
(1998) 09 P&H CK 0134

In the Punjab And Haryana At Chandigarh

Case No : Civil Writ Petition No. 8524 of 1998

Om Kant Aggarwal and Another

APPELLANT

Vs

Punjab National Bank and Others

RESPONDENT

Date of Decision : 10-09-1998

Acts Referred:

Constitution of India, 1950 — Article 14, 226, 227

Recovery of Debts Due to Banks and Financial Institutions Act, 1993 — Section 21, 31

Citation : AIR 1999 P&H 80 : (1998) 4 RCR(Civil) 525

Hon'ble Judges : V.K. Bali, J;B. Rai, J

Bench : Division Bench

Advocate : S.C. Mohunta and Yogesh Putney, for the Appellant; Hans Raj Bansal, for the Respondent

Final Decision : Dismissed

Judgement

V.K. Bali, J.—Om Kant Aggarwal along with another through present petition filed by him under Articles 226/227 of the Constitution of India seeks issuance of a writ in the nature of certiorari so as to quash order dated 21-7-1995 passed by Senior Sub-Judge, Karnal, as also to quash the consequential order dated 22-1-1997 passed by Debt Recovery Tribunal, wherein the suit filed by first respondent namely Punjab National Bank had been decreed without affording any opportunity to the petitioners to lead evidence. Prayer of the petitioners is also to quash the order dated 3-11-1997 passed by respondent No. 8 wherein the application bearing No. 72 of 1997 for setting aside ex parte decree u/s 22(G) of the Recovery of Debt Due to Banks and Financial Institutions Act, 1973 has been dismissed as also to quash order dated 19-2-1998 to the extent the condition to deposit an amount of Rs. 5 lacs has been imposed upon the petitioners by the Appellate Authority i.e. 9th respondent.

2. The brief facts of the case leading to passing of various orders referred to above that are sought to be quashed reveal that the petitioner started business by taking franchise from M/s. Elgi Tyre and Treads Ltd. for which they were in

need of funds. The funds were raised by way of term loan for the project i.e. Rs. 1,28,000.00 for the vehicle and Rs. 4 lacs for working capital. The case of the petitioners is that due to some unavoidable circumstances and the policies of the Government, it was not possible to earn profits. A memorandum of undertaking came to be prepared with the consent of the first respondent and after executing the Memorandum of Undertaking, shares were purchased by the 6th and 7th respondents which were subsequently transferred in their names and copy of the Memorandum of Undertaking was brought to the notice of the respondent-bank that the possession has been taken over by the 6th and 7th respondents. The respondent No. 1 gave an assurance to the petitioners that their security pledged or hypothecated with the bank will be released shortly. Despite execution of Memorandum of Undertaking first respondent instead of recovering the amount due from 6th and 7th respondents filed suit for recovery to the tune of Rs. 15,27,065.00 in the Court of Civil Judge, Karnal on 21-1-1993 against the petitioners. It is further the case of the petitioners that the suit aforesaid came up for consideration before the Civil Judge, Karnal on 21-1-1993 and while issuing notice to the petitioners, the Civil Judge was pleased to restrain the defendants in the suit from alienating the mortgaged property and other machinery of the industry in any manner till further orders. Respondents Nos. 6 and 7 were appointed as Directors of the Company in view of the Memorandum of Undertaking, sold the Generator set in July, 1994 by violating the orders passed by the Civil Court and this fact was brought to the notice of the learned Civil Judge by the petitioners by filing an application u/s 151 of the Code of Civil Procedure. The petitioners were represented by Shri V.K. Kapoor, Advocate before the Civil Court, Karnal and the case of the petitioners is that the said lawyer was already on the panel of Punjab National Bank and represented the petitioners against the said bank whereas he was not supposed to represent/defend the petitioners against the Punjab National Bank. The Recovery of Debts Due to Banks and Financial Institutions Act, 1993 came into force and as per provisions of the said Act the cases involving the amount of more than Rs. 10 lacs automatically stood transferred to the Tribunal. The vires of the said Act were challenged by certain associations in various High Courts and all the petitions were transferred to the Hon''ble Supreme Court. A stay was granted by the Hon''ble Supreme Court but the same was vacated vide order dated 18-3-1996. Meanwhile Shri V.K. Kapoor, Advocate filed written statement in the Civil Court at Karnal. However, inasmuch as the suit was for the recovery beyond Rs. 10 lacs after coming into force the Act of 1993, the same was transferred to the Tribunal at Jaipur. It is further the case of the petitioners that their counsel who was defending them before the Civil Court at Karnal did not inform them regarding transfer of the civil suit to Jaipur Bench of the Tribunal. On 21-7-1995, the Civil Court due to non-appearance of the counsel for the petitioners proceeded against ex parte and fixed the case for evidence of the bank and for consideration of the contempt petition. Counsel for the petitioners did not appear and colluded with the respondent-bank being their standing counsel. Meanwhile the constitutionality of the Act was upheld by the Hon''ble Supreme Court and all

