Kotak Mahindra Bank Pvt. Limited vs Ambuj A. Kasliwal on 16 February, 2021

Equivalent citations: AIR 2021 SUPREME COURT 1041, AIRONLINE 2021 SC 60

Author: A.S. Bopanna

Bench: V. Ramasubramanian, A. S. Bopanna, S. A. Bobde

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
CIVIL APPEAL NO. 538 OF 2021
(Arising out of SLP (CIVIL) No.21555 of 2019)

Kotak Mahindra Bank Pvt. Limited .…Appellant(s)

Versus

Ambuj A. Kasliwal & Ors. …. Respondent(s)

WITH
CONT.PET.(C)No.569/2020 in SLP(C) No. 21555/2019

JUDGMENT

A.S. Bopanna,J.

Leave granted.

2. The appellant is before this Court assailing the order dated 16.07.2019 passed in W.P.(C) No.7530 of 2019 whereby the High Court of Delhi has permitted the respondents No. 1 and 2 herein to prosecute the appeal before the Debts Recovery Appellate Tribunal ('DRAT' for short) without pre□ deposit of a portion of the debt determined to be due, as provided under Section 21 of the Recovery of Debts and Bankruptcy Act, 1993 ('RDBA Act' for short). The appellant/Bank claiming to be aggrieved by the said order is before this Court in the instant appeal.

3. This Court while taking note of the matter at the first instance, had through the order dated 22.11.2019 directed the respondents No.1 and 2 to deposit an amount of Rs.20 Crores before the

Registry of this Court within a period of 8 weeks. In the said order it was indicated that the further proceedings in the appeal before the DRAT shall remain stayed till the next date of hearing or till the date of deposit of the said amount by the respondents No.1 and 2, whichever is earlier. The deposit as directed by this Court has not been made by the respondents No.1 and 2. The appellant/Bank, therefore, alleging that there is disobedience of the order passed by this Court has filed the accompanying Contempt Petition seeking action against respondents 1 and 2. In that background, since both these matters pertain to the same issue, they are taken up together, considered and disposed of by this common order.

4. The brief facts leading to the present proceedings is that the respondent No.3, namely, Hindon River Mills Ltd. had availed financial assistance from the respondent No.6–IFCI Ltd. The respondents No.1 and 2 had offered their personal guarantee in respect of the said financial assistance. The respondents No.1 to 3 had defaulted in re-payment of the dues and the account having been classified as non-performing asset was thereafter auctioned by respondent No.6–IFCI Ltd. wherein the appellant herein was the successful bidder and accordingly, the unpaid debt and non-performing asset was assigned in their favour. The assignment as made was assailed by the respondents No. 1 to 3 before the High Court in WP(C) No.14999 of 2006 which came to be dismissed and the SLP(C) No. 35004 of 2011 filed was taken note by this Court and in the said proceedings the settlement which was entered into between the parties was recorded and disposed of. As per the settlement, the respondents No. 1 to 3 had agreed to repay the sum of Rs.145 Crores with interest at 15% per annum subject to the same being repaid on or before 31.07.2012. The respondents No. 1 to 3 are stated to have not adhered to the terms of settlement and the re-payment was not made. The appellant Bank, therefore, instituted recovery proceedings by filing an application before the Debts Recovery Tribunal ('DRT' for short), New Delhi in O.A. No.281 of 2015. In the said proceedings the appellant Bank claimed that the respondents No. 1 to 3 would be liable to pay the entire outstanding since the benefit of the settlement wherein the outstanding amount was frozen had not been availed within the time frame. Accordingly, the sum of Rs. 572,18,77,112/– (Rupees Five Hundred Seventy-Two Crores Eighteen Lakhs Seventy-Seven Thousand and One Hundred Twelve), which was due as on 31.12.2014 along with interest and other charges was claimed before the DRT.

