(2008) 02 P&H CK 0196

In the Punjab And Haryana At Chandigarh

Case No : Civil Writ Petition No. 20175 of 2006

Harjinder Singh — APPELLANT

Vs

Debts Recovery Appellate Tribunal, Delhi — RESPONDENT

Date of Decision : 25-02-2008

Acts Referred:

Haryana Ceiling on Land Holdings Act, 1972 — Section 26
Recovery of Debts Due to Banks and Financial Institutions Act, 1993 — Section 34
Sick Industrial Companies (Special Provisions) Act, 1985 — Section 22

Citation : (2008) 2 ISJ 46 : (2008) 2 Law Herald 1405

Hon'ble Judges : Rakesh Kumar Garg, J and Satish Kumar Mittal, J

Advocate : Mr. Aashish Chopra, Advocate.For the Respondents Nos. 3 to 7, Mr. Anand Chhibber, Advocate., Advocates for appearing Parties

Judgement

Satish Kumar Mittal, J.—The petitioner, who was the auction purchaser of the property of the guarantor (respondent No.3 herein), has filed the instant writ petition, challenging the order dated 1.11.2006, passed by the Debts Recovery Appellate Tribunal, Delhi (hereinafter referred to as ''the Appellate Tribunal'') setting aside the order dated 26.7.2006, passed by the Debts Recovery Tribunal, Chandigarh (hereinafter referred to as ''the DRT''), and holding that the Recovery Officer could not have proceeded with the auction of the property in question, when there was a statutory bar under Section 22 of the Sick Industrial Companies (Special Provisions) Act, 1985 (hereinafter referred to as ''SICA''), and consequently all the further proceedings including the sale in question has been set aside.

2. In the present case, Canara Bank (respondent No.2 herein) instituted Original Application No. 139 of 2001 before the DRT against the borrower company and the guarantors (respondents No.3 to 7 herein) for recovery of certain amounts. The said Original Application was allowed exparte on 30.3.2004 and an exparte Recovery Certificate was issued for recovery of Rs. 21,67,602/ subject to correction. Subsequently, respondents No.3 to 7 filed an application for setting aside the exparte Recovery Certificate. Admittedly, the respondent Company also

filed a reference before the BIFR under the SICA and at the time of pendency of the Original Application and execution proceedings, the matter was pending before the AAIFR in appeal No. 148 of 2002. Consequently, when the Recovery Officer sought to recover the aforesaid amount under the Recovery Certificate by selling the property in question, belonging to respondent No.3, the guarantor, respondents No.3 to 7 moved an application before the Recovery Officer for stay of the execution and recovery proceedings, in view of Section 22 of SICA. On 21.4.2005, the Recovery Officer dismissed the said application and thereafter, on 23.4.2005, the property in question belonging to the guarantor was put to auction. The petitioner gave the highest bid of Rs. 1.26 crores and also deposited the requisite earnest money with the fall of hammer. Respondents No.3 to 7 challenged the said order dated 21.4.2005 by filing appeal before the DRT. During the pendency of the appeal, the Recovery Officer confirmed sale in favour of the petitioner, while dismissing the objections filed by respondents No.3 to 7. In pursuance of that order, the auction purchaser paid the entire sale consideration. Subsequently, the DRT though held that the appeal filed by the respondent against the order of the BIFR was pending before AAIFR, but instead of staying all further proceedings pending before the Recovery Officer, by placing reliance upon a decision of the Supreme Court in Kailash Nath Agarwal and others v. Pradeshiya Industrial & Investment Corporation of U.P. Ltd. and another, (2003) 4 Supreme Court Cases 305, dismissed the appeal filed by respondents No.3 to 7 against the order dated 21.4.2005, on the premise that protection under Section 22 of SICA is not available to the guarantors. Aggrieved against the said order, respondents No.3 to 7 filed appeal before the Appellate Tribunal. Vide impugned order dated 1.11.2006, the Appellate Tribunal has allowed the said appeal, while following the decision of the Supreme Court in M/s. Patheja Bros. Forgings & Stamping and Anr., v. I.C.I.C.I. Ltd. and Anr., 2000 ISJ Banking 655, wherein it was held that protection available under Section 22 of SICA is applicable even to the guarantors after 1994 amendment to Section 22 of SICA. It has been further held that the decision of Kailash Nath Agarwal''s case (supra) is distinguishable and the same is not applicable to the facts and circumstances of the present case. In this regard, the following observations have been made by the Appellate Tribunal :

?... The view taken by the Tribunal below, in my considered view, appears to be erroneous, in as much as in Patheja''s case, the Hon''ble Supreme Court has clarified the position with regard to the protection available to the guarantors also after the amendment of Section 22 of SICA in 1994. Nonetheless, the provisions under Section 34 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 is in addition to and not in derogation of such other acts including SICA. For proper appreciation, the provision under section 34 (2) of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 is abstracted hereunder :

?The provisions of this Act or the rules made thereunder shall be in addition to, and not in derogation of the Industrial Financial Corporation Act, 1948 (15 of

1948), the State Financial Corporations Act, 1951 (63 of 1951), the Unit Trust of India Act, 1963 (52 of 1963), the Industrial Reconstruction Bank of India Act, 1984 (62 of 1984), `the Sick Industrial Companies [Special Provisions) Act, 1985 (1 of 1986 and the Small Industries Development Bank of India Act, 1989 (39 of 1989)]?

