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Court : DRAT Delhi

Decided On : May-13-2003

Reported in : I(2005)BC132

Judge : K Kumaran

Appellant : Creation Decor Pvt. Ltd. and ors.

Respondent : Small Industries Development

Advocate for Def. : Mr. Bhargava

Judgement :

1. This is an application under Section 21 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (hereinafter referred to as 'the Act') for waiver of the pre-deposit of the amount ascertained by the Debts Recovery Tribunal, Jaipur (hereinafter referred to as 'the DRT') as due from, and payable by the applicants/appellants to the respondent.

2. According to the applicants/appellants, they have suffered huge losses, that the 1st defendant company has died due to the inaction on the part of the respondent-bank, and that the other applicants/appellants, who are now working on their own, are leading just a hand to mouth existence. Therefore, according to them, they are not in a position to pay 75% of the decreed amount. Therefore, they have requested that the pre-deposit may be waived.

3. The respondent-bank has filed a suitable reply opposing this application, and the applicants/appellants have also filed a rejoinder in the shape of the affidavit of Mr. Manpreet Singh (2nd appellant herein).

4. I have heard the learned Counsel for both the sides, and perused the records.

5. The respondent-bank filed O.A. 358/2000 claiming Rs. 50,63,813/- with subsequent interest and costs from defendants 1 to 3, who are the appellants herein. The 1st defendant/ appellant is the company while the 2nd and 3rd defendants/appellants are the Directors of the same.

The learned Presiding Officer, by his order dated 31.10.2001, passed the final order directing the appellants/defendants 1 to 3 to pay Rs. 50,63,813/- with interest at 6% per annum. Aggrieved, the defendants/appellants have presented the appeal, and this application for waiver. In his additional affidavit (rejoinder), Manpreet Singh, the 2nd appellant has stated that the appellants had filed six Miscellaneous Applications before the DRT, but they were not heard, considered, and no speaking orders were passed, which is a violation of the principles of natural justice. He has also urged that the notifications of the Reserve Bank of India have not been taken into consideration, and that the bank has rejected the request for one time settlement. He has also urged that the resources/incomes of the Directors of the company are insufficient to make the deposit, while the company itself is lying in a state of coma without any resources to pay the amount to the bank. Though the respondent-bank took time to file a reply to this additional affidavit (rejoinder), the respondent-bank did not file any such reply.

6. The learned Counsel for the defendants/appellants contends that in deciding this application under Section 21 of the Act, this Tribunal has to take three factors into consideration, viz., (i) whether there has been a violation of the principles of natural justice; (ii) whether the applicants/appellants have made out a prima facie case; and (iii) whether there is any hardship to the applicants/appellants.

7. The learned Counsel for the applicants/appellants contends that the defendants/appellants had filed an application for amending the written statement (copy of which has been enclosed with the appeal as Annexure-D), and another application

to bring on record certain facts along with some documents (Annexure-E to the appeal), but these applications have neither been disposed of nor have they been considered in the final order also.

8. According to the learned Counsel for the applicants/appellants, the defendants/appellants also filed another application (Annexure-F to the appeal) seeking time to produce certain documents, and for directing the respondent to submit correct statement of account or permit the defendants/appellants to call Mr. Bhargava for cross-examination. The learned Counsel for the defendants/appellants contends that this application was also not disposed of though there is a reference to this application in the day-to-day order dated 15.5.2001.

9. The learned Counsel for the defendants/appellants further contends that the defendants/ appellants also filed an affidavit along with certain circulars (Annexure-G to the appeal), and even the order dated 21.5.2001 passed by the learned Presiding Officer of the DRT refers to this affidavit wherein violation of the circulars of the Reserve Bank of India had been pleaded, but, the learned Presiding Officer has brushed aside the same on the ground that the Tribunal cannot give directions to the bank for complying with these circulars. According to the learned Counsel for the defendants/appellants, interest has been charged by the respondent-bank contrary to the circulars of the Reserve Bank of India.

10. The learned Counsel for the defendants/appellants contends that the defendants/ appellants had also filed another application (Annexure-H to the appeal) to place on record certain documents like the communications between the defendants/appellants and the bank, and that was also not considered and disposed of. He contends that there is not only a prima facie case in favour of the defendants/appellants, but, it is also evident that there has been violation of the principles of natural justice, and, therefore, the condition for pre-deposit of the amount should be waived.