the matters pertaining to recovery of suit beyond Rs.10 lacs were transferred to the concerned Bench of the Tribunal and the present suit was transferred to the Jaipur Bench in November, 1996 despite the fact that the stay was vacated on 18-3-1996. It is further the case of the petitioners that the Tribunal never gave notice of the transfer of the suit to them nor their counsel informed them. Instead of issuing notice as provided under Rule 13 as also Section 19(4) it proceeded ex parte against the petitioners. On 17-12-1996, the Tribunal received the suit and decreed the same against the petitioners on 22-1-1997. The petitioners filed an application bearing No. 72 of 1997 for setting aside ex parte decree. The application came up for hearing before the Tribunal but the same was dismissed on 3-11-1997. The petitioners then challenged the order passed by the 8th respondent by filing C.W.P. No. 1863 of 1997 which was later on withdrawn in order to avail remedy under the Act. On 19-2-1998 the petitioners filed statutory appeal as provided under the Act before the Appellate Tribunal, Mumbai and the 9th respondent entertaining the appeal imposed condition to deposit Rs. 5 lacs. Against this order of the Appellate Tribunal, the petitioners filed Civil Revision under Article 227 of the Constitution of India. It is further the case of the petitioners that after hearing their counsel, the Hon'ble single Judge was pleased to grant permission to file a writ petition under Article 226 of the Constitution of India. It is in these circumstances that the present petition has been filed for the reliefs as indicated in the earlier part of the judgment.

3. Mr. Mohanta, Senior Advocate appearing on behalf of the petitioners vehemently contends that the Civil Court had actually no jurisdiction to pass decree inasmuch as the decree came to be passed when the Act of 1993 had already come into existence. He further contends that the order passed by the Tribunal is without jurisdiction inasmuch as it was enjoined upon the said Tribunal to issue notice u/s 31 of the Act of 1993.

4. The Court would have probed the issues raised by Mr. Mohanta if an alternative remedy was not available to the petitioners. It would be recalled that the petitioners did avail of an alternative remedy but did not pursue the same after the Appellate Tribunal had passed an interim order directing the petitioners to deposit a sum of Rs. 5 lacs as pre-condition for hearing appeal on merits. It is thus a case where not only an alternative remedy was available to the petitioners, but the same was also availed of. The appeal preferred by the petitioner was not heard by the Appellate Tribunal as concededly an amount of Rs. 5 lacs as ordered by the Appellate Tribunal vide interim order was not deposited. In the facts fully detailed above, the petitioners cannot be permitted to challenge the orders passed by the Civil Court or by the Tribunal at Jaipur, having availed of an alternative remedy of filing an appeal which as referred to above, was not taken to its logical ends. Faced with this situation Mr. Mohanta, the learned counsel appearing for the petitioners then urged that the orders passed by the Appellate Tribunal directing the petitioners to deposit Rs. 5 lacs as condition precedent was illegal and without jurisdiction. He is, however, unable to support his contention either from the provisions of the statute i.e. the Act of

1993 or from any judicial precedent. On the contrary the order of the Appellate Tribunal can well be supported from the provisions of the statute i.e. the Act of 1993 which requires deposit of 75% of the amount of debt as a condition precedent for filing an appeal provided the Appellate Tribunal reduces the amount to be deposited. Section 21 of the Act reads as follows :--

"Deposit of amount of debt due, on filing appeal:-- Where an appeal is preferred by any person from whom the amount of debt is due to a bank or a financial institution or a consortium of banks or financial institutions, such 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.

Provided that the Appellate Tribunal may, for reasons to be recorded in writing, waive or reduce the amount to be deposited under this section.

