

(2013) 08 AHC CK 0049

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 34076 of 2011

M/s. Jyoti Extraction Pvt. Ltd. and Another

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 06-08-2013

Acts Referred:

Citation : (2013) 8 ADJ 240 : (2014) 1 ALJ 724 : (2013) 100 ALR 606 : (2014) 1 AWC 858 : (2014) 1 BC 572 : (2013) 121 RD 222

Hon'ble Judges : Tarun Agarwala, J

Bench : Single Bench

Advocate : Pradip Kumar, for the Appellant; Chandan Sharma, K.M. Asthana, Atul Kumar Singh, Sanjeev Singh, Yaswant Singh and Sandeep Shukla, for the Respondent

Judgement

Tarun Agarwala, J.—The petitioner is a company registered under the Companies Act and sought financial assistance in the form of working capital loan from the respondent Bank. It transpires that a loan of Rs. 90,00,000/- was sanctioned in the year 1992. The petitioners failed to repay the loan, and accordingly, the respondents Bank filed original suit in the year 1992, before the Civil Court, Allahabad for recovery of Rs. 97,61,000/-, which was subsequently transferred to the Debt Recovery Tribunal, Allahabad (hereinafter referred to as the Tribunal). It is alleged that during the pendency of the original application before the Tribunal, the parties arrived at a compromise, settling the entire amount at Rs. 1,05,00,000/-. It is alleged that without adhering to the terms of the settlement, the respondent Bank took recourse to recover the amount by issuing a notice u/s 13(2) of The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as the "NPA Act"). Upon failure to pay the amount as per the demand notice, a notice u/s 13(4) of the said Act was issued for taking possession. Pursuant to this notice issued under sub clause (4) of Section 13, the petitioner filed an application u/s 17(1) of the said Act before the Tribunal for setting aside the said possession notice. During the pendency of this application, the petitioner filed an

amendment application, which was rejected by an order dated 11th August, 2010 and the Tribunal, thereafter, fixed 06th September, 2010 for further orders.

2. It transpires that two impleadment applications were filed by the guarantors on 16th August, 2010 to implead themselves as parties in the case as well as to implead the auction purchaser. On this application, the Tribunal fixed 17th August 2010. The matter was heard by the Tribunal on 17th August, 2010 and thereafter the Tribunal fixed 23rd August, 2010 for delivery of order on the impleadment application. On 23rd August, 2010, the Tribunal, instead of passing an order on the impleadment application, dismissed the application of the petitioner u/s 17(1) for non appearance under Order 9 Rule 8 of the Code of Civil Procedure. When the petitioner came to know of the said order, a restoration application dated 4.10.2010 was filed before the Debt Recovery Tribunal, which was rejected by an order dated 23rd February, 2011. The petitioner, being aggrieved by the said order, filed an appeal u/s 18 of the Act before the Debt Recovery Appellate Tribunal, Allahabad (hereinafter referred to as the Appellate Tribunal)

3. It transpires that the petitioner paid a Court fee of Rs. 200/- on this miscellaneous appeal and the Registrar put a note that there was a deficiency of Court fee, inasmuch as, the appellant was required to pay a Court fee of Rs. 1,00,000/-. The petitioner objected to it and the matter was placed before the Appellate Tribunal. By an order dated 10th August, 2011, the Appellate Tribunal directed the petitioner to deposit a sum of Rs. 1,00,000/- towards Court fee as per Rule 13(2)(b) of the Security Interest (Enforcement) Rules, 2002 (hereinafter referred to as the Rules of 2002). The Tribunal, while directing the petitioner to pay Rs. 1,00,000/-, relied upon its earlier judgment in *Vikram Singh v. Union Bank of India*, in appeal No. 146 of 2009 decided on 05th April, 2011. The petitioner, being aggrieved by the said order, has filed the present writ petition.

4. The Court has heard at length Sri Pradip Kumar, the learned counsel for the petitioner, Sri K.M. Asthana, the learned counsel for respondent No. 2 and 3 i.e., the Tribunal and the Appellate Tribunal, and Sri Sanjeev Singh, the learned counsel for respondent No. 4, Union Bank of India and Sri Sandeep Shukla, the learned counsel holding brief of Sri Chandan Sharma, the learned counsel for respondent No. 5.

