

(2012) 04 DEL CK 0098

In the Delhi High Court

Case No : Cont. Appeal (C) No. 6 of 2012

Atul Kumar

APPELLANT

Vs

M/s Koshika Telecom Limited and Others

RESPONDENT

Date of Decision : 17-04-2012

Acts Referred:

Contempt of Courts Act, 1971 — Section 11, 12, 12(1), 12(4), 19
Recovery of Debts Due to Banks and Financial Institutions Act, 1993 — Section 30

Citation : (2012) 2 BC 671 : (2012) 188 DLT 693 : (2012) 4 ILR Delhi 741

Hon'ble Judges : Sanjay Kishan Kaul, J;Rajiv Shakdher, J

Bench : Division Bench

Advocate : Mukul Rohatgi, Mr. Suresh Dobhal, Ms. Alpana Poddar and Mr. Rahul Tyagi, in Cont. Appeal C No. 6 of 2012, Mr. Mukul Rohatgi, Mr. Pawanjit S. Bindra and Ms. Alpana Poddar, in Cont. Appeal C No. 8 of 2012 and Mr. Rakesh Tiku with Mr. R.P. Agrawal, Mr. Arvind Kumar Singh and Ms. Priyadarshini Verma, in Cont. Appeal C No. 9 of 2012, for the Appellant; Rajiv Bahl, Adv for R-1/OL. and Mr. P.S.Bindra, Advocate for R-2 in Cont. Appeal (C) No. 6 of 2012, Mr. Rajiv Bahl, Adv for the Official Liquidator. Cont. Appeal (C) No. 8 of 2012 and Mr. Suresh Dutt Dobhal, Advocatefor R-3. Ms. Shalini Soni, R-4 in person. Mr. Rajiv Bahl, Advocate for the Official Liquidator in Cont. Appeal (C) No. 9 of 2012, for the Respondent

Judgement

Sanjay Kishan Kaul, J.—The contempt jurisdiction has to be exercised with care and caution by a court. It is not to be used either with vindictiveness or to "teach a lesson". The civil contempt involves a private injury and ought to be punished when a degree of misconduct is involved and proved. "The defiance should be willful and intentional as opposed to unintentional, accidental, casual or bona fide conduct."{Central Bank of India Vs. Sarojini Kumari; 1999 Cri L.J. 2130 (RAJ)}. There has to be a conscious effort or attempt on the part of the contemnor to willfully disobey the orders of a court and the discretion given to the Court, while arming it with contempt power, has to be exercised to ensure that the dignity of the court and majesty of law is maintained. A contemnor must always be given an opportunity to repent. The repentance on the part of the contemnor and

tendering of unqualified apology should be permitted to help him escape from rigorous punishment. The courts cannot be unduly touchy on the issue of contempt where orders have not been implemented forthwith especially when the effect of those very orders is effaced by pronouncements from appellate courts. We hasten to add that this is not meant to be a licence for violation of an order till it subsists. It is in this context that it was observed by a Constitution Bench of the Supreme Court in *Shri Baradakanta Mishra Vs. The Registrar of Orissa High Court and Another*, that "A heavy hand is wasted severity where a lighter sentence may serve as well." In the same judgment, it was observed as under:

We ought never to forget that the power to punish for contempt large as it is, must always be exercised cautiously, wisely, and with circumspection. Frequent or indiscriminate use of this power in anger or irritation would not help to sustain the dignity or status of the court, but may sometimes affect it adversely. (Special Reference No. 1 of 1964; (1965) 1 SCR 413; referred to in *Baradakanta Mishra*)

2. We have set out the parameters and the legal position at the threshold itself before analyzing the facts of the case. This became necessary as we are faced with a situation where despite the opposite party expressing against pursuing the contempt in view of certain subsequent orders, the learned single Judge has taken upon himself to proceed with the civil contempt, to convict the parties of contumacious conduct and willful disobedience and thereafter sentence them to heavy fine and simple imprisonment.

3. IFCI limited advanced loans to M/s Koshika Telecom Ltd. for setting up a telecom business. The loans were secured by hypothecation of the tower and other movable assets and two of the directors of the company gave personal guarantees. The service of the loan became irregular and since there were persistent defaults, IFCI filed proceedings before DRT for recovery of its debts, which was registered as OA No. 148/2002. The financial status of M/s Koshika Telecom Limited, however, continued to deteriorate, resulting in a winding up petition bearing No. 75/2002 being filed before the company court titled as "*Lord Krishna Bank Ltd. v. Koshika Telecom Limited*". The company was wound up vide order dated 02.08.2005 and the Official Liquidator took over charge of its assets.

