

* IN THE HIGH COURT OF DELHI AT NEW DELHI

% Date of Decision : 16th August, 2011

+ W.P.(C) 5138/2011

SATINDER KAPUR & ORS. Petitioners
Through: Mr.Rajeeve Mehra, Senior Advocate
with Mr.Manish Gandhi, Advocate.

versus

IFCI LTD. & ORS. Respondents
Through: Mr.Shahzad Khan & Mr.Zubair Khan,
Advocates with Mr.Ajay Raina, Chief
Legal Manager, Kotak Mahindra Bank.

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MR. JUSTICE SUNIL GAUR

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to Reporter or not?
3. Whether the judgment should be reported in the Digest?

PRADEEP NANDRAJOG, J.

1. M/s.Indian Magnetics Ltd., respondent No.4, is under liquidation.
2. Satinder Kapur, Shyam Sunder Kapur and P.N.Suri were the directors of the company. When all was well and the company was doing good business, credits were availed of by respondent No.4. Amongst others, IFCI Ltd., IDBI Ltd. and ICICI Ltd. had extended credit facilities to the company. Satinder Kapur, Shyam Sunder Kapur and P.N.Suri as directors of the company had stood personal guarantee to repay the credits if the company of which they were the directors of defaulted as per the agreements under which credit facilities were extended.

3. As the sunny days receded and the cold misty days started hanging over respondent No.4, the 3 credit facility providers i.e. IFCI Ltd., IDBI Ltd. and ICICI Ltd. instituted a composite proceeding for recovery of the amount due to them by filing OA No.493/1994 before the Debt Recovery Appellate Tribunal. IFCI Ltd. claimed a decree in sum of ₹17,43,75,255/-. IDBI Ltd. claimed a decree in sum of ₹9,28,39,404/-. ICICI Ltd. claimed a decree in sum of ₹9,90,90,363/-. Needless to state, pendente lite and future interest as per contract was claimed. Satinder Kapur, Shyam Sunder Kapur and P.N.Suri were impleaded as respondents on the plea that their liabilities were joint and several inasmuch as it was claimed that all the 3 had executed personal guarantees to secure repayment of such amount which may be due to the 3 lenders from the principal borrower i.e. respondent No.4.

4. During the pendency of OA No.493/1994, the Official Liquidator took possession of the assets of the respondent No.4 and with the assistance of the 3 secured creditors sold the assets and invited claims. IFCI Ltd. raised claim before the Official Liquidator in sum of ₹23,22,66,146/-. IDBI Ltd. raised claim in sum of ₹11,07,86,370/-. ICICI Ltd. raised claim in sum of ₹11,17,32,233/-.

5. On pari passu basis, the Official Liquidator disbursed a sum of ₹81,29,315/- to IFCI Ltd., ₹39,11,523/- to IDBI Ltd. and ₹38,76,628/- to ICICI Ltd.

6. Thereafter, ICICI Ltd. assigned the remaining debt to Kotak Mahindra Ltd., which got itself substituted before the Debt Recovery Tribunal as the assignee from ICICI Ltd.

7. OA No.493/1993 was decreed by the Debt Recovery Tribunal vide judgment and decree dated 25.10.2010 and the total sum decreed, pertaining to the claim of IFCI Ltd., IDBI Ltd. and Kotak Mahindra Bank Ltd., is ₹36,64,55,022.25, with pendente lite and future interest @12% per annum.

8. After the decree was passed, which needless to state, was joint and several against all the respondents, before the Debt Recovery Tribunal, petitioners made an offer to settle the dues by paying ₹30 lakhs to IFCI Ltd., which settlement has been accepted by IFCI Ltd. and sum of ₹30 lakhs has been received. ₹15 lakhs each was offered by way of full and final payment to IDBI Ltd. and Kotak Mahindra Bank Ltd. Whereas IDBI Ltd. is still considering the offer, Kotak Mahindra Bank Ltd. has not accepted the offer.

9. Satinder Kapur, Shyam Sunder Kapur and P.N.Suri filed an appeal against the decree passed by the Debt Recovery Tribunal and along with the appeal filed a miscellaneous application praying to the Debt Recovery Appellate Tribunal that the Appellate Tribunal should waive the requirement to deposit 75% of the debt decreed, as required by Section 21 of The Recovery of Debts due to Banks and Financial Institutions Act, 1993, and that the Appellate Tribunal should exercise its power under the proviso to Section 21.

