(2013) 04 CAL CK 0068

Calcutta High Court

Case No: M.A.T. No. 389 of 2013 and CAN No. 3023 of 2013

Andhra Bank		APPELLANT
	Vs	
Dinesh Kumar Agarwal		RESPONDENT

Date of Decision: April 23, 2013

Citation: (2013) 4 CHN 95

Hon'ble Judges: Mrinal Kanti Chaudhuri, J; Ashim Kumar Banerjee, J

Bench: Division Bench

Advocate: Sovon Siddhanta and Dinendra Nath Chatterjee, for the Appellant;Bhabes Ganguly, Somnath Banerjee for the State, Srijib Chakraborty and Sirsanya Bandopadhyay, for the Respondent

Judgement

Ashim Kumar Banerjee, J.

FACTS:

1. On February 6, 1996 Agarwals formed a company by the name of M/s. Chetani Exim Pvt. Ltd., the couple Dinesh Kumar Agarwal and Sunita Agarwal became its Directors. Chetani applied for financial support from Andhra Bank. The Bank sanctioned credit facility to the extent of Rs. 40 lacs as working capital vide letter dated February 1, 2007. Dinesh and Sunita executed personal guarantee to the extent of Rs. 10 lacs and Rs. 8 lacs respectively. Agarwals did not adhere to the repayment schedule. The Bank declared the account as non-performing. On October 7, 2009, the Bank served a notice u/s 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act (hereinafter referred to as "SARFAESI" Act, inter alia demanding a sum of Rs. 46,97,257.02. The respondent replied to the said notice on November 28, 2009 by contending; the said notice was illegal and as such liable to be quashed. In paragraph 7(II) of the said letter the learned advocate appearing for Agarwals would contend, "before taking such qusi step under the Act of 2002 the bank ought to have allowed and/or called upon my client to pay balance unpaid amount under compromise settlement which

settlement is still in operation and vogue". The Bank replied by letter dated December 9, 2009, the Agarwals never turned up to the branch for any discussion. Chetani replied by letter dated December 24, 2009 asking for time, date and venue for discussing settlement. Nothing happened. The authority waited for about three years and ultimately took physical possession of the flat being the only tangible asset belonging to Agarwals. On November 6, 2012 challenging the action of the Bank for taking possession of the flat in question Agarwals and Chetani filed a writ petition before the learned Single Judge on December 13, 2012. The learned Single Judge allowed the writ petition vide judgment and order dated February 1, 2013 quashing the action taken by the bank u/s 13(4) coupled with liberty to proceed afresh. Being aggrieved, Bank preferred the instant appeal that we heard on April 8, 2013.

ANALYSIS OF THE JUDGMENT AND ORDER OF THE LEARNED SINGLE JUDGE:

Learned Judge did not consider the merits of the case. His Lordship considered the provisions of law and ultimately came to the conclusion, the action on the part of the Bank was illegal. Pertinent to note, the Bank approached the Chief Judicial Magistrate, Barasat, 24-Parganas with an application u/s 14 of the SARFAESI Act and obtained an order on September 16, 2011 to take actual physical possession of the immovable properties/secured assets. According to the learned Judge, section 14 would not empower a Chief Judicial Magistrate to pass such order as the power was vested upon the Chief Metropolitan Magistrate in Metropolis and the District Magistrate in the rest part of the State. Barasat is not a Metropolis nor is Baguihati where the flat is situated. Hence, the Chief Judicial Magistrate did not have any authority u/s 14. The Bank should have approached the District Magistrate, 24-Parganas (North) for appropriate order. His Lordship differed with the view expressed by the Kerala High Court in the case of Solaris Systems (P.) Ltd. vs. Oriental Bank of Commerce reported in 2006 II D.R.T.C. 408 Kerala and relied on the decision of the Bombay High Court in the case of Indusind Bank Ltd. vs. State of Maharashtra reported in AIR 2008 NOC 2474 (Bom). His Lordship also considered the Apex Court decision in the case of Transcore Vs. Union of India (UOI) and Another, and in the case of United Bank of India Vs. Satyawati Tondon and Others, His Lordship lastly relied on the Apex Court decision in the case of Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and Others, . We are told in a case of the like nature His Lordship in W.P. No. 5968 (w) of 2013 Banani Kar. & Anr. vs. Union of India and Ors. quashed an attempt of the secured creditor on the strength of an order passed by the Chief Judicial Magistrate, 24-Parganas (South) vide judgment and order dated March 8, 2013.