4. The application filed by IFCI before the DRT was disposed of on 20.04.2006 holding M/s Koshika Telecom Limited liable for a sum of Rs. 233,73,92,900.27 along with pendente lite and future interest @ 10% per annum from 19.07.2002 till realization with costs of Rs. 1.5 lakhs and the Recovery Certificate was issued in terms thereof.

5. In order to recover its dues, IFCI filed recovery proceedings which were registered as RC No. 43/2006. In those proceedings, IFCI filed an application for sale of property (towers) mentioned in schedule, which were hypothecated with it. The Recovery Officer on 18.12.2007 directed attachment and sale of the hypothecated properties of M/s Koshika. However, in view of the appointment of

the Official Liquidator, an application was filed in the company petition by the Official Liquidator aggrieved by the order dated 18.12.2007. In the meantime, some of the hypothecated assets were sold by IFCI in its auction and part of the sale proceeds amounting to Rs. 12 crores came to be deposited with it. The application so filed by the Official Liquidator was, however, withdrawn on 05.02.2008 with liberty to file an appeal u/s 30 of The Recovery Of Debts Due To Banks And Financial Institutions Act, 1993. ("the RDDBFI Act? for short)

6. The Official Liquidator thereafter filed an appeal before the DRT against the order dated 18.12.2007 of the Recovery Officer which was dismissed on 25.07.2008. The DRT relied upon the judgment in Allahabad Bank Vs. Canara Bank and Another, where it was held that even if a company is in liquidation, the provisions of RDDBFI Act allow the RO to sell the properties of the debtors by giving notice and hearing to the OL and that the adjudication, execution and distribution of the sale proceeds and working out priorities as between banking and financial institutions and other creditors of the company so far as the monies realized under the RDDBFI act are concerned, has to be done by the Tribunal and not by the Company Court.

7. The Official Liquidator thereafter filed an appeal before the DRAT which was disposed of on 05.11.2008 as compromised by the parties and thereafter the Recovery Officer proceeded to sell the remaining properties in auction.

8. The IFCI filed an application before the Recovery Officer praying for the proceeds realized from sale of assets to be made over to IFCI as the Official Liquidator had received only one claim which was yet to be verified and no other claim had been received either from the workmen or from secured or unsecured creditors. The total realization from the assets sold by IFCI, being in the range of about 12 crores, a large amount of the debt of IFCI remained unsatisfied. This application was, however, opposed by the Official Liquidator. It appears that that the Official Liquidator had a meeting with Ms. Shalini Soni, AGM (one of the contemnors) on 19.08.2009 where a decision was taken that the sale proceeds of the land will be deposited with the Official Liquidator. The Official Liquidator filed a compliance/status report No. 281/2009 dated 06.10.2009 before the learned Company Judge and requested for appropriate directions to be issued inter alia for publishing the claims once again in newspapers with the expenses to be borne by the IFCI, the secured creditor, and for directions to be given to IFCI to deposit the sale proceedings with the Official Liquidator forthwith. On 08.10.2009, the learned Single Judge took the report on record and issued the following order:

Directions may also issue to IFCI, as prayed for, including a direction to the IFCI to pay for the expenses of the publication of the advertisement inviting the claims.

9. The aforesaid order thus shows that while a specific direction was issued to the IFCI to pay the expenses of the publication of advertisement inviting the

claims, no other specific direction was issued. A specific direction was worded in a manner as if it was "inclusive" while the general directions were that all the directions, as prayed for, may be issued to the IFCI. If one was to turn to the report dated 06.10.2009, there were a number of directions prayed for against IFCI:

i) Permission to publish the claims once again in newspapers with costs borne by IFCI.

ii) IFCI to provide details consisting of date of sale, amount of sale and date of handing over the possession to the auction purchasers.

iii) IFCI to deposit the sale proceeds with the Official Liquidator forthwith.

iv) IFCI to ensure availability of security guards for protection of properties of the M/s Koshika Telecom Limited and to provide details of guards along with photographs, details of PF/ESI and details of payment made to them, attendance sheet, the attendance sheet, the salary register and the account form which payment is realized to guards etc.