11. But the learned Counsel for the respondent contends that two of the applications were not pressed by the Counsel for the defendants, and, therefore, the present contention put forward by the appellants cannot be accepted. I find from the records of the DRT that the application for the amendment of the written

statement was filed on 11.5.2001 as is seen from the endorsement made on that application on the file of the DRT. The application (Annexure E) was filed on 15.5.2001 as per the seal found on the original application on the file of the DRT.¹² I have perused the day-to-day orders passed by the learned Presiding Officer of the DRT, and I find that this contention of the learned Counsel for the respondent is correct with regard to the application filed on 11.5.2001, as is seen from the orders passed by the learned Presiding Officer on 16.5.2001. But so far the Annexure 'E' filed on 15.5.2001, is concerned, it is not possible to conclude with certainty that this application-Annexure 'E' was disposed of (on 21.5.2001). Because, both the applications, Annexure 'E', and the application-Annexure 'F' were presented before the DRT on 15.5.2001.

The learned Presiding Officer has, in his order dated 21.5.2001, merely stated that the application dated 15.5.2001 is not pressed. So, it is not clear as to whether he was referring to Annexure 'E' or Annexure 'F'.

13. Even, the learned Counsel for the respondent was not sure as to which application that the learned Presiding Officer of the DRT was referring to when he had observed that the Counsel for the defendants did not press the application dated 15.5.2001. The learned Presiding Officer of the DRT has, in his order dated 21.5.2001, not stated that the "applications" (in plural) were not pressed. Therefore, it is evident that he was referring to only one of the two applications. If he was referring to Annexure 'E' as not pressed by the defendants, then it was only an application to bring on record certain records with a prayer for a direction to the bank to release certain amount being the balance of the loan, and to set off against the liability of the defendants certain amount to which the defendants were eligible by way of subsidy. That would mean that the application Annexure 'F' (which was also filed on 15.5.2001) remained pending without being disposed of. In the application Annexure 'F' the appellants/defendants have prayed that they may be permitted to submit the documents of the bank to prove certain deposits allegedly made by them, that the respondent-bank should be directed to submit a correct statement of accounts or that permission should be granted to them to call Mr.

Bhargava for cross-examination. They had also prayed in this application for granting them time for producing the bank records relating to the encashment of certain cheques given by the defendants/appellants.

14. If this application-Annexure 'F' had not been disposed of, then, the appellants/defendants would be entitled to urge in the appeal that there has been violation of the principles of natural justice because their request for permitting them to submit certain documents of the bank, and for a direction to the respondent-bank to submit the correct statement of accounts has not been considered and decided one way or the other and similarly, their alternative prayer for calling Mr.

Bhargava for cross-examination has not been considered and decided one way or the other. In these circumstances, the appellants/ defendants are entitled to put forth the contention that there has been a violation of the principles of the natural justice, which will have to be considered in the appeal.

15. The learned Counsel for the appellants/defendants points out that the appellants/ defendants had filed an affidavit (Annexure 'G' to the appeal) of Manpreet Singh, the 2nd appellant herein, annexing therewith certain circulars of the Reserve Bank of India and pleading that there has been a violation of these circulars by the respondent-bank. The contention of the learned Counsel for the appellants/defendants is that interest has been charged contrary to the circulars of the Reserve Bank of India, and that was brought to the notice of the DRT, but the learned Presiding Officer of the DRT, in the impugned order, has brushed aside this plea put forward by the defendants/appellants by observing that there is no provision in the Act under which a direction can be given to the bank for the compliance of the circulars of the Reserve Bank of India. According to the learned Counsel for the appellants, this is not correct. The learned Counsel for the appellants/defendants also contends that the defendants/appellants had also filed an application (Annexure 'H' to the appeal) praying that they may be allowed to settle the dues in terms of the directions of the Reserve Bank of India, on the proposals made by them, and that this application has also not been disposed of. The learned Counsel for the appellants/defendants points out from the order dated 7.8.2001 passed by the learned Presiding Officer of the DRT that not only final

arguments, but also arguments on the application were heard, but there has been no consideration and decision with regard to the same.

