

(2016) 03 AHC CK 0018

In the Allahabad High Court

Case No : Civil Misc. Writ Petition C No. 7244 of 2016

M/s Eastern Export House & Another

APPELLANT

Vs

Debt Recovery Appellate Tribunal & 2 Others

RESPONDENT

Date of Decision : 02-03-2016

Acts Referred:

Constitution of India, 1950 — Article 226

Recovery of Debts Due to Banks and Financial Institutions Act, 1993 — Section 21

Citation : (2016) 4 ADJ 540 : (2016) 168 AIC 914 : (2016) 3 AllWC 2872 :
(2016) 116 ALR 808 : (2016) 2 BankJ 696 : (2016) 4 BC 83 : (2016) 2 DRTC
26 : (2016) 335 ELT 386 : (2017) 1 NIJ 193 : (2016) 131 RD 454 : (2016) 1 RJ
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Hon'ble Judges : Ran Vijai Singh, J.

Bench : Single Bench

Advocate : Ashish Agrawal and Sandeep Arora, Advocates, for the Respondent

Final Decision : Allowed

Judgement

Ran Vijai Singh, J. - Heard Sri A.K. Gupta along with Sri Rajesh Kesharwani, learned counsel for the petitioners and Sri Ashish Nigam holding brief of Sri Sandeep Arora, learned counsel for the respondent-bank.

2. By means of the present writ petition the petitioners have prayed for issuing a writ of certiorari quashing the order dated 22.1.2016 passed by the Debt Recovery Appellate Tribunal, Allahabad (in short DRAT) in Appeal No. R- 83/2015 (M/s Eastern Export House and another v. Union of India) by which the Appellate Tribunal has required the petitioners to deposit 50% of the entire amount of loan as determined by the Debt Recovery Tribunal (in short DRT).

3. While assailing the impugned order learned counsel for the petitioner submitted that the Appellate Tribunal has erred in not waiving the entire prerequisite statutory amount under section 21 of the Recovery of Debts Due to Bank and Financial Institutions Act, 1993 (in short DRRBFI Act, 1993).

4. The facts giving rise to the present case are that the petitioner no.1 claims itself to be a firm involved in the business of export of woollen carpets and is aggrieved by the impugned order dated 22.1.2016 by which the Appellate Tribunal has required the petitioners to deposit 50% of the entire amount of loan as determined by the DRT. It is stated that the firm had exported woollen carpets on the basis of 90 days payment against the document and its entire transactions were insured with the Export Credit Guarantee Corporation (in short ECGC). The entire premium as required was also deposited with the Union Bank of India Bhadohi Branch Bhadohi. The premium credit limit was also ensured by the Whole Turn Over Packing Credited Guarantee (in short W.T.P.C.G.).

5. It is also stated that the Bank has shown Zero balance in the year 2001 even then the Bank filed O.A. No. 115/04 (Union Bank of India v. M/s Eastern Export House). The case was contested but the DRT has allowed the claim of the Bank for recovery of a sum of Rs. 1,32,45,340/- with interest vide order dated 12.12.2013.

6. Aggrieved by the aforesaid order the petitioners herein have filed appeal under section 20 of the DRRBFI Act, 1993. The petitioners have also filed an application on 5.2.2014 for waiving the statutory deposit, which in view of section 21 of the DRRBFI Act, 1993 was 75% of the loan amount, on the ground that the firm was closed due to the financial crunch as the entire stocks of the petitioners were destroyed and on account of that the firm has suffered heavy loss. Non cooperation of the Bank was also emphasized. It is also contended that the petitioners exported the woollen carpets on the basis of the 90 days payment against the documents through bank as the same was purchased by the bank. The export goods were insured with ECGC for Rs. one crores for the period from 1.1.2001 to 31.1.2003 and the petitioners had paid the premium for the same. The P.C. limit was fully ensured by WTPCG, therefore, the bank should have filed the claim after expiry of four months from the due date of payment. It has also been stated that the Bank has received the entire payment of the exported goods and did not adjust the same in the loan account of the petitioners. The plea of fraud played by the bank upon the petitioner was also alleged.