10. A meeting is stated to have been held again between the Official Liquidator and Ms Shalini Soni on 26.10.2009 for deposit of sale proceeds and expenses for advertisement and the Official Liquidator filed a report bearing No. 13/2010 on 12.01.2010 for directions to IFCI to deposit the sale proceeds with the Official Liquidator.

11. The IFCI limited instead of depositing the sale proceeds with the Official Liquidator, chose to file an application on 09.12.2009 before the Recovery Officer praying that the sale proceedings received from the sale of assets of M/s Koshika Telecom Limited be directed to be appropriated by the IFCI Limited in partial discharge of the Recovery Certificate. This application was allowed by the Recovery Officer on 22.02.2010 with a direction that IFCI would furnish an undertaking by an competent officer that in future if any eligible claim in excess of the amount available with the Official Liquidator is received by the Official Liquidator, the requisite amount will be remitted to the Official Liquidator within seven days. This was apparently so because other than the amount realized from the movable assets, IFCI stands in queue with other unsecured creditors, secured creditors and the workmen's liability naturally take precedence over it. The Recovery Officer also directed that a sum of Rs. 1 crore will be kept with the Official Liquidator on provisional basis for defraying various expenses. The Official Liquidator was, however, aggrieved by the non compliance of the directions of the learned Company Judge dated 08.10.2009 and thus filed a petition under Sections 11 and 12 of The Contempt of Courts Act, 1971, which was registered as CCP No. 30/2010 in Company Petition No. 75/2002 arraying Ms. Shalini Soni alone as a respondent/contemnor for not depositing the sale proceeds with the Official Liquidator.

12. The Official Liquidator also filed an appeal before the DRT against the order

of the Recovery Officer dated 22.02.2010 which was allowed by the DRT on 11.06.2010 partially observing that that the Official Liquidator would be entitled to the amount to the extent of value of the land of the company while IFCI is entitled to the amount received from the sale of movable assets including microwave ovens and machineries. The IFCI also preferred an appeal being Appeal No. 286/2010 before the DRAT being aggrieved by the aforesaid order of the DRT. This appeal was dismissed on 13.07.2010 by the DRAT.

13. The IFCI assailed the order of the DRT and DRAT in WP(C) No. 5014/2010. The Division Bench (of which one of us Sanjay Kishan Kaul, J. was a member) issued notice on the writ petition on 28.07.2010 and stayed the orders of the DRT and DRAT relating to realization of the amounts from the IFCI.

14. Since the contempt petition filed in the company petition was pending, Ms Shalini Soni filed reply to the contempt petition pleading that IFCI had given all the information called for by the Official Liquidator; though IFCI was ready to bear the expenses for the advertisement, the Official Liquidator had not quantified the expenses, and that, the sale proceeds as per the order of the Recovery Officer had been kept by IFCI in a no-lien interest bearing account and the rest in FDR with a nationalized bank. It was stated that when no claims were received by the Official Liquidator, the IFCI filed the application for release of the entire amount to it and the Recovery Officer had allowed that application except a sum of Rs. 1 crore to be kept with the Official Liquidator. The DRT had modified the order to the extent that the IFCI will be allowed to retain monies received from the sale of movable properties and the appeal of IFCI before DRAT was dismissed. The matter was pending in writ petition before the High Court.

15. The WP(C) No. 5014/2010 was allowed on 06.12.2010. The Division Bench noticed that the counsel for IFCI on the first date itself had confined the grievance to the direction contained in the order dated 11.06.2010 of the DRT affirmed by the DRAT vide Order dated 13.07.2010 to the extent that it directed that realization from sale of immovable assets should be deposited with the Official Liquidator. The order dated 28.07.2010 issuing notice recorded the concession of the learned senior counsel for IFCI that there was no dispute with the proposition that IFCI is not a secured creditor qua the amount realized from sale of immovable properties and thus the lien of employees would have precedence and if there was any other unsecured creditor, whose claim is verified, the claim of the IFCI would stand alongside such unsecured creditor. However, no such claim had been received despite an earlier advertisement, but in case any such claim was received in pursuance to a subsequent advertisement, the same could be dealt with as recorded in that order especially keeping in mind the undertaking already given by the IFCI pursuant to the order of the Recovery Officer dated 22.02.2010. Learned counsel conceded that the expenses for future advertisements would be borne by the IFCI out of the amount lying in account with IFCI. The Division Bench noted in its order dated 06.12.2010 that the counter affidavit of the Official Liquidator did not enlighten