5. The learned counsel for the petitioner contended that the Appellate Tribunal has committed a manifest error in directing the petitioner to deposit a sum of Rs. 1,00,000/- towards Court fee, whereas the petitioner was only entitled to deposit a sum of Rs. 200/-, inasmuch as, his appeal was a miscellaneous appeal against an order passed by the Tribunal under Order 9 Rule 9 of the Code of Civil Procedure. It was contended that reliance placed by the Tribunal of its judgment in *Vikram Singh's* case (Supra) was wholly misplaced and was not applicable, inasmuch as, the decision in *Vikram Singh's* case was in relation to the payment of Court fee in an appeal filed u/s 20(1) of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (hereinafter referred to as the Act of 1993)

and was not a decision in relation to Court fee payable under Rule 13(2) of the Rules of 2002. It was urged that Court fee has to be paid as prescribed by the Act or Rules framed thereunder. In the instant case, the Court fee was required to be paid in accordance with Rule 13 of the Rules of 2002.

6. Court fee is a tax and the Rules relating to the payment of Court fee is required to be strictly construed. There is no scope of ambiguity.

7. On the other hand Sri K.M. Asthana, the learned counsel for the Tribunal has contended that no miscellaneous appeal lies before the Appellate Tribunal. In support of his contention, the learned counsel has placed reliance on a decision of the Supreme Court in M/s. Transcore v. Union of India and another, 2007 AIR SCW 389.

8. In order to find out as to what would be the appropriate Court fee payable in the present case, it would be appropriate to refer to a few provision of various Acts.

9. For facility, the provision of Section 18 of the NPA Act is extracted hereunder:

18. Appeal to Appellate Tribunal.--(1) Any person aggrieved, by any order made by the Debts Recovery Tribunal (under Section 17, may prefer an appeal alongwith such fee, as may be prescribed) to an Appellate Tribunal within thirty days from the date of receipt of the order of Debts Recovery Tribunal

(Provided that different fees may be prescribed for filing an appeal by the borrower or by the person other than the borrower.)

(Provided further that no appeal shall be entertained unless the borrower has deposited with the Appellate Tribunal fifty per cent of the amount of debt due from him, as claimed by the secured creditors or determined by the Debts Recovery Tribunal, whichever is less:

(Provided also that the Appellate Tribunal may, for the reasons to be recorded in writing, reduce the amount to not less than twenty-five per cent of debt referred to in the second proviso.)

(2) Save as otherwise provided in this Act, the Appellate Tribunal shall, as far as may be, dispose of the appeal in accordance with the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993) and rules made thereunder.

10. A perusal of sub-clause (1) of Section 18 clearly indicates that any person aggrieved by "any order" of the Tribunal can file an appeal u/s 18 of the Act. The words "any order" envisages filing an appeal not only against a final order, but also against an interlocutory order.

11. Sub-clause (1) of Section 18 further provides that an appeal against any order passed u/s 17 can be preferred alongwith such fee as may be prescribed. The word "prescribed" has been defined u/s 2(s) of the NPA Act, which means

prescribed by Rules made under this NPA Act.

12. The Security Interest (Enforcement) Rules, 2002 was promulgated on 20th September, 2002. Rule 13 provides payment of Court fee for filing an application before the Tribunal and for appeals filed against various orders of the Tribunal. For facility, Rule 13 is extracted hereunder:

13. Fees for applications and appeals u/s 17 and 18 of the Act.--(1) Every application under sub section (1) of Section 17 or an appeal to the Appellate Tribunal under sub-section (1) of Section 18 shall be accompanied by a fee provided in the sub-rule (2) and such fee may be remitted through a crossed demand draft drawn on a bank or Indian Postal Order in favour of the Registrar of the Tribunal or the Court as the case may be, payable at the place where the Tribunal or the Court is situated.