7. The Appellate Tribunal after noting the submission of the petitioners and taking note of the proviso to Section 21 of the DRRBFI Act, 1993 has observed that financial hardship and closure of business cannot be a ground for complete waiver of the entire prerequisite statutory amount.

8. While assailing this order, Sri Gupta, learned counsel for the petitioners submitted that the Appellate Tribunal has erred in considering the prima facie, merit of the case and passed the impugned order. He further submitted that the merit of the case ought to have been considered while considering the application of waiver. In support of his submission, he has placed reliance upon the judgment of a Division Bench of this Court in ITC Limited v. CC (Appeals) and CE (ELT 2005 (184) 347) and another judgment of learned Single Judge of this Court in Pole-ADS Advertising (P) Ltd. v. State of U.P. and others (2006 NTN

(Vol.30)- 105).

9. Refuting the submission of the learned counsel for the petitioners, Sri Nigam, who appears for the respondent submitted that the decision of the Division Bench in the case of ITC Limited (supra) was rendered in the matter of Central Excise and not in relation to the DRRBFI Act, 1993, therefore, the ratio laid down in that case cannot be made applicable in the facts and circumstances of the present case. He has also placed reliance upon judgment of the Karnataka High Court in Writ Petition No. 4972 of 2014 (Kilroskar Electric Company v. Idbi Bank Limited) decided on 18th June, 2014.

10. For deciding the controversy it would be appropriate to quote few relevant provisions of the DRRBFI Act, 1993, the Central Excise Act, 1944 as well as the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (in short Act, 2002).

11. Section 21 of the DRRBFI Act, 1993 reads as under:

"21. Deposit of amount of debt due, on filing appeal.-

Where an appeal is preferred by any person from whom the amount of debt is due to a bank or a financial institution or a consortium of banks or financial institutions, such appeal shall not be entertained by the Appellate Tribunal unless such person has deposited with the Appellate Tribunal seventy-five per cent of the amount of debt so due from him as determined by the Tribunal under section 19:

Provided that the Appellate Tribunal may, for reasons to be recorded in writing, waive or reduce the amount to be deposited under this section." Section 35 F of the Central Excise Act, 1944 reads as under:

"SECTION 35F. Deposit, pending appeal, of duty demanded or penalty levied. -

Where in any appeal under this Chapter, the decision or order appealed against relates to any duty demanded in respect of goods which are not under the control of Central Excise authorities or any penalty levied under this Act, the person desirous of appealing against such decision or order shall, pending the appeal, deposit with the adjudicating authority the duty demanded or the penalty levied :

Provided that where in any particular case, the Commissioner (Appeals) or the Appellate Tribunal is of opinion that the deposit of duty demanded or penalty levied would cause undue hardship to such person, the Commissioner (Appeals) or, as the case may be, the Appellate Tribunal, may dispense with such deposit subject to such conditions as he or it may deem fit to impose so as to safeguard the interests of revenue.

Provided further that where an application is filed before the Commissioner (Appeals) for dispensing with the deposit of duty demanded or penalty levied under the first proviso, the Commissioner (Appeals) shall, where it is possible to

do so, decide such application within thirty days from the date of its filing.

Explanation. - For the purposes of this section ""duty demanded"" shall include, -

(i) amount determined under section 11D;

(ii) amount of erroneous Cenvat credit taken;

(iii) amount payable under rule 57CC of Central Excise Rules, 1944;

(iv) amount payable under rule 6 of Cenvat Credit Rules, 2001 or Cenvat Credit Rules, 2002 or Cenvat Credit Rules, 2004;

(v) interest payable under the provisions of this Act or the rules made thereunder."

