
(2004) 08 BOM CK 0053

In the Bombay High Court

Case No : Writ Petition No. 5293 of 2004

Pandurang Keshav Gorwadkar and Another

APPELLANT

Vs

Paper and Pulp Conversions Ltd. and Others

RESPONDENT

Date of Decision : 11-08-2004

Acts Referred:

Companies Act, 1956 — Section 17, 19(19), 25, 442, 446

Citation : (2004) 6 BomCR 582 : (2004) 4 MhLj 932

Hon'ble Judges : S.U. Kamdar, J;A.P. Shah, J

Bench : Division Bench

Advocate : M.S. Karnik, S.M. Oak, for the Appellant; G.S. Kulkarni and Sonali Joshi, for R. No. 2 and S.S. Sarkar, for R. No. 4, for the Respondent

Judgement

S.U. Kamdar, J.—In the present petition, the petitioners have raised the grievance about the withdrawal of Rs. 3 crores by the respondent No. 2 out of the sale proceeds received from an auction sale in respect of the assets of the 1st respondent company. Some of the material facts of the present case briefly enumerated are as under:-

2. The petitioners before the Court are the employees of the respondent No. 1 whereas the respondent No. 2 is a bank and are secured creditors. The respondent No. 3 is the authority constituted under the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (hereinafter referred to as "the DRT Act"). The 2nd respondent filed an application being Original Application No. 344 of 1999 before the Debt Recovery Tribunal (hereinafter referred to as "the DRT") for recovery of the loan lent and advanced by them to the respondent No. 1 company. The said application was allowed by the DRT and ultimately on 21.8.2001 a recovery certificate was issued for the recovery of a sum of Rs. 25,50,91,756.94.

3. Pursuant to the said recovery certificate the 2nd respondent initiated recovery proceedings being Recovery Proceedings No. 78 of 2001. In execution of the said Recovery Certificate the respondent No. 2 bank attached and sold the assets of

the respondent No. 1 company which were secured in their favour.

4. It seems that in execution of the said recovery certificate the movable assets of the respondent No. 1 company were sold and amount of Rs. 4,70,55,000/- was recovered. It is the case of the 2nd respondent that out of the aforesaid amount, an amount of Rs. 3 crores as released to the 2nd respondent on 10.3.2004. It is further the case of the 2nd respondent bank that an amount of Rs. 1,17,55,000/- has been kept aside towards the likely claim of the petitioners herein who are workmen of the said 1st respondent company. It has also been the case of the 2nd respondent that further execution proceedings in respect of the immovable property of the 2nd respondent is also in progress.

5. There was also a company petition pending in this Hon"ble Court filed by a creditor for winding up of the company. The said Company Petition was numbered as 604 of 1986. Since the respondent No. 2 bank continued the recovery proceedings through DRT and even commenced appropriation of their claim in preference of other creditors by remaining outside the winding up proceedings. The workers were left with no option but to initiate their own legal proceedings in respect of their claim for wages and other dues. Thus they took out in the said pending Company Petition, an application for the recovery of their claims. It was inter alia contended therein that the 3rd respondent has hurriedly handed over a substantial part of the amount to the 2nd respondent bank in preference to their claims and therefore the said company application was moved to secure and pay over of their claims. The said Company Application was numbered as lodging No. 258 of 2004. It was, therefore, prayed in the said application that till the hearing and final disposal of the company petition, the provisional liquidator of the company should be appointed and the further proceedings before the Debt Recovery Tribunal arising out of the Recovery Proceedings No . 78 of 2001 should be stayed. The said company application is pending and no orders have been passed as yet thereon.

6. It has been contended by the petitioners that in light of the judgment of the Supreme Court in the case of Allahabad Bank v. Canara Bank and Anr., reported in (2004) 4 SCC 406 which has been subsequently confirmed by the recent judgment in the case of Textile Labour Association and Another Vs. The Official Liquidator and Another, , the Supreme Court has inter alia held that in view of insertion of Section 529A of the Companies Act 1 of 1956, the workers claim stands in pari passu with the charge of the secured creditors and the claim of the workers is required to be paid simultaneously with that of the secured creditors. It has been contended by the petitioners that in light of the provisions of Section 529A of the Companies Act, the respondent no. 2 could not have withdrawn a huge amount of Rs. 3 crores without the claim of the petitioners being adjudicated and paid over. Thus petitioners have approached this Court inter alia for a direction that the claim of the petitioners who are the workmen should be adjudicated and paid over. The respondent No. 2 has appeared before us and has inter alia contended that there is a sufficient amount of Rs. 175 lacs kept aside

