

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 03.01.2017

CORAM:

THE HON'BLE MR.JUSTICE S.MANIKUMAR
AND
THE HON'BLE MR.JUSTICE M.GOVINDARAJ

Writ Petition No.31351 of 2014
and
M.P.No.1 of 2014

- 1.Pioneer Cashew Industries Ltd.
300, Poonamallee High Road
Maduravoyal, Chennai - 602 102
Rep. by its Managing Director
C.Sivasubramanian
- 2.C.Sivasubramanian Petitioners
- vs.
- 1.The Debts Recovery Appellate Tribunal
Chennai, 4th Floor, Indian Bank Circle Office
55, Ethiraj Salai,
Chennai - 600 008
- 2.Indian Bank
Asset Recovery Management Branch 1
Ethiraj Salai
Chennai - 600 008
Rep. by its Chief Manager Respondents

Writ petition filed under Article 226 of the Constitution of India for a writ of certiorari to call for the records of the 1st respondent, the Debts Recovery Appellate Tribunal, Chennai in I.A.No.898 of 2014 in AIR No.502 of 2011 dated 19.09.2014 and quash the same.

For Petitioners : Mr.R.Subramanian
For Respondents : Mr.V.Kalyanaraman,
for M/s.Aiyar & Dolia for R2

JUDGMENT
(delivered by S.MANIKUMAR, J)

Proceedings dated 19.09.2014 in I.A.No.898/2014 in AIR No.502/2011, on the file of the Debt Recovery Appellate Tribunal at Chennai, is an order passed by the Chairperson, DRAT, Chennai, in an application filed by the borrowers/writ petitioners, to waive the statutory pre-deposit for

entertaining an appeal under Section 18 of the Recovery of Debts due to Banks and Financial Institutions Act, 1993 and the same is extracted hereunder:

IN THE DEBT RECOVERY APPELLATE TRIBUNAL AT CHENNAI

AIR 502/2011

(IA No.714/2008 in OA No.303/2011 on the file of
DRT-II, Chennai)

Between

1. M/s.Pioneer Cashew Industries Ltd., &
Anr.
300 Poonamallee High Road
Maduravoil, Chennai - 602 102 .. Petitioners/
Appellants

And

1. Indian Bank, ARMB-I, & Ors.
Chennai - 600 008 .. Respondents

PROCEEDINGS DATED 19.09.2014

IA 898/2014 (Waiver):

The representative of the first respondent bank stated that the amount due as on the date of filing of this appeal i.e. as on 13.6.2011 is Rs.4,60,55,795/- and prayed that orders may be passed for the pre-deposit.

Ld. Counsel appearing on behalf of the petitioners took this tribunal through the facts of the case and stated that the Ld. Presiding Officer has failed to understand the fact that the petitioners and the bank had already arrived at a compromise and that for certain reasons beyond the control of the petitioners the amounts could not be paid as per the compromise and that the Ld. Presiding Officer has proceeded to pass orders in IA No.714/2008 which is not sustainable. Ld. Counsel further stated that the Ld. Presiding Officer has failed to appreciate the merits of the case of the petitioners and that the petitioners have a very good case in the appeal. Ld. Counsel drew the attention of this tribunal to the flaws in the recovery certificate issued by the tribunal below and stated that in view of this alone the petitioners are entitled to a complete waiver in the pre-deposit which would in turn enable the petitioners to put forth their case in the appeal. Ld. Counsel further stated that if an opportunity is given to the petitioners they would be able to

