
(2013) 09 DEL CK 0417
In the Delhi High Court
Case No : Co. App. 64 of 2013

M/s. IFCI Ltd.

APPELLANT

Vs

M/s. Koshika Telecom

RESPONDENT

Date of Decision : 10-09-2013

Acts Referred:

Companies Act, 1956 — Section 529, 530

Recovery of Debts Due to Banks and Financial Institutions Act, 1993 — Section 30

Citation : (2013) 09 DEL CK 0417

Hon'ble Judges : Reva Khetrapal, J;Pratibha Rani, J

Bench : Division Bench

Advocate : P.S. Bindra, for the Appellant; Samar Singh Kalhwaha, for the Respondent

Final Decision : Dismissed

Judgement

Reva Khetrapal, J.—The Appellant in the present appeal seeks to challenge and impugn the order dated 1.8.2013 passed by the learned Single Judge in Company Application being C.A. No. 1073/2012 in Company Petition No. 75/2002 in the matter of "Lord Krishna Bank Limited Vs. Koshika Telecom Limited", whereby the Appellant was directed to deposit the sale proceeds with interest realized from Koshika Telecom Limited with the Official Liquidator. The facts pertinent to the present Appeal are that the Appellant, M/s. IFCI Limited is a public financial institution which had provided loan and granted other facilities to the Respondent/Company to enable it to set up its telecom business. The two Directors of the Company also gave personal guarantees. Apart from the aforesaid, the microwave tower and other movable assets owned by the Respondent/Company were hypothecated with the Appellant. Since the Respondent and the guarantors failed to repay the loan amount, the Appellant filed an Original Application before the concerned Debt Recovery Tribunal being OA No. 148/2002 for recovery of the debts due to the Appellant. The aforesaid Original Application was allowed on 20th April, 2006 and a decree was passed against the Respondent Company and its guarantors for a sum of Rs.

233,73,92,900.17 alongwith the pendent lite and future interest at the rate of 10% per annum from 19.07.2002 till realization with costs of Rs. 1.5 lakhs. A recovery certificate was drawn up in the aforesaid terms and recovery proceedings initiated before the Recovery Officer attached to the concerned Debt Recovery Tribunal. The Appellant filed applications for attachment and sale of towers and the land on which the towers were affixed belonging to the Respondent Company. The said applications were allowed by the Recovery Officer vide order dated 8.12.2007 and the aforesaid immovable assets were ordered to be attached and sold for realization of the dues of the Appellant.

2. Aggrieved by the aforesaid order dated 8.12.2007, the Official Liquidator, appointed as Provisional Liquidator of the Respondent Company in a winding up petition, being Company Petition No. 75/2002 titled "Lord Krishna Bank vs. Koshika Telecom Limited", filed an application in the said Company Petition impugning the same. The said application was, however, withdrawn on 5.2.2008 with liberty to file an appeal before the Debt Recovery Tribunal. The Respondent through the Official Liquidator thereupon filed an appeal u/s 30 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (in short "RDB Act"). The said appeal was dismissed by the Debt Recovery Tribunal vide its order dated 25.7.2008. An appeal from the order of the Debt Recovery Tribunal was thereafter preferred to the Debt Recovery Appellate Tribunal. However, the said appeal was disposed of on 5.11.2008 in terms of the compromise arrived at between the parties during the pendency of the appeal. Thereupon, the properties of the Respondent Company were sold in auction by the Recovery Officer. The Appellant filed an application before the Recovery Officer praying that the proceeds realized from the sale of the assets to the tune of approximately Rs. 12 Crores be allowed to be appropriated by the Appellant. By an order dated 22.2.2010, the Recovery Officer allowed the said application relying upon the judgment of the Hon'ble Supreme Court in the case of Andhra Bank Vs. W.T. Seshachalam, . This led to the filing of an appeal by the Respondent before the DRT. By its order dated 11.6.2010, the Presiding Officer, DRT allowed the appeal and modified the order dated 22.2.2010 passed by the Recovery Officer to the extent that the Respondent Company at this stage was held entitled to the amount received from the sale of land sold by the Recovery Officer and the amount received from the sale of movable assets of the Respondent were allowed to be retained with the Appellant. Aggrieved therefrom the Appellant preferred an appeal before the Debt Recovery Appellate Tribunal. By an order dated 13.7.2010, the said appeal preferred by the Appellant was dismissed. Left with no other option, the Appellant preferred a Writ Petition, being Writ Petition (Civil) No. 5014/2010 before this Court. On 28.7.2010, this Court directed that the directions contained in order dated 13.7.2010 passed by the DRAT directing the Appellant to deposit realization from the sale of immovable properties with the Official Liquidator be stayed. The aforesaid Writ Petition was finally disposed of vide judgment dated 6.12.2010 modifying the order dated 13.7.2010 passed by the DRAT and the orders dated 11.6.2010 passed by the DRT whereunder the