Section 18 of the Act, 2002 reads as under:

"18. Appeal to Appellate Tribunal

(1) Any person aggrieved, by any order made by the Debts Recovery Tribunal under section 17, may prefer an appeal along with such fee, as may be prescribed to the Appellate Tribunal within thirty days from the date of receipt of the order of Debts Recovery Tribunal:

PROVIDED that different fees may be prescribed for filing an appeal by the borrower or by the person other than the borrower:

PROVIDED FURTHER that no appeal shall be entertained unless the borrower has deposited with the Appellate Tribunal fifty per cent. of the amount of debt due from him, as claimed by the secured creditors or determined by the Debts Recovery Tribunal, whichever is less:

PROVIDED ALSO that the Appellate Tribunal may, for the reasons to be recorded in writing, reduce the amount to not less than twenty-five per cent. of debt referred to in the second proviso.

(2) Save as otherwise provided in this Act, the Appellate Tribunal shall, as far as may be, dispose of the appeal in accordance with the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993) and rules made thereunder."

12. From the bare reading of Section 21 of the DRRBFI Act, 1993 it would transpire that the appeal shall not be entertained by the Appellate Tribunal unless the appellant deposits 75% of the amount of debt as determined by the Tribunal under section 19. However, according to the proviso to that section the Tribunal has been empowered to waive or reduce the amount of debt.

13. From the perusal of second proviso to section 18 of the Act, 2002 it would transpire that the appeal cannot be entertained unless the borrower deposits 50% of the amount of debt due from him as claimed by the secured creditors or determined by the DRT whichever is less with the Appellate Tribunal. According

to second proviso, for the reasons to be recorded, the amount of debt may be reduced by the Tribunal but not less than 25%.

14. Whereas from the perusal of the proviso contained under section 35-F of the Excise Act the Appellate Tribunal may dispense with the required deposit of the entire amount or the penalty they levied considering the undue hardship of the person filing the appeal or to impose conditions in order to safeguard the interest of the revenue.

15. From the perusal of section 21 of the DRRBFI Act, 1993, Section 18 of the Act 2002 and section 35-F of Central Excise Act, 1944 it is clear that in all the cases before filing an appeal some amount of the required amount has to be deposited and similarly the Appellate Tribunal/Authority has been empowered to reduce the amount of debt or to put conditions in order to safeguard the revenue. Neither under the Central Excise Act, 1944 nor under the Act, 2002 there is provision of complete waiver. The power of complete waiver has been conferred upon the Appellate Tribunal only under the DRRBFI Act, 1993. While conferring the absolute power of waiver, legislature must have been conscious in order to safeguard the interest of the borrower too, therefore, while exercising the power under section 21 of the DRRBFI Act, 1993 the appellate authority must have proceeded with caution taking note of the object and spirit of the proviso which talks about the complete waiver or reduction of the required statutory amount. In the Division Bench decision of this Court in ITC Limited (supra) following observation has been made:

"Similar view has been reiterated in Assistant Collector of Central Excise, Chandan Nagar v. Dunlop India Ltd. and Ors., AIR 1985 SC 330; State of Madhya Pradesh v. M/s. M.V. Vyavsaya Co., AIR 1997 SC 993; Upadhyay and Co. v. State of U.P. and Ors., (1999) 1 SCC 81, deprecating the tendency of the Courts granting stay of recovery by mere filing of the case as it exposes the "impairment of the public interest.

In view of the above, the aforesaid authorities make it clear that the Court should not grant interim relief/stay of the recovery merely by asking of a party. It has to maintain a balance between the rights of an individual and the State so far as the recovery of sovereign dues is concerned. While considering the application for stay/waiver of a pre-deposit, as required under the law, the Court must apply its mind as to whether the appellant has a strong prima facie case on merit. In case it is covered by the judgment of a Court/Tribunal binding upon the Appellate Authority, it should apply its mind as to whether in view of the said judgment, the appellant is likely to succeed on merit. If an appellant having strong prima facie case, is asked to deposit the amount of assessment so made or penalty so levied, it would cause undue hardship to him, though there may be no financial restrain on the appellant running in a good financial condition. The arguments that appellant is in a position to deposit or if he succeeds in appeal, he will be entitled to get the refund, are not the considerations for deciding the application. The order of the Appellate Authority itself must show that it had