establish that the final order of the Ld. Presiding Officer is perverse and is full of inconsistencies and infirmities. Ld. counsel further stated that apart from the above the petitioners are presently in severe financial difficulties and that the same should not be a hindrance to their case being put forth before this tribunal and prayed that in view of the merits of the case, in view of the erroneous order passed by the Ld. Presiding Officer, in view of order which has not considered the settlement in the proper perspective, the petitioners are entitled to a complete waiver and prayed orders may be passed completely waiving the pre-deposit and added that the appeal may itself be taken up and disposed of at the earliest as the petitioners has ample chances of success in the appeal and finally added that for a small loan of Rs.50.00 lakhs the bank has managed to hike the liability to that of Rs.4.60 crores. Ld. Counsel went on to add that there are absolutely no merits in the contentions of the bank and that the bank is not entitled to any money as per their claim. Ld. counsel relied upon the decision of Hon'ble High Court Kerala in the case of "Bright Resorts (P) Ltd. & others Vs. DRT & others - 2007 SCC Online Ker 447; (2003) 2 KLJ 831; (2003) 11 AIC 757; (2003) 3 KLT 184; (2004) 119 Com Cas 8" and stated that this tribunal should abide by the said decision and take note of guiding factors set out therein with respect to the discretionary powers of a tribunal in the matter relating to the pre-deposit.

Heard the Ld. Counsel for the petitioners. It is seen that the Ld. Counsel for R1 bank has made his submissions on 18.9.2014. R2, R3 and R5 have already been given up. R4 has died.

It is seen that the amount due as on the date of filing of this appeal is Rs.4,60,55,795/- and no amount has been paid by the petitioners after the availment of loan. Therefore from the fact that this tribunal is bound by Sec.21 of the RDDBFI Act, from the fact that the petitioners have not repaid public money which they have borrowed from the bank, from the fact that the petitioners cannot be permitted to enjoy public money without being directed to repay the same, from the fact that the non repayment of public money has led to the creation of a NPA which in turn has caused a deterioration of the economic fabric of the nation, from the fact that the petitioners by non repayment of public money have denied the recirculation of public money amongst other citizens of the counter, from the fact that the petitioners are certificate debtors, from the

fact that it is always open to the petitioners to put up their entire case during the course of hearing of the appeal, from the fact that the appeal cannot be entertained without the pre-deposit being made and from the fact that it would be appropriate if the petitioners are given a reduction of 25% from that 75% in the pre-deposit the following order is passed.

"The petitioners are directed to deposit a sum of Rs.2,30,27,898/- into this Tribunal on or before 29.11.2014. In the event the said deposit is not made into this tribunal on or before 29.11.2014 this IA shall stand automatically dismissed."

Sd/-
CHAIRPERSON
DRAT, Chennai

2. Though several grounds have been raised assailing the proceedings stated supra, Mr.R.Subramanian, learned counsel for the writ petitioners submitted that in I.P.No.35/2008 dated 12.01.2009, this court has declared Mr.C.Sivasubramanian/writ petitioner No.2, as insolvent and therefore, he is unable to make pre-deposit into the tribunal. It is also the submission of the learned counsel for the petitioners that amounts periodically paid, were not taken note of. He also added, that the Tribunal has failed to consider that the petitioners are unable to satisfy the condition of pre-deposit and therefore, erred in passing the impugned proceedings.

Heard the learned counsel for the parties and perused the material available on records.

3. Before advertng to the above said contentions, let us have a cursory look at the relevant provision. Section 20 of the Recovery of Debts and Bankruptcy Act, 1993 deals with appeal to the Tribunal. Section 21 of the said Act deals with deposit of amount of debt due, on filing.

4. Material on record discloses that Indian Bank, Chennai, has filed O.A.No.1039/1998, which has been re-numbered as O.A.No.303/2011, for the following reliefs:

(a) Pay the applicant bank the debt of Rs.1,09,19,469.19 owing to it from the defendants with pendente lite interest and further interest at 17.34% per annum with quarterly rests from the date of this application till realisation with costs and Advocate's fees of this application.

(b) Issue a recovery certificate to the Recovery Officer for recovery of the amounts mentioned in prayer (a) above.

(c) direct the sale of "A" Schedule properties, stocks, etc, without prejudice to Applicant Bank's right of seizure and sale by public auction or private treaty and apply the sale proceeds towards the amount due.

(d) Direct the sale of mortgaged properties described in Schedule B.1 to B.5 hereunder and apply the sale proceeds towards the amount due and also grant a personal decree against the defendants 2 to 5 for the balance amount due with further interest at 17.34% per annum with quarterly rests up to the date of payment in case the sale proceeds of the mortgaged properties and stocks are found insufficient to satisfy the amount due.