(2) The amount of fee payable shall be as follows:

13. Sub Rule (1) of Rule 13 indicates that every application filed u/s 17(1) before the Tribunal or an appeal filed u/s 18(1) before the Appellate shall be accompanied by a fee as provided in sub Rule (2). A perusal of sub Rule (2) of Rule 13 indicates that a borrower filing an application before the Debt Recovery Tribunal under sub-section (1) of Section 17 would be required to pay a Court fee of Rs. 500/- for every Rs. 1 lac or part thereof where the amount is less than Rs. 10 lacs as specified in clause (a) of Serial No. 1, and under clause (b), the borrower would be required to pay a fee of Rs. 5000/- plus Rs. 250/- for every Rs. 1 lac or part thereof in excess of Rs. 10 lacs subject to a maximum of Rs. 1 lac. Where the amount of debt is less than Rs. 10 lacs and where the applicant is an aggrieved party other than the borrower, the said applicant would be required to pay under clause (c) a Court fee of Rs. 125/- for every Rs. 1 lac or part thereof and where the debt due is Rs. 10 lacs and above the applicant is required under clause (e) to pay Rs. 1250/- plus Rs. 125/- for every Rs. 1 lac or part thereof in excess of Rs. 10 lacs subject to a maximum of Rs. 50,000/-. Clause (e) indicates that any other application filed by any person, the Court fee payable is Rs. 200/-. Serial No. 2 of Rule 13(2) indicates that same Court fee is payable as provided under Serial No. 1 of Rule 13(2), where an appeal is filed before the Appellate Tribunal against any order passed by the Tribunal u/s 17.

14. In the instant case, the petitioner's application u/s 17(1) of the Act was dismissed in default for non appearance by an order dated 23rd August, 2010 by applying the provision of Order 9 Rule 8 of the Code of Civil Procedure.

15. For facility, Order 9 Rule 8 of the CPC is extracted hereunder:

O9 R8. Procedure where defendant only appears.--Where the defendant appears and the plaintiff does not appear when the suit is called on for hearing, the Court shall make an order that the suit be dismissed, unless the defendant admits the claim, or part thereof, in which case the Court shall pass a decree against the defendant upon such admission, and, where part only of the claim has been

admitted, shall dismiss the suit so far as it relates to the remainder.

16. A perusal of the aforesaid provision indicates that the Court could dismiss the suit for want of prosecution on account of non appearance of the plaintiff. In the instant case, the Tribunal has dismissed the application of the petitioner u/s 17(1) of the Act for non appearance on 17th August, 2010.

17. Under the Civil Procedure Code, the plaintiff has a remedy of filing a restoration application under Order 9 Rule 9. For facility, the said provision is extracted hereunder:

O9 R9. Decree against plaintiff by default bars fresh suit.--

(1) where a suit is wholly or partly dismissed under Rule 8, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action. But he may apply for an order to set the dismissal aside, and if he satisfies the Court that there was sufficient cause for his non-appearance when the suit was called on for hearing, the Court shall make an order setting aside the dismissal upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit.

(2) No order shall be made under this rule unless notice of the application has been served on the opposite party.

18. Based on the said provision, the petitioner filed a restoration application, which was rejected by the Tribunal by an order dated 23rd February, 2011.

19. Under the Civil Procedure Code, an order passed under Order 9 Rule 9 is appealable under Order 43 Rule 1(c). For facility, the said provision is extracted hereunder:

O. 43 R 1. Appeals from orders.--An appeal shall lie from the following orders under the provisions of Section 104, namely:

(a)

(b)

(c) an order under Rule 9 of Order IX rejecting an application (in a case open to appeal) for an order to set aside the dismissal of a suit;

20. An appeal filed u/s 104 read with Order 43 Rule 1(c) is a miscellaneous appeal and is not a decree, and consequently, no regular appeal u/s 96 of CPC could be filed.

21. The aforesaid provisions of the CPC are applicable to the Tribunal as well as to the Appellate Tribunal u/s 22 of the Act of 1993. For facility, Section 22 of the Act of 1993 is extracted hereunder:

22. Procedure and Powers of the Tribunal and the Appellate Tribunal.

(1) The Tribunal and the Appellate Tribunal shall not be bound by the procedure

laid down by the Code of Civil Procedure, 1908 (5 of 1908), but shall be guided by the principles of natural justice and, subject to the other provisions of this Act and of any rules, the Tribunal and the Appellate Tribunal shall have powers to regulate their own procedure including the places at which they shall have their sittings.

(2) The Tribunal and the Appellate Tribunal shall have, for the purposes of discharging their functions under this Act, the same powers as are vested in a Civil Court under the Code of Civil Procedure, 1908 (5 of 1908), while trying a suit, in respect of the following matters, namely:

- (a) summoning and enforcing the attendance of any person and examining him on oath;
- (b) requiring the discovery and production of documents;
- (c) receiving evidence on affidavits;
- (d) issuing commission - missions for the examination of witnesses or documents;
- (e) reviewing its decisions;
- (f) dismissing an application for default or deciding it ex parte;
- (g) setting aside any order of dismissal of any application for default or any order passed by it ex parte;
- (h) any other matter which may be prescribed.