10. Needless to state, IFCI Ltd. having settled its dues did not oppose the application. IDBI Ltd. kept mum as it was still considering the offer. Kotak Mahindra Bank Ltd. opposed the application filed by Satinder Kapur, Shyam Sunder Kapur

and P.N.Suri praying that they be granted complete exemption from making any deposit.

11. It may be noted that the 3 directors offered to deposit ₹30 lakhs with the Debt Recovery Tribunal; being ₹15 lakhs each which they had offered by way of settlement to IDBI Ltd. and Kotak Mahindra Bank Ltd. To show their bonafides, ₹4 lakhs, payable as per the offer made by them to Kotak Mahindra Bank Ltd., has been deposited by them before the Debt Recovery Tribunal.

12. Vide impugned order dated 8.6.2011, the Debt Recovery Appellate Tribunal has disposed of the application filed by Satinder Kapur, Shyam Sunder Kapur and P.N.Suri praying that they be exempted from making any deposit pending hearing of the appeal. It has been directed that 25% of the decretal amount pertaining to the share of the decree relatable to the Kotak Mahindra Bank Ltd. be deposited.

13. The said order dated 8.6.2011 is in challenge in the instant writ petition.

14. Needless to state, law is clear. The power of the Appellate Tribunal to waive deposit contemplated by Section 21 of The Recovery of Debts due to Banks and Financial Institutions Act, 1993 has to be exercised on well known judicial principles.

15. Apart from considering the usual prima-facie case, balance of convenience and irreparable loss and injury, the Appellate Tribunal has to consider: "Whether it would be a case of undue hardship if the letter of the law has to be complied with by the appellant before it."

16. Suffice would it be to state that no person should be denuded the right of appeal if there is financial hardship

and this is the reason why the legislature has enacted the proviso to Section 21 of The Recovery of Debts due to Banks and Financial Institutions Act, 1993. Otherwise, the section would be susceptible to a constitutional challenge of being unreasonable.

17. Considering undue hardship, the only observations to be found in the impugned order are in para 9 where the Appellate Tribunal has observed as under:-

“Again, they have not filed any satisfactory evidence on the record or any affidavit to show that they are not in a position to deposit the amount. No documentary evidence saw the light of the day.”

18. We may note that while offering a one-time settlement to the 3 creditors, Satinder Kapur, Shyam Sunder Kapur and P.N.Suri had filed documents with the 3 financial institutions showing their financial position. The proposal has been annexed as Annexure A-10 with the writ petition and we find that the proposal contains attachments, by way of folders, wherefrom the net worth and the financial position of Satinder Kapur, Shyam Sunder Kapur and P.N.Suri could be gathered.

19. We are informed that the said proposal was placed for consideration before the Appellate Tribunal, but without the attachments, by way of folders, and this seems to be the reason why the Appellate Tribunal has held that no satisfactory evidence was brought on record to show the hardship of Satinder Kapur, Shyam Sunder Kapur and P.N.Suri, in terms of the 3 having no money, to make the pre-deposit.

20. Since it is the satisfaction of the Appellate Tribunal which has to be recorded at the first instance with respect to

the power of the Appellate Tribunal under the proviso to Section 21 of The Recovery of Debts due to Banks and Financial Institutions Act, 1993, noting that the counsel concerned placed the settlement proposal as a part of the documents before the Appellate Tribunal, but inadvertently forgot that it was the attachments which mattered, inasmuch as the attachments would show the net worth of Satinder Kapur, Shyam Sunder Kapur and P.N.Suri; to subserve the ends of justice, we direct that the Appellate Tribunal should reconsider the application filed by the petitioners seeking waiver of the pre-deposit by granting an opportunity to the petitioners to file the attachments they had enclosed with the settlement proposal which contained, as per the petitioners, a statement of their net worth. Taking into account the same, the Appellate Tribunal would decide whether the petitioners are facing a financial hardship of a kind which warrants a waiver of the pre-deposit as a condition precedent to hear the appeal filed by the 3 petitioners.

21. To enable the Appellate Tribunal to comply with the direction issued by us, we set aside the impugned order dated 8.6.2011 and restore Misc.Application No.30/2011 for fresh adjudication by the Debt Recovery Appellate Tribunal.

22. No costs.

23. DASTI.

(PRADEEP NANDRAJOG)
JUDGE

(SUNIL GAUR)
JUDGE

AUGUST 16, 2011
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