

(2014) 10 MAD CK 0149
In the Madras High Court
Case No : Writ Petition No. 17177 of 2011

L. Jayakumar

APPELLANT

Vs

Central Bank of India

RESPONDENT

Date of Decision : 30-10-2014

Acts Referred:

Constitution of India, 1950 — Article 226
Penal Code, 1860 (IPC) — Section 34, 405, 415, 418, 463

Citation : (2014) 5 LW 150 : (2014) 7 MLJ 667

Hon'ble Judges : S. Vaidyanathan, J

Bench : Single Bench

Judgement

S. Vaidyanathan, J.—Aggrieved by non-payment of the arrears of legal fees and the remuneration to a sum of Rs. 26,42,615/- along with interest by the respondents/bank, the petitioner has come forward with the present writ petition, seeking for a Writ of Mandamus to the respondents to make the above said payment. According to the petitioner, he is the senior member of the Bar, having practice in High Court of Madras for more than three decades and a partner of a registered legal firm, M/s. L. Jayakumar & Associates. The respondents approached the petitioner to find out the way to recover a sum of Rs. 472.24 lakhs from M/s. S & S Power Switch Gear Ltd., which is a sick unit, against which the respondents bank initiated recovery proceedings in O.A. No. 223 of 2003 on the file of the Debts Recovery Tribunal, Madras. The petitioner, after studying various factors, opined that the said company might have created an artificial loss with an intention to prevent the creditors from realizing their investments and the loan and therefore, unless all the consortium of all the banks who advanced loans make a joint effort expeditiously before the alleged winding up proceedings, it would be difficult to recover the loan. The respondents informed that as such, they found it difficult to co-ordinate with other consortium of banks, and determined to initiate necessary legal action based on petitioner's advice. They offered that in the event of petitioner succeeding in his efforts to recover at least 25% of the book debt, they would pay 5% of the money

received as incentive to the petitioner, based on the amount recovered. The petitioner agreed to explore all possible measures to recover the loan from the said company on a condition that the respondents should co-ordinate with his efforts to proceed against all the Directors of the said company both in the insolvency Court and Criminal Court under Sections 405, 415, 418, 463, 468 r/w 34 IPC. Pursuant to the suggestion given by the petitioner, the respondents/bank, by their letter dated 30.7.2004 offered Rs. 60,000/- by way of fees plus 5% as incentive from and out of recovery made either through Court or through compromise, provided the recovery exceeds 25% of the amount due in the Account as per the prescribed norms of the bank.

2. Thereafter, as per the approval of the scheme of arrangement by this Court, M/s. S & S Power Switch Gear Ltd., paid Rs. 73,62,728/- to the respondents, representing 20% of the principal outstanding in terms of the scheme of arrangement. Thereafter, pursuant to the order of this Court dated 01.08.2007, the respondents/bank were permitted to proceed against the guarantors of the above said company in the recovery proceedings in O.A. No. 223 of 2003 in their individual capacity as well as in the solvency proceedings. Later, the officials of the said company met the Chairman and some of the executive Directors of the respondents bank at Bombay and got an arrangement in such a way, recommending the Zonal Manager of the respondents bank to receive Rs. 2,53,00,000/- from the said company as a full & final settlement. According to the petitioner, this arrangement was so strange that out of Rs. 2,53,00,000/- and Rs. 73,62,000/- were to be recovered as OTS and the balance of Rs. 179.38 lakhs was to be treated as "management fees". Ultimately, the respondents bank succeeded and obtained Rs. 2,53,00,000/- from the said company.

3. The grievance of the petitioner is that as per the offer earlier, the respondents bank have to pay 5% of the incentive charges, however, the same was deliberately denied. The petitioner made it clear that if incentive not paid, he will be claiming interest at rate of 20% p.a. However, by letter dated 13.7.2009, the respondents bank informed the petitioner that the incentive of 5% cannot be accepted as the recovery made through compromise settlement, has not exceeded 25% of the amount due in the account on the date of recovery. Therefore, the petitioner has come forward with the present writ petition, claiming Rs. 26,42,615/- including incentive of 5%, interest, litigation expenses and mental agony for Rs. 5,00,000/-.

