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Court : Chennai

Decided On : Feb-22-2016

Judge : Satish K. Agnihotri & M. Venugopal

Appeal No. : W.P.No. 32566 of 2015

Appellant : Vasudevan and Others

Respondent : Indian Overseas Bank, Rep. By its Senior Manager and Others

Judgement :

(Prayer: Writ Petition filed under Article 226 of the Constitution of India, praying for issuance of Certiorarified Mandamus calling for the records of the 3rd Respondent culminating in unfair order in their second and latter part of their proceedings dated 13.02.2014 leading to lodging the Appeal No. AIR 785/2011 for non-payment of court fees on or before 5.5.2014 and quash the second and latter part of the proceedings leading to lodging the appeal No.AIR 785/2011 and consequently direct the 3rd Respondent to consider the petitioners application to pursue the counter claim in the appeal No.AIR 785/2011 in the SR No.6908/2010 in OA.No.98/07 as 'Indigent Persons' without payment of the court fees.) M. Venugopal, J.

1. The Petitioners have preferred the instant Writ Petition praying for passing of an order by this Court in calling for the records of the 3rd Respondent's/DRAT proceedings dated 13.02.2014 relating to Appeal in AIR No.785 of 2011 for non-payment of Court Fees on or before 05.05.2014 and to quash the second and latter part of the said proceedings. Further, they have sought for passing of a consequential order by this Court in directing the 3rd Respondent/Debts Recovery Appellate Tribunal, Chennai to consider their application to pursue the Counter Claim in the Appeal AIR No.785 of 2011 in Sr.No.6908/2010 in O.A.No.98/2007 as 'Indigent Persons' without payment of the Court Fees.

2. The 3rd Respondent/Debts Recovery Appellate Tribunal, Chennai, on 13.02.2014, in AIR No.785 of 2011, had, inter alia, observed the following:

... Ld. Counsel appearing on behalf of the respondent bank stated that this cannot be entertained without the payment of balance court fee.

It is seen that balance court fee of Rs.29,750/- has to be paid by the appellants. Therefore time is given to the appellants for paying the balance court fee of Rs.29,750/- upto 5.5.2014. In the event the balance court fee is not paid on or before 5.5.2014 this AIR shall stand automatically lodged. ?

3. According to the Learned Counsel for the Petitioners, the order dated 01.08.2011 in Counter Claim Sr.No.6908 of 2010 (filed by the Petitioners/Claimants) in O.A.No.98/2007 (Old O.A.No.467/1997 on the file of the DRT-I, Chennai) is an illegal and unreasonable one because of the reason the same is against the weight of evidence and the facts of the case.

4. The Learned Counsel for the Petitioners urges before this Court that the Hon'ble Debt Recovery Tribunal II, Chennai had failed to consider that the Petitioners are 'Indigent Persons' and have no means to pay the Court Fees specified under Section 20 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 read with Rule .

5. The Learned Counsel for the Petitioners brings it to the notice of this Court that the 3rd Respondent/DRAT, Chennai in the first part of the impugned proceedings

dated 13.02.2014 allowed the I.A.No.173 of 2013 [restoration], which was earlier lodged.

6. The prime submission of the Learned Counsel for the Petitioners is that the 'Appeal Papers' were misplaced on the table of the Advocate on record M.V.L.Narasimhan, who expired and later they were traced out. In fact, the Petitioners are living in penury and due to financial problems, they were unable to get the assistance of a Lawyer to file the Writ Petition challenging the order of the DRAT lodging their Appeal.

7. At this stage, it is represented on behalf of the Petitioners that an interim relief was sought for in the 'Appeal' before the 3rd Respondent/DRAT, Chennai to permit them to pursue their Counter Claim as 'Indigent Persons' and the same was also not taken note of by the Tribunal. As such, the Petitioners were performed to file a separate I.A. on 18.03.2014 praying to treat them as 'Indigent Persons' which was not numbered and returned for maintainability and the same was resubmitted to the Registry furnishing relevant citations. However, the same was not listed on 05.05.2014 and further, the Petitioners were informed that the Appeal was lodged consequent to the proceedings dated 13.02.2014.

