

Messrs. Keystone Constructions and Others Vs. State Bank of India and Others

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Court : Mumbai

Decided On : Oct-08-2013

Judge : S.J. Vazifdar & K.R. Shriram

Appeal No. : Writ Petition No. 1382 of 2013 alongwith Writ Petition No. 1454 of 2013

Appellant : Messrs. Keystone Constructions and Others

Respondent : State Bank of India and Others

Judgement :

S.J. Vazifdar, J.

1. The interpretation of the 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 the "SARFAESI Act" or the "said Act") falls for consideration in these writ petitions.

Section 18 of the SARFAESI Act reads as under:-

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.]

(2) Save as otherwise provided in this Act, the Appellate Tribunal shall, as far as may be, dispose of the appeal in accordance with the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993) and rules made thereunder.

It is essentially the second proviso that falls for consideration.

2. The questions that arise in Writ Petition No. 1382 of 2013 also arise in Writ Petition No. 1454 of 2013. Writ Petition No.1454 of 2013 also raises further questions. In Writ Petition No.1382 of 2013 the petitioners are the principal borrowers. The petitioners in Writ Petition No.1454 of 2013 are mortgagors.

3. It would be useful to preface this judgment with a summary of it.

(A) The case briefly is this. In both the writ petitions, the respondents invoked the provisions of the SARFAESI Act. The petitioners filed appeals under section 17 of the said Act in which they took out the applications for interim reliefs. The Debt Recovery Tribunal (DRT) granted interim reliefs subject to the petitioners depositing certain amounts within a specified time. The petitioners filed appeals

under section 18 before the Debt Recovery Appellate Tribunal (DRAT) challenging the interim orders insofar as they required them to deposit the said amounts. In these appeals, the petitioners filed applications for waiver of the pre-deposit required to be made under the second proviso to section 18 as a condition to the maintainability of the appeals. The DRAT however, directed the petitioners to deposit the percentage prescribed under section 18(1) (50% or 25%) of the sum claimed by the petitioners which is substantially higher than the amount ordered to be deposited by the DRAT as a condition for the interim orders.

(B)(i) The following issues arise in both the writ petitions. Whether in cases where the DRT grants interim relief conditional upon deposit of an amount of money that amount constitutes the amount of debt due from the borrower determined by the DRT for the purposes of the second proviso to section 18(1) of the SARFAESI Act.

This issue in turn requires a consideration of two questions. Firstly, whether in an interlocutory application under section 17 of the SARFAESI Act, the DRT is entitled to determine prima-facie the amount due by the borrower to the creditor. Secondly, whether a mere direction in an interlocutory application to deposit an amount as a condition to the grant of an interim order constitutes a determination of the amount due by the DRT for the purpose of the second proviso to section 18(1).

(ii) We have held that in a interlocutory application taken out in an appeal under section 17 of the SARFAESI Act, the DRT is entitled to determine prima-facie and only for the purpose of such application the amount due by the borrower to the creditor. Whether the DRT has determined the same or not depends upon the order. A mere order directing the deposit of a certain amount as a condition for the interim order cannot be said to be the amount of the debt determined by the DRT for the purposes of the second proviso to section 18(1). If however, the DRT determines prima-facie the amount of the debt due from the borrower, it is that amount that must be considered while computing the pre-deposit required under the second proviso to section 18(1).

We have come to the conclusion that the amount directed to be deposited by the DRT in both the cases was not on the basis of a determination even prima-facie,

of the amount of the debt due from the borrower.

(C) The following additional issues arise in Writ Petition No.1454 of 2013 in which the petitioners are mortgagors:

(i) Whether under the second proviso to section 18(1) of the SARFAESI Act, a mortgagor is bound to make the pre-deposit as a condition to the maintainability of his appeal under that section?

This issue in turn requires a consideration of two questions. Firstly, whether a mortgagor, falls within the ambit of the term "borrower" in the second proviso to section 18(1). Secondly, whether the amount due from him under the mortgage falls within the ambit of the expression "amount due from him" in the second proviso to section 18(1). Indeed the answer to the second question must follow the answer to this first.

(ii) We have answered these questions in the affirmative, against the petitioners.

(D) (i) Whether the words "as claimed by the secured creditors" in the second proviso to section 18(1) relate only to the amounts claimed in duly filed proceedings for the recovery of the debt before a Court, Tribunal or other authority ?

(ii) We have answered the question in the negative, against the petitioners.

(E)(i) Whether section 18(1) operates only where the claim is made by more than one secured creditor and not where the claim is made by just one secured creditor?

(ii) We have answered the question in the negative, against the petitioners.

4. We will first deal with Writ Petition No.1382 of 2013 in which the petitioners are the principal borrowers.

The petitioners in Writ Petition No.1382 of 2013 have challenged an order dated 30th April, 2013 passed by the Debt Recovery Appellate Tribunal (DRAT) disposing of Miscellaneous Application No.409 of 2013 filed by them seeking a

waiver of deposit required by the second proviso to section 18(1) of the said Act.