applied its mind to the issue raised by the appellant and it has been considered in accordance with the law. The expression "undue hardship" has a wider connotation as it takes within its ambit the case where the assessee is asked to deposit the amount even if he is likely to exonerate from the total liability on disposal of his appeal. Dispensation of deposit should also be allowed where two views are possible. While considering the application for interim relief, the Court must examine all pros and cons involved in the case and further examine that in case recovery is not stayed, the right of appeal conferred by the legislature and refusal to exercise the discretionary power by the authority to stay/waive the pre-deposit condition, would be reduced to nugatory/illusory. Undoubtedly, the interest of the Revenue cannot be jeopardised but that does not mean that in order to protect the interest of the Revenue, the Court or authority should exercise its duty under the law to take into consideration the rights and interest of an individual. It is also clear that before any good could be subjected to duty, it has to be established that it has been manufactured and it is marketable and to prove that it is marketable, the burden is on the Revenue and not on the manufacturer.

In view of the above, we are of the considered opinion that as the Appellate Authority has not addressed to itself any of the issues involved in the appeal rather has gone to the issue of financial hardship which was unwarranted and uncalled for in the fact situation of this case. The order impugned cannot be sustained in the eyes of law and we have no option but to allow this petition and set aside the order impugned."

16. Following the aforesaid judgement learned Single Judge of this Court in Pole-ADS Advertising (P) Ltd.(supra) has also held that while considering the application of waiver prima facie, merit of the case has to be seen. Here in this case, as has been discussed above, apart from financial crunch and closure of the business for last many years the petitioners have also pleaded merit of the case including the Bank's own initiation for accepting the proposal of settlement for which the petitioners have deposited Rs. 4,50,000/-, the papers of which has been brought on record as Annexures 14 and 15 of the writ petition.

17. From the perusal of the impugned order passed by the Appellate Tribunal it transpires that while considering the waiver application of the petitioners the Appellate Tribunal has only considered the hardship and closure of the business and directed the petitioners to deposit 50% of the amount but it has not at all considered prima facie merit of the case.

18. Learned counsel for the respondents contended that the order has been passed by recording reasons and the amount of statutory deposit has been reduced. On being confronted as to under which circumstance the entire statutory amount /pre requisite condition can be waived and on what ground the amount can only be reduced, learned counsel for the respondent could not show any statutory provision or any judicial pronouncement on the point enumerating the circumstances under which the entire amount can be waived and under

which the amount can be reduced. Whereas, in the case of ITC Limited (supra) this court has touched this aspect of the matter, may be under the different statute, but the principles laid down by the Division Bench are near to the truth in the context of the present case too as in the present case there is provision for complete waiver provided the Appellate Tribunal is satisfied, whereas in the Central Excise Act there is no provision for complete waiver. The petitioners' case stands on better footing looking into the provision to section 21 of DRRBFI Act, 1993, therefore, in my considered opinion the Appellate Tribunal has erred in not considering that aspect of the matter including prima facie, merit of the case while passing the impugned order, therefore, the same cannot be sustained in the eye of law.

19. In the result the writ petition succeeds and is allowed. The order dated 22.1.2016 passed by the Debt Recovery Appellate Tribunal, Allahabad in Appeal No. R-83/2015 (M/s Eastern Export House and another v. Union of India) is hereby quashed. The Tribunal is directed to pass a fresh order after hearing learned counsel for the parties in accordance with law without granting any unnecessary adjournment to any of the party. In case any adjournment is sought that may be granted only after imposing cost not less than Rs. 2000/- per adjournment with the direction to deposit the cost by the next date fixed. It is also observed that till the petitioners waiver application is disposed of by the Appellate Tribunal, no coercive action shall be taken against the petitioner to recover the amount.