them any further and it was not disputed that no claims had been received in pursuance to the first advertisement except one claim, but even the particulars of that claim had not been set out nor the same had been verified. The costs of advertisements were not indicated nor was the Official Liquidator in a position to state so even on the date of hearing. The Division Bench found that the facts of the case were peculiar as the money was lying with IFCI, a public financial institution, to the extent of sale realization from the immovable properties in respect of which the IFCI was not a secured creditor, but no other claims had been verified to show that there were other unsecured creditors or claim of workmen which was yet to be satisfied. The amount realized from sale of both the movable and immovable assets was not even fraction of the amount which was due to the petitioner under the decree. The operative paragraphs of the order dated 06.12.2010 are as under:

11. The function of the OL is only to ensure that the claims of secured creditors are satisfied to the extent it can be and unsecured creditors get the remaining amount *pari passu*. No such unsecured creditor has come to light despite an advertisement being issued. The OL is somehow keen only for the amount to be transmitted to it, the objective of which is not clear to us. If there were other claims then naturally the role of OL comes into play and he would have to distribute the amount *pari passu*. The amount is secured as it is lying with the petitioner-Corporation, which is a public financial institution, and has been only provisionally appropriated in terms of the orders of the Recovery Officer.

12. We thus consider it appropriate to modify the impugned orders and permit the petitioner to retain the amount realized against sale of immovable properties making it clear that the claims of any unsecured creditors would rank *pari passu* with that of the petitioner-Corporation to that extent and the claim of workmen would first have to be satisfied. Insofar as the advertisement costs are concerned, the OL to communicate the costs in writing to the petitioner-Corporation and the petitioner-Corporation will make the payment to OL of that amount along with 20 per cent additional amount to defray the incidental expenses. The petitioner-Corporation will abide by the undertaking given on its behalf before the DRT as well as before us on 28.07.2010.

13. The writ petition is allowed in the aforesaid terms leaving the parties to bear their own costs.

16. The effect of the aforesaid order is that IFCI was held entitled to retain the amounts both from the sale of movable and immovable assets of M/s Koshika Telecom Limited subject to the other directions contained as aforesaid. This should have brought an end to the controversy qua the amount i.e. the issue arising as to whether this amount had to be deposited by the IFCI with the Official Liquidator. However, this did not happen even though the Official Liquidator sought to withdraw the contempt proceedings on 08.03.2011 before the learned single Judge in view of the orders passed by the Division bench on 06.12.2010. The learned single Judge in effect declined the prayer for withdrawal

of the contempt proceedings and wanted to enquire as to whether the Recovery Officer was aware of the orders passed by the learned Company Judge on 08.10.2009 while passing the orders dated 22.02.2010 and consequently the Official Liquidator did not press the withdrawal of the contempt proceedings. The learned single Judge proceeded to issue notice for the first time on 23.05.2011 to IFCI through its Managing Director (contemnor herein) and the Recovery Officer (contemnor herein). The Recovery Officer was issued the notice as to why he had passed the order on 22.02.2010 contrary to the order of the learned Company Judge dated 08.10.2009. It may be added that Mr. Atul Kumar Rai is the Managing Director of IFCI Limited and the contemnor before us, but no notice was issued to him by name, but only by designation. This order was passed despite the learned single Judge being apprised of the order passed by the Division Bench on 06.12.2010 putting the controversy at rest.

17. In response to the contempt notice, affidavits were filed by all the three contemnors. It would be appropriate now to deal with each of these affidavits separately.

18. On behalf of IFCI, initially a reply supported by an affidavit of Sh. Avinash Kumar as Assistant General Manager was filed whereby an unconditional apology was tendered to the Court. The relevant facts which have already been sketched out hereinabove were set out in the affidavit. The affidavit states that the IFCI was given copies of the orders passed by the learned Company Judge on 08.10.2009 for the first time on 22.02.2010 as annexures to the reply filed before the Recovery Officer and that in the prior meeting held on 26.10.2009 in the chamber of the Official Liquidator, attended by Ms. Shalini Soni, AGM, copies of the order dated 08.10.2009 and report No. 281/2009 were not supplied. It is also stated that since the Official Liquidator was aggrieved by the order passed by the Recovery Officer on 22.02.2010, an appeal was filed before the DRT which was partially allowed on 11.06.2010. The order dated 11.06.2010 had been challenged by the IFCI before the DRAT which challenge was rejected on 13.07.2010 and it is thereafter that WP(C) No. 5014/2010 was filed. The Official Liquidator filed a counter affidavit in that writ petition taking all the pleas including that IFCI was in contempt of order dated 08.10.2009, but the writ petition was allowed on 06.12.2010. It was also emphasized that the plea of the Official Liquidator seeking appropriation of the amount was contrary to the judgment of the Supreme Court in *Allahabad Bank v. Canara Bank & Anr.*'s case (supra) as it is the Recovery Office alone who could have prioritized the debt amongst banks, financial institutions and other creditors. It appears that at the insistence of the learned Single Judge, the Managing Director also filed a personal affidavit on 11.08.2011 tendering an unconditional apology stating that he had no knowledge of the developments leading to the filing of the contempt petition nor was he aware of the orders passed on 08.10.2009.

