THE ILLUSORY RIGHT TO APPEAL: THE CONSTITUTIONALITY OF THE MANDATORY PRE-DEPOSIT REQUIREMENT UNDER SECTION 18 OF THE SARFAESI ACT, 2002

Raghav Kidambi, B.COM LLB (Hons.), Jindal Global Law School

ABSTRACT

The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 was enacted to enable swift, court-free recovery of non-performing assets. Section 18 of the Act requires an appeal to the Debts Recovery Appellate Tribunal on a mandatory pre-deposit of fifty per cent of the debt due which can be waived to twenty-five percent but not less than that at the Tribunal's discretion to not less than that. This paper argues that this rigid framework, where the appellant's secured asset has already been sold before the appeal is preferred, renders the statutory right of appeal illusory for economically weaker litigants, reinforcing the very defect the Supreme Court identified and struck down in *Mardia Chemicals Ltd. v. Union of India* in respect of the erstwhile Section 17. The paper explores the constitutionality of Section 18 of the Act in respect of Supreme Court rulings on the right to appeal in *Garikapati Veeraya* and the characterization of the right to appeal as a fundamental right under Article 14 and 21 of the Constitution in *Anita Kushwaha.* The paper compares similar pre-deposit provisions in different Act’s and draws two recommendations to balance the objective of the SARFAEASI Act while also upholding every citizen’s right to appeal as a fundamental right.

INTRODUCTION

Prior to 2002, the legal framework relating to commercial transactions did not keep pace with the changing commercial practices and financial sector reforms. The Recovery of Debts and Bankruptcy Act, 1993 (hereafter referred to as the "RDDB Act") laid down time taking procedures for a bank or a secured creditor to take over possession of a debtor's property and realize their dues from it. Under Section 19 of this Act, a bank would not be allowed to take over possession of the property of a borrower without first approaching the Debts Recovery Tribunal (hereafter referred to as "DRT"), prove the exact debt and finally obtain a recovery certificate. Due to this, it resulted in slow-paced recovery of defaulting loans and tremendous amounts of non-performing assets of banks and financial institutions. The Narasimham Committee and the Andhyarujina Committee was constituted by the Central Government for the purpose of examining the banking and commercial sector reforms and the changes needed in the legal system in order to keep up with the rapidly changing Indian economy. The Committees suggested the enactment of a new legislation for securitization and empowering banks to take possession of the securities and sell them without the intervention of the court. This Act came to be known as The Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereafter referred to as the "SARFAESI Act")

The SARFAESI Act, 2002 was brought about to regulate the securitization and reconstruction of financial assets and to provide for a central database of security interests created on property rights. This would enable banks and financial institutions to realize long term assets, manage the problem of liquidity, asset liability mismatches and improve recovery by way of exercising powers to take possession of securities, sell them and reduce non-performing assets by adopting measures for recovery or reconstruction.[1]

With the enactment of this Act, it brought with it certain provisions regarding the right to move an application against measures to recover secured debts under Section 17 of the SARFAESI Act whereby any person aggrieved by the measures taken by the secured creditor can move the DRT for relief against such measures. [2] If the borrower or any party is aggrieved by the findings of the DRT, they may prefer an appeal to the Debts Recovery Appellate Tribunal under Section 18 of the SARFAESI Act.

[1] Prudent ARC Ltd. v. Sidha Neelkanth Paper Industries, 2020 SCC OnLine Del 1641
[2] Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, S. 17

SECTION 18 OF THE SARFAESI ACT

Section 18 of the SARFAESI Act reads as follows:

(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. [3]

This provision lays down the procedure undertaken in order for the Debts Recovery Appellate Tribunal (hereafter referred to as "DRAT) to entertain an appeal from the DRT. The most problematic part of this provision lies in the second proviso. It lays down that an appeal cannot be entertained by the DRAT unless the borrower has deposited fifty percent of the amount of debt due from him or determined by the DRT, whichever is lesser. This essentially creates a condition on the right of the aggrieved party to appeal to an appellate tribunal to challenge either an erroneous order or an order that overlooks an error apparent on the face of record.