5. As this writ petition essentially raises a question of law, it is sufficient to refer to the facts only briefly.

(A) The respondents sanctioned in favour of the petitioners, a cash credit facility of Rs.750.00 lakhs, the repayment whereof was secured by a charge on certain assets belonging to the petitioners.

The respondents issued a notice dated 14th September, 2010 under section 13(2) of the said Act in which it claimed that a sum of Rs.4,93,24,997/- was due and payable to it by the petitioners. The petitioners by their letter dated 11th November, 2010, raised various objections. The petitioners contend that the same were not effectively dealt with in the respondents' reply thereto dated 18th October, 2010.

The Sub Divisional Officer by a notice dated 19th March, 2013, stated that physical possession of the secured assets would be taken.

6(A). On 26th March, 2013, the petitioners filed Securitisation Application No.152 of 2013 under section 17 of the said Act, challenging the notice under section 13(2) and the action proposed to be taken, as stated therein.

The petitioners also sought interim reliefs restraining the respondents, inter-alia, from taking physical possession of the said assets or from interfering with the petitioners' possession thereof in any manner as well as from taking any further action pursuant to the demand notice under section 13(2).

(B). By an order dated 2nd April, 2013, on the interim application, the Debts Recovery Tribunal (hereinafter referred to as "DRT") directed the respondents not to take any further action till 3rd May, 2013, subject to the petitioners depositing a sum of Rs.50,00,000/- on or before 22nd April, 2013 towards the loan, failing which it was ordered that the protection would not be available.

We will refer to this order in detail later for the construction and effect thereof as that is what falls for consideration in this matter.

(C). The petitioners challenged the above order dated 2nd April, 2013, to the extent that it required them to deposit a sum of Rs.50,00,000/- by filing Miscellaneous Appeal No.131 of 2013 under section 18 of the said Act.

(D) In this appeal, the petitioners filed Miscellaneous Application No.409 of 2013, seeking waiver of the deposit, as contemplated by section 18 of the said Act.

7. Miscellaneous Application No.409 of 2013, seeking waiver of deposit was disposed of by the impugned order dated 30th April, 2013 passed by the DRAT, directing the petitioners to deposit an amount of Rs.2.00 crores in four installments of Rs.50,00,000/- each. This predeposit was calculated as the percentage of the amount claimed by the respondents. The petitioners contend that the pre-deposit ought to have been only Rs.12,50,000/- calculated as a percentage of the amount directed by the DRT to be deposited viz. Rs.50,00,000/-.

8. Mr. Cama, the learned counsel appearing on behalf of the petitioners in Writ Petition No.1382 of 2013 submitted that where the DRT grants interim relief conditional upon deposit of an amount of money, that amount constitutes the amount determined by the DRT for the purposes of the second proviso to sub-section (1) of section 18 of the SARFAESI Act.

In the present case, the interim order dated 2nd April, 2013 was granted by the DRT conditional upon the petitioners depositing a sum of Rs.50,00,000/-. According to him, therefore, Rs.50,00,000/- was the amount determined by the DRT for the purposes of the second proviso to section 18(1) of the said Act. In other words, according to him, the DRAT ought to have directed the petitioners to deposit 50% or 25% as the case may be, of Rs.50,00,000/- and not of the amount claimed by the respondents.

9. Before considering the submission, it is necessary to note two things. Firstly, the second proviso to section 18(1) has been held to be mandatory by the Supreme Court in the case of NarayanChandra Ghosh vs. UCO Bank, (2011) 4 SCC 548. Secondly, the proviso has been held to be applicable even to an appeal against an interim order by the judgment of a Division Bench of this Court in M/s. Vinay Container Services Pvt. Ltd. vs. Axis Bank, Mumbai, 2011(3) LJ SOFT, 95 = AIR

2011, Bombay 37.

10. In *NarayanChandra Ghosh v. UCO Bank*, (2011) 4 SCC 548, the Supreme Court upheld the judgment of the High Court setting aside the order of the DRAT entertaining the appellant's appeal without insisting on a pre-deposit. The Supreme Court held that the condition of pre-deposit under section 18(1) is mandatory and that there is a bar to the entertainment of an appeal under section 18 unless this condition precedent is fulfilled. The Supreme Court further held as under :-

9. The argument of the learned counsel for the appellant that as the amount of debt due had not been determined by the Debts Recovery Tribunal, the 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 an 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 the appellants 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.

11. The judgment is, therefore, also an authority for the proposition that if the amount of debt is not determined, the question of predeposit must be computed with reference to the amount claimed by the secured creditors. The issue raised by Mr. Cama was neither raised before nor decided by the Supreme Court.