CONTENTIONS:

2. Mr. Sovon Siddhanta, learned counsel appearing with Mr. Dinendra Nath Chatterjee, learned counsel advanced the argument on behalf of the Bank. Mr. Siddhanta would bank upon the Kerala High Court decision and contend, once the

Chief Metropolitan Magistrate was permitted to exercise power u/s 14 there would be no reason why the Chief Judicial Magistrate in respect of other cities and/or towns would not be empowered to exercise such judicial power which their counterpart would avail sitting in Metropolis. Mr. Siddhanta drew our attention to the decision of the learned Single Judge in case of Solaris Systems (P.) Ltd. (supra). He would also rely upon a Madras High Court decision in the case of The Dhanlakshmi Bank Limited Vs. Kovai Foods and Beverages and Others, The learned Single Judge of the Madras High Court considered Section 14 and observed as follows:

On perusal of the impugned order it appears that the learned Chief Judicial Magistrate is under misconception. Since the term "Chief Judicial Magistrate" is missing in the Act, instead "District Magistrate" is mentioned, erroneously returned the application. Power has been conferred on the District Head in metropolitan areas as well as in the non-metropolitan areas to initiate proceedings in this regard. Section 17(1) of the CrPC reads as follows:

The High Court shall, in relation to every metropolitan area within its local jurisdiction, appoint a Metropolitan Magistrate to be the Chief Metropolitan magistrate for such metropolitan area.

Section 12(1) of the CrPC reads as follows:

In every district (not being a metropolitan area), the High Court shall appoint a Judicial Magistrate of the First Class to be the Chief Judicial Magistrate.

Section 3(1)(d) of the CrPC reads as follows:

any reference to the Chief Judicial Magistrate shall, in relation to a metropolitan area, be construed as a reference to the Chief Metropolitan Magistrate exercising jurisdiction in that area.

The power conferred with the Chief Metropolitan Magistrate is equal to the Chief Judicial Magistrate in the District level. The learned District Magistrate will be seen only as Chief Judicial Magistrate. The return of the application of the petitioner is erroneous.

3. His Lordship relied on section 17(1) of the Criminal Procedure Code that would provide, the High Court in relation to every Metropolis would appoint a Metropolitan Magistrate to be the Chief Metropolitan Magistrate and u/s 12(1) a Judicial Magistrate to be the Chief Judicial Magistrate. u/s 3(1)(d), any reference to the Chief Judicial Magistrate shall, in relation to a metropolitan area would be construed as a reference to Chief Metropolitan Magistrate. On a combined reading of the said provisions, His Lordship observed, the District Magistrate as mentioned in section 14 would be seen only as Chief Judicial Magistrate.

4. Per contra, Mr. Srijib Chakraborty, learned counsel would contend, section 14 was clear on the issue except in a Metropolis the power was conferred on a District Magistrate and not any other person. Hence, the Bank was not entitled to enforce the order of the Chief Judicial Magistrate.

OUR VIEW:

5. We have considered the rival contentions. We have carefully perused the judgment and order of the learned Single Judge and the precedents cited at the Bar and relied upon by the learned Single Judge. In our considered view, the learned Single Judge was not only correct but also accurate to interpret the provision of law. If we read Section 14, it would clearly mean, the legislature did not intend to bring the Court of law at the stage of Section 13 or 14. Hence, it entrusted the Chief Executive of the District to exercise the power u/s 14. Only exception was made in case of Metropolis that was entrusted to the Chief Metropolitan Magistrate. We do not support the logic of the Madras High Court or the Kerala High Court to the extent, District Magistrate should be seen as Chief Judicial Magistrate. The learned Single Judge of the Madras High Court considered the relevant provisions of the Criminal Procedure Code where the Chief Metropolitan Magistrate was authorized to use the power that was vested on the Chief Judicial Magistrate. It was not other way round. Had it been only Chief Metropolitan Magistrate, we would have supported the logic. Once the District Magistrate was clearly mentioned in section 14, the intent was clear and unambiguous. We cannot interpret otherwise. We fully agree, in a case of Metropolis, the Chief Metropolitan Magistrate having the expertise to examine the provisions of law, would judiciously exercise such power whereas in case of other cities or towns the District Magistrate being an Executive without having the legal expertise would not be so competent like Chief Metropolitan Magistrate. It is for the legislature to amend the law if they intend to do so. So long it is not done, we are unable to support the view of the Madras High Court or the Kerala High Court. We fully support the learned Single Judge on the proposition of law.