WHY SECTION 18 OF THE ACT IS PROBLEMATIC

Section 17 of the SARFAESI Act originally provided for filing an appeal to the DRT within 45 days of any action taken by the creditor under sub-section (4) of Section 13. Sub-section (2)

[3] Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, S. 18

of Section 17 laid down that where an appeal is preferred, such appeal shall not be entertained by the DRT unless the borrower has deposited with the DRT seventy-five per cent of the amount claimed in the notice under Section 13(2) of the Act. This was challenged in the case of Mardia Chemicals Ltd. v. Union of India, (2004) 4 SCC 311 whereby the Hon'ble Supreme Court struck down this provision as being unconstitutional. The words of the Hon'ble Supreme Court were:

60. *The requirement of pre-deposit of any amount at the first instance of proceedings is not to be found in any of the decisions cited on behalf of the respondent. All these cases relate to appeals. The amount of deposit of 75% of the demand, at the initial proceeding itself sounds unreasonable and oppressive, more particularly when the secured assets/the management thereof along with the right to transfer such interest has been taken over by the secured creditor or in some cases property is also sold. Requirement of deposit of such a heavy amount on the basis of a one-sided claim alone, cannot be said to be a reasonable condition at the first instance itself before start of adjudication of the dispute. Merely giving power to the Tribunal to waive or reduce the amount, does not cure the inherent infirmity leaning one-sidedly in favour of the party, who, so far has alone been the party to decide the amount and the fact of default and classifying the dues as NPAs without participation/association of the borrower in the process. Such an onerous and oppressive condition should not be left operative in expectation of reasonable exercise of discretion by the authority concerned. Placed in a situation as indicated above, where it may not be possible for the borrower to raise any amount to make the deposit, his secured assets having already been taken possession of or sold, such a rider to approach the Tribunal at the first instance of proceedings, captioned as appeal, renders the remedy illusory and nugatory."* [4]

The Supreme Court did not hold back its words when the discussion about the 75% pre-deposit requirement to move the DRT in the first instance came up. Although, this paper does not contest this waiver of the pre-deposit to move the DRT in the first instance, instead what this paper argues is for a more humanitarian approach to the current Section 18 of the SARFAESI Act which lays down that the borrower has to put down 50% of the amount due as the pre-deposit which can be reduced to 25% if deemed fit by the DRAT. Though the bone of contention is different, what matters more is the reason and principle behind why the Supreme Court decided to strike down Section 17 of the SARFAESI Act, which later was amended in

[4] Mardia Chemicals Ltd. v. Union of India, (2004) 4 SCC 311

2004 when the Government of India passed the Enforcement of Security Interest and Recovery of Debts Laws (Amendment) Act, 2004. This amendment deleted the requirement of a 75% pre-deposit completely.

While Section 18 of the SARFAESI Act is different from the erstwhile Section 17 of the Act, it still has some similarities. Section 18 requires the borrower to put down 50% of the amount due with the tribunal, which can be reduced to 25% if the DRT is convinced by the facts and circumstances of the case. This is problematic because it raises the question of who can appeal because a borrower or a guarantor whose property has been taken over by the secured creditor and auctioned off, cannot challenge an order of the DRT before the DRAT solely because they have no means to put down the required deposit to even kickstart the appeal process. This provision would work well with larger corporations or individuals who are well to do because they can be expected to put down such amounts of money just for moving the appeal, but an ordinary citizen like the majority of the Indian population cannot be expected to deposit such amounts of money especially after their property is out of their hands. They are essentially left remedy-less if they wish to challenge the order of the DRT or if the DRT has gravely erred in its findings.

