

M/s India Steel Works Ltd. & Ors. v. Kotak Mahindra Bank Ltd.

M/s India Steel Works Ltd. & Ors.

...Appellant

Kotak Mahindra Bank Ltd.

...Respondent

Case No: Appeal on Diary No. 1876/2023

Date of Judgement: 08/11/2023

Judges:

Mr Justice Ashok Menon, Chairperson

For Appellant: Mr Mr Rishabh Shah along with Ms Ragini Singh, i/b M/s Ragini Singh & Associates, Advocate.

For Respondent: Mr Rohit Gupta, along with Mr Vinay Deshpande, i/b M/s V. Deshpande & Co., Ad, Advocate.

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Facts:

M/s India Steel Works Ltd. & Ors. (Appellants) are challenging the order dated 05/10/2023 passed by the Debts Recovery Tribunal-I, Mumbai (DRT) in I.A. No. 2953/2023 in Securitisation Application (S.A.) No. 136/2023. The DRT dismissed the Appellants' application seeking to restrain Kotak Mahindra Bank Ltd. (Respondent) from taking physical possession of the secured assets under the SARFAESI Act. The Appellants have filed I.A. No. 703/2023 seeking a waiver of the mandatory pre-deposit required under Section 18(1) of the SARFAESI Act to entertain the appeal.

The Appellants have challenged the SARFAESI measures under Section 17 of the SARFAESI Act, raising various contentions:

- The classification of the debt as a non-performing asset (NPA) mentioned in the demand notice under Section 13(2) differs from the date mentioned in the application filed before the NCLT.
- The Appellants had availed a loan from DNS Bank by mortgaging the same properties, and DNS Bank has a pari passu charge over the assets.
- The Appellants' factory was destroyed in a fire accident in 2019, followed by a cyclone in 2020, and then affected by the COVID-19 pandemic-induced lockdown.
- The possession notice issued under Section 13(4) by the Respondent is challenged.
- The Appellants made several payments towards the debt, reducing the liability.
- The Respondent sanctioned an additional facility in the form of WCTL under the Emergency Credit Line Guarantee Scheme (ECLGS) of ₹80 lakhs but allegedly breached a condition mentioned in the sanction letter.

The Respondent Bank has filed an affidavit opposing the waiver application, stating that a complete waiver of the mandatory pre-deposit is not contemplated. The Appellants, vide letter dated 28/11/2020, admitted committing default in repayment of outstanding dues and requested rescheduling/restructuring of the credit facilities. The Appellants, vide letter dated 10/02/2022, reiterated the admission of default and offered to pay the principal amount of ₹11.09 crores, seeking a month's moratorium and proposing to repay the outstanding dues in 2 years through EMIs with an upfront payment of ₹2 crores. The Appellants again offered to pay ₹13.50 crores (10% upfront and the balance within 90 days) vide letter dated 31/08/2023, which was rejected by the Respondent on 13/09/2023. Consequent to the dismissal of the application by the DRT, the Respondent proceeded to take physical possession of the secured assets. DNS Bank had also taken measures under the SARFAESI Act by issuing a demand notice under

Section 13(2). The Respondent sought consent from DNS Bank for taking possession of the secured assets under Section 13(9) of the SARFAESI Act, and DNS Bank consented, subject to the condition that any recovery made by the Respondent should be shared in proportion to the exposure of the two banks. The outstanding dues payable by the Appellants to the Respondent as of 06/10/2023 are ₹22,21,91,168.82, and to DNS Bank as of 30/09/2023 are ₹33,78,31,000/-, aggregating to ₹56,00,22,168/-.

Arguments by Parties:

Appellants' Arguments:

The Appellants have suffered due to calamities, and there are no business activities taking place. Therefore, indulgence may be shown to reduce the mandatory pre-deposit to a minimum of 25% of the debt due. The Appellants have a good prima facie case to maintain the challenge under Section 17 of the SARFAESI Act. The demand notice under Section 13(2) dated 04/08/2021 demands a sum of ₹13,77,85,111/- as of 30/05/2021. Therefore, the Appellants argue that they may be permitted to deposit 25% of this amount for entertaining the appeal.

Respondent Bank's Arguments:

The Respondent Bank relies on the decision of the Bombay High Court in Shree Vindhya Paper Mills Ltd. vs. Stressed Assets Stabilisation Fund & Ors., which held that the borrower must deposit 50% of the debt claimed by all the secured creditors cumulatively. The Respondent contends that the Appellants should be directed to deposit 50% of the total amount due to the secured creditors, including the Respondent and DNS Bank, which amounts to ₹56,00,22,168/-.

Court's Elaborate Opinions:

The second proviso to Section 18(1) of the SARFAESI Act states that no appeal shall be entertained unless the borrower has deposited 50% of the debt due from him, as claimed by the secured creditors or determined by the DRT, whichever is less. The Respondent obtained consent from DNS Bank to proceed against the secured assets under

Section 13(9) of the SARFAESI Act, and DNS Bank consented, subject to the condition that any recovery made by the Respondent should be shared in proportion to the exposure of the two banks. The amount borrowed by the Appellants is not from a consortium of banks but separate facilities availed from the Respondent and DNS Bank. Separate actions for recovery were initiated by the banks by issuing separate notices under Section 13(2). The consent letter from DNS Bank only indicates that the recovery made by the Respondent should be shared in proportion, not that the entire debt due to both banks should be considered for pre-deposit purposes. In Shree Vindhya Paper Mills Ltd. case, the recovery was being made by the Stressed Assets Stabilisation Fund for the entire debt due to all the secured creditors cumulatively, which is different from the present case where the Respondent had demanded only the amount due to it. For the purpose of pre-deposit under Section 18(1), the amount demanded by the Respondent (₹13,77,85,111/-) should be taken as the threshold for calculating the pre-deposit. Considering the Appellants' contention of financial strain due to calamities, and the lack of evidence regarding the financial capabilities of the directors/guarantors, the Appellants were directed to deposit ₹5 crores as pre-deposit. The Appellants had already produced a demand draft for ₹25 lakhs on 19/10/2023. The balance of ₹4.75 crores was to be paid in two instalments within specified dates. Default in payment of any instalment would entail the dismissal of the appeal without any further reference to the Tribunal. In view of the payment of ₹25 lakhs, there shall be a stay on further SARFAESI measures until the next date of hearing.

Cases Cited:

Shree Vindhya Paper Mills Ltd. vs. Stressed Assets Stabilisation Fund & Ors. (Bombay High Court)

Sections and Laws Referred:

Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act)

- Section 13(2): Demand notice

- Section 13(4): Taking possession of secured assets
- Section 13(9): Consent from secured creditors
- Section 17: Right to appeal
- Section 18(1): Appeal to DRAT (second proviso on pre-deposit)