5. When this was the position, during the pendency of O.A.No.281 of 2015 before the DRT the respondent No.7/National Highways Authority of India ('NHAI' for short), acquired a portion of the mortgaged property belonging to respondent No.3 and deposited the compensation amount of Rs.62,31,87,312/–(Rupees Sixty-Two Crores Thirty-One Lakhs Eighty-Seven Thousand and Three Hundred Twelve), before the DRT. The compensation was thereafter enhanced by the District Magistrate (Arbitrator) Ghaziabad and a further sum of Rs.72,96,12,827/–(Rupees Seventy-Two Crores Ninety-Six Lakhs Twelve Thousand and Eight-Hundred Twenty-Seven) was deposited. Thus, in all a sum of Rs.152,81,07,159/–(Rupees One Hundred Fifty-Two Crores Eighty-One Lakhs Seven Thousand and One Hundred Fifty-Nine) was the compensation amount which was deposited on behalf of respondent No.3 relating to the mortgaged property, which was credited to the account of respondent No.3. With these developments in the background, the DRT had proceeded to consider the claim application and ultimately ordered issue of recovery certificate through the order dated 15.03.2018. Through the said order, as against the claim, the DRT had limited the decretal

amount to Rs.145 Crores with future interest at 9% per annum till the realisation, on reducing balance. It was further ordered therein that the amount would be payable after taking into consideration the amount of Rs.152,81,07,159/- (Rupees One Hundred Fifty-Two Crores Eighty-One Lakhs Seven Thousand and One Hundred Fifty-Nine) paid during the pendency of the proceedings.

6. The appellant/Bank as well as respondents No. 1 to 3 claiming to be aggrieved by the order dated 15.03.2018 passed by DRT have preferred appeals before the DRAT. This Court at this juncture is not required to consider the merits of the rival contentions relating to the loan transaction and the quantum of recovery thereof etc., which is the matter arising in the appeal before DRAT. The present proceeding is limited only with regard to the issue pertaining to the pre-deposit contemplated in law insofar as the appeal filed by the respondents No.1 and 2 herein, before the DRAT. In that regard, the respondents No.1 and 2 herein, in their Appeal No.311 of 2018 before the DRAT had also filed an application in IA No.511 of 2018 seeking waiver of pre-deposit amounting to fifty per cent of the debt determined by the DRT. The DRAT having noticed the contentions on the said aspect and also taking into consideration that the amount of Rs.152,81,07,159/- (Rupees One Hundred Fifty-Two Crores Eighty-One Lakhs Seven Thousand and One Hundred Fifty-Nine) was received by the appellant Bank, had in that context noted that the balance of the debt due works out to Rs.68,18,92,841/- (Rupees Sixty-Eight Crores Eighteen Lakhs Ninety-Two Thousand and Eight Hundred Forty-One). Hence, DRAT through the order dated 27.02.2019 directed that fifty per cent of the said amount is to be deposited. Review filed against the same was dismissed on 09.04.2019.

7. The respondents No.1 and 2 claiming to be aggrieved by the orders dated 27.02.2019 and 09.04.2019 approached the High Court of Delhi in WP(C) No.7530 of 2019. The High Court having adverted to the rival contentions and being swayed by the fact that the appellant/Bank has recovered the sum of Rs.152,81,07,159/- (Rupees One Hundred Fifty-Two Crores Eighty-One Lakhs Seven Thousand and One Hundred Fifty-Nine), arrived at the conclusion that the respondents No.1 and 2 are to be permitted to prosecute the appeal without pre-deposit and directed accordingly. It is in that view, the appellant/Bank claiming to be aggrieved by such order dated 16.07.2019 passed by the High Court is before this Court in the instant appeal.

8. Heard Mr. V.Giri, learned Senior Advocate for the appellant, Mr. Mukul Rohtagi and Mr. Ritin Rai, learned Senior Advocates for the respondents and perused the appeal papers.

9. As seen, though the sequence which led to the proceedings before the DRT and DRAT is taken note and referred in some detail, the short issue for consideration is with regard to the correctness or otherwise of the order passed by the DRAT and the High Court of Delhi in the matter relating to pre-deposit of the debt due, in an appeal before the DRAT. In order to address the said issue, it would be appropriate to take note of Section 21 of the Recovery of Debts and Bankruptcy Act, 1993 which provides for deposit of the amount of debt due on filing the appeal. Section 21 of the RDBA reads as hereunder: -"Deposit of amount of debt due, on filing appeal – Where an appeal is preferred by any person from whom the amount of debt is due to a bank or a financial institution or a consortium of banks or financial institutions, such appeal shall not be entertained by the Appellate Tribunal unless such person has deposited with the Appellate Tribunal [fifty per cent.] of the

amount of debt so due from him as determined by the Tribunal under section 19:

> Provided that the Appellate Tribunal may, for reasons to be recorded in writing, [reduce the amount to be deposited by such amount which shall not be less than twenty-five per cent. of the amount of such debt so due] to be deposited under this section." (emphasis supplied)

10. A perusal of the provision which employs the phrase "appeal shall not be entertained" indicates that it injuncts the Appellate Tribunal from entertaining an appeal by a person from whom the amount of debt is due to the Bank, unless such person has deposited with the Appellate Tribunal, fifty percent of the amount of debt so due from him as determined by the Tribunal under Section 19 of the Act. The proviso to the said Section, however, grants the discretion to the Appellate Tribunal to reduce the amount to be deposited, for reasons to be recorded in writing, but such reduction shall not be less than twenty-five per cent of the amount of such debt which is due. Hence the pendulum of discretion to waive pre-deposit is allowed to swing between fifty per cent and twenty-five per cent of the debt due and not below twenty-five per cent, much less not towards total waiver. It is in that background, keeping in perspective the said provision, the DRAT has in the instant case ordered deposit of fifty per cent of the amount. The respondents No.1 and 2 while seeking waiver of the deposit have essentially projected the case to indicate that the recovery certificate ordered by the DRT is for the sum of Rs.145 Crores with interest at 9% per annum and the amount realised by the Bank from the compensation amount payable to respondent No.3 is itself a sum of Rs.152,81,07,159/- (Rupees One Hundred Fifty Two Crores Eighty One Lakhs Seven Thousand and One Hundred Fifty Nine) and as such there is no debt due.

11. In that regard the High Court has concluded as hereunder: -"9. Having heard learned senior counsels for the parties, we are of the considered view that learned DRAT has not viewed the aspect of pre-deposit correctly in the present case. The amount of Rs.152,81,07,159/- was received by the respondent-bank during the pendency of the Original Application. The respondent-bank did not amend its Original Application to claim that it has adjusted the said amount, and did not limit its claim for the balance amount. Consequently, while adjudicating the Original Application, the DRT has proceeded on the basis that the respondent-bank is bound by the settlement amount of Rs.145 crores, and is entitled to future interest thereon at the rate of 9% per annum from 5th July, 2012 onwards till realization on the reducing balance, after taking into account the amount of Rs.152,81,07,159/- received during the pendency of the Original Application.

10. Aforesaid being the position, merely because the amount of Rs.152,81,07,159/- was received by the respondent-bank before passing of the final judgment, and not thereafter, would make no difference while considering the aspect of pre-deposit that the debtor, or the guarantor would have to deposit in terms of Section 21 of the aforesaid Act."

12. The extracted portion indicates that the High Court has proceeded at a tangent while adverting to the aspect of recovery made towards the loan amount from the land acquisition compensation payable to respondent No.3. The conclusion appears to be that the receipt of the compensation amount even though was before passing of the decree, would wipe out the decretal amount of Rs.145

Crores with interest at 9% per annum, though it has not been expressly stated so. Per contra, the DRAT by its order dated 27.02.2019 while directing the pre-deposit of fifty per cent of the amount had taken note of the fact that if the decretal amount as ordered by the DRT is taken into consideration and the amount received by the Bank towards the compensation amount is credited, the balance of the decretal amount payable by respondents No.1 to 3 would work out to Rs.68,18,92,841/-(Rupees Sixty Eight Crores Eighteen Lakhs Ninety Two Thousand and Eight Hundred Forty One). It is in that view, the DRAT has ordered pre-deposit of fifty per cent of the said amount which still remains to be a debt due. On that aspect, though the ultimate correctness of the actual amount due is a matter for calculation to be made in the execution proceedings, for the present, for the purpose of pre-deposit if the decree/recovery certificate issued by the DRT is taken into consideration the position is clear that even if the amount of compensation is appropriated, either before or after the decree, there would still be outstanding amount payable which would be the subject matter of the appeal in DRAT, apart from the fact that the appellant Bank in their appeal are claiming the entire amount which has fallen due since the terms of settlement was not adhered to.