A five-judge bench of the Supreme Court in Seth Nand Lal v. State of Haryana, 1980 Supp SCC 574 gave their opinion on conditions imposed while moving an appeal before the appellate courts. The Supreme Court held:

*"**22.** It is well settled by several decisions of this Court that the right of appeal is a creature of a statute and there is no reason why the legislature while granting the right cannot 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."* [5]

While it is not uncommon to place some conditions on the right to appeal before an appellate court or tribunal, a condition such as the one mentioned in the second proviso to Section 18 of the SARFAESI Act is an extremely unforgiving condition placed upon an appellant and essentially backing them into a corner. The court in the abovementioned case did affirm the fact that such a condition on an appeal shall not be so onerous rendering the right almost illusory. That is exactly what is happening under Section 18 of the Act as the appeal cannot

[5] Seth Nand Lal v. State of Haryana, 1980 Supp SCC 574

take even a step forward if the fifty percent of the amount of debt due is not deposited with the tribunal. A statue such as the SARFAESI Act is one that heavily favours the creditors upon a default of payment by the borrowers but this is also not free of illegal measures undertaken by the secured creditors in order to realize their dues from the borrower. These illegal measures begin from taking possession of the property against the rules laid down in the SARFAESI Act and the Security Interest (Enforcement) Rules, 2002, not complying with the strict timelines given under these provisions and incorrect auction proceedings against the provisions of the Act. The borrower has no choice but to approach the DRT in the first instance and if there is an erroneous order passed by the DRT, the borrower's hands are tied as they cannot appeal anymore because their means of depositing that money to the tribunal has been sold off and realized by the creditor.

The Supreme Court in its own words in *Mardia Chemicals* held that merely giving the tribunal the power to reduce or waive the amount does not cure the inherent infirmity leaning one-sidedly in favor of one party being the secured creditor. The Court further went on to say that it may not be possible for the borrower to raise any amount to make the deposit as his secured assets have already been taken possession of or sold and to have such a condition to approach the tribunal in the first instance renders the remedy illusory and nugatory. [6] This corresponds to the old Section 17 of the Act before the 2004 amendment. When the Apex Court of the country acknowledges the fact that having the assets of the borrower sold or taken possession of, and having such a condition renders the right illusory, then why does the Supreme Court turn a blind eye to Section 18 of the SARFAESI Act? Merely because this is not a court of first instance does not mean the principles laid down in *Seth Nand Lal* vanish away.

The borrower's financial condition will not magically change for the better just because the seventy-five percent deposit requirement was done away with. They will still remain in the same state when they approach the DRAT but they are suddenly expected to make a deposit of fifty percent of the debt due once the financial institutions have auctioned off their properties. This requirement appears to punish the appellant more than it aims to serve the ends of justice from an erroneous order.

---

[6] Mardia Chemicals Ltd. v. Union of India, (2004) 4 SCC 311

THE COURTS' STANCE ON SECTION 18

Various High Courts and the Supreme Court have laid down their conclusions regarding the requirement of the pre-deposit under Section 18 of the SARFAESI Act. This requirement of the pre-deposit is a huge burden on the appellant which essentially closes the doors of justice to them which makes it one of the most highly contested issues under this Act. On the issue of whether the pre-deposit is a valid condition before the Appellant, the Supreme Court in Narayan Chandra Ghosh v. UCO Bank, (2011) 4 SCC 548 held:

*"**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 the 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."* [7]

The bench strictly stuck to the letter of the law while interpreting Section 18 of the SARFAESI Act, dismissing the application of the Appellant holding that if the Appellant does not make the said deposit in the tribunal in the specified time period, the bank is free to take the necessary steps. The Apex Court had the opportunity to strike down a provision similar to what it struck down seven years prior, but this time they decided to strictly follow the law by the letter.

A similar issue came up before the Delhi High Court in Prudent ARC Ltd. v. Sidha Neelkanth Paper Industries, 2020 SCC OnLine Del 1641. In this case, the borrower's properties were already auctioned off by the secured creditor, and the secured creditor was able to recover a

[7] Narayan Chandra Ghosh v. UCO Bank, (2011) 4 SCC 548

part of the total amount due. The main point of contention was whether this amount that was recovered was supposed to be included while calculating the total amount of debt due in order for the Appellant to make the appropriate deposit before the DRAT. The Delhi High Court answered in the affirmative and held:

"In our opinion, the secured creditor cannot insist that for making a pre-deposit with the Appellate Tribunal, the amounts recovered from the sale of a secured asset of the borrower should be excluded. The borrower ought to be given the benefit of the amount recovered from the sale of the secured asset while computing the "amount of debt due", for the purposes of entertaining the appeal, as contemplated in the second proviso to Section 18 of the SARFAESI Act, 2002." [8]

It further went on to say:

"any amount that may have been deposited by the borrower with the secured creditor or with the Debt Recovery Tribunal after filing of the petition under Section 17 of the SARFAESI Act, must also be taken into consideration while computing the "amount of debt due" for purposes of entertaining the appeal, as contemplated under the second proviso to Section 18 of the SARFAESI Act, 2002." [9]

This was a significant judgement as the Delhi High Court acknowledged that the amount that is realized by the creditor can be deducted from the total amount due in order to determine the amount that needs to be deposited before the DRAT. This was a step in the right direction as it allowed the relaxation of the strict letter based interpretation of this Section. It was interpreted more humanely making the proceedings before the DRAT more accessible to the Appellant by including the amount realized by the creditor. This sadly did not last long as the Supreme Court overturned this in Sidha Neelkanth Paper (P) Ltd. v. Prudent ARC Ltd., (2023) 236 Comp Cas 448. While doing so, it held:

*"**16.** In view of the above and for the reasons stated above, in the present case, the respective High Courts have seriously erred in directing to adjust/ appropriate the amount realised by auction sale of the secured properties/ deposited by the auction purchasers while considering the 50 per cent. of the amount as pre-deposit to be deposited by the borrower, while preferring*

[8] Prudent ARC Ltd. v. Sidha Neelkanth Paper Industries, 2020 SCC OnLine Del 1641
[9] *Ibid*

an appeal before the Debts Recovery Appellate Tribunal. Even the High Court of Delhi has erred in excluding the amount payable towards interest while considering the "debt due". As per section 2(g) of the Act 1993, "debt" means liability inclusive of interest as claimed by the bank/ financial institution." [10]

The Supreme Court set aside the slightly different interpretation made by the Delhi High Court and pronounced a judgement that again restored the status quo as laid down in *Narayan Chandra Ghosh.*

The dichotomy of the situation emerges when the *Mardia Chemicals'* judgement is compared to the more recent judgements of the courts. While in *Mardia Chemicals* the Supreme Court struck down a provision for being too unreasonable, the same court later uphoeld the validity of a very similar provision, overturning the judgement of a division bench of the Delhi High Court in *Prudent ARC Ltd.* The most important argument raised against the erstwhile Section 17 was that when the properties of the borrower are auctioned off, they cannot be expected to make a deposit of seventy-five percent of the amount due to the secured creditor before the DRT at the first instance because they either have limited means of income, their income depended on the auctioned property or their income was simply not enough to make such a deposit. While the court struck it down as being unreasonable for such a deposit to be made before the DRT at the "first instance of proceedings," it is a simple question whether the requirement of a fifty percent deposit at the next stage becomes extremely reasonable while all the other factors remain the same.

THE CONSTITUTIONAL CONFLICT

The requirement of the pre-deposit before the DRAT under Section 18 of the SARFAESI Act is of a mandatory nature as confirmed by the various courts when brought under a challenge, but by holding it to be a mandatory requirement with absolutely no waiver below the twenty-five percent limit makes it an unreasonable and an unconscionable provision which takes away the borrower's or the aggrieved party's right to appeal before the appellate tribunal. A Constitutional bench of the Supreme Court in Garikapati Veeraya v. Subbiah Choudhry, (1957) 1 SCC 180 presented five principles after relying on numerous decisions before various courts. It held:

[10] Sidha Neelkanth Paper (P) Ltd. v. Prudent ARC Ltd., (2023) 236 Comp Cas 448

*"**32.1.** That the legal pursuit of a remedy, suit, appeal and second appeal are really but steps in a series of proceedings all connected by an intrinsic unity and are to be regarded as one legal proceeding.*

***32.2.** The right of appeal is not a mere matter of procedure but is a substantive right.*

***32.3.** The institution of the suit carries with it the implication that all rights of appeal then in force are preserved to the parties thereto till the rest of the career of the suit.*