4. A detailed counter affidavit has been filed by the respondents bank, wherein, it is stated that the services of the petitioner were engaged for initiating insolvency proceedings against the Directors/Guarantors. As per their letter, dated 30.7.2004, the engagement of the petitioner was subject to the condition of payment of Rs. 60,000/- towards the fee of the petitioner to be paid in three installments and an incentive of 5% from and out of the recovery made provided exceeded 25% of the amount due in the account. The respondents bank did not accept the claim of the petitioner that the incentive should be paid on the total

claim and not on the recovery made as the bank could not accept any such claim against the recovery policy. By letter, dated 30.3.2009, the Central Office of the bank communicated the sanction of OTS at Rs. 2,53,00,000/-; the contractual dues to the bank on said date was Rs. 20,81,30,369/- and thus the amount recovered as far below 25% of the dues. By letter, dated 13.7.2009, the respondents bank informed the petitioner that the incentive claim cannot be paid as the amount recovered is not in excess of 25% of the amount due in the account on the date of recovery. It is further stated that the fee due to the petitioner has been settled and the claim made by the petitioner towards interest and mental agony is misconceived when the very alleged liability does not exist. The petitioner cannot invoke the jurisdiction of this Court under Article 226 for resolving the disputed contractual claims. Therefore, with these averments, the respondents sought for dismissal of the writ petition.

5. Heard the learned counsel appearing for the petitioner and the learned counsel for the respondents.

6. Mr. V. Karthikeyan, learned counsel appearing for the petitioner would submit that it is (sic) proper on the part of the respondents bank in denying the incentive of 5% on the amount recovered to the petitioner, having availed his precious legal service, whose instance and strenuous efforts by which, the defaulted company has come down for settlement and without which, the respondents bank would not have certainly obtained the money. The petitioner has discharged his legal obligations and legal assistance to the respondents bank in a well considered manner and in appreciation of his services and as agreed by the respondents/bank, the incentive ought to have been granted to the petitioner atleast in recognition of his honorary services. In support of his contentions, the learned counsel relied upon a decision of the Hon"ble Supreme Court reported in R.D. Saxena Vs. Balram Prasad Sharma, " wherein, the Hon"ble Supreme Court has elaborately dealt the issue regarding the sequential importance for members of the legal profession and their lien for their fees on the litigation papers entrusted to them by the clients. It has been held by the Hon"ble Supreme Court that the right of the litigant to have the files returned to him is a corresponding counterpart of the professional duty of the advocate and that dispute regarding fees would be a lis to be decided in an appropriate proceeding in court. The learned counsel also relied upon a decision reported in K.V. Venkatapathi (deceased), K.V. Sundararajan, S.R. Sundar and Vanaja Venkatapathi Vs. Chennai Metropolitan Water Supply and Sewerage Board, ", wherein, while allowing the writ petition filed by former Advocate General, State of Tamil Nadu for Mandamus, to direct the Government to pay pending professional fees along with interest at the rate of 12% p.a., this Court directed the Government to pay the bills with interest at 9% p.a. and observed in para 18 as follows:

"18.....The authorities of the Government and Public Sector Undertakings are duty bound to keep in mind that it is not proper to force the learned Advocates to file Writ Petitions for the sanction of their legal fees after availing their

professional service/work with satisfaction. Forcing the learned counsels, who are officers of the Court to stand as litigants is regrettable. The concerned officers of the Government and Public Sector undertakings are to be reminded by the Chief Secretary, Government of Tamil Nadu to settle the legal fee payable to all the Advocates so as to avoid unwanted litigations of this nature before this Court..."

7. On the other hand, the learned counsel appearing for the respondents bank would contend that the respondents bank has already paid the advocate fee to the petitioner and the claim of the petitioner for payment of 5% incentive on the amount recovered cannot be granted since it is agreed that said incentive of 5% will be paid from and out of the recovery made either through Court or through compromise provided recovery exceeds 25% of the amount due in the account and admittedly, the recovered amount has not exceeded 25% of the amount and it is below 20% of the total due by the defaulted company. He also contended that since the claim of the petitioner is disputed, the petitioner cannot agitate in the writ petition and the same has to be decided by an appropriate forum. In support of his contention, the learned counsel relied upon a decision of the Hon"ble Supreme Court reported in New India Assurance Co. Ltd. Vs. A.K. Saxena, .

