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(2010) 12 DEL CK 0072

In the Delhi High Court

Case No : Writ Petition (C) No. 5014 of 2010

IFCI Ltd. APPELLANT

Vs

Koshika Telecom RESPONDENT

Date of Decision : 06-12-2010

Acts Referred:
Banks and Financial Institutions Act, 1993 — Section 30

Citation : (2010) 12 DEL CK 0072

Hon'ble Judges : Sanjay Kishan Kaul, J;M.L. Mehta, J

Bench : Division Bench

Advocate : Maninder Singh and P.S. Bindra, for the Appellant; Rajiv Bahl, for the Respondent

Final Decision : Allowed

Judgement

Sanjay Kishan Kaul, J.—The petitioner is a public financial institution which granted loan to the respondent-company for setting up of the telecom business. The two directors of the respondent-company also gave personal guarantees. To secure the loan, the tower and other moveable assets owned by the respondent-company were hypothecated with the petitioner-Corporation.

2. The respondent-company and the guarantors failed to repay the loan and the petitioner thus filed proceedings for recovery of the debts before the DRT by way of OA No. 148/2002. This application was allowed on 20.04.2006 and a decree was passed against the respondent-company and its guarantors for a sum of Rs. 233,73,92,900-27/- along with pendente lite and future interest @ 10 per cent per annum from 19.07.2002 till realization with costs of Rs. 1.5 lakhs. The petitioner took out execution proceedings before the Recovery Officer and in pursuance to the order dated 08.12.2007, the properties mentioned in the schedule to the annexure of the application were attached and sold for realization of the dues.

3. The respondent-company also went into liquidation in view of the orders

passed in Company Petition No. 75/2002 titled Lord Krishna Bank v. Koshika Telecom Ltd and a provisional winding up order has been passed in the said matter. The Official Liquidator (''OL'' for short) was aggrieved by the order passed by the Recovery Officer on 08.12.2007 and filed an application in the said Company Petition, which application was, however, subsequently withdrawn with leave to file an appeal before the DRAT against the order of the Recovery Officer. The appeal was filed by OL u/s 30 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (''the said Act'' for short). This appeal was, however, dismissed vide order dated 25.07.2008 against which the OL filed an appeal before the DRAT. It is during the pendency of the proceedings before the DRAT that the appeal was compromised and disposed of by the order dated 05.11.2008.

4. The Recovery Officer thereafter proceeded to sell the properties of the respondent-Company in auction and since only one claim, which was yet to be verified, was received by the OL and no other claim had been received either from workmen or from secured or unsecured creditors, the petitioner filed an application before the Recovery Officer praying for the proceeds realized from sale of assets to be made over to the petitioner-Corporation. The total realization is stated to be about 12 crores and thus a large amount of the debt of the petitioner-Corporation remained unsatisfied. This application was allowed by the Recovery Officer on 22.02.2010. While disposing of the application, the Recovery Officer directed the petitioner to furnish an undertaking of a competent officer that in future if any eligible claims in excess of the amount available with the OL is received by the OL, requisite amount as per law shall be remitted by petitioner-Corporation to the OL. This is so because other than the amount realized from the moveable assets, the petitioner-Corporation had to stand in queue pari passu with other unsecured creditors and the workmen''s liability would naturally take precedence over it. The Recovery Officer further directed that a sum of Rs. 1 crore shall be kept with the OL on a provisional basis for defraying of various expenses.

5. The OL on behalf of the respondent-Company filed an appeal before the DRT which allowed the appeal and modified the order dated 22.02.2010 to the extent that the respondent-Company was entitled to the amount received from sale of land by Recovery Officer while the amount received from sale of moveable assets would remain with the petitioner. Now, the petitioner was aggrieved by this order of the DRT dated 11.06.2010 and thus preferred an appeal before the DRAT which has been dismissed in terms of the impugned order dated 13.07.2010.

6. On the first date itself, learned Counsel for the petitioner confined his grievance to the direction contained in the impugned order dated 11.06.2010 of the DRT affirmed by the order of the DRAT dated 13.07.2010 to the extent that it directed that realization from sale of Immovable assets should be deposited with the OL. The order dated 28.07.2010 further records the concession of the learned senior counsel for the petitioner-Corporation that there was no dispute

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with the proposition that the petitioner is not a secured creditor qua the amount released 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 petitioner-Corporation would be pari passu with such unsecured creditor. It was pointed out by learned Counsel that no such claim had been received despite an earlier advertisement but in case any such claim is 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 petitioner pursuant to the order of the Recovery Officer dated 22.02.2010. Learned Counsel also conceded that expenses for future advertisements would be borne by the petitioner out of the amount lying in account with the petitioner-Corporation.

7. We had issued notice to the OL on the same date along with a copy of the order and learned Counsel entered appearance for the OL on 17.08.2010 but expressed his ignorance about the order dated 28.07.2010 and requested for some time to examine the order and file a counter affidavit to that limited extent. No counter affidavit was filed despite opportunity granted when the matter was listed on 22.09.2010 and one further opportunity was sought and thus two weeks time was granted to the OL to file the counter affidavit subject to costs. The counter affidavit has, however, been filed only on 01.12.2010 and that too without serving a copy on the petitioner. Insofar as the costs is concerned, it is stated that the counsel for the petitioner waived the costs.

8. A perusal of the counter affidavit does not enlighten us any further as it is only a recital of what has transpired which is also apparent from the petition filed by the petitioner. It is not disputed that the no claims have been received in pursuance to the first advertisement except one claim but even the particulars of that have not been set out nor whether the same has been verified. All that is submitted by the learned Counsel for OL is that advertisements are required to be issued in different states i.e. Delhi, Uttar Pradesh, Jharkhand, Uttarakhand, Orissa and Bihar, for which permission had been granted by the learned Company Judge.

9. On a query being posed, learned Counsel for the respondent-Company despite the presence of dealing person from the Office of OL cannot state as to what would be the costs of such advertisements. However, learned senior counsel for the petitioner-Corporation has already undertaken on behalf of the petitioner that the costs would be borne by the petitioner. It is also not disputed before us that no written communication quantifying the amount required by the OL has been sent to the petitioner.

10. We find that the facts of the present case are peculiar inasmuch as the money is lying with the petitioner-Corporation which is a public financial institution to the extent of sale realization from the Immovable properties in respect of which the petitioner-Corporation is not a secured creditor, but no other claims have been verified to show that there are other unsecured creditors or

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claim of workmen which is yet to be satisfied. The amount realized from sale of both moveable and Immovable assets is not even fraction of the amount which is due to the petitioner under the decree.

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.

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