(3) Any proceeding before the Tribunal or the Appellate Tribunal shall be deemed to be a judicial proceeding within the meaning of Sections 193 and 228, and for the purposes of Section 196, of the Indian Penal Code (45 of 1860) and the Tribunal or the Appellate Tribunal shall be deemed to be a Civil Court for all the purposes, of Section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973 (2 of 1974).

22. A perusal of Section 22(2)(f) and (g) of the Act of 1993 indicates that the Tribunal has the power to dismiss an application for default and also has the power to set aside any order of dismissal of any application for default. The Appellate Tribunal also has the same powers of the CPC to the extent stated in Section 22.

23. In the light of the aforesaid provision, it is apparently clear that the Tribunal has the power to dismiss an application for want of prosecution and also has the power to set aside an order of dismissal of an application for default. Orders passed on such application does not amount to a decree, and consequently, a miscellaneous appeal can be filed u/s 104 read with Order 43 Rule 1(c) of the Code of Civil Procedure.

24. Section 18 of the Act of 2002 gives a right to any person aggrieved by any order of the Tribunal to file an appeal before the Appellate Tribunal. The word

"any order" includes an order passed on a miscellaneous application.

25. The question now to be considered is, what would be the Court fee payable on a miscellaneous appeal filed under Rule 13 of the Rules of 2002? Serial No. 1 of Rules 13(2) provides the Court fee is payable by an applicant who is a "borrower" or is "an aggrieved party" other than the borrower or who is "any person" who files any other application before the Tribunal. Admittedly, the petitioner in the instant case is a borrower and its application filed u/s 17(1) was dismissed for want of prosecution. The petitioners filed a miscellaneous application for restoration. A Court fee of Rs. 200/- was paid under Serial No. 1 of Rule 13(2)(e) of the Rules 2002. This application was rejected by the Tribunal. The petitioners have a remedy of filing an appeal u/s 18 against an order passed by the Tribunal. The appeal so filed is against the order rejecting the application for setting aside the order dismissing the case in default. The appeal is not against an order filed u/s 17(1) of the Act, and consequently, the Court fee as depicted under Clause (a)(b)(c)(d) of Serial No. 1 of sub Rule (2) of Rule 13 of the Rules of 2002 is not payable, inasmuch as, it relates to an order passed u/s 17(1) of the Act. As a result of the aforesaid, the Court fee payable would be such as depicted under clause (e) of serial No. 1 of sub Rule (2) of Rule 13 of the Rules of 2002.

26. The words used under clause (e) is, "any other application by any person". The words "any application" would include an application filed for setting aside the order dismissing the application u/s 17(1) in default. The words "any person" under clause (e) would also include the borrower for the purpose of filing an application to set aside an order dismissing an application for default. Such harmonious interpretation would justify the ends of justice for payment of Court fee for a miscellaneous appeal.

27. Reliance placed by the Appellate Tribunal of its decision in Vikram Singh's case (Supra) is patently misplaced and is not applicable. In the first instance, the said decision was in relation to payment of Court fee in an appeal filed before the Tribunal u/s 20(1) of the Act of 1993, which is different and distinct from an appeal filed u/s 18 of the Act of 2002. Further, the conclusions so arrived at in Vikram Singh's case (Supra) was in relation to an ex parte judgment and decree passed by the Tribunal, which is not applicable in the instant case, inasmuch as, the order passed by the Tribunal rejecting the application in default is not an order amounting to a decree. The decision of the Supreme Court in the matter of M/s. Transcore (Supra) has no bearing with the controversy involved in the present case.

28. In the light of the aforesaid, the impugned order of the Appellate Tribunal cannot be sustained and is quashed. The Court holds that the petitioner is liable to pay a Court Fee of Rs. 200/- being an appeal filed by the petitioner before the Appellate Tribunal, which is payable under Clause (e) of Serial No. 1 of sub Rule (2) of Rule 13 of the Rules of 2002. The writ petition is allowed. The Appellate Tribunal is directed to decide the appeal on merits after hearing the parties

concerned.