13. Thus, when prima facie it was taken note by the DRAT that further amount was due and the pre-deposit was ordered, without finding fault with such conclusion the High Court was not justified in setting aside the orders passed by the DRAT. As noted from the extracted portion of the order passed by the High Court, all that the High Court has concluded is that the benefit of the receipt of Rs.152,81,07,159/-(Rupees One Hundred Fifty Two Crores Eighty One Lakhs Seven Thousand and One Hundred Fifty Nine) as against the decretal amount cannot be denied though it was received before passing of the final judgment. Such conclusion in any event could not have tilted the balance in favour of the respondents No.1 and 2 to waive the entire pre deposit, unless the High Court had rendered a categorical finding that the entire decretal amount stands satisfied from such receipt and there was no debt due which in any event was beyond the scope of consideration in a petition of the present nature. On the other hand, as stated, the DRAT having taken note of the decretal amount, the receipt of the amount credited as compensation and, having further noted the debt is still due, has directed the pre-deposit limited to that extent.

14. Therefore, in the facts and circumstances arising herein, when further amount is due and payable in discharge of the decree/recovery certificate issued by the DRT in favour of the appellant/Bank, the High Court does not have the power to waive the pre-deposit in its entirety, nor can it exercise discretion which is against the mandatory requirement of the statutory provision as contained in Section 21, which is extracted above. In all cases fifty per cent of the decretal amount i.e. the debt due is to be deposited before the DRAT as a mandatory requirement, but in appropriate cases for reasons to be recorded the deposit of at least twenty-five per cent of the debt due would be permissible, but not entire waiver. Therefore, any waiver of pre-deposit to the entire extent would be against the statutory provisions and, therefore, not sustainable in law. The order of the High Court is, therefore, liable to be set aside.

15. It is noticed that this Court while considering an analogous provision contained in Section 18 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ('SARFAESI' for short) relating to pre-deposit in order to avail the remedy of appeal has

expressed a similar opinion in the case of Narayan Chandra Ghosh vs. UCO Bank and Others (2011) 4 SCC 548, which reads as hereunder: □

7. Section 18(1) of the Act confers a statutory right on a person aggrieved by any order made by the Debts Recovery Tribunal under Section 17 of the Act to prefer an appeal to the Appellate Tribunal. However, the right conferred under Section 18(1) is subject to the condition laid down in the second proviso thereto. The second proviso 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. However, under the third proviso to the sub□section, the Appellate Tribunal has the power to reduce the amount, for the reasons to be recorded in writing, to not less than twenty□five per cent of the debt, referred to in the second proviso. Thus, there is an absolute bar to entertainment of an appeal under Section 18 of the Act unless the condition precedent, as stipulated, is fulfilled. Unless the borrower makes, with the Appellate Tribunal, a pre□deposit of fifty per cent of the debt due from him or determined, an appeal under the said provision cannot be entertained by the Appellate Tribunal. The language of the said proviso is clear and admits of no ambiguity.

8. It is well□settled that when a Statute confers a right of appeal, while granting the right, 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. Bearing in mind the object of the Act, the conditions hedged in the said proviso cannot be said to be onerous. Thus, we hold that the requirement of pre□deposit under sub□section (1) of Section 18 of the Act is mandatory and there is no reason whatsoever for not giving full effect to the provisions contained in Section 18 of the Act. In that view of the matter, no court, much less the Appellate Tribunal, a creature of the Act itself, can refuse to give full effect to the provisions of the Statute. We have no hesitation in holding that deposit under the second proviso to Section 18(1) of the Act being a condition precedent for preferring an appeal under the said Section, the Appellate Tribunal had erred in law in entertaining the appeal without directing the appellant to comply with the said mandatory requirement.