19. The affidavit filed by Ms. Shalini Soni is more or less in the same terms as of Mr. Avinash Kumar. While tendering an unqualified apology, it has been

categorically stated that she had attended a meeting called by the Official Liquidator on 26.10.2009 where she had expressed her readiness to fulfil all the requirements for compliance of the orders of the court and to furnish the relevant information. However, the expenses were not quantified for inviting the claims and thus IFCI could not have deposited the amount without knowing how much to deposit. The Official Liquidator was also a party to the sale proceedings conducted by the Recovery Officer and was a part of the Assets Sale Committee constituted for purposes of sale of assets of M/s Koshika Telecom Limited.

20. The affidavit of Mr.R.K.Bansal, the Recovery Officer, also tenders unqualified apology. The factual position has been explained in the affidavit stating that the copy of the order dated 08.10.2009 itself did not indicate that IFCI had been directed to remit the entire sale proceeds of the assets of the M/s Koshika Telecom Limited to the Official Liquidator. This aspect became clear only when the order dated 08.10.2009 is read with the compliance/status report No. 281/2009 dated 06.10.2009. At the time of hearing of the application of IFCI, it is pleaded that true spirit of the order dated 08.10.2009 passed by the learned Company Judge was not brought to the notice of the Recovery Officer by any of the parties during the course of the arguments. He further goes on state in para 10 of the affidavit as under:

10. That in the hindsight, the Deponent states that he ought to have read the entire application and the reliefs/directions that had been sought by the Official Liquidator. This as stated, was a bona fide oversight and was totally unintentional.

21. We may notice that all the contemnors had appeared before the Court also and submitted to tender an unqualified apology. The learned single Judge, however, in terms of the order dated 06.02.2012 while noticing the apology tendered in the affidavits, has still found them guilty of contempt and stated that the fact of the apology was only a matter to be considered as a mitigating circumstance on the point of sentence. The learned single Judge found that the order passed by the Recovery Officer on 22.02.2010 showed that the order passed on 08.10.2009 by the learned Company Judge was duly communicated to Ms Shalini Soni which in turn would amount to a communication to IFCI including its Managing Director. The remedy, as per the opinion of the learned single Judge, if IFCI was aggrieved by the order dated 08.10.2009, was to assail it in appeal and merely because the order dated 08.10.2009 ultimately became inoperative on account of orders passed by the Division Bench was held not to assist the contemnors. The learned single Judge from observations in para 16 appears to have been weighed down by the fact that the IFCI is a public financial institution having a legal department and thus should have acted in accordance with law. Similarly, qua the Recovery Officer, it has been found that the order dated 08.10.2009 had been placed before him in the record, the defence that this was not specifically pointed out to him cannot be accepted.

22. Mr.Atul Kumar Rai assailed the order of the learned single Judge dated 06.02.2012 holding him guilty of contempt by filing a SLP being SLP No.

