of 2013 dated 9th July, 2013**, in support of such proposition. The Judgement, aforesaid, is reproduced for the sake of convenience:-

"Heard Sri Deepak Kumar Jaiswal, the learned counsel for the petitioner and Sri V.K. Srivastava, the learned counsel for the respondent-bank.

With the consent of the learned counsel for the parties, the writ petition is being decided at the admission stage itself without calling for any counter affidavit, since no factual controversy is involved in the present writ petition.

The petitioner is a guarantor to a loan taken by M/s. Ganpati Traders, who defaulted in the payment of the loan. Accordingly, the bank issued a notice under Section 13(2) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as the Act of 2002) and thereafter, issued a notice under Section 13(4) of the Act of 2002 for taking possession of the property of the guarantor, pursuant to which possession was taken and the property of the guarantor was put to auction. It has come on record, that pursuant to the auction, a sum of Rs.50,11,847/- has been realised towards the loan amount.

The petitioner, being aggrieved by the issuance of the notice bank under Section 13(4) of the Act of 2002, filed an application under Section 17 of the Act of 2002 before the Debts Recovery Tribunal praying that the possession be restored in his favour. This application was rejected by the Tribunal, against which the petitioner preferred an appeal under Section 18 of the Act of 2002.

Section 18 of the Act of 2002 requires that any person aggrieved by an order of the Debts Recovery Tribunal could prefer an appeal provided he deposits 50% of the amount of debt due from him as claimed by the secured creditor or determined by the Debts Recovery Tribunal, whichever is less. The petitioner by his own calculation filed an application for waiver of the 50% to 25% as per the second proviso of Section 18 of the Act of 2002 along with a bank draft of Rs.2.65 lacs and prayed that suitable orders may be passed for waiving the balance amount and entertaining the appeal. The said application was rejected by the Debts Recovery Appellate Tribunal by the impugned order. The petitioner, being aggrieved by the said order, has filed the present writ petition.

The Appellate Tribunal held that 50% of the amount demanded by the bank has to be deposited irrespective of the recovery so made by the bank by way of auction.

Having heard the learned counsel for the parties and having perused the impugned order, the Court finds it strange that the bank is demanding Rs.94,08,777/- along with future interest but the possession notice issued under Section 13(4) of the Act of 2002 indicates that the bank had demanded a sum of Rs.60,65,380.90 along with future interest. The Court is of the opinion that the amount indicated in the notice under Section 13(4) of the Act of 2002 can only be made the basis for the purpose of filing the appropriate deposit in an appeal under Section 18 of the Act of 2002, inasmuch as the petitioner had questioned the said notice before the Debts Recovery Tribunal. The contention of the respondent bank''s counsel that 50% of

Rs.94,08,777/- has to be deposited is erroneous.

The second proviso to Section 18 of the Act of 2002 is relevant for the purpose of deciding the appeal. For facility, the said provision is extracted hereunder:

"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 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]

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.]"

A perusal of the said provision indicates that 50% of the amount of the debt due from him as claimed by the secured creditors or determined by the Debts Recovery Tribunal has to be deposited by the person who challenges the order of the Debts Recovery Appellate Tribunal.

In the instant case, no amount as yet has been determined by the Debts Recovery Tribunal and the petitioner has only questioned the possession notice issued by the bank under Section 13(4) of the Act of 2002, which indicates that an amount of Rs.60,65,380.90 was required to be deposited by the petitioner at the time of filing the appeal.

In the instant case, the Court finds that the respondent bank had auctioned the property of the petitioner and has recovered a sum of Rs.50,11,847/-, which is more than the 50% of the total amount sought to be recovered. The proviso to Section 18 of the Act of 2002 restricts the entertainment of the appeal unless the borrower deposits 50% of the amount of debt due from him as claimed by the secured creditors. Since more than Rs.50 lacs has already been realised by the secured creditor, namely, the bank, which is more than 50% of the debt due from the petitioner, the purpose of the proviso stands satisfied.

The Court is of the opinion that there was no requirement for the petitioner to deposit any further amount for entertainment of his appeal under the second proviso to Section 18 of the Act of 2002.

In the light of the aforesaid, the decision cited by the respondent-bank in the case of **Indian Bank v. M/s. BLue Jaggers Estates Ltd. and others, 2010 (3) Bankers''**

Journal 9 has no application to the present set and circumstances of the case.

For the reasons stated aforesaid, the impugned order cannot be sustained and is quashed. The writ petition is allowed. The Debts Recovery Appellate Tribunal is directed to entertain the appeal without any pre-condition of deposit and decide the appeal on merits in accordance with law."

8. Learned counsel has also relied upon a division Bench judgement of Delhi High Court in **Poonam Mansani v. J& K. Bank Ltd., reported in AIR 2010 Delhi 28** to contend that amount of interest accrued upon notice Under Section 13 (2) is not required to be counted. Para 8 and 9 of the report is relied upon, which reads as under:-

"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 under Section 13(2). Secondly, the Appellate Tribunal was of the view that only 25% of the demanded amount be deposited by way of pre-deposit under Section 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 under Section 13(2), less any recovery made by the bank thereafter. Since the respondent No.1 bank has recovered 8.60 crores in the proceedings under Section 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)."