8. The Learned Counsel for the Petitioners cites the decision of the Hon'ble Supreme Court in A.A.Haja Muniuddin V. Indian Railways, reported in (1992) 4 Supreme Court Cases 736, at page 737, whereby and where under, it is observed and held as follows:

When an indigent person approaches the Tribunal for compensation for the wrong done to him, the Tribunal cannot refuse to exercise jurisdiction merely because he does not have the means to pay the fee. In such a situation we think the ends of justice require that the Tribunal should follow the procedure laid down in Order XXXIII of the Code to do justice for which it came to be established. Although the Act and the Rules do not specifically provide for the application of Order XXXIII of the Code, there is nothing in the Act or the Rules which precludes the Tribunal from following that procedure if the ends of justice so require. Section 18(1) only says that the Claims Tribunal 'shall not be bound' by the procedure laid down by the Code but does not go so far as to say that it 'shall be precluded' from invoking

the provisions laid down by the Code even if the same is not inconsistent with the Act and the Rules. Since the Claims Tribunal is empowered to regulate its own procedure, there is nothing in the Act and the Rules which precludes the invocation of Order XXXIII of the Code. A view which advances the cause of justice must be preferred to the one which defeats it. Access to justice cannot be denied to an individual merely because he does not have the means to pay the prescribed fee. Such a view would leave indigent persons without a remedy. It is, therefore, essential that the provisions of the Act and the Rules must be broadly interpreted to ensure access to justice. 9. He also relies on the decision of the Hon'ble Supreme Court in R.V.Dev Alias R.Vasudevan Nair V. Chief Secretary, Govt. of Kerala and others, (2007) 5 Supreme Court Cases 698, at special page 699, wherein it is observed as under:

A person who is permitted to sue as an indigent person is liable to pay the court fee which would have been paid by him if he was not permitted to sue in that capacity, if he fails in the suit of the trial or even without trial. Payment of court fee as the scheme suggests is merely deferred. It is not altogether wiped off. Order 33 Rule 10 of the Code of Civil Procedure provides for the consequences in regard to the calculation of the amount of court fees as a first charge on the subject matter of the suit.

For calculation of court fee, there does not exist any distinction between a situation attracting Order 33 Rule 10 on the one hand and Order 33 Rule 11 on the other. The court fee is to be calculated on the amount claimed and not on the amount decreed. For the said purpose, what is relevant is the final decision taken by the court in this behalf. Order 33 Rule 11 directing the pauper plaintiff to pay the court fee can be made in the four different situations.

(i) When the plaintiff failed in the suit.

(ii) Where the plaintiff is dispaupered.

(iii) Where the suit is withdrawn.

(iv) Where the suit is dismissed under the circumstances specified in clause (a) or clause (b) of Order 33 Rule 11.

The contention that clauses (a) and (b) of Order 33 Rule 11 would attract all the four situations contemplated by Order 33 Rule 11 is misconceived. Clauses (a) and (b) would be attracted only when the suit is inter alia dismissed by reason of the contingencies contained in clauses (a) and (b). Order 33 Rule 11 clauses (a) and (b) refer to the fourth condition only. Each situation as referred to herein before is distinct and different. The word "or" is disjunctive and thus must be given effect to independent of the other cases. When, therefore, the plaintiff fails in the suit or the plaintiff is dispaupered, the same has nothing to do with dismissal of the suit under the circumstances specified in clauses (a) and (b).

In a case where Order 33 Rule 11 is attracted, the Court cannot direct the defendant to pay the court fee and it must be paid by the plaintiff or the co-plaintiff.
?

10. He also seeks in aid of the Judgment in Tapan Kumar Das V. State Bank of India and others, (1 (2007) BC 178), whereby and where under, at paragraphs 10 to 15, it is observed as follows:

10. The principles of law enunciated by the Supreme Court in A.A. Haja Muniuddin referred to above settles the proposition yet again that in dispensation of justice by the Court of Law, to secure the "ends of justice" in litigation are the last golden words for guidance. Courts, and for that matter Tribunals, exist to give access to justice to the poor, common people. It is a Constitutional mandate.

