
(1983) 08 DEL CK 0006

In the Delhi High Court

Case No : First Appeal No. 243 of 1982

Quality Poly Vinyls (P) Ltd.

APPELLANT

Vs

Delhi Financial Corporation

RESPONDENT

Date of Decision : 02-08-1983

Acts Referred:

Citation : (1983) 24 DLT 207

Hon'ble Judges : M.L. Jain, J

Bench : Single Bench

Advocate : P.C. Khanna, Anu Goswamy and Asghar Ali Khan, for the Appellant;

Judgement

M.L. Jain, J.

(1) This order will dispose of F.A.O. 243 of 1982, F.A O.244 of 1982 and G.M. 235 of 1982.

(2) The Delhi Financial Corporation filed an application on 26-10-1978 under Section 31 read with Section 32 of the State Financial Corporation Act, 1951 (the Act) against M/s Quality Poly Vinyls (P) Ltd. for recovery of a sum of Rs. 4,56,811.59. The learned Additional District Judge issued an ad interim injunction restraining the firm from transferring the assets and an ad interim order of attachment of security. A show cause notice was issued under Sub-section (4) of Section 32 of the Act as to why the interim order of attachment should not be made absolute and injunction confirmed. The company showed cause and filed a written statement on 6-2-1980. Replication was filed in March, 1980 on behalf of the Corporation. Issues were framed. The evidence of the Corporation was closed on 8-9-1980. Case was adjourned for the evidence of the company. On 27-10-1980 the company moved two applications, one under Order 1 Rule 10 and the other under Order 6 Rule 17, Code of Civil Procedure, 1908. Replies were filed on 28-11-80. The case was fixed for arguments on the aforesaid two applications and after some adjournments it ultimately stood adjourned to 17-3-1981 for the same purpose. On that date nobody appeared for

the company. The learned Additional District Judge rejected the two applications, proceeded ex-parte, heard arguments and delivered judgment on the same date. The learned Additional District Judge decreed the aforesaid amount in favor of the Corporation and directed that the Corporation shall be entitled to realise the decretal amount by sale of the mortgaged property.

(3) The company filed an application on 18-3-1981 under Order 9 Rule 13, C.P.G. for setting aside the ex-parte order. That application was dismissed in default on 14-7-1981. Application for restoration thereof was filed on 20-7-1981. It was accepted on 7-7-1982. The application was restored and rejected by the learned Additional District Judge by his order of 4-8-1982. The company filed an appeal Fao 244 of 1982 on 30-8-1982. Simultaneously, the company also filed an appeal against the decretal order of 17-3-1981 on 30-8-1982. Along with this appeal an application u/s 5 of the Limitation Act, 1963 was also filed. The company also filed on 31-8-1982 a G.M(M) 235 of 1982 under Article 227 of the Constitution against the order of the Additional District Judge dated 4-8-1982.

(4) The cause shown for nonappearance on 17-3-1981 was that the counsel for the company got busy in the High Court and while coming to attend the court his car went out of order on way and he got delayed. The Director of the company could not attend the court due to the sudden death of a close relative of his. Counsel for the respondent appeared at 12-30 p.m. By then the order of 17-3-1981 had been passed. Counsel made the application on 18-3-1981 for setting aside the ex-parte order. The learned Judge did not go into the merits of the application. The ground for rejecting the laid application under Order 9 Rule 13 CPC was that it was not maintainable because the special law, namely, the Act provides for an appeal against the order made under Sub-section (7) of Section 32 of the Act. For this view, he relied upon M/s Rajdhani Enterprises v. Haryana Financial Corporation and others, 1970 Plr 491. In this case, it was held that Order 9 Rule 13 applies to a decree and an order under Sub-section (7) of Section 32 of the Act was not a decree. The only remedy available to the aggrieved party was to file an appeal u/s 32(9) of the Act against the ex-parte order within 30 days of the order. The learned counsel for the Corporation submitted before me that the view adopted by the Punjab & Haryana High Court was supported by the Gujarat State Financial Corporation Vs. Natson Manufacturing Co. Pvt. Ltd. and Others, and M/s Parkash Playing Cards Manufacturing Co. v. Delhi Financial Corporation AIR 1988 Delhi 48. These decisions have held that an application u/s 31 of the Act was not a suit. The learned counsel urged that since it is not a suit, the adjudication under the Act cannot be called a decree. A decree as defined in Section 2(2), C.P.G. can be made only with regard to matters in controversy in a suit. It was further contended that the scope of investigation under the Act is very narrow and limited. It does not contemplate the investigation of each and every plea that might be raised before the District Judge by either party: Bhawani Parshad Kapur v. Himachal Pradesh Financial Corporation AIR 1983 H.P. 43. On the other hand in Industrial Finance Corporation of India and Another Vs. Thakur Paper Mills Ltd. and Another, , while dealing with