6394/2010 before the Supreme Court which was disposed of on 17.02.2012. The Supreme Court noticed that the controversy related to the issue as to whether an appeal would lie u/s 19 of the Contempt of Courts Act, 1971 before the Division Bench of the High Court against the order of conviction or whether both the order of conviction and sentence have to be assailed only at the stage when the order of sentence is passed i.e. that the order of conviction cannot be assailed in appeal. The Supreme Court did not express any final opinion on this question in the order dated 17.02.2012 as undisputably an appeal would be maintainable after pronouncement of punishment/sentence by the High Court. The SLP was accordingly disposed of with a direction that the punishment/sentence imposed upon the petitioner would remain suspended for a period of four weeks to enable the petitioner to file an appeal to seek an appropriate order from the appellate court in terms of Section 19(2) of the Contempt of Courts Act, 1971. The SLP of Ms. Shalini Soni was, however, listed on 23.02.2012 which was disposed of on the analogy of SLP(C) No. 6394/2012. Mr. R.K. Bansal, however, did not file any SLP. The learned single Judge thereafter heard the parties on 24.02.2012, 01.03.2012 and 06.03.2012 before reserving the judgment. It may be noticed that in the meantime an application for review had also been filed by Mr. Atul Kumar Rai on 21.02.2012, on which also arguments were heard. The learned single Judge found that adopting the path of pardon for the contemnors was yielding disastrous results as far as the sanctity and obedience of judicial orders was concerned and litigants were gathering the impression that the moment apology is tendered even while maintaining that no contempt was committed, the Court would melt down and pardon them. The learned single Judge was thus not inclined to show any leniency and found it a dangerous trend that the parties obtained relief from the subordinate authorities which stood declined by this Court. All the three contemnors were sentenced to undergo simple imprisonment for a period of one month. IFCI as an institution has been imposed with a fine of Rs. 5 lakhs, out of which Rs. 3,50,000/- should be deducted from the salary of Mr. Atul Kumar Rai while the balance amount should be deducted from the salary of Ms. Shalini Soni.

23. The three contemnors have thus assailed the orders of conviction and sentence before us in these appeals.

24. We have heard the learned counsel for the appellants as well as the learned counsel for the Official Liquidator. The learned counsel for the Official Liquidator has really nothing to add and in fact stated that the Official Liquidator had formed an opinion to withdraw the contempt proceedings in view of the subsequent orders of the Division Bench dated 06.12.2010, but this request was declined by the learned single Judge who proceeded to hear the contempt petition on merits. One common thread which permeates the submissions advanced on behalf of all the three contemnors is that the counsels accept that the appropriate remedy against the order dated 08.10.2009 of the learned Company Judge was for IFCI to have approached the appellate court. This was not done. It was, however, submitted that the appellants had tendered

unqualified apology and were not motivated by any personal gains. The IFCI was only seeking to recover its dues and the amounts realized were only a fraction of the total amount found due under the Recovery Certificate. The function of the Official Liquidator was to protect the monies and assets of the company in liquidation (M/s Koshika Telecom Limited), to meet liabilities of the creditors, statutory dues, workmen's dues etc. An advertisement was published by the Official Liquidator in various newspapers, but except for one claim no other claims were lodged. This shows that there were no other secured or unsecured creditors or workmen's dues. The single claim received had also not been verified. The IFCI is a public sector enterprise and the money was as safe with it as with the Official Liquidator. The assets had been sold with the Official Liquidator on the Assets Sale Committee and thus there was complete transparency in the sale of the assets. The IFCI had already given an undertaking that in case any claims were lodged by even unsecured creditors, they would stand *pari passu* with such claims or workers claims qua the unsecured assets of M/s Koshika Telecom Limited.

25. The learned counsel appearing for Ms. Shalini Soni confessed that it may have been a case of over-enthusiasm on the part of Ms. Shalini Soni to secure the amount for IFCI Limited on the basis of a legal understanding that there were two separate proceedings and that the rights of IFCI were protected in the proceedings before the DRT. This was stated to be not a whimsical view of Ms. Shalini Soni, but that the Supreme Court itself in *Allahabad Bank v. Canara Bank & Anr.*'s case (*supra*) had opined that for a company in liquidation, the proceedings of the RDDBFI Act allow the Recovery Officer to sell the properties of the debtors by giving notice and hearing to the OL and that the adjudication, execution and distribution of the sale proceeds and working and priorities as between banking and financial institutions and other creditors of the company so far as the monies realized under the RDDBFI Act are concerned, has to be done by the Tribunal and not by the Company Court. It was under the belief of such a bona fide view that the proceedings were initiated before the Recovery Officer.

26. One may add that it cannot be disputed that the controversy qua these amounts stood at rest in view of the judgment of the Division Bench of this Court on 06.12.2010 and interim protection had been granted in those proceedings on 28.07.2010. Thus the view propounded by IFCI, in fact, prevailed. This order has not been assailed further and has become final and binding. Of course, this would not be an answer to the plea that between 08.10.2009 and the orders being passed by the Division Bench, the IFCI was required to comply with the directions of the learned Company Judge or ought to have assailed the same in appeal which they failed to do.