16. Learned Counsel for the respondent-bank/on the other hand, contends that the plea of the defendant/appellants in this regard was vague, and it had not been pointed out as to which specific circular of the Reserve Bank of India had been violated, and that the DRT has given interest pendente lite at 6% per annum from the date of suit till realisation. He also contends that the defendants/appellants have no right to seek enforcement of the guidelines of the Reserve Bank of India, and that they are bound by the agreement with the bank in this regard. In support of his contention, the learned Counsel for the respondent-bank relies upon the decision in *E. Satyanarayanan v. Reserve Bank of India*, (2002) 112 Company Cases 272. The learned Counsel for the respondent-bank also relies upon the decision of Hon'ble Supreme Court in *Delhi Financial Corporation v. B.B. Behel*, I (1999) BC 574 (SC)=II (1999) CLT 118 (SC)=III (1999) SLT 4=2000(1) Bank CLR 17 (SC), wherein it has been held as follows: "Even if it is accepted that the appellant had, in some cases, granted substantial relief to the debtors affected by terrorists activities, it is far beyond the powers of the Court to compel a creditor to forego part of its claim of interest on the ground of hardship to a debtor. In financial transactions such adjustments should be left to the parties to settle the matter in the best interest or exigencies of the business. The appellant is a statutory financial institution which carries on its activities by borrowing amounts so a direction of such nature will upset its financial equilibrium and land it in a financial crisis making it non-viable." 17. Learned Counsel for the respondent-bank also relies upon the decision in *M.M. Accessories v. U.P. Financial Corporation*, 2003(1) Bank CLR 87 (All), in support of his contention that a direction cannot be given to the respondent-bank to accept the proposal for one time settlement.

18. The learned Counsel for the appellants/defendants, on the other hand, contends that these circulars and guidelines issued by the Reserve Bank of India have the force of the statutory circulars, and they have to be complied with by the banks. In support of his contention, he relies upon the decision in *Corporation Bank v. D.S.Gowda*, II (1994) BC 614 (SC)=1995(1) Bank CLR 215 (SC), wherein it has been held that under the Banking Regulation Act wide powers are conferred

on the Reserve Bank to enable it to exercise effective control over the banks, and that Sections 21 and 35A of the Banking Regulation Act enable it to issue directives in public interest to regulate the charging of interest on loans or advances made from time to time. It has also been held that it is in exercise of this power that it issued circulars fixing the rates of interest to be charged from borrowers, and that these circulars/directions have statutory flavour.

19. But, the learned Counsel for the respondent-bank on the other hand, contends that Sections 21 and 35-A of the Banking Regulation Act, 1949 do not apply to the respondent-bank. He contends that as per Section 2(e) of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 a banking company shall have the same meaning assigned to it in Clause (c) of Section 5 of the Banking Regulation Act, 1949. He points out that as per Section 5(c) of the Banking Regulation Act, 'Banking Company' means any company which transacts the business of banking in India. He further contends that Section 3 of the Companies Act defines a company as one incorporated under the Companies Act, whereas, the respondent-Small Industries Development Bank of India is a creature of an Act of Parliament and is not a company under the Companies Act. But, the learned Counsel for the applicants/appellants, on the other hand, contends that if that be so, the respondent-bank will not be able to invoke the jurisdiction of the DRT under the Act of 1993. The learned Counsel for the respondent-bank contends that the respondent-bank can take proceedings under the Act of 1993. But, in my view, these contentions have to be and can be considered in the appeal, and it is not necessary or proper for me to give a final opinion in this application under Section 21 of the Act of 1993, on these points.

20. The learned Counsel for the respondent-bank further contends that the applicants/ appellants have not been able to point out the circular the benefit of which the applicants/ appellants are entitled to. The learned Counsel for the appellants points out that in the Memorandum of Appeal itself the applicants/appellants have urged that the respondent cannot charge higher rates of interest over the rate prescribed by the Reserve Bank of India in the case of small-scale industries, that the circulars of the Reserve Bank of India do not permit the charging of the penal interest also, and that as per the circulars issued by the

Reserve Bank of India the maximum interest to be charged from small-scale industries is 5% below 11.25% per annum. The compendium of circulars on Small Scale Industries has been filed with Annexure 'G' to the appeal. These points raised by the applicants/appellants have also to be considered in the appeal.

21. Taking into consideration all these circumstances pointed out above, I am of the view that the applicants/appellants have made out a prima facie case to be argued in the appeal.