12. In *M/s. Vinay Container Services Pvt. Ltd. vs. Axis Bank, Mumbai*, the DRAT had directed the petitioners to comply with the condition of pre-deposit under section 18(1) in an appeal filed before it arising out of an interlocutory direction of the DRT. The Division Bench of this Court considered whether the requirement of pre-deposit would be attracted where the order challenged before the DRAT is not a final order under section 17, but an interlocutory order. In that case also, the petitioners had filed an appeal under section 17 of the said Act, in which it moved an application for interim reliefs. The DRT directed the respondents not to take physical possession of the secured assets but made its order conditional on a deposit of a sum of Rs.1.78 crores by the petitioners within four weeks. The DRT observed that the respondents' claim was in excess of Rs.17.18 crores together with interest. The petitioners challenged this order before the DRAT, which held that the provisions of section 18 of the said Act regarding predeposit had to be complied with in case of an interlocutory order. Accordingly, the DRAT directed the petitioners to deposit 25% of the total claim of the respondents, which amounted to Rs.4,29,50,000/- in two installments. Thus, in that case, whereas the DRT had ordered deposit of a sum of Rs.1.78 crores, the DRAT in an appeal challenging the same directed the petitioners to deposit an amount of about Rs.4.30 crores. The case before us is the same - in the petitioners appeal against the order of the DRT to deposit a sum of Rs.50 lakhs as a condition for the stay, the DRAT directed the pre-deposit of Rs.2 crores. The reference to the DRT Act in the judgment and in this judgment is to the Recovery of Debts Due to Banks and Financial Institutions Act, 1993. The Division Bench held as under :-

9. Under the second proviso, the amount of fifty per cent which is required to be deposited by the borrower, is computed either with reference to (i) the amount of debt due from him as claimed by the secured creditors or (ii) the amount of debt due from him as determined by the Debts Recovery Tribunal. The lesser of the two amounts has to be deposited as a condition precedent to the appeal being entertained. In a situation where the amount of the debt is yet to be determined by the Debts Recovery Tribunal, obviously, the second limb can have no application. As already noted earlier, the scope of an appeal under Section 17, where a measure has been adopted by the secured creditor under Section 13(4) is the determination as to whether the measure has been adopted in accordance

with the provisions of the Act and the rules. Where the amount of the debt is yet to be determined by the Tribunal and an appeal is preferred before the Appellate Tribunal by the borrower, the condition of pre-deposit would continue to apply by virtue of subsection (1) of Section 18. In such a situation, the borrower would be liable to deposit fifty per cent of the amount of debt due from him inasmuch as there is no determination at that stage by the Tribunal of the amount of the debt.

10. The view which we are inclined to take is consistent with the judgments of the High Courts of Delhi and Madras to which a reference would briefly now be made.

11. In *Indian Bank vs. M/s. Hamosons Apparels Private Limited* (WP No. 3958/2007 and connected matters), a Division Bench of the Madras High Court construed the provisions of Section 18(1). The Division Bench rejected the submission that an order of pre-deposit cannot be passed where an appeal is preferred against an interim order of the Tribunal or against an order of the Tribunal declaring interim relief.

The submission before the Madras High Court was that an order of pre-deposit cannot be passed for the reason that there is no determination of the debt due. The Division Bench has observed as follows:

In a case where appeal u/s 18 is preferred against interim order or for non-grant of interim order, the aggrieved persons, while praying for interim injunction to stall the proceeding, cannot allege that no determination has been made by DRT with regard to the claim. It cannot blow hot and cold by moving in appeal u/s 18 against interim order or non-grant of interim order, for the purpose of getting an appropriate interim order in appeal u/s 18 and allege non-determination of claim by Tribunal, which at best can be determined at the time of final hearing of the case, that too in a case where if any dispute is raised by party u/s 19 of DRT Act, 1993 or bank files an application u/s 13 (10) of NPA Act. Therefore, the effect and correct meaning to give to the sentence the amount of debt due from him as claimed by secured creditor or determined by Debts Recovery Tribunal, whichever is less as mentioned under 2nd proviso to Section 18(1), a harmonious reading has to be made, which may fit in all situations. Therefore, we hold that the 2nd proviso to Section 18(1) stipulates pre-deposit of 50% due as claimed by the

secured creditor or determined by the Debts Recovery Tribunal whichever is less, and in absence of a determination by; the Tribunal, the person has to deposit 50% of the amount claimed by the secured creditor, subject to waiver under 3rd proviso to Section 18(1).

.....