Appellant was directed to retain the amount realized from the sale of immovable properties. However, it was made clear in the said order that the claim of unsecured creditors would rank *pari passu* with that of the Appellant Corporation to that extent and claim of workmen would first have to be satisfied and the Appellant Corporation would abide by the undertaking given on its behalf before the DRT as well as this Court on 28.7.2010. It may be noted at this juncture that the order dated 28.7.2010 records the concession of learned senior counsel for the Appellant Corporation that there was no dispute with the proposition that the Appellant 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 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 if any such claim is received in pursuance to a subsequent advertisement, the same could be dealt with in consonance with the undertaking already given by the Appellant pursuant to the order of the Recovery Officer dated 22.2.2010. It was in these circumstances that the Appellant Corporation was allowed to retain the amount realized from the sale of immovable assets of the Respondent Company.

3. It subsequently transpired that the Official Liquidator on or about 11th May, 2012 filed an application under Rule 9 of the Companies (Court) Rules, 1959, *inter alia*, praying that the Appellant Corporation may be directed to deposit the entire sale proceeds with interest to the Official Liquidator for deciding *pro rata* share on the claims received as per the provisions of Sections 529 and 530 of the Companies Act, 1956. It was stated in the application that pursuant to the orders passed by the Division Bench of this Court on 6.12.2010, an advertisement for inviting claims from secured/unsecured creditors and workmen had been published in the newspapers on 14.11.2011. Pursuant to the said publication, certain claims had been received and examined by the Official Liquidator, details whereof were set out in paragraph 5 of the application. With respect to the sale proceeds lying with the Appellant, it was stated that despite several letters issued to the Appellant to remit the same, no reply or response had been received till date.

4. The Appellant Corporation filed a reply to the said application stating that the same was not maintainable and liable to be dismissed for the reason that while deciding W.P.(C) No. 5014/2010 filed by the Appellant, a Division Bench of this Court had held that the Appellant was entitled to retain the amount realized against the sale of immovable properties till the time the claims of other unsecured creditors were verified. It was further stated that in any event the Appellant Corporation was not liable to deposit the entire sale proceeds with the Official Liquidator till the time the claims were verified. After considering the reply filed by the Appellant, the learned Company Judge *vide* the impugned order passed on 1st August, 2013 allowed the application of the Official Liquidator and directed the Appellant Corporation to deposit the entire sale proceeds with

interest thereon with the Official Liquidator as prayed in the application so that payments could be made to all the unsecured creditors in accordance with law. The relevant extract of the impugned order of the learned Company Judge reads as under:-

The learned counsel for IFCI however contends that in terms of the order of the Division Bench passed on 6.12.2010 in WP(C) 5014/2010 the amount can be handed over the OL after IFCI satisfies itself as to what verification was carried out by the OL with regard to the claims of unsecured creditors. He has strongly relied on the observations in para 12 of this order. I am afraid I am unable to accede to the contention. As I read para 12, it appears to me that it was only a temporary arrangement that the sale proceeds of the immoveable properties would remain with IFCI. When the OL has been appointed by this Court and he is in-charge of the properties and funds of the company under liquidation, it is his function to disburse the amount after taking approval of the Company court for making the payments. His duties and functions cannot be made subject to the supervision of IFCI. I therefore direct IFCI to deposit the entire sale proceeds with the interest earned thereon with the OL within a week from today, as prayed for in the application so that payments could be made to all the unsecured creditors in accordance with law.

The application is accordingly disposed of.

5. Before this Court also, the learned counsel for the Appellant Corporation has strongly relied upon the orders of the Division Bench dated December 6, 2010 passed in the aforesaid writ petition. After going through the said orders, we are not inclined to agree with the Appellant's counsel for the reason that the aforesaid orders were passed by the Division Bench after noting that no unsecured creditor had come to light despite advertisement having been issued by the OL. As things stand, the OL has issued a second advertisement and claims of at least six other creditors have been filed with the OL. We extract hereinbelow the relevant extract of the judgment of the Division Bench, which bears out the fact that it was never the intent of the Division Bench that the amount lying with the Appellant Corporation, which is an unsecured creditor, should remain with the Appellant Corporation for all times to go and even if claims of other creditors were filed with the OL:-

8. ...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 immoveable 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 claim of workmen which is yet to be satisfied. The amount realized from sale of both moveable and immoveable 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 immoveable 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.

6. It also cannot be lost sight of that there is no dispute as to the fact that the Appellant Corporation is not a secured creditor qua the amount realized from sale of immovable properties and if there are any other unsecured creditors the claim of the Appellant Corporation would rank *pari passu* with such unsecured creditors. The claims of other unsecured creditors having surfaced upon the second advertisement having been issued by the OL, we do not find any infirmity in the order of the learned Company Judge directing the Appellant Corporation to deposit the sale proceeds relating to the sale of immovable property of the Company in liquidation with the Official Liquidator. The appeal is without merit and is accordingly dismissed.