D/L
Item Nos.
06 & 07
01.05.2025
KOLE

AO-COM 5 of 2025
With
IA No. CAN 1 of 2025

Northern ARC Capital Limited
-Vs.-
ASA International India Microfinance Ltd. & Ors.

WITH

AO-COM 7 of 2025
With
IA No. CAN 1 of 2025

Mr. Jay Saha, Sr. Adv.
Mr. S. Roy,
Mr. S. Ghosh,
... for the appellant.

Mr. Swatarup Banerjee,
Mr. N. Dasgupta,
Ms. Saheli Sen,
Mr. Rajib Mullick,
Ms. A. Saha,
.... For the respondent no. 1.

Mr. Pranit Bag,
Mr. Dip Jyoti Chakraborty,
Mr. Amit Pareek,
Mr A. Mishra,
Mr. S. Sinha,
.... For the respondent no. 3 (IDFC First Bank)

AO-COM 5 of 2025 is directed against orders dated March 26, 2025 and April 8, 2025, passed by the learned Judge, Commercial Court at Rajarhat in a suit filed by the appellant herein. AO-COM 7 of 2025 is directed against an order dated April 9, 2025, passed in the same proceeding. Since the two appeals arise from the same set of facts, we have, by consent of the parties, taken up the appeals and the connected applications for hearing together.

A point which is technical in nature and raised but not really pressed by Mr. Bag, learned Advocate, appearing for the respondent no. 3 in these appeals is that the respondent no. 3 is not yet a party to the suit that is pending before the learned Trial Court. To protect its interest, the respondent no. 3 (hereinafter referred to as 'IDFC') applied to be examined *pro interesse suo* before the learned Trial Court. Such application is pending. Hence, technically speaking, IDFC ought not to have been added as a party respondent in these appeals.

Technically Mr. Bag may be correct. However, we wish to address the merits of the case. Since Mr. Bag's client has itself approached the learned Trial Court to protect its interest, impleading IDFC as party respondent in these appeals, would not, in our opinion, in any manner prejudice it.

A point of maintainability of these appeals has been urged on behalf of the respondent no. 1, who is the first defendant in the suit. It was argued by Mr. Banerjee, learned Advocate assisted by Mr. Dasgupta, learned Advocate, that Section 8 of the Commercial Court's Act bars any revisional application or petition against an *interlocutory* order of a commercial court. This is, however, subject to the provisions of Section 13 which provides for appeals against orders and decrees of the commercial court. However, an order to be appealable, must be an order enumerated in Order 43 Rule 1 of the Code of Civil Procedure. Any other order is not appealable. It has been submitted that the orders from which these two appeals have been preferred are not orders which find mention in Order 43 Rule 1 CPC and therefore, the appeals are not maintainable. The orders were really passed on the *pro interesse suo* application made by IDFC before the learned Trial Court. Although the injunction application of the plaintiff/appellant under Order 39 Rules 1 and 2 CPC was on record, the same was never really heard.

We do not find merit in this argument of the respondent no. 1. The orders impugned in these appeals were clearly passed on the application of the plaintiff under Order 39 Rules 1 and 2 of the Code of Civil Procedure. Therefore, the present appeals are well-maintainable.

Coming to the merits, both the appellant and IDFC claim to be creditors of the respondent no. 1 (in short 'ASA'). It is the plaintiff's case that it had advanced huge sums of money to ASA. Presently, approximately Rs. 15 crore is due from ASA. IDFC is approximately 10 per cent shareholder in ASA. IDFC has also lent money to ASA but that is what is called subordinated debt. According to the plaintiff, its claim for recovery of money lent to ASA takes precedence over IDFC's claim against ASA. Apprehending that by dint of its 10 per cent shareholding in ASA, IDFC will recover its entire claim from ASA which would leave nothing for the plaintiff, the plaintiff has filed the present suit and has asked for *interlocutory* reliefs therein.

Mr. Bag, learned Advocate appearing for IDFC shows us a circular of the Reserve Bank of India (hereafter "RBI") issued in the year 2013, which in its Glossary of terms used in the said circular defines subordinated debt as referring to the status of the debt. According to that definition, in the event of bankruptcy or liquidation of the debtor, subordinated debt only has a secondary claim of repayment, after other debts have been repaid. Learned Advocate says that the question of superior debt or senior debt or subordinated debt would arise only when the debtor company goes into liquidation or there is an insolvency proceeding in respect of that company. Since IDFC's claim against ASA is primarily contractual, the question of subordinated debt or any other kind of debt would not arise at this stage.

In response, the plaintiff has shown us a circular dated October 19, 2023 (updated as on February 27, 2025), issued by the RBI, which is captioned Master Direction - Reserve Bank of India (Non-Banking Financial Company – Scale Based Regulation) Directions, 2023. In that circular, subordinated debt has been defined as an instrument, which is fully paid up, is unsecured and is subordinated to the claims of other creditors and is free from restrictive clause and is not redeemable at the instance of the holder or without the consent of the supervising authority of the non-banking finance company. Mr. Saha, learned Senior Counsel for the plaintiff, says that the status of a subordinated debt remains the same irrespective of whether the debtor company is in liquidation or insolvency or not. Such a debt can only be recovered after other creditors have paid their dues.

We see that initially an order dated December 23, 2024, was passed by the learned Trial Court injuncting the defendant no. 1 from making payment to any of its creditors without first paying the entire dues of the plaintiff as claimed in the suit. The defendant no. 1 had gone up in appeal. By an order dated

January 17, 2025, the said order was modified, leaving the defendant no. 1 free to make payment to its creditors.

Whether or not the plaintiff's claim has a superior status vis-a-vis, the claim of IDFC is an issue which has to be decided upon consideration of the pleadings and submissions of the parties at the final hearing of the application for injunction. We are not inclined to go into that issue at the ad interim stage inasmuch as the proceedings are still pending before the learned Trial Court. We are of the view that the learned Trial Court should decide the issue after hearing all concerned parties including IDFC. We also request the learned Trial Court to decide the issue as expeditiously as possible and preferably within two months from the date of communication of this order by the parties to the learned Trial Court.

For a period of two months from date, the defendant no. 1 shall go on paying the equated monthly installments to IDFC as it has been paying in the recent past. However, keeping in view the fact that the Plaintiff has raised an arguable point as regards superiority of its debt which would have to be decided upon interpretation of the two RBI Circulars and upon examining as to whether both of the said circulars or anyone of them is applicable to the facts of the present case as also the extent of applicability thereof (if at all anyone of them is applicable), we feel that it would be just and proper to direct that for the said period of two months nothing more than the equated monthly installments should be paid to IDFC.

We make it clear that all points are left open for the parties to urge before the learned Trial Court. The learned Trial Court is requested to decide the issues including the issue of whether or not the plaintiff has a superior claim against the defendant no. 1 vis-a-vis IDFC, in accordance with law, without being influenced by any observation in this order.

Another point that has occurred to us and which we leave for the learned Trial Court to consider is whether a pure money claim can be secured under the law of the land.

With the aforesaid observations, the appeals and the connected applications are disposed of.

Urgent photostat certified copy of this order be supplied to the parties, if applied for, as early as possible.

(Om Narayan Rai, J.) **(Arijit Banerjee, J.)**