13. For the aforesaid reasons, we hold that the requirement of pre-deposit under subsection (1) of Section 18 of the Act would also apply where an appeal is filed before the Appellate Tribunal against an interlocutory order passed by the Debts Recovery Tribunal under Section 17 of the Act. The power of the Tribunal to pass an interlocutory order is ancillary to its jurisdiction under Section 17 in view of the judgment of the Supreme Court in *Mardia Chemicals Limited (supra)*. The provisions of Section 18(2) cannot be so interpreted to mean that an interlocutory order passed by the Tribunal is not referable to the provisions of Section 17. Indeed, it is in the context of proceedings under Section 17 that the Tribunal assumes jurisdiction and it is in aid of that jurisdiction that the Tribunal can pass an interlocutory order. This position is consistent with the judgment of a Division Bench of this Court in *Nashik Merchants Cooperative Bank Ltd. vs. Aditya Hotels Pvt. Ltd.*

13. Mr. Cama submitted that neither the Supreme Court nor the Division Bench of this Court considered the question raised by him. The parties in that case did not contend that the interim order of the DRT determined the debt due in the appeal under section 17 of the SARFAESI Act. According to him in an interlocutory application filed in an appeal under section 17, the DRT is entitled to determine the debt due to the bank and if it does so, it is that amount that constitutes the debt due for the purpose of the second proviso to section 18(1) of the Act.

14. Mr. Cama's submission that neither the Supreme Court in the case of *NarayanChandra Ghosh v. UCO Bank* nor the Division Bench of this Court in the case *M/s. Vinay Container Services Private Limited v. Axis Bank* is an authority for the proposition that the DRT cannot determine the debt due by the appellant in an interlocutory application taken out in an appeal under section 17 of the Act, is well founded. In those cases, the debt due was not determined even prima facie by the

DRT. In fact, the contentions raised in those cases were on the basis that there was no such determination. Neither of these judgments are an authority for the proposition that if the DRT in an interlocutory application under section 17 determines even prima facie the debt due, that amount cannot constitute the debt due by the applicant for the purposes of the second proviso to section 18(1) of the Act.

15. Mr. Toor, the learned counsel appearing on behalf of the respondents submitted that this, however, would not take the petitioner's case further as the submission is contrary to the judgment of a Division Bench of this Court in the case of *M/s. Forum Diamonds and Ors. v. State Bank of Baroda and Ors.* 2010 (1) LJSOFT 47 = 2010 (1) All MR 140. In that case, the DRAT rejected the petitioner's prayer for a complete waiver of the deposit required under section 18 of the SARFAESI Act. The DRT had refused to entertain the application for interim reliefs on the ground that it was premature as actual physical possession of the secured assets had not been taken. The petitioner challenged this order before the DRAT in which it filed an application for waiver of the requirement of the deposit. It was contended that since the debt had not been determined by the DRT, there cannot be an order of pre-deposit on an undetermined amount. It was contended that the DRT had failed to exercise its jurisdiction as it ought to have granted the relief of waiver of pre-deposit. As Mr. Cama rightly pointed out, that was also a case where no amount was determined by the DRT as being due by the appellant to the bank. The Division Bench held as under :-

"7. We are not impressed by this contention. The provisions of Section 18 of the Securitisation Act contemplates that 50% or 25% of the amount has to be deposited by the appellant of the amount claimed by the secured creditors or the amount determined by DRT whichever is less. There is some element of benefit available to the applicant under these provisions but the interpretation given by the Petitioners as that itself would mean rendering the provisions of Section 13 as well as the provisions of Section 17 ineffective and inoperative, cannot be accepted. The Legislature in its wisdom has used the word or and the same has to be construed and read as or and not as and. Either of the amounts i.e. the amount claimed by the secured creditors or the amount determined by the DRT can be the

basis for determining 50% or 25% of the debts, as the case may be. The very purpose of enacting Sections 13 to 18 of the Securitisation Act was to provide an expeditious methodology for recovering public dues without any delay. Section 13 empowers the secured financial institutions to take possession of the mortgaged assets or secured assets after complying with the requirements of Section 13. In other words, the amount claimed by the secured creditors in the notice can itself be a ground for taking possession, if the notice is not complied with, which in turn would give remedy to the Applicant to invoke the provisions of Section 17 of the Securitisation Act. Once an appeal under Section 18 is filed, the applicant will have to comply with the order passed by the DRAT as regards to compliance to the predeposit condition. There could be cases where the provisions of Securitisation Act have been invoked after institution of the proceedings under the DRT Act and where DRT either prima facie or on final determination has determined the amount payable by the Debtor. In that event the amount determined by the DRT would have to be the basis for complying with the condition of predeposit if the same is less than the one claimed by Bank. The benefit intended to be provided to the borrower is wherever the amount has been determined by the DRT and it is less than the amount claimed by the secured creditors under Section 13(2) or (4) of the Act. The Appellate Tribunal cannot insist on deposit of more than 50% of the amounts claimed by the secured creditors. But for this limited benefit, no further concession can be given to the debtors as per the provisions of Section 18 of the Securitisation Act. The very legislative purpose of enacting this provision would stand defeated if the contention of the Petitioners is accepted that unless the amount is determined by the Competent Forum the provisions of pre-deposit as contemplated under Section 18 cannot come into play and no order in terms thereof can be passed. This will lead to an absurd result that neither the amount would be deposited till final determination nor the secured creditors would be able to take possession of the mortgaged assets which is against the very intent of Section 13 of the Act." [emphasis supplied]