9. A division Bench judgement of Bombay High Court in **National Polymers & Ors. v. Union of India & Ors., reported in AIR 2011 Bombay 132** is also relied upon in support of the contention. Para 14 of the Judgement reads as under:-

14. In the present case, the amount which was claimed in the notice under Section 13(2) was Rs.24.72 Crores while as on the date of the order of the Appellate Tribunal the amount outstanding was Rs.31 Crores. The Appellate Tribunal has duly considered the submissions which were urged on behalf of the Petitioners and having regard to the discipline mandated by the second and the third provisos to Section 18(1) directed the Petitioner to deposit an amount of Rs.7 Crores. The exercise of that discretion does not require any interference under Article 226 of the Constitution and in any event neither the Appellate Tribunal nor this Court would be justified in granting a waiver in excess of the amount as mandated by the third proviso to Section 18(1). For these reasons, we see no merit in the Petition. The Petition is accordingly dismissed. There shall be no order as to costs.

10. The petition is opposed by respondent bank, contending that the term "debt" is defined in statute, which includes the interest accrued. Reliance is placed upon a division Bench judgement of Bombay High Court in Review Petition No. 78 of 2015, in **Writ Petition No. 6778 of 2014, in M/s. MRB Roadconst. Pvt. Ltd. v. Rupee Co-Op. Bank, decided on 5th February, 2016.**

11. I have heard Sri. S.K. Pandey for the petitioner and Satish Chaturvedi for the respondents and have perused the records.

12. On the basis of respective contentions advanced by the counsel for the parties, the issue that arises for consideration is as to whether the amount of pre-deposit in terms of second proviso to Section 18 (1) of the Act constitutes the sum/figure mentioned in notice under Section 13 (2) alone, or includes the amount of interest accrued thereupon, till the date of filing of appeal?

13. Section 18 (1) of the SARFAESI Act provides as under:-

"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 30 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."

The power to reduce pre deposit of half of debt due, in terms of second proviso is restricted to 25%, by virtue of third proviso.

14. Section 2 (ha) of the SARFAESI Act defines ''debt'' as under:-

"debt" shall have the meaning assigned to it in clause (g) of section 2 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993;

15. Thus, definition of ''debt'' as defined under Section 2 (g) of the Recovery of Debt Due to Bank and Financial Institutions Act, stands ingrafted in the Act of 2002. Section 2 (g) of the Act of 1993 of the RDDB Act reads as under:-

"debt" means any liability (inclusive of interest) which is claimed as due from any person by a bank of a financial institution or by a consortium of banks or financial institutions during the course of any business activity undertaken by the bank or the financial institution or the consortium under any law for the time being in force, in cash or otherwise, whether secured or unsecured, or assigned, or whether payable under a decree or order of any civil court or any arbitration award or otherwise or under a mortgage and subsisting on, and legally recoverable on, the date of the application;]

16. The term ''debt'' as per the definition given in the statute is inclusive of interest, which is claimed as due, from a person, by the Bank or Financial Institutions. The proviso to Section 18(1) contemplates pre deposit, with reference to the debt due, as claimed by the secured creditor or determined by Tribunal, whichever is less. Even if the notice under Section 13 (2) is seen, in right perspective, it would be apparent that not only the sum quantified therein, but even future interest, is a part of debt due in terms of second and third proviso to section 18(1) of the Act. There is nothing in the statute which may restrict the debt due to the sum quantified in the notice under Section 13(2) of the Act alone, and exclude the amount of interest accrued which may have fallen due till the date of filing of appeal. Law is settled that if language employed in statute is plain, and does not admit any ambiguity, its literal meaning would have to be assigned. Merely because it causes hardship, would not be a ground to depart from the words used in the statute. Reference may be had to the Judgement of Apex Court in **Rohitash v. Om Prakash Sharma, 2013 (11) SCC 451** and **Narayan v. Baba Saheb, 2016 (6) SCC 725**. Thus, I am inclined to hold that it is not just the sum specified in Section 13(2) alone, but the interest accrued thereupon till the filing of appeal, which needs to be reckoned for working out the amount of pre-deposit in terms of second proviso to Section 18 of the Act. The judgement of this Court in Gopal Ji Gupta (Supra) since fails to notice the definition

of ''debt'', as provided in the Act itself, as such, with greatest respect, I fail to agree with the ratio laid down therein.

17. For the view which I propose to take, I am supported by a Division Bench Judgement of Bombay High Court in **M.R.B Road Construct. Pvt. Ltd. v. Rupee Co-op Bank Ltd.** Para 17 to 19 of the Judgement, which is relevant for the present purposes, reads as under:-

"17. On an ex-facie reading of the said definition, it is clear that the word "debt" has been given an extremely wide meaning and means any liability (inclusive of interest) which is claimed as due from any person by a bank or a financial institution during the course of any business activity undertaken by such bank or financial institution under any law for the time being in force, in VRD 13 of 26 RPW78.15 FINAL.doc cash or otherwise, whether secured or unsecured, or assigned, or whether payable under a decree or order of any civil court or any arbitration award or otherwise or under a mortgage and subsisting on, and legally recoverable on, the date of the application.