27. One cannot but take notice of another fact. On the company going into liquidation, reports are filed by the Official Liquidator from time to time on which orders/directions are passed by the Company Court. These are stated to be in the nature of chamber proceedings though we are informed that as per the

current practice, the learned Judge for convenience sake takes these matters in court. The compliance/status report No. 281/2009 filed by the Official Liquidator on 06.10.2009 sought various directions which have been set out by us while discussing this report. The learned Company Judge while passing the order dated 08.10.2009 did not issue specific directions qua all the prayers made. In fact, what was observed was that the directions may also issue to IFCI, "as prayed for", followed up with the expression "including a direction to the IFCI to pay for the expenses of the publication of the advertisement inviting the claims." Thus, on the one hand, learned Company Judge considering one of the directions as an important one, has issued a specific direction while not issuing such a specific direction qua the issue of deposit of the amount by IFCI with the Official Liquidator. If one may say so, certainly some ambiguity could arise from the interim directions passed.

28. We are of the view that the complete controversy stood examined in the order passed by the Division Bench on 06.12.2010. We have already reproduced the operative portion of the directions hereinbefore to indicate the line of reasoning which weighed with the Division Bench. The function of the Official Liquidator was not to keep monies with itself for the sake of it. The Official Liquidator is a custodian for purposes of meeting the claims of various kinds of creditors, statutory dues and workmen's dues. In the facts of the present case, even the first advertisement issued by the Official Liquidator did not result in any claims whatsoever except one claim. This fact had to be balanced with the astronomical claim outstanding to IFCI from the company in liquidation (M/s Koshika Telecom Limited) where only a fraction was realized from sale of assets. IFCI is a public sector enterprise and the monies were fully secured with it. IFCI had also given an undertaking that it is only qua the hypothecated material that it could appropriate the amounts while the amounts realized from the remaining assets were available for all kinds of creditors. Thus whether the amount would lie with the Official Liquidator or IFCI, it was equally secure especially when there were no other claims forthcoming which would reduce the entitlement of IFCI to appropriate the balance amount.

29. One cannot also lose sight of the fact that, it is not an endeavour by any individual to appropriate the amounts to itself contrary to orders of the Court. Ms. Shalini Soni was of the bona fide view that the rights of the IFCI to appropriate the amount should be agitated before the Recovery Officer on account of the proceedings arising from the Recovery Certificate. This view apparently had its basis in the judgment of the Supreme Court in *Allahabad Bank v. Canara Bank & Anr.*'s case (supra). The only fault of Ms. Shalini Soni was that once the order was passed by the learned Company Judge on 08.10.2009 and the IFCI was aggrieved by it, before approaching the Recovery Officer, judicial propriety demanded that the order dated 08.10.2009 ought to have been assailed before the appellate court.

30. Similarly, the Recovery Officer ought to have been also more careful (the fact

which he admits in its affidavit) before passing the order dated 22.02.2010, to call upon the IFCI to take out the necessary proceedings to first get the order dated 08.10.2009 stayed.

31. Insofar as Mr.Atul Kumar Rai is concerned, we may note that it is not as if the head of the institution looks to the nitty gritty of each transaction or each dispute. The matter pertained to a loan account which had resulted in a Recovery Certificate. It is not as if this aspect was brought to the notice of the board or the Managing Director at any stage when proceedings were taking place with discussions between Ms.Shalini Soni and the Official Liquidator for utilization of the sale proceeds. Merely because Mr.Atul Kumar Rai happens to be the Managing Director will not fasten him with a vicarious liability especially in the nature of such contempt jurisdiction and thus Mr.Atul Kumar Rai cannot be faulted at all. Despite this, assuming the overall responsibility as a head of the organization, Mr.Atul Kumar Rai had tendered an unqualified apology while stating that it was the then Chief General Manager of IFCI who was looking to the aspect in question. Mr.Atul Kumar Rai is the CEO and MD of IFCI apart from the additional responsibilities of subsidiaries of IFCI being IFCI Infrastructure Limited, IFCI Factors Limited, IFCI Venture Capital Funds Limited and IFCI Financial Services Limited. The organizations work in an established procedure of hierarchy and it is informed that IFCI alone has more than 600 cases pending all over the country, having a lending portfolio in excess of Rs. 16,000 crores.