16. The first sentence of the portion underlined recognizes a prima facie determination by the DRT of the amount payable by the debtor. The Division Bench did not hold that a prima facie determination of the amount payable by the debtor for the purpose of section 18 can only be in proceedings filed under the

DRT Act. In other words, we do not read the judgment as having restricted the prima facie determination of the amount payable by the debtor only to proceedings under the DRT Act. If the prima facie determination of the amount payable by the debtor under the DRT Act constitutes the amount of debt due by the debtor as determined by the DRT for the purpose of section 18 of the SARFAESI Act, there is no reason why a similar prima facie determination of the DRT in an interlocutory proceeding under section 17 of the SARFAESI Act cannot also constitute the amount of debt due by the debtor as determined by the DRT for the purpose of section 18. This is not inconsistent with the judgment of the Division Bench.

17. An amount, including the extent/quantum of a debt, can always be determined by a Court prima facie. Whether the word "determined" refers to a final determination or even a prima facie determination must depend upon the context in which it is used. The context in which the word "determined" is used in section 18 indicates that it may be a final determination or even a prima facie determination. The provisions of the SARFAESI Act do not either expressly or by necessary intendment preclude a prima facie determination of the debt due by the borrower. The provisions, in fact, indicate the contrary. As we noted earlier, section 17 of the Act entitles a borrower to apply for interim reliefs in an appeal under section 17. An appeal under section 18 against an interim order is maintainable. A prima facie determination of the debt due would be relevant in certain interim applications such as in applications to restrain the bank from enforcing the securities where the appellant/borrower contends that the amount claimed is excessive. The DRT may well grant a stay subject to the borrower depositing or securing what is determined prima facie to be the debt due. We hasten to add that the DRT may not always be bound to determine the debt due even prima facie. If, however, for any reason it does so, there is no reason why its decision ought not to be considered to be the debt due as determined by the DRT for the purpose of the provisions of section 18(1) of the SARFAESI Act. To hold otherwise would be contrary to and render the provisions of section 18 nugatory.

18. It is settled law that against an interlocutory order under section 17 of the SARFAESI Act, an appeal lies under section 18 of that Act. There is nothing that restrains the DRT from coming to a prima facie conclusion of the debt due. Absent

an express provision or an intention to the contrary it must, in fact, be assumed to have such a power for it could otherwise lead to injustice. Take for instance a case where the DRT finds the quantum of the claim made by the bank to be ex-facie unsustainable. While granting an interlocutory injunction, the DRT could impose a condition requiring the appellant / debtor to deposit what it considers, albeit prima facie, to be the debt due. If the debtor files an appeal against the order, it is that amount which must be considered while determining the amount of pre-deposit under the second proviso to section 18(1).

19. The word "determined" in the second proviso of section 18 does not necessarily mean a final determination. If the DRT, in proceedings filed by the creditor under the DRT Act determines the borrowers / debtor's liability finally, that would be the amount to be taken into consideration for the purpose of the second proviso. If, on the other hand, there is no such final determination and the DRT comes to a prima facie determination of the amount due, that would be the amount determined by the DRT for the purpose of the second proviso to section 18.

20. Mr. Toor relied upon upon paragraphs 94 to 97 of the judgment of the Supreme Court in *Ashok Leyland Limited v. State of Tamil Nadu* (2004) 3 SCC 1 in support of his contention that the term "determine" refers only to the final adjudication of a proceeding. Before referring to these paragraphs, it is necessary to note the questions that fell for consideration in that case. One of the main issues in that case was the interpretation of section 6-A of the Central Sales Tax Act, 1956. The judgment also dealt with another petition which sought a declaration that section 9(2) of the Central Sales Tax Act designating the authorities of the movement state to adjudicate upon the situs of sales and character of a transaction in the course of an inter-State sale was arbitrary and ultra vires the Constitution of India in matters involving elements of transactions taking place in more than one State. In paragraph 36, the Supreme Court inter-alia set out Article 269 of the Constitution of India which reads as under :-

"269. Taxes levied and collected by the Union but assigned to the States.-(1) Taxes on the sale or purchase of goods and taxes on the consignment of goods shall be levied and collected by the Government of India but shall be assigned and

shall be deemed to have been assigned to the States on or after the 1st day of April, 1996 in the manner provided in clause (2).

Explanation.-For the purpose of this clause,-

(a) the expression 'taxes on sale or purchase of goods' shall mean taxes on sale or purchase of goods other than newspapers, where such sale or purchase takes place in the course of inter-State trade or commerce;

(b) the expression 'taxes on the consignment of goods' shall mean taxes on the consignment of goods (whether the consignment is to the person making it or to any other person), where such consignment takes place in the course of inter-State trade or commerce.