11. This is already stated how painstakingly the petitioner/appellant has detailed his predicament in trying for his small industrial unit to stand and grow but failed. In this limited question of allowing exemption of hefty appeal fees we need not probe whether it was his own fault or the Bank's. That question can be taken and decided when the appeal is underway. But, for now, it is enough if the appellant/petitioner has been able to show, a strong prima facie case to lead the Court or Tribunal to believe that he may indeed be too poor to pay the appeal fees of Rs. 20,000/- to even have his access to justice to place his points for a decision

on merits.

12. The petitioner-appellant has stated in solemn affirmation the state of his movable and immovable property and the acute financial crisis he had landed in. Most importantly, all these assertions by the petitioner are not at all assailed in any material particulars by the respondent-Bank. So, for the limited purpose of our satisfaction whether, the petitioner is an "indigent person", these uncontroverted assertions by the, petitioner by solemn affirmation are sufficient to give him the allowance he has prayed for that he be exempted from paying the requisite fees for the appeal under the special circumstances.

13. I believe, there is no point saying that petitioner did not try such similar application before in the D.R.T. or the Hon'ble Court as an "indigent person". The point is, whether now he is too poor or incapable to pay the appeal fee of Rs. 20,000/- to have his hearing made. It is also settled that in a given case, it is quite within the competence of the Tribunals to apply the provision of the CPC if the ends of justice so require. To my mind, in this view of the matter, the balance is certainly tilted in favour of the petitioner to allow him the door to justice and not to slam it shut.

14. I think, under the special facts and circumstance spelt out the prayer of the petitioner should be allowed for the ends of justice.

15. Accordingly, the application for exemption of appeal fees is allowed the appeal be registered without the fees. ?

11. At this stage, this Court very relevantly points out that the Petitioners had filed Counter Claim in Sr.No.6908/2010 in O.A.No.98 of 2007 on 18.10.2010. As a matter of fact, the Counter Claim in Sr.No.6908/2010 was dismissed by the Debts Recovery Tribunal - II, Chennai on 01.08.2011 holding that the same was not maintainable and that the Defendants 2, 4 and 8 (Petitioners herein) have no locus standi to file the same in their official capacity as Managing Director and Directors of the 1st Defendant Company which is in liquidation and further, it was observed that there was no necessity to go into the issue relating to the declaration of the Claimants (Petitioners) as 'Indigent Persons' to exempt them from paying the

required Court Fee.

12. It is to be borne in mind that the Writ Petitioners as Appellants had projected Appeal in AIR No.785 of 2011 before the Debts Recovery Appellate Tribunal, Chennai, being dissatisfied with the order of the Debts Recovery Tribunal II, Chennai dated 01.08.2011 in Counter Claim Sr.No.6908/2010 in O.A.No.98 of 2007. The said Appeal was dismissed for default owing to the non-appearance of the Appellants on 22.01.2013. To restore the Appeal AIR No.785 of 2011 to file, the Petitioners/Appellants filed I.A.No.173 of 2013 before the Debts Recovery Appellate Tribunal, Chennai and the same was ordered to be restored on file, on 13.02.2014.

13. In the instant case, the Petitioners/Defendants 2, 4 and 8 had preferred the Appeal in AIR No.785 of 2011, which was restored to file. The Writ Petitioners status in the 1st Defendant/Kanchi Prints (P) Limited, Madras were that of Managing Director and Directors after the winding up of the 1st Defendant Company, by means of an order passed by this Court, an Official Liquidator, Madras was impleaded to represent the 1st Defendant Company. As per Section 457(1)(a) of the Companies Act, 1956, an Official Liquidator is enjoined to institute or defend any suit, prosecution or other legal proceeding, Civil or Criminal in the name and on behalf of the Company. It cannot be lost sight of that in the present case, the Official Liquidator (representing the 1st Defendant Company) had not preferred the Appeal in AIR No.785 of 2011. Per contra, the Writ Petitioners have preferred the said Appeal.