***32.4.** The right of appeal is a vested right and such a right to enter the superior court accrues to the litigant and exists as on and from the date the lis commences and although it may be actually exercised when the adverse judgment is pronounced such right is to be governed by the law prevailing at the date of the institution of the suit or proceeding and not by the law that prevails at the date of its decision or at the date of the filing of the appeal.*

***32.5.** This vested right of appeal can be taken away only by a subsequent enactment, if it so provides expressly or by necessary intendment and not otherwise."* [11]

This judgement of the Constitutional bench lays down that the right of appeal is a substantive right and is a core legal entitlement. When the right of appeal becomes a legal entitlement, it cannot just be taken away half-way through the litigation process due to an unconscionable condition placed on the aggrieved parties. The court laid down these five principles keeping in mind the sacrosanct nature of the right to appeal and the legislature cannot be allowed to take it away so easily by enacting provisions such as the one in Section 18 of the SARFAESI Act.

A five-judge Constitution bench of the Supreme Court Anita Kushwaha v. Pushap Sudan, (2016) 8 SCC 509 interpreted the word "life" appearing in Article 21 of the Constitution. Relying on various landmark precedents, it held:

"We have, therefore, no hesitation in holding that access to justice is indeed a facet of right to life guaranteed under Article 21 of the Constitution. We need only add that access to justice may as well be the facet of the right guaranteed under Article 14 of the Constitution, which guarantees equality before law and equal protection of laws to not only citizens but non-citizens also. We say so because equality before law and equal protection of laws is not limited

[11] Garikapati Veeraya v. Subbiah Choudhry, (1957) 1 SCC 180

in its application to the realm of executive action that enforces the law. It is as much available in relation to proceedings before courts and tribunal and adjudicatory fora where law is applied and justice administered. The citizen's inability to access courts or any other adjudicatory mechanism provided for determination of rights and obligations is bound to result in denial of the guarantee contained in Article 14 both in relation to equality before law as well as equal protection of laws. Absence of any adjudicatory mechanism or the inadequacy of such mechanism, needless to say, is bound to prevent those looking for enforcement of their right to equality before laws and equal protection of the laws from seeking redress and thereby negate the guarantee of equality before laws or equal protection of laws and reduce it to a mere teasing illusion. Article 21 of the Constitution apart, access to justice can be said to be part of the guarantee contained in Article 14 as well." [12]

The Supreme Court has unequivocally held the fact that access to justice constitutes a part of Article 21 and 14 of the Constitution of India. Once a fundamental right, it becomes a right that is not merely procedural in nature but one that is to be given the most substantive protection, ensuring the doors of the appellate court are not closed simply because an Appellant is unable to make a deposit before the tribunal. Article 14 guarantees the right to equality to all citizens and non-citizens. When such a deposit is made mandatory, the litigants who do not have the financial capacity to the said deposit, they are stripped of their fundamental right to access justice, creating a discriminatory classification where justice becomes accessible only to those who can afford such a deposit.

The Constitutional bench in the same case went on to hold:

"(iv) The process of adjudication must be affordable to the disputants

38. *Access to justice will again be no more than an illusion if the adjudicatory mechanism provided is so expensive as to deter a disputant from taking resort to the same. Article 39-A of the Constitution promotes a laudable objective of providing legal aid to needy litigants and obliges the State to make access to justice affordable for the less fortunate sections of the society."* [13]

The Supreme Court made the observation that the access to justice will remain nothing but an

[12] Anita Kushwaha v. Pushap Sudan, (2016) 8 SCC 509

[13] *ibid*

illusory right if it is not made affordable to the disputants who are from the less fortunate sections of the society. According to the Central Registry of Securitization Asset Reconstruction and Security Interest of India (hereafter referred to as "CERSAI"), there are 9.76 Crore Security Interest Registrations as on 31.03.2026. [14] It is not possible that all of these registrations are made to those that are able to satisfy this requirement of the DRAT. To say that a deposit is needed from these borrowers in order to have their appeals heard by the DRAT is a gross violation of Article 21 as interpreted in *Anita Kushwaha* and *Garikapati Veeraya* whereby the right to appeal was held to be a substantive right and not merely procedural in nature. This sacrosanct nature of the right to appeal is taken away in plain sight under Section 18 of the SARFAESI Act.