9. The argument of learned counsel for the appellant that as the amount of debt due had not been determined by the Debts Recovery Tribunal, appeal could be entertained by the Appellate Tribunal without insisting on pre□deposit, is equally fallacious. Under the second proviso to sub□section (1) of Section 18 of the Act the amount of fifty per cent, which is required to be deposited by the borrower, is computed either with reference to the debt due from him as claimed by the secured creditors or as determined by the Debts Recovery Tribunal, whichever is less. Obviously, where the amount of debt is yet to be determined by the Debts Recovery Tribunal, the borrower, while preferring appeal, would be liable to deposit fifty per cent of the debt due from him as claimed by the secured creditors. Therefore, the condition of pre□deposit being mandatory, a complete waiver of deposit by the appellant with the Appellate Tribunal, was beyond the provisions of the Act, as is evident from the second and third provisos to the said Section. At best, the Appellate Tribunal could have, after recording the reasons, reduced the amount of deposit of fifty per cent to an amount not less than twenty□five per cent of the debt referred to in the second proviso. We are convinced that the order of the Appellate Tribunal, entertaining appellant's appeal without insisting on pre□deposit

was clearly unsustainable and, therefore, the decision of the High Court in setting aside the same cannot be flawed." (emphasis supplied)

16. Having arrived at the above conclusion the issue is also with regard to the extent to which pre-deposit is to be ordered in the instant case. Though the learned Senior Advocates on either side have indicated different figures as the actual debt due as on today, we do not propose to enter into that aspect of the matter since the actual amount due is a matter which would be taken note by the DRAT while considering the appeal on merits and at the point of recovery if any, in the execution proceedings. However, for the present we would take note of the amount as indicated in the order dated 27.02.2019 passed by the DRAT. Hence, for the purpose of determining the pre-deposit, the decretal amount due is taken at Rs.68,18,92,841/-(Rupees Sixty-Eight Crores Eighteen Lakhs Ninety-Two Thousand and Eight Hundred Forty-One). Mr. Mukul Rohtagi, learned Senior Advocate would contend that a portion of property belonging to respondent No.3 has been acquired and the remaining property is still under mortgage and as such pre-deposit would be burdensome to the respondents No.1 and 2, more particularly when the entire compensation amount is deposited and major portion of the debt due is discharged.

17. As already noted, a total waiver would be against the statutory provisions. However, in the instant case, taking note that though the issue relating to the actual amount due is to be considered by the DRAT, keeping in view the fact that the DRT has taken into consideration the earlier settlement and has accordingly decreed the claim to that extent and towards such decree since payment of a major portion is made, though by appropriation of the compensation amount and admittedly since the remaining properties belonging to respondent No.3 is available by way of mortgage and the respondents No.1 and 2 are the personal guarantors, we deem it appropriate that in the peculiar facts and circumstances of this case to permit the pre-deposit of twenty-five per cent of the amount as taken note by the DRAT i.e. twenty-five per cent of Rs.68,18,92,841/-(Rupees Sixty Eight Crores Eighteen Lakhs Ninety Two Thousands and Eight Hundred Forty One). To the said extent, the order dated 27.02.2019 passed by the DRAT on IA No.511 of 2018 is liable to be modified.

18. It is clarified that the consideration made herein and debt due quantified is limited to the aspect relating to pre-deposit. All other contentions including as to the actual amount of debt due is left open to be urged in the pending appeals.

19. In view of the above conclusion the interim direction to deposit the amount of Rs.20 Crores as ordered on 22.11.2019 would lose its relevance at this point of time. Though as per the said direction dated 22.11.2019 the amount was to be deposited within the time frame and there is non-compliance, in view of the subsequent development of the final order being passed in the appeal, we see no reason to proceed further in the Contempt Petition initiated by the appellant, though at an earlier point of time notice was ordered to the respondent.

20. In the result;

(i) The order dated 16.07.2019 passed by the High Court of Delhi in WP(C) No.7530 of 2019 is set aside;

(ii) The order dated 27.02.2019 passed by the DRAT, Delhi on IA No.511 of 2018 in Appeal No.311 of 2018 is modified. The respondents No. 1 and 2 are permitted to deposit twenty-five per cent of Rs.68,18,92,841/- (Rupees Sixty-Eight Crores Eighteen Lakhs Ninety-Two Thousand and Eight Hundred Forty-One) and prosecute the Appeal No.311 of 2018, subject to such deposit being made within 8 weeks, failing which the appeal shall not subsist in the eye of law;

(iii) The appeal is accordingly allowed in part. No costs;

(iv) The Contempt Petition No.569 of 2020 is closed as unnecessary;

(iv) Pending application, if any, shall stand disposed of.

.....CJI.

(S. A. Bobde) .....J. (A. S. Bopanna) .....J (V. Ramasubramanian) New Delhi, February 16, 2021