towards the dues which are payable to the workers and, therefore, it is submitted that the workers have suffered no prejudice in respect, of their claim. It is however argued by the learned counsel for the respondent No. 2 that it is necessary that before any payment is made such claim of the workers is required to be adjudicated. On the other hand, the learned counsel for the petitioner has argued that in a company application which was preferred by the petitioners, the respondent no.1 has in fact admitted the claim of the workers and, therefore, there is nothing left to be adjudicated. The respondent no. 2 however submits and in our view with considerable force that the Court cannot direct payment of the amount of the workers merely on the basis of the so called admission of the part of the respondent no. 1 company which is under liquidation or by its erstwhile directors. Without the same being scrutinized and adjudicated in their behalf. In the judgment of the Hon"ble Supreme Court of India in the case of Allahabad Bank v. Canara Bank and Anr. (supra) the Court has held that the issue of payment of workers must be decided and determined by the Debt Recovery Tribunal under the provisions of Section 17 read with Section 25 of the said Act and that the company Court has no jurisdiction to interfere with the said proceedings. In paragraph 50 of the said judgment it has been held, inter alia, as under:-

"50. For the aforesaid reasons, we hold that at the stage of adjudication u/s 17 and execution of the certificate u/s 25 etc. the provisions of the RDB Act, 1993 confer exclusive jurisdiction on the Tribunal and the Recovery Officer in respect of debts payable to banks and financial institutions and there can be no interference by the Company Court u/s 442 read with Section 537 or u/s 446 of the Companies Act, 1956. In respect of the monies, realized under the RDB Act, the question of priorities among the banks and financial institutions and other creditors can be decided by the Tribunal under the RDB Act and in accordance with Section 19(19) read with Section 529-A of the Companies Act and in no other manner. The provisions of the RDB, Act, 1993 are to the above extent inconsistent with the provisions of the former. This position holds good during the pendency of the winding-up petition against the debtor Company and also after a winding-up order is passed. No leave of the company Court is necessary for initiating or continuing the proceedings under the RDB Act, 1993. Points 2 and 3 are decided accordingly in favour of the appellant and against the respondent."

7. In light of the view expressed by the Supreme Court in the aforesaid matter, there is no manner of doubt that the jurisdiction to determine the payments and its priorities is totally vested with the Debt Recovery Tribunal even in execution proceedings and, therefore, we are of the view that the petitioner should be directed to approach the said Debt Recovery Tribunal for the purpose of determination of their claim and consequential payment in respect thereof.

8. However, while doing so, there are certain directions which are necessary to be issued in the present writ petition and accordingly we pass the following order which will be implemented in accordance with guidelines set out in this

judgment :-

(1) The Debt Recovery Tribunal is directed to retain the sum of Rs. 1,17,55,000/- and not to disburse the same either to the 2nd respondent or to any other person till and until the claim of the

(2) The Presiding Officer of the Debt Recovery Tribunal, Mumbai shall adjudicate upon the claims of the petitioner workers and more particularly of the employees whose names are set out in Exhibit "A" and determine the salaries payable either as and by way of arrears or otherwise to each of the workers.

(3) Once the claim of each of the workmen is determined, the Debt Recovery Tribunal shall make payment of the said dues to the workers out of the amount lying with him of the said Rs. 1,17,55,000/- and if there is a short fall, then the Debt Recovery Tribunal will be permitted to call for the said balance amount from the 2nd respondent out of the sum of Rs. 3 crores which has already been withdrawn by the 2nd respondent from the sale proceeds of the auction sale of the movable properties of respondent no. 1.

(4) The Debt Recovery Tribunal shall in the meantime deposit the said amount of Rs. 1,17,55,000/- in fixed deposit with a nationalised bank initially for period of three months and then renewable for a further period of three months.

9. For effectuating the aforesaid directions, it is necessary that the Debt Recovery Tribunal has to follow certain procedure and/or guidelines under the provisions of the DRT Act. Under the provisions of the Debt Recovery Appellate Tribunal (Financial and Administrative Power) Rules, 1997 the Appellate Tribunal is vested with the powers to provide for the procedure for conducting various proceedings. We are of the view that the Chairperson, Appellate Tribunal in exercise of the aforesaid provisions should frame guidelines and/or prescribe the procedure which is required to be followed by the Debt Recovery Tribunal while adjudicating the claims of the workmen. Since there is no procedure or guidelines provided either under the Act or the Rules to adjudicate the claim of the workers before the same is paid over or satisfied we direct the Chairperson/ Presiding Officer of the Debt Recovery Tribunal to frame such guidelines and/or rules which may be necessary keeping in mind the procedures of the Debt Recovery Tribunal in such cases. These guidelines will be thereafter followed by the Debt Recovery Tribunal while adjudicating the claims of the workers and for determination of priorities in respect of various creditors including secured creditors u/s 529A of the Companies Act 1 of 1956. The said guidelines shall be framed by the Debt Recovery Appellate Tribunal on or before 31.12.2004.