6. We should have ended here, however, our conscience would prick looking at the facts. Writ Court is a Court of equity. Court of appeal being an extension of the original jurisdiction cannot be oblivion and cannot shut their eyes that would result in a gross injustice, rather it would be a premium to dishonesty. On examination of the facts we would find, the couple formed a company and obtained credit facilities to the extent of Rs. 40 lacs. Possibly, they did not repay any sum, at least not specifically claimed in their reply to the Bank. Even if it was paid it would be pittance considering the amount of the dues. Working capital loan was granted to the extent of Rs. 40 lacs for trading. The company had no tangible asset at all. The couple had only the flat that could be taken possession of. Plant and machinery was shown as Rs. 4 lacs. We fail to appreciate, how plant and machinery would be relevant for trading of plastic granules. Bank officials must be involved in the fraud. The loan

was sanctioned on January 31, 2007. It was to be repaid by January 30, 2009. The amount of Rs. 40 lacs became Rs. 46 lacs within two years. The reply to the notice u/s 13(2) did not make any specific proposal to repay. The reply to the Bank would show, the borrower never approached the Bank for repayment. In course of hearing, we asked Mr. Chakraborty as to what amount the borrower would pay to show their bona fide. We adjourned the matter on April 5, 2013. Mr. Chakraborty was prompt enough to inform us on the next day, he was not in a position to pay anything. It is true, the Bank dispossessed the couple. It is also true, Bank waited for long three years even after service of notice u/s 13(2). During these three years period not a single penny was repaid.

7. If we consider section 13 and 14 together, we would find, there had been subjective compliance. The Bank issued notice u/s 13(2) demanding payment. The Bank was entitled to take possession u/s 13(4) that they took. Section 14 was an enabling provision for obtaining necessary administrative help that would not take away the substantive power of the Bank u/s 13(4). Section 13(4) would empower the Bank to take possession in case of default in making payment of the outstanding so demanded u/s 13(2). The Bank was not obliged to approach any authority u/s 14 for taking possession. Section 14 would empower the Bank to approach the appropriate authority under the said provision making a request to take possession on their behalf if they so like. It was rather making a request to an authority to take possession on their behalf.

8. From the documents it appears, the Bank officer being the Assistant General Manager, Andhra Bank took possession on behalf of the Bank and not the District Magistrate or the Chief Judicial Magistrate or the police authority, hence, such possession was u/s 13(4) not u/s 14. If we look to the order dated September 16, 2011 passed by the Chief Judicial Magistrate, we would find the Officer-In-Charge, Baguihati, was directed to take possession u/s 14(2) however, the possession notice was signed by the Assistant General Manager and not Officer-In-Charge, hence, the order of the Chief Judicial Magistrate was not acted upon at all. If the police force gave necessary police assistance to the Bank Manager that would be for protection of the officer from any untoward incident or to prevent breach of peace. The possession so taken by the Bank in our view, was u/s 13(4) and not u/s 14. Hence, although we fully agree with the finding of the learned Judge on the proposition of law, we beg to differ with His Lordship on the ultimate decision. His Lordship held, the approach of the Bank u/s 14 was contrary to law. We find, the ultimate approach was not u/s 14 but u/s 13(4), hence, His Lordship''s direction to restore possession cannot be sustained and as such is set aside.

9. Appeal succeeds and is allowed. The writ petition is dismissed. There would be however no order as to costs. Urgent certified copy of this judgment, if applied for, be given to the parties on their usual undertaking.

Mrinal Kanti Chaudhuri, J.

I agree.