32. We may usefully refer to the provisions of Section 12 of the Contempt of Courts Act, 1971 in respect of the aforesaid. Section 12(4) of the said Act reads as under:

(4) Where the person found guilty of contempt of court in respect of any undertaking given to a court is a company, every person who, at the time the contempt was committed, was in charge of, and was responsible to, the company for the conduct of business of the company, as well as the company, shall be deemed to be guilty of the contempt and the punishment may be enforced, with the leave of the court, by the detention in civil prison of each such person.

Provided that nothing contained in this sub section shall render any such person liable to such punishment if he proves that the contempt was committed without his knowledge or that he exercised all due diligence to prevent its commission.

(emphasis supplied)

Thus, the aforesaid makes it clear that merely because a corporate entity is alleged to have committed contempt would not be a ground to make the CEO/ Managing Director or head of the organization liable for contempt if he had no knowledge of the same. If in the perspective of this Section, the aforesaid facts are analyzed, we find that Mr.Atul Kumar Rai as CEO has categorically averred in his affidavit that he was not aware of the proceedings which is not unusual considering 600 cases are pending in respect of IFCI and the CEO cannot be expected to look to each case unless it is brought to his notice.

33. We are of the view that especially taking into consideration the orders of the Division Bench dated 06.12.2010, the controversy ought to have been put to a rest when the Official Liquidator itself wanted to withdraw the contempt petition on 08.03.2011. The learned single Judge did not even permit that but proceeded to issue notices further to the Managing Director of IFCI by designation and Recovery Officer ostensibly to know whether the Recovery Officer was aware of the orders passed by the learned Company Judge on 08.10.2009 when he passed the orders dated 22.02.2010. No notice was issued to Mr. Atul Kumar Rai in person, but since the affidavits filed on behalf of IFCI were not by the Managing Director, even the Managing Director filed his personal affidavit. All the three contemnors had tendered unqualified apology and the Recovery Officer had stated in so many words that he should have been more careful in analyzing the papers before him. This is of course apart from the fact that we are of the view that the order dated 08.10.2009 itself was not free from doubt for the manner in which it was framed.

34. We find that there is no case whatsoever of contempt made out against Mr. Atul Kumar Rai while Ms. Shalini Soni ought to have been more careful in first assailing the order dated 08.10.2009 in appeal before filing an application before the Recovery Officer on which orders were passed on 22.02.2010. Similarly, the Recovery Officer ought to have perused the reply filed by the Official Liquidator. Given this situation, unqualified apology tendered more than met the requirement as it was not a case of any willful contumacious conduct for the court to either proceed with conviction or impose sentence and that too such a harsh one.

35. The question whether there is contempt of court or not is a serious one as the court is both the accuser as well as the judge of the accusation requiring the court to act with as great circumspection as possible making all allowances for errors of judgment and difficulties arising from inveterate practices in courts and tribunals. The punishment and that too with such severity would arise only in a case of clear contumacious conduct, which has not been explained. It is only in the case of a deliberate lapse and disregard to one's duties and in defiance of authority that such extreme measures are called for. To take action in a case where the contemnor has unconditionally apologized even though the lapse is not deliberate would "certainly sound the death knell of what Dean Roscoe Pound calls "judicial justice" and the Rule of Law." (In Re: In Re: S. Mulgaokar,

36. We are, thus, of the unequivocal view that all the three appeals are liable to be allowed, orders of conviction dated 06.02.2012 and order on sentence dated 19.03.2012 are liable to be set aside with the acceptance of apology on the part of Ms. Shalini Soni and Mr. R.K. Bansal while Mr. Atul Kumar Rai is held not to have any role in the matter in issue.

37. We may also notice another aspect of the matter arising from the quantum of fine imposed on the contemnors. Section 12(1) of the Contempt of Courts Act, 1971 Act provides for a fine which may extend to Rs. 2,000/-, but the fine

imposed in the present case is running into lakhs. This is contrary to the statutory provisions. Such fine would not be sustainable in view of the observations of a Constitution Bench of the Supreme Court in Supreme Court Bar Association Vs. Union of India and Another, However, this matter need not detain us any further since we have already held that the present case is not one which should have invited either a conviction or a sentence. The appeals are allowed in the aforesaid terms leaving the parties to bear their own costs.

CM No. 5248/2012 in Cont.Appeal (C) No. 06/2012

CM No. 5834/2012 in Cont.Appeal (C) No. 08/2012

CM No. 6108/2012 in Cont.Appeal (C) No. 09/2012

No further directions are called for on these applications in view of the disposal of the appeals.

The applications stand disposed of.