8. It is not in dispute that the services of the petitioner were engaged by the respondents bank for initiating insolvency proceedings against the Directors/ Guarantors of the so-called sick company, M/s. S & S Power Switch Gear Ltd.

9. A perusal of the letter dated 30.7.2004 addressed by the respondents bank to the petitioner reveals that the total fee to the petitioner is fixed at Rs. 60,000/- payable in three stages, of which, initial fee of Rs. 20,000/- would be paid at the time of filing of IP and the next Rs. 20,000/- would be paid after the case has reached the final stage and the last installment would be paid after getting finality in the matter. Apart from this, an incentive of 5% would be paid from and out of the recovery made either through Court or through compromise provided recovery exceeds 25% of the amount due in the account as per the bank's prescribed norms for payment of incentive. It is not in dispute that the above said conditions were agreed and acted upon by the petitioner. It is not disputed by the petitioner that the agreed amount towards his fee at Rs. 60,000/- has been paid by the respondents/bank. The only dispute persisting between the petitioner and respondents/bank is mainly pertaining to the payment of incentive of 5% amount.

10. It is to be noted that by letter dated 30.7.2004, the petitioner informed the respondents bank, to the following effect:

"When we are forcibly proceeding against the above parties, the bank while settling the claim should not let us down, depriving our right of claiming incentive referred to in your letter dated 30th July, 2004. Your claim in O.A. No. 223 of 2003 is about Rs. 7,58,36,608/-. While you settle your claim amount, our incentive 5% may also be added along with the legal expenses. Our incentive

should be based on the total claim, but not on recovery you make."

11. Therefore, according to the petitioner, his incentive should be based on the total claim, but not on recovery the respondents bank make from the company. This is specifically disputed by the respondents bank, stating that the respondents bank never agreed and indeed cannot agree for such payment of incentive at 5% on the amount recovered since it is against their recovery policy. According to the respondents bank, incentive of 5% will be paid from and out of the recovery made either through Court or through compromise provided recovery exceeds 25% of the amount due in the account as per their prescribed norms for payment of incentive and that since the amount recovered from the default company not exceeded more than 25% of the total due, they rightly rejected the claim of the petitioner for payment of 5% incentive.

12. Therefore, since the respondents bank have categorically disputed the claim of the petitioner for payment of 5% incentive, this Court is not inclined to entertain the same in this Writ Petition and it is settled law that the disputed questions of fact cannot be determined in a writ petition under Article 226 of the Constitution of India and it has be decided in an appropriate proceeding before the Civil Court. This Court is supported by the decision of the Hon"ble Supreme Court reported in "New India Assurance Co. Ltd. Versus A.K. Saxena" (cited supra), wherein, the dispute arose regarding payment of advocate fee and while following its earlier decision reported in "R.D. Saxena versus Balaram Prasad Sharma", (cited supra), the Hon"ble Supreme Court has held as under in para 5 to 7.

"5. Learned senior counsel for the appellants states that no fees is payable to the respondent. In our view, it is not for this Court, as it was not for the High court, to adjudicate upon such a disputed question of fact. The High Court should not have given the directions it did also because at the time the High court passed the impugned order, a writ petition No. 27380 of 2001 was pending. In this writ petition the respondent had claimed payment of his fees.

"6. This case is fully covered by a decision of this Court in R.D. Saxena Vs. Balram Prasad Sharma, wherein this Court has held that advocates have no lien over the papers of their clients. It is held that at the most the advocate may resort to Legal remedies for unpaid remuneration. It has been held that the right of the litigant to have the files returned to him is a corresponding counterpart of the professional duty of the advocate and that dispute regarding fees would be a lis to be decided in an appropriate proceeding in Court.