14. Indeed, one cannot ignore a very vital fact that as per Section 19(8) of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, the claim as regards the cause of action accruing to the Defendant against the Petitioner/Applicant shall be made either before or after the filing of the application but before defendant delivered his defence. In fact, Section 19(8) of the RDDB and FI Act, relating to 'Counter Claim' is akin to Order 8 Rule 6A of the Civil Procedure Code.

15. Dealing with the aspect of term 'Pauper', it is to be pointed out that the Petitioner/Plaintiff's capacity to raise money is the real test of his means and not

mere possession of some property, as opined by this Court. When the Petitioner's claim that they are indigent persons, ordinarily, the onus is on the other side to prove that they are not indigent persons. In this connection, this Court very pertinently points out that the word 'Person' in Rule 1 of Order 33 of the Civil Procedure Code includes a Company [vide General Clauses Act 10 of 1897, Section 3(39)]. An Official Liquidator of a Company is quite competent to apply for leave to sue in forma pauperis for and on behalf of the Company if the Company is a pauper within the meaning of this Rule. Further, the fact that the Liquidator in his personal capacity is not a Pauper does not affect the question as per decision *Perumal V. Thirumalarayapuram Nidhi Ltd.*, (1917) ILR 41 Mad 624.

16. In reality, the stand of the Petitioners is that they projected a separate I.A. on 18.03.2014 before the Appellate Tribunal praying to treat them as 'Indigent Persons', it was not numbered and returned for maintainability. At this juncture, though a plea is taken on behalf of the Petitioners that the said separate I.A. dated 18.03.2014 filed by the Petitioners was resubmitted to the Registry of the Appellate Tribunal, it is to be categorically pointed out by this Court that after passing of an order by the Debts Recovery Appellate Tribunal, Chennai on 13.02.2014 in I.A.No.173 of 2013, whereby and whereunder, the said IA was allowed and consequently, AIR No.785 of 2011 was restored to file, the said filing of separate I.A. dated 18.03.2014 was of no avail, because of the simple reason that the said application was returned for certain compliance on 26.03.2014 and the same being complied with on 29.03.2014 by the Petitioners and additional affidavit and petition was filed on 01.04.2014. Furthermore, after passing of the order on 13.02.2014 in AIR No.785 of 2011, the Debts Recovery Appellate Tribunal, in Law, had become *Functus Officio* and viewed in that perspective, the purported filing of separate I.A. (complying with certain defects) and filing of additional affidavit and petition on 01.04.2014 were of no avail.

17. Besides the above, it is to be noted that the Petitioners/ Appellants paid a sum of Rs.250/- towards Court Fee by means of Indian Postal Order dated 23.09.2011 at the time of filing of the Appeal in AIR No.785 of 2011 on the file of the Debts Recovery Appellate Tribunal, Chennai dated 23.09.2011. As per Rule 7, Serial No.5(iii) of the Debts Recovery Tribunal (Procedure) Rules, 1993, where the

amount of Debt exceeds Rs.30 lakhs or more, the Court Fee payable is Rs.30,000/-. In the instant case, the Petitioners/ Appellants at the time of filing the Appeal in AIR No.785 of 2011 had paid Rs.250/- through Postal Order. As such, they have to pay a balance of Rs.29,750/-.

18. Be that as it may, in the light of the aforesaid detailed qualitative and quantitative discussions and also this Court, taking note of a primordial fact that the 1st Defendant Company was wound up by the order of this Court and that the Official Liquidator was impleaded to represent the 1st Defendant Company and apart from that, this Court, on going through the Proceedings dated 13.02.2014 of the 3rd Respondent/Debts Recovery Appellate Tribunal, Chennai, in AIR No.785 of 2011 [filed against Counter Claim Sr.No.6908/2010 in O.A.No.98/2007 (Old O.A.No.467/1997 on the file of DRT-I, Chennai)], on balance, comes to an irresistible and inescapable conclusion that the time granted to the Writ Petitioners/Appellants for paying the deficit Court Fee of Rs.29,750/- till 05.05.2014 etc., does not suffer from any serious material irregularity or patent legal infirmity or illegality in the eye of Law. Resultantly, the Writ Petition is devoid of merits.

19. In the result, the Writ Petition is dismissed. No costs.

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