

BEFORE THE DEBTS RECOVERY
APPELLATE TRIBUNAL, AT: MUMBAI

Present: Mr Justice Ashok Menon, Chairperson

I.A. No. 566/2022 (WoD)

In

Misc. Appeal No. 97/2023

Between

M/s. Wateredge Hospitality Pvt. Ltd. & Ors. ... Appellant/s
V/s.

The Authorized Officer, ... Respondent/s
State Bank of India

Mr Herbert A. Noronha, Advocate for Appellants.

Ms. Vinaya Chavan, i/b M/s. Vinaya Chavan & Co., Advocate for Respondent Bank.

:- Order dated: 20/11/2023:-

This is an application filed under section 18 (1) of the Securitisation & Reconstruction of Financial Assets & Enforcement of Security Interest Act, 2002 ("SARFAESI Act", for short) for a waiver of pre-deposit to entertain the appeal.

2. This Tribunal had, vide order dated 11/01/2023 disposed of the application by directing the Appellants to deposit a sum of ₹3 crores under section 18 (1) in two equal instalments of ₹1.5 crores within a gap of three weeks each. It was further ordered that on payment of the 1st instalment within the stipulated time, the Appellants are entitled to a stay of the further Sarfaesi measures initiated by the Respondent bank. The Appellant challenged the order of this Tribunal before the Hon'ble High Court of Gujarat in Special Civil Application No. 4405 of 2023, and vide order dated

06/09/2023, the order of this Tribunal was quashed and set aside with a direction for fresh consideration of the application for waiver.

3. The Hon'ble High Court had observed that there was an application for condonation of delay pending to be decided and therefore, the application for condonation of delay should have been decided in the first instance before considering the application for waiver of deposit and hence, this Tribunal was at fault for not deciding the application for condonation of delay before considering the application for waiver of deposit.

4. The other reason for setting aside the orders of this Tribunal is for the reason that this Tribunal had in the impugned order contradicted the earlier statement that there was no prima facie case and despite that, granted a concession exercising jurisdiction under the 3rd proviso to section 18 (1) of the SARFAESI Act by reducing the pre-deposit to 25%. Hence there was a direction to consider the application afresh.

5. Coming to the question of deciding the application for condone action of delay before the consideration of the application under section 18 (1), the Hon'ble High Court of Bombay holds a contradictory view. In *M/s Deluxe Cotton Corporation & Ors vs. Bank of Baroda 2016 SCC OnLine Bom 2629*, the Division Bench of the High Court relying on the decisions of the Hon'ble Supreme Court and various other high courts held thus:

“16. Thus, the position that emerges upon a survey of the authorities is that an appeal filed along with an application for condonation of delay in filing the appeal is nevertheless an appeal in the eyes of the law. Accordingly, such an appeal, when dismissed upon refusal to condone the delay, is nevertheless a dismissal of the appeal itself. Such dismissal,

confirms the order appeal against and therefore, amounts to the disposal of the entire appeal itself. As a corollary therefore, the appeal court, at the stage when it is considering the application for condonation of delay in the institution of the appeal, is also 'entertaining the appeal' itself. The bar under section 21 of the said Act will, therefore, apply even at the stage of consideration of the application for condonation of delay accompanying in appeal under section 20 of the said Act..... Therefore, until such a person deposits the amount prescribed or secured is a waiver or reduction under the proviso, there is no question of Appellate Tribunal entertaining the appeal under section 21. In view of the legal position discussed earlier, an appeal accompanied by an application for condonation of delay in filing the appeal, is itself an application in the appeal for the purpose of section 20 of the said Act. Accordingly, unless the predicates on section 21 of the said Act were complied with, there was no question of DRAT even entertaining the appeal or application for condonation of delay in filing the appeal.”

6. It is keeping in view the aforesaid decision of the Division Bench of the Bombay High Court that the application for waiver of deposit was considered in the first instance before the consideration of the application for condonation of delay which would be tantamount to 'entertaining the appeal'. Even before the disposal of the Special Civil Application by the Hon'ble High Court of Gujarat, the application for condonation of delay was entertained and allowed consequent to the deposit of the entire amount of the pre-deposit by the Appellant. It is seen that the allowing of the application for condonation of delay was challenged before the Hon'ble High Court of Gujarat in Special Civil Application No. 14688 of 2023 and vide order dated 17/10/2023 the order to condone delay was confirmed subject to payment of costs ₹10,000/- to the Respondent. Hence, it may not be necessary for considering the application for condonation of delay afresh by this Tribunal.

7. Concerning the reconsideration of the waiver of pre-deposit, this Tribunal had observed that it was not enthused with the prima

facie case in favour of the Appellants. The challenge to the Sarfaesi measures initiated by the Respondent was not found to be very satisfactory and that is why this Tribunal observed that it was not enthused with the prima facie case. However, the Appellants have produced the income tax returns to prove that they are under financial strain. It was also pointed out that their business failed because the CRZ Regulations prevented them from completing the construction of the hotel which was intended to be constructed. The Appellants' hotel business ran into heavy weather, and they had on that ground, requested the Respondent to restructure the loan. The existence of a prima facie case and the financial strain undergone by the Appellants are the considerations on which the pre-deposit can be reduced by this Tribunal from the mandatory 50% up to 25% exercising its discretion under the third proviso to Sec.18(1) of the SARFAESI Act. In the instant case, the threshold amount for calculation of the pre-deposit is to be taken as the amount mentioned in the demand notice under section 13 (2) of the SARFAESI Act, which is ₹97,187,207/- (see *Sidha Neelkanth Paper Industries Private Limited & Ano vs. Prudent ARC Limited & Ors* 2023 SCC OnLine SC 12). 50% of the aforesaid amount would come to ₹4,85,93,603.50 and 25% of the amount would come to ₹2,42,96,801.80. This Tribunal had directed the Appellants to deposit ₹3 crores as pre-deposit which is more than 30% of the aforesaid threshold amount. I find no reason to alter the finding concerning the amount of pre-deposit.

In the result, I find that there is no need for any further directions

concerning pre-deposit already made. Since the order of this Tribunal has already been complied with and the appeal is entertained, the Respondent bank is directed to file a reply to the Misc. Appeal and get ready for hearing on 07.02.2024. Given the pre-deposit already made, the further Sarfaesi measures shall stand stalled till the hearing of the appeal.

Sd/-
Chairperson

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DRAFT MUMBAI