The decision of Hon''ble Supreme Court in Kailash Nath Agarwal and others Versus Pradeshiya Industrial & Investment Corporation of UP Limited relied upon by the Tribunal below is distinguishable with that of the ratio laid down by the Hon''ble Supreme court in Patheja Bros., Forgings & Stampings Vs. ICICI. The three Judge Bench of the Hon''ble Supreme Court in Patheja''s case while examining the earlier view taken by the Hon''ble Supreme Court has held that the protection under Section 22 is extendable even to the guarantors. In the light of the view taken by the Hon''ble Supreme court in Patheja''s case and the provisions under Section 34 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, it is difficult to deny the protection available under Section 22 of SICA in view of the ratio laid down by the Hon''ble Supreme Court in Patheja''s case. As rightly pointed out by the learned counsel for the appellants, in the Kailash Nath Agarwal''s case, protection was sought under the provisions of the Pradeshiya Industrial & Investment Corporation of UP Limited and, therefore, the Hon''ble Supreme Court tried to distinguish between the suit and proceedings and in the facts of that case, held that protection cannot be extended to such of those parties who claim benefit under the provisions of the UP Act. As discussed, there is no ambiguity in the facts of the case and the protection which is available to the appellants under Section 22 of the SICA. In that view of the matter, I have no hesitation to hold that the Recovery Officer could not have proceeded with further enquiry including that of auctioning the property when there is a statutory bar under Section 22 of SICA. It is further held, the DRT, Chandigarh could not have refused to stay all further proceedings either on its file or on the file of the Recovery Officer relating to this dispute. In the circumstances, there shall be stay of all further proceedings pending on the files of the Presiding Officer and the Recovery Officer relating to this case till a decision is taken by the AAIFR. Accordingly, the appeal is allowed. Consequently, the impugned order is set aside. No costs.?

3. After hearing counsel for the parties and going through the orders passed by the DRT and the Appellate Tribunal, we do not find any valid ground to interfere in the impugned order.

4. It has not been disputed that when the Original Application for recovery of the amount were pending before the DRT and the recovery proceedings, after passing of the exparte order were pending before the Recovery Officer, the appeal filed by the respondent Company against the order of BIFR under SICA was pending before AAIFR. In spite of the pendency of the said appeal, the recovery proceedings were not stayed by the Recovery Officer in view of Section 22 of SICA and the stay application was dismissed on the ground that property of

the guarantor was to be auctioned, which was not protected under Section 22 of SICA. Immediately after dismissal of the stay application, the property was put to auction. The appeal filed by respondents No. 3 to 7 against the order of the Recovery Officer though was dismissed by the DRT on the ground that the provision of Section 22 of SICA is not applicable in case of the property of the guarantor, however, the Appellate Tribunal by following the decision of the Supreme Court in Patheja''s case (supra) has set aside the order of the DRT while holding that protection under Section 22 of SICA is also available even to the guarantor.

5. A contention has been raised by learned counsel for the petitioner that in the instant case, the judgment given by the Supreme Court in Kailash Nath Agarwal''s case (supra) is applicable and only a limited protection has been given to the guarantor with respect to the suit, which cannot be filed for recovery of the amount in dispute. But as far as the recovery proceedings are concerned, no protection has been provided. We do not find any force in the contention raised by learned counsel for the petitioner, because in Kailash Nath Agarwal''s case (supra), the Supreme Court has held that Section 22 of SICA does not extend to recovery proceedings against the guarantor under Section 3 of the U.P. Public Moneys (Recovery of Dues) Act, 1972, but here in the present case, the recovery proceedings were initiated on the basis of the exparte decree obtained in the Original Application before the DRT under the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (hereinafter referred to as ''the Act''). Therefore, in our opinion, the Appellate Tribunal has rightly relied upon the decision of the Supreme Court in Patheja''s case (supra), where it was held that suit for the enforcement of the guarantees in respect of the loans granted to the company cannot be proceeded with unless consent as required under Section 22 of SICA is obtained. In our opinion, the Appellate Tribunal, while considering the provision of Section 34 (2) of the Act, has rightly held that in view of the judgment of the Supreme Court in Patheja''s case (supra) and the provision of Section 34 of the Act, it is difficult to deny the protection available under Section 22 of SICA. Thus, we are of the opinion that it was rightly found that the Recovery Officer has wrongly rejected the prayer of respondents No.3 to 7 to stay the recovery proceedings, and all consequent proceedings including auction of the property and confirmation of sale during the pendency of the appeal before the AAIFR are liable to be quashed. We do not find any force in the contention raised by learned counsel for the petitioner that against the confirmation of sale in favour of the petitioner, respondent No.3 initially filed CWP No. 11957 of 2005 seeking quashing of order dated 27.7.2005. Subsequently, the said writ petition was withdrawn to avail the statutory remedy of appeal, but no such appeal was filed. Therefore, the order of confirmation became final. In our opinion, once the initiation of the auction proceedings was wholly without jurisdiction in view of Section 22 of SICA and the Recovery Officer has illegally proceeded with the auction proceedings, then the entire auction proceedings are to be set aside and the order of confirmation of sale was not to be separately

questioned. Such an order can be challenged on the ground of illegality in conducting the auction only when the Recovery Officer had the jurisdiction to auction the property. Here in the instant case, the Recovery Officer has wrongly dismissed the stay application, in spite of the pendency of appeal before AAIFR. In our opinion, the very assumption of the jurisdiction by the Recovery Officer for initiating the recovery proceedings in terms of the Recovery Certificate was illegal. Therefore, all the subsequent proceedings are liable to be quashed. The interest of the petitioner has already been protected in the impugned order, when it has been ordered that the respondent bank will release the money of the auction purchaser (petitioner herein) along with accrued interest. We have been informed that the petitioner has received the refund along with interest, though stated to be accepted under protest.

6. In view of the above, we do not find any ground to interfere in the impugned order, passed by the Appellate Tribunal.

Dismissed.