an analogous provision of the Industrial Financial Corporation Act, 1948, it was held that such proceedings are of the kind contemplated by Section 141, CPC. This view was followed in *Durlabh Kumar Vs. The District Judge, Indore and Another*, . Section 32(6) of the Act requires that the District Judge shall proceed to investigate the claim of the Corporation in accordance with the provisions contained in CPC 1908, in so far as such provision may be applied thereto. Now, I see no difficulty why the provisions of Order 9 and Rule 13 thereof in particular cannot be applied to an order made ex-parte u/s 32 of the Act, as if it were a decree ex-parte. In *Asnew Drums Private Ltd. and Others Vs. Maharashtra State Finance Corporation and Others*, , the District Judge directed sale of the property and passed an order for issue of sale proclamation under Order 21 Rule 66, G.P.G. According to Section 32(8) of the Act, an order of attachment and sale shall be carried into effect as far as practicable in the manner provided in CPC for the attachment and sale as of the Corporation was a decree holder. The sale took place but the borrower company challenged the sale. The District Judge dismissed the Company's application. The company appealed under Order 43 Rule 1(5). The High Court dismissed the appeal on the ground that no appeal lay. The Supreme Court held that the District Judge was not a *persona designata*, and it is difficult to understand why the scope of the language should be cut down by not including appeals provided under CPC within the ambit of the words "in the manner provided in the Code of Civil Procedure". Thus, it was clear that the order of attachment or sale is like a decree and the CPC applies to it. The order of 17-3-1981 was an order for sale if moneys were not paid. Indeed, it was correctly described as a decree and the application was correctly registered as a suit. It has all the elements of a decree. Therefore, Order 9 Rule 13 is attracted and the order of 4-8-1982 deserves to be set aside. As to merits it proved that counsel could not reach in time and the application was moved next day. There is sufficient cause for default and the application deserves to be accepted.

(5) With great respect, for the reasons aforesaid I am not inclined to accept fully the view taken in *Rajdhani Enterprises (supra)*. In case of an ex-parte decree, two remedies are available to the defendant. He can file an appeal, or can file an application under Order 9 Rule 13. Same is the case in respect of an order made under Sub-section (7) of Section 32 of the Act. The party could do one or both. He has done both but his appeal was time barred. The learned counsel for the appellant submitted that (1) the period pent in Order 9 Rule 13 proceedings be excluded and in that case the appeal will be in time and (2) the appellant has moved an application C.M. No.2982 of 1982 u/s 5 of the Limitation Act to condone the delay.

(6) The learned counsel for the respondent opposed these requests on the ground that they are not bona-fide. He pointed out that the company had obtained a copy of the decree but the appeal was filed on 30-8-1982. Even otherwise the appellant has been delaying the proceedings. In the circumstances of the case, it seems to me that there was no need to file the appeal against the order of 17-3-1981. It was done by way of caution and the time consumed in

Order 9 Rule 13 proceedings deserve to be excluded. If the time is not excluded, it is otherwise a fit case for condensation of delay as well.

(7) The learned counsel for the appellants submitted that the impugned order of 17-3-1981 has been passed without hearing the debtor. On 17-3-1981, the case was fixed for arguments on the two applications. The court at the most could have dismissed those applications and adjourned the case for the evidence and arguments of the appellant. The learned Judge has passed the order without giving proper and effective hearing to the appellant and has thus committed breach of the principles of natural justice. If it is held that the appeal is not maintainable, it Wjs a fit case in which supervisory jurisdiction should be exercised. I agree.

(8) Consequently, I set aside the impugned order of 17-3-1981 and 4-8-1982, accept the application under Order 9 Rule 13 and direct the learned Additional District Judge to hear the said two applications and dispose of them and then proceed to deal with the main claim. There shall be no order as to costs, The two appeals and the miscellaneous petition shall stand disposed of accordingly .