A counter argument can be made as it was in the case of Anant Mills Co. Ltd. v. State of Gujarat, (1975) 2 SCC 175 whereby the four judge bench of the Supreme Court held that a pre-deposit requirement to hear a tax appeal does not constitute a violation of Article 14 of the Constitution because the sitting judge has the power to waive it off in its entirety. This discretion is given to the judge to balance the interests of the litigant by waiving off the pre-deposit entirely in cases of genuine hardship but also discouraging frivolous appeals in cases of tax defaults by placing this statutory bar.

The Preamble of the Indian Constitution resolves to secure to all its citizens justice, social, economic and political. The promise of economic justice should not just remain as a mere rhetoric in the Constitution but rather should be seen to be structured in a manner whereby the common citizen has total and complete access to justice and this access should not end up depending on their financial standing and capability. The Preamble also resolves that there shall be equality of status and of opportunity. When justice and the right to appeal becomes so selective based on who can afford it, it becomes against the spirit under which the Constitution of India was drafted. Equality of opportunity also encompasses an equal opportunity to justice through an appeal. That right is taken away by the imposition of an unforgiving financial threshold under Section 18 of the Act.

Though the pre-deposit is not a secured asset, it cannot be adjusted to the amount due to the bank or the creditor, but it nevertheless creates a statutory bar on who can appeal and who cannot. The irony lies in the fact that those who are limited by this bar created by the legislature

[14] CERSAI, https://www.cersai.org.in/CERSAI/home.prg (last visited July 17, 2026).

are the ones that need it the most. Law can never be this black and white, and the real test of the judiciary lies in whether they are able to ensure justice reaches those who cannot access it. In this regard, Section 18 of the SARFAESI Act fails them.

RECOMMENDATIONS

Until this point, the discussion majorly revolved around the constitutionality of Section 18 of the SARFAESI Act and whether it is in consonance with some of the foundational Supreme Court rulings. This brings up recommendations or suggestions in order to bring Section 18 and the right to appeal under the SARFAESI Act to the same page as these rulings.

It is established that not everybody can afford this route of making an appeal before the DRAT, so the legislature has to make a change in the Act by bringing in a waiver for genuine undue hardships. This does not take away the fifty percent pre-deposit requirement or its subsequent waiving down to twenty-five percent but rather the acknowledgement of genuine undue hardships whereby appellants are overburdened in an already distressed situation by either borrowing from other sources or by exhausting their monetary capacity completely for the duration of the suit before the Appellate Tribunal. In Anant Mills Co. Ltd. v. State of Gujarat, (1975) 2 SCC 175, the Supreme Court upheld the pre-deposit requirement under Section 406(2)(e) of the Bombay Provincial Municipal Corporations Act on the premise that it provided an "undue hardship" proviso. It held:

"The requirement about the deposit of the amount claimed as a condition precedent to the entertainment of an appeal which seeks to challenge the imposition or the quantum of that tax, in our opinion, has not the effect of nullifying the right of appeal, especially when we keep in view the fact that discretion is vested in the appellate Judge to dispense with the compliance of the above requirement. All that the statutory provision seeks to do is to regulate the exercise of the right of appeal. The object of the above provision is to keep in balance the right of appeal, which is conferred upon a person who is aggrieved with the demand of tax made from him, and the right of the Corporation to speedy recovery of the tax. The impugned provision accordingly confers a right of appeal and at the same time prevents the delay in the payment of the tax. We find ourselves unable to accede to the argument that the impugned provision has the effect of creating a discrimination as is offensive to the principle of equality enshrined in Article 14 of

the Constitution." [15]