(2) The net proceeds in any financial year of any such tax, except insofar as those proceeds represent proceeds attributable to Union Territories, shall not form part of the Consolidated Fund of India, but shall be assigned to the States within which the tax is leviable in that year, and shall be distributed among those States in accordance with such principles of distribution as may be formulated by Parliament by law.

(3) Parliament may by law formulate principles for determining when a sale or purchase of, or consignment of, goods takes place in the course of inter-State trade or commerce."

The observations in paragraphs 94 to 97 of the judgment relied upon by Mr. Toor were in the context of Article 269 and in particular clause (3) thereof. Paragraphs 94 to 97 read as under :-

"94. The word determination must also be given its full effect, which presupposes application of mind and expression of the conclusion. It connotes the official determination and not a mere opinion of (sic or) finding.

95. In Aiyar, P. Ramanatha: Law Lexicon, 2nd Edn., it is stated:

Determination or order. The expression determination signifies an effective expression of opinion which ends a controversy or a dispute by some authority to

whom it is submitted under a valid law for disposal. The expression order must have also a similar meaning, except that it need not operate to end the dispute. Determination or order must be judicial or quasi-judicial. *Jaswant Sugar Mills Ltd. v. Lakshmi Chand* (Constitution of India, Article 136).

96. In *Blacks Law Dictionary*, 6th Edn., it is stated:

A determination is a final judgment for purposes of appeal when the trial court has completed its adjudication of the rights of the parties in the action. *Thomas Van Dyken Joint Venture v. Van Dyken*.

97. It is not in dispute that the principles for determination as to what would cause an inter-State sale or intra-State sale are to be laid down in terms of the provisions of a parliamentary Act having regard to the express provisions contained in clause (3) of Article 269 and clause (3) of Article 286 of the Constitution. What principles can be deduced by reason of such a legal fiction has been stated by this Court in *Consolidated Coffee Ltd.* in the following terms:.....

The judgment does not hold that there can never be said to be a *prima facie* determination in any circumstances. It is obvious that in the context of Article 269(3), the determination as to when a sale or purchase took place in the course of inter-State trade or commerce is a final determination. The judgment did not deal with a situation where such a determination could be at a *prima facie* stage. The ambit of the words "determining", "determined" or "determination" must depend upon the context in which they are used. There can be a final determination as well as a temporary determination, including for the purpose of interlocutory applications. A *prima facie* determination is of necessity subject to a final determination. That, however, would make no difference in the present case. There is nothing that militates against a temporary or *prima facie* determination of the debt due in interlocutory proceedings in applications/appeals under section 17 of the SARFAESI Act.

21. Where the DRT in an interlocutory application taken out in an appeal under section 17 of the SARFAESI Act determines *prima facie* the amount of debt due by the appellant / debtor, the same constitutes the debt due by the appellant as

determined by the DRT for the purpose of the second proviso to section 18.

22. In the facts of this case, however, this submission does not carry the petitioner's case any further as the DRT has not determined the debt due by the petitioner to the respondent. The DRT, by the order dated 2nd April, 2013, merely records the respondent's notice demanding a sum of Rs.4.93 crores and the respondents contention that as on the date of the application, the amount due was about Rs.7.50 crores. The order also records the statement that the petitioners wanted to make payment, but were unable to do so due to financial difficulty and the petitioners representations as to how the amount would be repaid. The order further records the submissions regarding the validity of the mortgage. The operative part of the order merely required the respondent-bank not to take any further action till the specified date subject to the petitioner depositing the amount of Rs.50,00,000/-. The stipulation of the amount of Rs.50,00,000/- was not a determination even prima facie of the debt due by the petitioners to the respondents.

23. The order of the DRT, therefore, did not determine even prima facie the debt due by the petitioners to the respondent. The DRT was not even invited to do so by the petitioner. The order, in fact, indicates that far from disputing the debt, the petitioner, in fact, expressed a desire to discharge it in a particular manner. The sum of Rs.50,00,000/- stipulated by the DRT in the order dated 2nd April, 2013, as a condition for the grant of an interim order is an ad-hoc amount, unrelated to the determination of the debt due. There is not a whisper in the order which remotely indicates that the DRT considered Rs.50,00,000/- even prima facie to be the debt due.

24. Where the DRT merely makes the grant of an injunction conditional upon the deposit of a certain amount, that amount does not ipso facto constitute the debt due as determined by the DRT for the purpose of the second proviso to section 18(1). Each order of the DRT would have to be construed to ascertain whether the debt due was determined prima facie or otherwise. In the present case there was no determination of the debt due.

25. In the circumstances, this is a case where the DRT had not determined even prima facie the debt due by the petitioner to the respondents. In that event, the amount claimed by the respondents would be the amount to be taken into consideration for the purpose of determining the amount to be deposited under the second and third provisos to section 18(1).