5. Mr. Mohanta, however, contends that the provisions of Section 21 are ultra vires as it enjoins upon the appellant to deposit 75 per cent of debt as a condition precedent. The pre-condition of deposit of 75 per cent is onerous and thus violative of Article 14 of the Constitution of India. We find no merit in this contention. Appeal is creature of statute. If no grouse can be made for not providing an appeal obviously no grouse can equally be made if conditions are imposed for filing the same. In *Anant Mills Co. Ltd. v. The State of Gujarat* 1975 Tax LR 1540 the Apex Court observed as under at page 1249 of AIR :--

"The right of appeal is the creature of a statute. Without a statutory provision creating such a right the person aggrieved is not entitled to file an appeal. We fail to understand as to why the legislature while granting the right of appeal cannot impose conditions for the exercise of such right. In the absence of any special reasons there appears to be no legal or constitutional impediment to the imposition of such conditions. It is permissible, for example, to prescribe a condition in criminal cases that unless a convicted person is released on bail, he must surrender to custody before his appeal against the sentence of imprisonment would be entertained. Likewise, it is permissible to enact a law that no appeal shall lie against an order relating to an assessment of tax unless the tax had been paid."

6. The Apex Court in *Navinchandra Chotelal Vs. Central Board of Excise and Customs and Others*, while dealing with Sub-section (1) of Section 129 of the Customs Act, 1962 held that "the said Section makes it obligatory on appellant to deposit duty or penalty pending the appeal or to comply with the order passed under the Proviso. On failure of the appellant to comply with either requirement the Appellate Authority is competent to dismiss appeal though dismissal is not expressly provided for in Section 129."

7. The last contention of Mr. Mohanta is that even though the appeal was competent and the same was filed, this Court is not debarred from entertaining a petition under Article 226 of the Constitution of India. Once the orders

complained of are without jurisdiction, despite the fact that an alternative remedy is available, the petitioners can yet file a writ petition under Article 226 of the Constitution of India. He further contends that when the orders of the Appellate Tribunal directing the petitioners to deposit a sum of Rs. 5 lacs was earlier challenged in this Court by way of revision petition under Article 227 of the Constitution of India, the learned single Judge of this Court held that scope of Article 227 is limited and, therefore, petition under Article 226 should have been filed. The operative part of the order dated 3-4-1998 passed by single Judge of this Court reads as under :--

"I am of the opinion that the petitioners cannot invoke Article 227 of the Constitution of India. The revision petition is, therefore, dismissed with liberty to the petitioners to file a writ petition, if so advised under Article 226 of the Constitution of India."

8. There is no need to go into the first question raised by Mr. Mohanta, in the facts of this case, as it is not a case where the petitioners might not have availed of an alternative remedy provided to them under the statute i.e. the Act of 1993. They did file an appeal. As mentioned above, by way of interim order they were directed to deposit an amount of Rs. 5 lacs. In such a situation where the petitioners did file an appeal under the provisions of the Act of 1993 they ought to have taken the remedy to its logical end. At this stage, perhaps the interim order passed by the Appellate Tribunal directing the petitioners to deposit a sum of Rs. 5 lacs can alone be challenged. While challenging the said order no arguments have been raised to show that the same is either illegal or improper. In so far as the order passed by the single Bench of this Court dated 3-4-98 is concerned, the petitioner was only advised to file a writ petition under Article 226 of the Constitution of India. The revision preferred by the petitioners was dismissed with liberty to them to file a writ petition, if so advised under Article 226 of the Constitution of India. The operative part of the order passed by single Bench reproduced above, cannot be interpreted to say that in the facts and circumstances of the case, the writ petition under Article 226 of the Constitution of India was competent. In the earlier part of the order the Hon''ble single Judge had observed that the writ petitions are being listed in this High Court before a Division Bench consisting of two Hon''ble Judges and the present was not a case of exercising superintendence over the Tribunal, when the petitioners are seeking a writ of certiorari. The order dated 3-4-1998 at the best can be interpreted to say that Revision Petition under Article 227 of the Constitution of India was not a proper remedy availed of by the petitioners.

9. That apart we have gone through the order passed by the Tribunal dismissing the application of the petitioners for setting aside ex parte order. It may be mentioned here that the orders passed by the Civil Judge, Karnal cannot be complained of at this stage as the same have no effect in view of the orders passed at Jaipur. It is the order passed by the Tribunal at Jaipur which is at present effective and operative. While dealing with the application of the

petitioners for setting aside ex parte judgment it was observed by the learned Tribunal that Shri Kapoor was a panel lawyer for the plaintiff-bank much prior to the institution of the case at Karnal. The plaintiff-bank had specifically pleaded that after receipt of the application to set aside the ex parte judgment, the Branch Manager contacted Shri V.K. Kapoor, who disclosed that he had informed to the petitioners with regard to non-appearance on their behalf and this fact has not been rebutted by the petitioners. It has been further observed that issues in the suit were framed on 29-7-1994 and the case was fixed for evidence of the plaintiff-bank but during this period and from 21-7-95 till filing of the application the petitioners did not make enquiry about the progress of the case.

10. Finding no merit in this petition, we dismiss the same in limine.