

(2011) 12 BOM CK 0161
In the Bombay High Court
Case No : Writ Petition (L) No. 2758 of 2011

M/s. Sterlite Technologies Ltd.

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 22-12-2011

Acts Referred:

Constitution of India, 1950 — Article 226

Recovery of Debts Due to Banks and Financial Institutions Act, 1993 — Section 19, 21

Citation : (2012) 4 ALLMR 784 : (2012) 2 MhLj 112

Hon'ble Judges : D.Y. Chandrachud, J;A.A. Sayed, J

Bench : Division Bench

Advocate : R.A. Dada, with Mr. Madhur R. Baya, for the Appellant; Rajiv Chavan with Mr. L.T. Satelkar for Respondent No. 1. Mr. Dinyar Madon with Mr. Umesh Shetty and Mr. Vikash Kumar instructed by . Mr. A.T. Agarwal for Respondent No. 3 Mr. Rajesh Talekar instructed by . K. Ashar and Co., for the Respondent

Judgement

Dr. D.Y. Chandrachud, J.—These proceedings under Article 226 of the Constitution are directed against an order of the Debts Recovery Appellate Tribunal (DRAT) dated 22 November 2011 on an application for waiver of deposit under the provisions of Section 21 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993. By the order impugned, the DRAT has declined to grant any waiver of deposit and has required the Petitioner to deposit 75% of the decretal amount under the substantive provisions of Section 21.

2. The Debts Recovery Tribunal (DRT) has decreed the claim of the Fourth Respondent by its order dated 28 October 2010 in the following terms :

a) The Applicant Bank is entitled to a Recovery Certificate against the Defendant No.1 for a sum of :

i) a sum of Japanese Yen 219,993,455 with further interest @ 6% p.a. simple from 07.09.2001 till realization;

ii) a sum of Rs.21,46,886.61 with further interest @ 8% simple from the date of

the application till realization in respect of payment of insurance charges;

iii) a sum of Rs.64,98,073.48 with further interest @ 8% simple from the date of the application till realization in respect of payment of warehousing and clearing charges;

iv) a sum of Rs.2,34,20,907.03 in respect of legal charges with further interest @ 8% p.a. simple from the date of the application till realization with costs, which also includes advocate's fees prevailing in the State;

b) It is further declared that in case of default by Defendant No.1, the Applicant Bank is at liberty to sell the movable properties mentioned in Exhibit M and distribute the sale proceeds among the Applicant Bank and Defendant Nos.2 to 6.

The Petitioner has filed an appeal in which an application for waiver of deposit was made. The DRAT while directing a deposit of 75% of the decretal amount, furnished only the following reasons in its order:

In this case the appellant has sought total waiver of 75% of the decretal amount mainly on the ground that the judgment and order passed by the DRT is prima facie bad in the eyes of law. He has not sought waiver on account of financial hardship or on account of any other similar hardship. The learned counsel for the appellant at this stage wants a finding on the impugned judgment before the appeal is entertained and heard on merit. All the grounds raised by the learned Counsel for the appellant relate to the merit of the appeal. At this stage i.e. before entertaining the appeal, it will not be proper to make any comment on the impugned judgment and order passed by the Tribunal. After considering the entire facts and circumstances of the case, I am of the view that the appellant has failed to make out any case for waiver. The application for waiver is therefore rejected.

3. Learned Counsel appearing on behalf of the Petitioner submits that under the proviso to Section 21 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, the Appellate Tribunal is empowered for reasons to be recorded in writing to waive or reduce the amount to be deposited under the Section. In the present case, the Petitioner did not seek a waiver on the ground of financial hardship, but principally on the ground that the judgment and order passed by the Tribunal is prima facie incorrect. The Appellate Tribunal has completely failed to consider whether a prima facie case has been made out and since no case was advanced on the ground of financial hardship, directed a full deposit representing 75% of the decretal amount. This, it is urged, amounts to a failure to exercise the jurisdiction and is amenable to the writ jurisdiction of this Court.

4. On the other hand, Counsel appearing on behalf of the Fourth Respondent submitted that the Appellant has suffered a decree and according to first principles, is required to deposit the full decretal amount. The Petitioner having failed to make out a case of financial hardship, no error can be found in requiring

the Petitioner to deposit 75% which is the mandate of Section 21.

5. The rival submissions now fall for consideration.

6. Section 21 provides that where an appeal is preferred by any person from whom an amount of debt is due to a Bank or a financial institution or a consortium, the 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 u/s 19. Under the proviso to Section 21, the Appellate Tribunal may, for reasons to be recorded in writing, waive or reduce the amount to be deposited under the section. The mandate of the statute is that ordinarily an Appellant before the Appellate Tribunal must deposit 75% of the amount of the debt due as determined by the Tribunal u/s 19. Parliament, however, has in its wisdom conferred a wholesome power upon the Appellate Tribunal to reduce the amount to be deposited under the section. The exercise of that power is a judicial power which is further structured by the requirement that reasons have to be recorded in writing for reducing the amount to be deposited to less than 75% of the debt as determined by the Tribunal. The Appellate Tribunal has proceeded in the present case on an erroneous conception as to its own jurisdiction. The Learned Chairperson has observed that at this stage it is not possible to make any comment on the impugned judgment and order of the Tribunal. Now, at the stage when it considers an application for dispensing with the condition of deposit, the Appellate Tribunal is not expected to render a final finding on the merits of the contentions urged in regard to the judgment of the Tribunal. That has to await the final determination of the appeal. But, it is a well settled principle of law that even at that stage, the question as to whether a prima facie case has been made out has to be evaluated by the Appellate Tribunal. For the limited purpose of considering whether a dispensation should be granted, the Appellate Tribunal has necessarily to evaluate as to whether a prima facie case is made out and the reasons which are to be formulated have to be confined only to that determination. If the proposition which has been laid down by the DRAT were to be accepted as good law that would mean that a litigant who does not plead financial hardship is disabled from urging that the requirement of predeposit should be reduced or waived within the parameters laid down by the statute. That is not reflective of the legal position. In considering as to whether a waiver should be granted, both the elements of a prima facie case and the question of financial hardship would have to be considered by the Appellate Tribunal. Where as in the present case, the Appellant does not plead financial hardship that is a relevant consideration which has to be taken into consideration and placed in the balance by the Appellate Tribunal. But that is not dispositive of the jurisdiction of the Appellate Tribunal. The Appellate Tribunal in its appellate jurisdiction is required to evaluate as to whether a prima facie case has been made out for the grant of waiver. Hence, with respect, we are unable to subscribe to the position as set out in paragraph 20 of the judgment of the DRAT quoted above.

7. Counsel appearing on behalf of the Fourth Respondent relied upon a decision of a Division Bench of the Madras High Court in Malini Srinivasan Vs. Canara Bank, Asset Recovery Management Branch and The Debt Recovery Appellate Tribunal, In that case, as the judgment of the Division Bench would indicate, the DRAT noted that the Tribunal had in fact reduced the amount to be deposited to about 25% of the debt determined. Obviously, therefore, there was an application of mind by the DRAT to the merits of the rival contentions.

8. Since the DRAT has not considered the application for waiver in terms of the legal position as elaborated in the previous paragraph of this judgment, which is consistent with the provisions of Section 21, we set aside the impugned order of the Appellate Tribunal and restore the application for waiver of deposit to the file of the Appellate Tribunal for a decision afresh. On the request of the Fourth Respondent, we expedite the disposal of the application and would request the Appellate Tribunal to endeavour a disposal preferably within a period of two months.