26. The contention that if no amount is determined, it must be presumed that the amount determined by the DRT for the purpose of the second proviso to section 18(1) is nil is not well founded. If no amount is determined to wit, where the debt due is not ascertained by the DRT it does not follow that the amount determined is nil - that no amount is due. The submission is a contradiction in terms. A determination that no amount is payable is, in effect, a determination of the amount due.

27. The submission is also contrary to the judgment of the Supreme Court in *NarayanChandra Ghosh v. UCO Bank and Ors.* (supra). Even in that case, there was no determination of the amount payable. As stated in paragraph 3 of the judgment the DRT had not entertained the appeal under section 17 on a technical ground. The Supreme Court expressly recorded that the quantum of the amount due from the appellant had not been determined by the DRT in the appeal under section 17. The DRAT entertained the appeal under section 18 without insisting on any deposit as required by section 18. The High Court set aside the order of the DRAT. The Supreme Court upheld the decision of the High Court and dismissed the Appeal. The Supreme Court noted that the bank's notice under section 13(2) demanded a sum of Rs.52,42,474/- and directed the appellant / borrower to deposit a sum of Rs.15,00,000/- within four weeks. The Supreme Court, therefore, computed the deposit on the basis of the respondent-bank's claim.

28. Writ Petition No.1382 of 2013, therefore, requires to be dismissed.

29. As far as this aspect is concerned, the situation is no different in Writ Petition No.1454 of 2013. The DRT had, by an order dated 15th January, 2013, directed the petitioners to deposit a sum of Rs.30 lakhs in two equal installments and directed the respondent-bank to defer further proceedings pursuant to the order of

the Chief Metropolitan Magistrate in the event of the amount being deposited. The DRT had not by this order determined prima facie the amount due by the petitioner to the respondent-bank. The order merely records the contentions of the parties. It notes the bank's claim of a sum of more than Rs.4.5 crores. It is important to note that the DRT specifically stated that the contentions raised by the petitioners would be dealt with at the final hearing of the appeal under section 17 as they raised issues to be dealt with after completion of the pleadings. Therefore, even in this case, the DRT had not determined the amount due by the petitioners to the respondent-bank for any purpose whatsoever.

In this Writ Petition, the petitioner has challenged the order of the DRAT dated 4th March, 2013, in an appeal against the said order dated 15th January, 2013, directing the petitioner to deposit a sum of Rs.1.25 crores in two equal installments. As far as this aspect is concerned, therefore, the contention of the petitioners in this Writ Petition is also rejected.

30. This brings us to Writ Petition No.1454 of 2013. In this Writ Petition, the petitioner is a mortgagor. In Writ Petition No.1382 of 2013, the petitioner was the borrower.

31. Mr. Khandeparkar adopted Mr. Cama's submissions and raised additional contentions which we will now deal with. We do not find any of them to be well founded.

The reference to the petitioners hereafter is, therefore, to the petitioners in Writ Petition No.1454 of 2013.

32. Mr. Khandeparkar submitted as follows. The second proviso to section 18(1) requires the "borrower" to deposit with the DRT 50% of the amount of debt due from him. A mortgagor is not a borrower. The petitioners are mortgagors and not borrowers. In any event the amount due to the respondent from the principal borrower cannot be said to be a debt due from the petitioners / mortgagors as the debt is due only by the principal borrowers.

The words "due from him" in the second proviso of section 18(1) do not include a mortgagor as the debt is not due from the mortgagor. The debt, according to him, is due from the principal borrower and only the repayment thereof is secured by the mortgage.

The petitioners, therefore, cannot be called upon to deposit any amount under the provisos to section 18(1) of the SARFAESI Act.

33. The submissions are not well founded. It is necessary to set out the provisions of the SARFAESI Act and the DRT Act relevant to the additional submissions.

34(A). Sections 2(f), 2(ha) and 2(k) of the SARFAESI Act read as under :-

"2. Definitions.-(1) In this Act, unless the context otherwise requires,-

.....

(f) "borrower" means any person who has been granted financial assistance by any bank or financial institution or who has given any guarantee or created any mortgage or pledge as security for the financial assistance granted by any bank or financial institution and includes a person who becomes borrower of a securitisation company or reconstruction company consequent upon acquisition by it of any rights or interest of any bank or financial institution in relation to such financial assistance.

.....

(ha) "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;

.....

(k) "financial assistance" means any loan or advance granted or any debentures or bonds subscribed or any guarantee given or letters of credit established or any other credit facility extended by any bank or financial institution;"

(B) Section 2(g) of the DRT Act reads as under :-

"2. Definitions.-In this Act, unless the context otherwise requires,-

.....