5. Subsequent to the filing of the above said Original Application, parties have entered into a compromise. A joint Memo of Compromise dated 08.10.2004 has been filed. Based on the above, O.A.No.303/2001 has been disposed of on 11.10.2004 by the Debts Recovery Tribunal - II, Chennai. The order reads as follows:

ORDER

Counsel appearing for the applicant bank has filed a joint memo of compromise dated 8th October, 2004 stating that a sum of Rs.70,12,000/- has been arrived among the parties as full and final settlement as against the claim in the OA. A sum of Rs.17.53 lakhs has been paid on 30-9-04 out of Rs.70.12 lakhs. The balance of Rs.52.59 lakhs shall be payable from the date of saction (26-8-04) viz. within six months shall carry simple interest @ 11.5% p.a. on the reducing balance method.

2. It is also agreed between the parties in one of hte clause of the joint memo of compromise that on payment of Rs.17.53 lakhs, which is the first installment, the applicant shall release the documents relating to the property situated at Plot No.14, Door No.1, II Main Road, Pallavan Nagar, Maduravoyal, Chennai to the defendants. Since the aforesaid amount of Rs.17.53 lakhs has already been paid on 30.09.2004, the Registry is hereby directed to return Exh.A63, A64 and A66 to the applicant bank, after ensuring necessary formalities, with a further direction to return the same to the parties concerned.

3. There is also a clause in the Joint memo that in the case of non-compliance of any of the condition stated in the said memo, the concession given above shall be treated as cancelled and the applicant bank shall be entitled to recover the entire amount of Rs.1,09,19,469.19 with future interest and costs.

4. The memo has been signed by the Chief Manager of the applicant bank, the defendants and the

counsel appearing on both the sides. The same has been taken on record. No order as to cost.

6. Subsequently, bank has filed I.A.No.714/2008 in O.A.No.303/2001 to pass orders in terms of the Joint Memo dated 08.10.2004 to invoke the default clause. Having regard to the averments, and the default committed, the Debts Recovery Tribunal-II, Chennai, passed orders on 28.08.2009 in I.A.No.714/2008 in O.A.No.303/2001 as hereunder:

IN THE DEBTS RECOVERY TRIBUNAL-II AT CHENNAI
DATED THIS 20TH DAY OF AUGUST 2009

PRESENT: SHRI E.JACOB R.DANIEL, M.A., M.L.,

D.C.F.Sc.,

PRESIDING OFFICER

INTERLOCUTORY APPLICATION NO.714/2008

IN

OA No.303/2001

Indian Bank,
Rep. by its Authorised Officer
ARMB Branch
IV Floor, Circle Office Buildings
55, (Old No.24/2) Ethiraj Salai
Egmore, Chennai - 8 ... Petitioner/Applicant
bank

Vs.

1.M/s.Pioneer Cashew Industries Ltd,
300, Poonamallee High Road,
Maduravoil
Chennai 602 102 and 5 others
...Respondents/Defendants

ORDER

1) Counsel for petitioner/applicant bank has filed the instant application i.e., I.A.No.714/2008 to pass orders in terms of the joint memo dated 11.10.2004 to invoke default clause.

2) In the affidavit filed with the IA, applicant bank has averred as follows:-

2.1. On the request of defendant, OTS was sanctioned on 20.08.2004 agreeing to accept the amount of Rs.70.12 lakhs within a period of 6 months subject to certain terms and conditions. The said OTS amount was payable before 26.02.2005. Defendants paid a sum of Rs.17.53 lakhs on 29.09.2004 and Rs.24 lakhs on 03.06.2005 and sought extension of the due date up to 30.06.2005 for the balance payment. The due date was extended up to 18.08.2005, but the amount was not paid and the OTS lapsed. Further, extension of OTS upto 15.10.2005 was made with a third party keeping an amount of Rs.18 lakhs in 'No Lien' account to meet the OTS commitment. Again the time was extended till

31.10.2005. The defendants did not pay the OTS amount as per terms and the third party withdrew the 'No Lien' amount deposited. The OTS stood lapsed and the same was communicated to defendants.