10. However, in the meantime, we set out certain basic guidelines for the purposes of use of the Debt Recovery Tribunal to be followed while adjudicating the said claim of workmen and other secured creditors and for determination of its priorities. The said guidelines will also be followed in the present case till and until the guidelines are framed by the Chairperson or the Presiding Officer of the Debt Recovery Tribunal as directed above. We lay down the following guidelines

as an interim arrangement:

i) After the issuance of the recovery certificate the Presiding officer shall direct the applicant bank to issue an advertisement in two local newspapers one of which will be in English and another in vernacular language of that region inviting the claims of the workers.

ii) Simultaneously the Presiding Officer will also issue a notice to the directors or ex-directors of the company, as the case may be, calling upon them to submit a statement supported by documentary records, inter alia, indicating the number of workmen, their last drawn salary paid and the arrears of salary or other claims, if any.

iii) The Presiding Officer will prescribe the format of an affidavit in which the workers can file their claim before the Presiding Officer. Such claim should be supported by the workers on the basis of the documents which are briefly set out as under:-

(a) Letter of appointment,

(b) Letter of confirmation,

(c) Last salary slip or any evidence of salary drawn,

(d) Any other relevant documents such as ESI card, Provident Fund details

iv) The Presiding Officer will not insist that all the documents as mentioned above should be filed cumulatively but will permit the workers to file the aforesaid documents in so far as they are available with the said workmen.

v) The amount realized by the Presiding Officer under the recovery certificate shall be deposited by the presiding Officer without any disbursement to any party whatsoever save and except the security charges or expenses towards the auction sale. The entire amount shall be invested in the fixed deposit of a nationalized bank alone for an initial period of one year renewable thereafter at the interval of six months each at a time.

vi) The Presiding officer after receiving the applications from the workers in respect of their debt, will scrutinize and verify the same with that of the records produced by the company, directors or ex-directors of the said company. The Presiding Officer thereafter will on verification if there is no dispute pertaining to the quantum of amount payable to the workers shall quantify the same. The Presiding Officer also will simultaneously quantify the amount payable to various secured creditors and/or statutory liabilities of sales tax payable by the said company. The Presiding officer on the quantification of each of the said three claims, shall apply the following formula i.e. the amount available divided by amount payable to all the secured creditors and the sales tax authorities.

vii) In an event of dispute in respect of quantum of payment to be paid over to the workers or any particular individual workman, the Presiding officer will hear

both the parties, namely, secured creditors and/or the workers and after hearing both the parties will give his decision quantifying the amount which according to the Presiding Officer is due and payable to the workers on the basis of the documents which are available and/or produced by the parties.

viii) The rate so derived will be multiplied with the amount of the claim of each worker, secured creditors and statutory sales tax liability. The figure so derived shall be an amount payable on the basis of pari passu charge as contemplated u/s 529A of the Companies Act.

ix) The Presiding Officer will thereafter make necessary payments to the workmen and obtain from the workers a stamped receipt indicating the receipt of their dues.

x) The Presiding Officer will obtain the original affidavit of claim as provided in clause (iii) of these guidelines from the workmen duly identified either by an Advocate or notarized by Public Notary. Similarly, the receipts when issued should also be identified by an Advocate and/or a union leader or an office bearer of the said company identifying that the said workman of the said company and is entitled to the amount received by him.

xi) The rate derived on the basis of the aforesaid formula will be thereafter advertised by giving an advertisement in the same newspapers as mentioned above i.e. one English newspaper and one newspaper in vernacular language.

11. The aforesaid procedure will be followed as an interim procedure by the Presiding Officer till and until the regulations are formulated by the Chairperson of the Debt Recovery Appellate Tribunal as directed in the present judgment by us.

12. We dispose of the present writ petition accordingly. However, there shall be no order as to costs.

Parties to act on an ordinary copy of this order duly authenticated by the Private Secretary of this court.