Section 18 of the SARFAESI Act fits perfectly into the above discussion. The above judgement cuts completely across Section 18 of the SARFAESI Act because the SARFAESI Act creates two classes of litigants that can appeal. One that can afford the appeal to be heard and the second who cannot. This argument was dismissed in *Anant Mills Co. Ltd.* to be in violation of Article 14 of the Constitution because it had given the judge the discretion to waive it off completely to those to whom it causes "genuine hardship." That discretion is nowhere present in the SARFAESI Act. So it truly remains to be a violation of Article 14 as long as there is no insertion of this floor or this genuine hardship waiver. Although the intent of the legislature may be right to discourage false appeals, but it also discourages righteous and valid appeals of those who cannot afford the pre-deposit. The Court in *Anant Mills Co. Ltd.* further held:

"The bar created by Section 406(2)(e) to the entertainment of the appeal by a person who has not deposited the amount of tax due from him and who is not able to show to the appellate Judge that the deposit of the amount would cause him undue hardship arises out of his own omission and default. The above provision, in our opinion, has not the effect of making invidious distinction or creating two classes with the object of meting out differential treatment to them; it only spells out the consequences flowing from the omission and default of a person who despite the fact that the deposit of the amount found due from him would cause him no hardship, declines of his own volition to deposit that amount. " [16]

While tax and SARFAESI matters cannot be compared apple to apple, one principle arises out of this judgement. It is that in order for the appeal provision to stay in consonance with the letter and spirit of the Constitution, there must also lie an exception to those who genuinely cannot afford it. A blanket restriction on the right of appeal takes away this spirit. While appeals are a creature of the legislature, they can also impose conditions on such a right to appeal. But this condition should not be so onerous that it deters genuine litigants who have no other remedy but an appeal to the DRAT. The first recommendation I propose is this discretionary waiver in cases of genuine hardship.

The second recommendation is that of adjusting the sale proceeds against the pre-deposit. When the borrower or the guarantor's property has been auctioned off in the proceedings, and

[15] Anant Mills Co. Ltd. v. State of Gujarat, (1975) 2 SCC 175
[16] *ibid*

an appeal is preferred to the DRAT to intervene in those proceedings for any valid reason, the litigants are still hit by this roadblock. In Srishti Arogyadham (P) Ltd. v. Punjab National Bank, 2018 SCC OnLine Del 12716, the Delhi High Court held:

*"**19.** We are conscious of the fact that the amount of pre-deposit has to be made in DRAT and not in the Bank. But still when no amount is due from the petitioner whether the pre-deposit can still be insisted upon. The argument can be made that the condition of pre-deposit is to discourage frivolous litigation which if permitted, would defeat the very purpose of the enactment of early settlement of the disputes. The argument is appealing but the same shall not hold good in the facts of the case with which we are concerned. Otherwise, the provision of appeal for persons/entities like the petitioner, shall become otiose/illusory. In fact, the insistence of pre-deposit shall be inequitable in the facts. Nothing precludes DRAT while deciding the appeal, if it finds that the appeal filed by the petitioner is frivolous, to impose suchcost as deemed fit, to be recovered from the excess amount already lying deposited with the Bank."* [17]

The Delhi High Court in this judgement has laid down that when the complete debt due to the secured bank has been recovered by the bank through the sale of the secured assets, the pre-deposit to hear the appeal cannot be insisted upon as that cannot be calculated as "debt due."

Similarly, in Prudent ARC Ltd. v. Sidha Neelkanth Paper Industries, 2020 SCC OnLine Del 1641, the Delhi High Court held:

*"**65.** We are in complete agreement with the view taken by co-ordinate Benches of this court, while respectfully disagreeing with the view expressed by the Bombay High Court in Eskays Construction Pvt. Ltd. (supra). In our opinion, the secured creditor cannot insist that for making a pre-deposit with the Appellate Tribunal, the amounts recovered from the sale of a secured asset of the borrower should be excluded. The borrower ought to be given the benefit of the amount recovered from the sale of the secured asset while computing the "amount of debt due"", for the purposes of entertaining the appeal, as contemplated in the second proviso to Section 18 of the SARFAESI Act, 2002."* [18]

[17] Srishti Arogyadham (P) Ltd. v. Punjab National Bank, 2018 SCC OnLine Del 12716
[18] Prudent ARC Ltd. v. Sidha Neelkanth Paper Industries, 2020 SCC OnLine Del 1641