2.2. The defendants had earlier been sanctioned OTS for Rs.80 lakhs on 20.03.2003 which was also not paid. It was set out therein that in case of non-compliance of any of the conditions in the memo, the concession given shall be treated as cancelled and the applicant bank shall be entitled to recover the entire amount of Rs.1,09,19,469.19 with future interest and costs. Except the payment of Rs.42.03 lakhs, the defendant did not pay any amounts and committed default of the joint memo dated 08.10.2004 constraining the applicant bank to file this IA to invoke the default clause and to seek decree as per OA claim.

3. In this case, notice was ordered on defendants. A perusal of the proceedings dated 17.3.2009 reveals that the defendants have not filed vakalat and reply. Further, after filing the joint memo dated 11.10.2004, the applicant bank has simultaneously proceeded against the properties mentioned in the OA under SARFAESI Act and realised the proceeds and some of the documents pertaining to the properties sold were also returned to applicant bank. The proceedings recorded before this Tribunal as well as the submissions made by the counsel for applicant bank reveals that a sum of Rs.17.53 lakhs on 30.09.2004, Rs.24 lakhs on 03.06.2005 and Rs.58.10 lakhs were realised by applicant bank by sale of properties scheduled to the OA through the proceedings under SARFAESI Act.

4. The joint memo of compromise dated 08.10.2004 signed by both the parties contains a default clause. The relevant portion of the same is reproduced hereunder for clarity:-

".....It further submitted that in the event of the non-compliance of any one of the aforesaid conditions, the original application OA No.303/2001 shall stand decreed as prayed for by the applicant and the applicant shall be entitled to recover the full amount of Rs.1,09,19,469.19 with future interest and with costs as prayed for till payment in full and also proceed to bring the other properties which are not released by the applicant bank detailed in the OA for sale towards realisation of decretal dues and thus render justice."

5. Keeping in view the default committed by defendants in terms of the compromise agreed between the parties, I hereby allow IA 714/2008. Consequently, the following order is passed:

(a) applicant bank is entitled to recover the full amount of Rs.1,09,19,469.19 with future interest @ 17.34% p.a. with quarterly rests from the date of filing of the OA till realisation and also costs of the OA from the defendants 2 to 5 personally and by sale of mortgaged and hypothecated properties scheduled to the OA;

(b) applicant bank is directed to give credit to the amounts realised by them on the respective dates of realisation and the balance be recovered accordingly.

(c) Applicant bank to furnish the details of the properties already released and proceeds realised under the compromise entered between the applicant bank and the defendant as well as the proceedings under SARFAESI Act and the remaining properties available in the OA schedule to proceed further, within two weeks from the date of his order.

(d) Applicant bank to file cost memo within two weeks from the date of this order;

(e) Registry is directed to issue Recovery Certificate in terms of this final order;

Sd-
(E.Jacob R.Daniel)
PRESIDING OFFICER

7. Accordingly, Recovery Certificate in DRC Number 39 of 2010 has been issued by the Presiding Officer, DRT-II, Chennai, as follows:

DEBTS RECOVERY TRIBUNAL - II AT CHENNAI
ORIGINAL APPLICATION NO.303 OF 2001
RECOVERY CERTIFICATE
DRC NUMBER 39 OF 2010

In the matter of

Indian Bank
Rep. By its Authorised Officer
ARMB Branch
IV Floor
Circle Office Buildings
55, (Old No.24/2), Ethiraj Salai
Egmore, Chennai - 600 008

... Applicant/Judgment

Creditor

-Vs-

1.M/s.Pioneer Cashew Industries Ltd
& 5 others ... Defendants/Judgment
Debtors

SCHEDULE OF COST

S.No	Item of Costs	Amount
1	Amount determined against the defendants 2 to 5 personally	1,09,19,469.19
2	Interest @ 17.34% p.a. on Rs.1,09,19,469.79p with quarterly rests from 31.12.2008 till 07.12.2009	6,13,37,967.15
3	Application/Court Fees	1,12,000.00
4	Advocate Fees	2,60,875.50
5	others	
	SUB TOTAL	7,26,30,311.84
6	Less amount recovered after suit	1,31,79,000.00
	TOTAL	5,94,51,311.84