18. On a plain reading of the 2nd proviso to section 18(1) of the SARFAESI Act read with the definition under the word "debt" as defined in section 2(g) of the RDDB Act, it is clear that before an appeal can be entertained by the DRAT, the borrower has to deposit 50% of the amount of debt due from him as claimed by the secured creditors or as determined by the DRT whichever is less. If there is no determination of the debt by the DRT under the provisions of the RDDB Act, then the borrower would have to deposit 50% of the amount of debt due from him as claimed by the secured creditors.

The provision on a plain reading does not in any way exclude taking into consideration the future interest that is accrued on the debt owed by the borrower to the secured creditor. In fact, the definition of the word "debt" means any liability (inclusive of interest) which is claimed as due from any person by a bank or a financial institution. Therefore, if the claim made by the secured creditor in the Section 13 (2) notice includes future interest, the same would certainly be included in the "amount of the debt due" from the borrower to the secured creditor as contemplated under the 2nd proviso to Section 18(1) of the SARFAESI Act. There is therefore no justification to hold that it is only the figure that is mentioned in the Section 13(2) notice that is to be taken into consideration and not the future interest accrued on the said sum, whilst determining the deposit amount under the 2nd proviso to Section 18 of the SARFAESI Act. The amount of deposit would have to be determined on the basis of the amount of debt due by the borrower to the secured creditor on the date when the appeal is filed in DRAT. This would not only include the amount mentioned in the Section 13(2) notice but also interest accrued thereon till the date of filing of the appeal under Section 18 of the SARFAESI Act. To our mind, this is the only interpretation that is possible of the 2nd proviso to Section 18 of the SARFAESI Act. If we were to accept the contention of the Petitioner that the amount to be deposited by the borrower [under the 2nd proviso to Section 18(1) would be

only on the basis of the sum/figure as mentioned in the Section 13(2) notice and not the interest accrued thereon after the date of the said notice, the same would be violating the plain language of the statute. To interpret the 2nd proviso to Section 18 (1) in this fashion, to our mind, would clearly violate the plain and unambiguous language of the said section.

19. We must mention here that after the issuance of the notice under Section 13(2) and before the appeal is filed in the DRAT under Section 18 of the SARFAESI Act, if the borrower has made any part payment of the debt due to the secured creditors, then credit for the same would have to be given to the borrower and for the purposes of deposit under the 2nd proviso to Section 18(1), the reduced amount (after giving credit) would have to be taken into consideration for determining the amount required to be deposited by the borrower. This is simply because on the date of filing of the appeal, the debt due to the secured creditor would be reduced after giving credit for the amount already paid."

18. The Judgement of Delhi High Court in Poonam Mansani also fails to take note to the definition of debt. In para 23 of the judgement of the M.R.B Road Construct(Supra), this aspect is noticed in the following words:-

"23. The second judgment relied upon by Mr. Shah was a decision of the Delhi High Court in the case of **Poonam Manshani, AIR 2010 Delhi 28**. It appears from the said decision that the Delhi High Court has taken a view that the expression "amount of debt due from him, as claimed by the secured creditors or determined by the Debts Recovery Tribunal, whichever is less" would have to be determined ignoring the interest component. On a close scrutiny of the aforesaid decision, we find no reference in the same to the definition of the word "debt" as defined under the provisions of the SARFAESI Act. As mentioned earlier, the word "debt" means any liability inclusive of interest claimed as due from any person by a bank or financial institution during the course of any business activity undertaken by the said bank or financial institution. When interest is specifically included in the definition of the word "debt", we see no reason why the same ought to be excluded whilst determining the amount that is to be taken into consideration for the purpose of arriving at the figure to be deposited by the borrower under the 2nd proviso to Section 18(1) of the SARFAESI Act. In fact, on a perusal of the said judgment, we do not find any reason given for making such an exclusion. We, therefore, with great respect to the Delhi High Court, are unable to agree with the ratio laid down in the aforesaid decision."

19. So far as the judgement of Bombay High Court in National Polumar (Supra) is concerned, this issue is neither specifically discussed nor decided. The inference sought to be drawn merely on the basis of reference to the figures specified therein is not liable to be countenanced.

20. In the facts of the present case it is to be noticed that the amount of debt due has already been quantified as on 23.9.2015, and therefore, determination relied upon by the appellate Tribunal for computing amount of pre-deposit, after granting benefit of third proviso, contains no error. The order passed by the appellate Tribunal, in such circumstances requires no interference in the present writ petition. Consequently, the writ petition fails. However, the time for depositing balance amount in terms of the order of the Tribunal is extended by a further period of one month from today.

21. Subject to modification aforesaid, the writ petition is consigned to records.