"7. We do not go into this question as to whether or not fees are payable to the respondent. It will be open for the respondent to file appropriate proceedings for recovery of his fees. The fact that, because of the impugned order, he has withdrawn his earlier writ petition would not preclude him from filing any other appropriate proceeding. In view of the above, the impugned order is set aside. The appeal is allowed. There will be no order as to costs."

13. However, the learned counsel appearing for the petitioner relied upon a decision reported in "K.V. Venkatapathi (deceased) and others versus Chennai Metropolitan Water Supply and Sewerage Board, Chennai and others" cited supra, would contend that having availed the professional service of the petitioner, it is not fair on the part of the respondents Bank to decline the payment of his fee and drive him to approach the legal forums. In the above said decision, the learned Judge of this Court (Hon"ble Mr. Justice N. Paul Vasanthakumar), while parting with the case, has expressed the following:

18. Before parting with this case, I am constrained to state as follows:

During the course of the hearing of this writ petition it was informed by the Members of the Bar that the Government and its instrumentalities are not paying the bill amounts to the former Advocate Generals, Additional Advocate Generals, Special Government Pleaders, Government Pleaders, Government Advocates and Standing Counsels promptly and even after expiry of their terms. Number of writ petitions are filed by former Law Officers. The authorities of the Government and Public Sector Undertakings are duty bound to keep in mind that it is not proper to force the learned Advocates to file writ petitions for the sanction of their legal fees after availing their professional service/work with satisfaction. Forcing the learned Counsels, who are Officers of the Court to stand as litigants is regrettable. The concerned officers of the Government and Public Sector Undertakings are to be reminded by the Chief Secretary, Government of Tamil Nadu to settle the legal fee payable to all the Advocates so as to avoid unwanted litigations of this nature before this Court. The registry is directed to mark a copy of this order to the Chief Secretary, Government of Tamil Nadu, Chennai-600009."

(Emphasis added)

14. Therefore, the learned Judge has cautioned that the authorities of the Government and Public Sector Undertakings are duty bound to keep in mind that it is not proper to force the learned Advocates to file writ petitions for the sanction of their legal fees after availing their professional service/work with satisfaction and forcing the learned Counsels, who are Officers of the Court to stand as litigants is regrettable.

15. Placing reliance on the above decision, the learned counsel, would therefore, contend that it is not appropriate on the part of the respondents bank, to deny the payment after availing the service of the petitioner and force him to stand before the forum as litigant.

16. The ratio of the above decision, in my considered view, cannot be made applicable to the present case for more than one reason, viz., that in the above said decision, there is no dispute that the Government is due and payable to the petitioner, who is former Advocate General towards his professional fee and the writ petition was filed, for a direction to the government for payment of professional fee along with interest. While dealing with the said issue, this Court has directed the Government to make payment along with interest. However, in

the present case, it is not in dispute that the respondents bank had paid the petitioner towards his professional fee at Rs. 60,000/- as agreed by both parties, however, as regards the payment of incentive of 5% on the total recovered amount claimed by the petitioner is disputed by the respondents bank. Therefore, when there is a dispute regarding the payment of 5% incentive, as already held by this Court being supported by the decision of the Hon"ble Supreme Court as stated supra, this Court cannot decide the same in a writ petition. Therefore, with respect, I am of the view that the decision rendered by learned Judge in "K.V.V. Venkatapathi case" cited supra, cannot be made applicable to the present case. In this regard, it is worthwhile to mention the decision of the Hon"ble Supreme Court in Padmasundara Rao and Others Vs. State of Tamil Nadu and Others, ", wherein, the Hon"ble Supreme Court has enunciated as to how to make reliance of the decisions and it has been held so as under: "Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. There is always peril in treating the words of speech or judgment as though they are words in a legislative enactment, and it is to be remembered that judicial utterances are made in the setting of the facts of a particular case, said Lord Morris in Herrington Vs. British Railways Board (1972) 2 WLR 537. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases."

Having regard to the above, while refraining to go into the question as to whether or not the incentives of 5% as claimed by the petitioner are liable to be paid by the respondents/bank, this Court dismissed the Writ Petition. However, it will be open for the petitioner to file appropriate proceedings for recovery of the amount towards incentives of 5% as claimed by him in this Writ Petition. No costs.