The Delhi High Court was in agreement with the opinion taken by the same court in *Srishti Arogyadham* as the "debt due" as prescribed under Section 18 of the SARFAESI Act should include the proceeds of the sale of the secured asset of the borrower as well. These proceeds should be deducted from the original debt due as mentioned in the demand notice under Section 13(2) of the SARFAESI Act in order to determine the amount of pre-deposit. This judgement of the Delhi High Court was consequently overturned by the Supreme Court, restoring the status quo as laid down in *Narayan Chandra Ghosh.* The Supreme Court's reasoning was that Section 18 of the Act requires the borrower to deposit the amount to invoke the jurisdiction of the DRAT and not a third-party auction purchaser.

But it is not logical that even after the borrower's asset is sold to realize the bank's credit, he must still make the deposit just because Section 18 does not consider a third-party's auction purchase to satisfy the pre-deposit condition to invoke the jurisdiction of the DRAT. With such inhumane reasoning given for such a judgement, the Supreme Court has completely overlooked the section of society that need the waiver because their livelihood depended on the very property that was auctioned off in order to settle the debt, but there is another layer added onto that in the form of a pre-deposit that the Supreme Court refuses to strike down.

To sum it up, the two recommendations that this paper proposes, is firstly that of inserting an undue hardship clause into Section 18 of the Act in order to protect the interests of the litigants whose livelihoods depended on the property that was auctioned off and have no other way to raise the money needed to fulfil the condition of the pre-deposit. The court should be given the authority to determine whether a litigant falls within this category and to grant that litigant the relief they deserve.

Secondly, to allow the adjustment of the proceeds of the auction sale to the total debt due as raised in the demand notice in order to calculate the pre-deposit amount. This exercise can be applied to those that do not fall within the "genuine undue hardship" waiver. If the DRAT is of the opinion that they are solvent enough and do not fall within the first category, the proceeds of the sale of their asset must be adjusted against the total amount due to calculate the pre-deposit amount.

CONCLUSION

The SARFAESI Act was conceived to achieve a quick and expedited recovery of non-performing assets without the intervention of the Courts. However, in its pursuit of this quick recovery of assets in order to realize the dues from the borrower, Section 18 of the SARFAESI Act creates a mechanism where the court's prioritize the satisfaction of the bank/creditor at the expense of the borrower. The mechanism is created by a pre-deposit requirement from the litigant approaching the DRAT in case of an appeal. This pre-deposit requirement stands at fifty percent of the total debt due, with a maximum waiver of twenty-five percent to bring it down to twenty-five percent of the debt due. This rigid and strict requirement has been challenged before numerous High Courts and the Supreme Court and these courts have taken different views on this.

The framework within which the appeal process to the DRAT works can be challenged on its Constitutional footing. It stands in direct collusion with some of the landmark Supreme Court rulings on the right to appeal such as in *Garikapati Veeraya* and *Anita Kushwaha* where the court held the right to appeal and an affordable access to appeal to be a fundamental right under Article 14 and 21 of the Constitution. To deny the aggrieved litigant the chance to move the DRAT by imposing such a restriction renders the right to appeal under Section 18 of the SARFAESI nothing but an illusory one.

To address this constitutional conflict, the legislature needs to give the courts the jurisdiction and authority to waive off the pre-deposit requirement in its entirety for those litigants who cannot afford to pay the pre-deposit even if their property has been auctioned off and it causes them a "genuine undue hardship" as held in *Anant Mills Co. Ltd.* Secondly, to adjust the sale amount realized from the secured asset once auctioned off and deduct it from the initial debt due as per the demand notice to calculate the final pre-deposit amount for those litigants that do not fall within the "genuine undue hardship" bracket. This balances the speedy disposal of the cases while also ensuring those who cannot afford an appeal are turned away from the courts on a mere procedural basis. Until Section 18 of the SARFAESI Act accommodates these exceptions, it will continue to operate as a barrier to litigants who need it the most, rendering the right to appeal completely illusory.