(g) 'debt' means any liability (inclusive of interest) which is claimed as due from any person by a bank or 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;"

35. The facilities granted to the principal borrower fall within the ambit of the definition of the words "financial assistance" in section 2(k) of the SARFAESI Act. Section 2(f), inter-alia, provides that a borrower means any person who has created any mortgage as security for the financial assistance granted by the bank or financial institution. In view of section 2(f) of the SARFAESI Act, the term "borrower" includes a mortgagor.

The petitioner being a mortgagor is, therefore, a "borrower" within the meaning of that term in section 18.

36. A mortgagor falls within the ambit of the term "borrower" in section 2(f) of the SARFAESI Act. Section 2(ha) of the SARFAESI Act provides that the term "debt" shall have the meaning assigned to it in section 2(g) of the DRT Act. Under section 2(g) of the DRT Act, "debt" means inter-alia any liability which is claimed as due from any person by a bank during the course of any business activity undertaken by the bank payable under a mortgage. Thus, the amount is payable by the petitioners albeit as mortgagors under the mortgage.

37. A mortgagor, therefore, falls within the ambit of the term "borrower" and the amount due from him under the mortgage falls within the ambit of the expression "amount due from him" in the second proviso to section 18(1).

38. Mr. Khandeparkar next submitted that the words "as claimed by the secured creditors" in the second proviso to section 18(1) relate to the amounts claimed in duly filed proceedings for the recovery of the debt before a Court, Tribunal or other authority. In other words, according to him, if no such proceedings are filed, there cannot be said to be any amount claimed by the secured creditors. We do not agree.

39. In fact, it is unnecessary for a creditor to file proceedings for recovery of their dues. A secured creditor is entitled to file proceedings under the SARFAESI Act without filing any other proceedings, including proceedings for recovery of the amounts claimed by it. The secured creditor is entitled to enforce its rights under the SARFAESI Act without filing a suit or any other recovery proceedings in respect of its dues. If the secured creditor recovers its dues pursuant to steps taken under the SARFAESI Act, it would not be necessary for it to file any other proceedings whether under the SARFAESI Act such as under section 14 thereof or under any other enactment. There is no warrant for restricting the words "as claimed" only to cases where the claim is made in recovery proceedings before a Court, Tribunal or other authority. The plain language of section 18 does not warrant it. The scheme of the SARFAESI Act militates against such a construction. The expression "as claimed" would include the amount claimed in a notice under section 13(2).

40. The reported judgments have, in fact, proceeded on the basis that the amount claimed in a notice under section 13(2) falls within the ambit of the words "of the amount of debt due from him, as claimed by the secured creditors". In *Godavari Laxmi Co-operative Bank Limited v. Union of India* AIR 2012 Bom. 69, the Division Bench of this Court noted that in the notice under section 13(2) the petitioner-bank had claimed an amount of Rs.24,61,985.54. In paragraph 10, the Division Bench noted the provisions of sections 13, 17 and 18. In paragraph 11, the Division Bench held that considering the notice issued by the bank, it was clear that the amount due and claimed by the petitioner for the purpose of entertaining the appeal would be the amount of Rs.24,61,985.54.

41. In the circumstances, we hold that the words as claimed by the secured creditors in the second proviso to section 18(1) includes a mere demand or an assertion by the secured creditor from the borrower including in a notice under section 13(2). In other words, the expression as claimed by the secured creditors does not apply only to cases where proceedings are adopted by the secured creditor for the recovery of the dues of the secured creditor from the borrower.

42. Lastly, Mr. Khandeparkar submitted that in view of section 2(zd) of the Act, the second proviso to section 18(1) would operate only where the claim is made by secured creditors i.e. more than one secured creditor and not where a claim is made by just one secured creditor. In other words, according to him, the provision applies only when there is a consortium of creditors. Section 2(zd) of the SARFAESI Act reads as under :

2. Definitions.-(1) In this Act, unless the context otherwise requires,-

.....

(zd) "secured creditor" means any bank or financial institution or any consortium or group of banks or financial institutions and includes-

(i) debenture trustee appointed by any bank or financial institutions, or

(ii) securitisation company or reconstruction company, whether acting as such or managing a trust set up by such securitisation company or reconstruction company for the securitisation or reconstruction, as the case may be; or

(iii) any other trustee holding securities on behalf of a bank or financial institution,

in whose favour security interest is created for due repayment by any borrower of any financial assistance;"

43. Thus under section 2(zd), the term secured creditor includes a bank or financial institution or any consortium or group of banks or financial institutions. In other words, the expression secured creditor in the singular includes banks or financial institutions i.e. more than one bank or one financial institution. Correspondingly, the use of the plural secured creditors in section 18 is consistent

with a case where the claim is made by just one creditor as well as to cases where the claim is made by more than one creditor.

44. In the circumstances, both the petitions are dismissed. There shall, however, be no order as to costs. The interim orders shall continue upto and including 15th December, 2013.

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