22. The learned Counsel for the applicants/appellants also contends that in view of the fact that the applications filed by the applicants/appellants before the DRT were not considered and disposed of, there has been a violation of principles of natural justice. In view of what I have pointed Out already, it is seen that some of the applications were not considered and disposed of by the DRT before even the O.A. itself was disposed of. The learned Counsel for the applicants/appellants contends that the denial of opportunity to cross-examine amounts to violation of the principles of natural justice. In this connection, he relies upon the decisions in *Raja Imports & Exports v. Collector of Customs*, 1991 (56) ELT 220 and *Sudhir Kumar v. Collector of Customs*, 1992 (61) ELT 308. These decisions support the contention of the applicants/appellants.

23. The learned Counsel for the applicants/appellants also contends that if the submissions made by a party are not considered, that also amounts to violation of principles of natural justice. He relies upon the decision in *In re: Yashwant Electricals Ltd.*, 2000 (115) ELT 865, which decision also supports his contention.

24. The learned Counsel for the applicants/appellants further contends that the existence of a prima facie case constitutes an important relevant factor in the consideration of the question of undue hardship.

In this regard, the learned Counsel for the applicants/ appellants relies upon the decision in *V.I.T. Sea Foods v. Collector of Customs*, 1989 (42) ELT 220. This decision also supports the contention of the learned Counsel for the applicants/appellants.

25. But, so far as the financial hardship pleaded by the applicants/appellants is concerned, the learned Counsel for the respondent-bank contends that the application is vague and without any details at all. He contends that the applicants/appellants have not given the details of their assets and liabilities. He points out that while the 1st appellant company's Balance Sheet and Profit & Loss Account have not been filed, the appellants 2 and 3 have not given the details of their assets and liabilities. The learned Counsel for the respondent-bank also points out from the impugned order itself that the DRT had directed the recovery of the amount by sale of the property of the 1st defendant-company, as also the property of the 2nd defendant bearing No. 812/6, Mohali, Chandigarh and the property of the 3rd defendant bearing No. 3198/15, Gali No. 1, Sang Trasen, Paharganj, New Delhi. The learned Counsel for the respondent-bank also points out that in the O. A. itself relief has been prayed for the attachment and sale of the above said properties. He also points out that a prayer for interim relief has also been made in paragraph 6(H) of the O.A. with regard to these properties. The learned Counsel for the respondent-bank also points out the averment in para 5(vii) regarding the hypothecation of the movables, and in paras 5(ix) and (x) above the creation of the mortgage in respect of immovable properties of the 1st defendant-company in Plot No. F-12, RIICO Industrial Area, Shahjahanpur, Dist. Alwar. The learned Counsel for the respondent-bank points out that in the written statement filed there is only a vague and general denial of the contents of paras 6(A) to (H) of the O.A., and there is no specific denial with regard to each of these properties. The learned Counsel for the respondent-bank also points out that the averments in para 5(vii) of the O.A., relating to the hypothecation of the movables, and averments, made in paras 5(ix) and (x), regarding the creation of mortgage, have been admitted, though, it has been stated that the respondent-bank cannot rely on the mortgage.

Pointing out these facts, the learned Counsel for the respondent-bank contends that there is no financial hardship to the appellants to deposit 75% of the amount decreed and there are no grounds for waiving the deposit. But, I have already found that the applicants/appellants have made out a prima facie case to be argued in the appeal, and that there has been violation of principles of natural justice. Therefore, the contention of the respondent-bank that the

applicants/appellants have no financial hardship, and, therefore, should be directed to deposit 75% of the amount determined by the DRT cannot be accepted.

26. But, the learned Counsel for the applicants/appellants during the course of his arguments stated that without prejudice to the contentions raised by the applicants/ appellants, but to show their bona fides the applicants/appellants are prepared to deposit about 2 to 3 lakhs. In these circumstances, taking into consideration the pleas taken by the applicants/appellants, I am of the view that the applicants/appellants can be directed to deposit Rs. 5 lakhs for the purpose of entertaining the appeal. The deposit of the rest of the amount only has to be waived.

27. Accordingly, this application is allowed in part. The applicants/appellants are directed to deposit a sum of Rs. 5 lakhs into the respondent-bank within six weeks from the date of this order, for the purpose of entertaining the appeal. The requirement to deposit the rest of the amount only is waived.

29. A copy of this order be furnished to the applicants/appellants and to the respondent-bank.

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