(Rupees five crores ninety four lakhs fifty one thousand three hundred and eleven and eight four paise only)

Sd/-
PRESIDING OFFICER
DRT-2, CHENNAI

8. Being aggrieved by the above, M/s.Pioneer Cashew Industries Ltd, Chennai and Mr.C.Sivasubramanian, Chennai/writ petitioners 1 and 2 herein, have filed an appeal under Section 20 and 30 of the Recovery of Debts due to Banks and Financial Institutions Act, 1993. In the said appeal, C.S.Rajamanickam, Chennai, C.S.Thirugnanasambandam, Chennai are sons of the second petitioner herein. S.Chandra, respondent No.4 in the appeal before DRAT, Chennai, is the wife of the second writ petitioner herein, who is no more.

9. In the said appeal, petitioners have prayed to set aside the order made in I.A.No.714 of 2008 in O.A.No.303 of 2001 on the file of Debts Recovery Tribunal - II, Chennai dated 20.08.2009. In the appeal, writ petitioners have taken out I.A.No.898/2014 in AIR No.502 of 2011 seeking for a prayer of waiver of pre-deposit, a requirement under Section 21 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993. Though Mr.R.Subramanian, learned counsel for the petitioner contended that Mr.C.Sivasubramanian, Chennai, the second petitioner herein has been declared as insolvent in I.P.No.35/2008 dated 12.01.2009, and that therefore, he is unable to make pre-deposit, the said fact has neither been pleaded nor argued before the Debts Recovery Appellate Tribunal, Chennai. Nowhere in the memorandum of grounds of appeal or the affidavit filed in support of the petition

seeking waiver, such contention has been made. At this juncture, though Mr.V.Kalaynaraman, learned counsel for the respondent bank submitted that there has been a suppression of declaration of insolvency, this court is not inclined to accept the said contention for the reason that had it been disclosed, the Tribunal would have considered granting waiver. For waiver, the borrower/guarantor or any person aggrieved over any of the measures taken for recovery, have to plead and substantiate, hardship, inability and satisfy the Tribunal that unless waiver is granted, appellants would be seriously prejudiced. Perusal of the averments made in the supporting affidavit to I.A.No.898/2014 in AIR No.502/2011 does not indicate that the petitioner has made any substantiative pleadings in support of the above factors.

10. On the contra, petitioners have only pleaded that monies paid were not properly accounted therefor. Though Mr.R.Subramanian, learned counsel for the writ petitioners submitted that Mr.C.Sivasubramanian has been declared as insolvent, we find that such declaration has been ordered for payment of a sum of Rs.1,34,200/-. Order in I.P.No.35/2008 has been passed in the year 2009. It is also to be noted that while doing so, this court has granted 18 months time to apply for discharge. The 2nd Writ petitioner has not furnished any details before this court as to whether subsequently he has been discharged from insolvency. But writ petition has been filed by Mr.C.Sivasubramanian describing him as the Managing Director of M/s.Pioneer Cashew Industries Ltd, Chennai. If he had been already declared as an insolvent, it is not known as to how he could still continue as the Managing Director of Pioneer Cashew Industries Ltd. Going through the material on record as well as the order impugned, we find no illegality or irregularity. Accordingly, the order of the Debts Recovery Appellate Tribunal, Chennai in I.A.No.898 of 2014 in AIR No.502 of 2011 dated 19.09.2014 is sustained.

In the result, writ petition is dismissed. However, there shall be no order as to cost. Consequently, the connected miscellaneous petition is closed.

WEB COPY

Sd/-
Asst.Registrar (CS III)

/true copy/

Sub Asst. Registrar

+1 cc to Mr.Aiyar & Dolia,advocate,sr.1450.

pk(co)
krd 1/2

W.P. No.31351 of 2014