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(2009) 04 BOM CK 0142

Bombay High Court (Aurangabad Bench)

Case No: Letters Patent Appeal No. 39 of 2009

Puran Maharashtra Automobiles and Satyam Automobiles	APPELLANT
Vs	
The Sub Divisional Magistrate, The Naib-Tahasildar (Revenue-1) and The Janata Sahakari Bank Ltd.	RESPONDENT

Date of Decision: April 4, 2009

Acts Referred:

- Arbitration Act, 1940 - Section 11(6)
- Constitution of India, 1950 - Article 19(1)
- Explosive Substances Act, 1908 - Section 7
- Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) - Section 13(2), 13(2), 14, 14, 14(1)
- State Financial Corporations Act, 1951 - Section 31(1)

Citation: AIR 2010 Bom 53 : (2009) 3 BomCR 39 : (2009) 4 BOMLR 1412 : (2009) 6 MhLj 977 : (2010) 7 RCR(Civil) 1765

Hon'ble Judges: Nishita Mhatre, J; B.R. Gavai, J

Bench: Division Bench

Advocate: V.D. Sapkal, for the Appellant; S.V. Natu and R.D. Reddy, AGP for Respondent Nos. 1 and 2, for the Respondent

Final Decision: Dismissed

Judgement

B.R. Gavai, J.
By consent the appeal is taken up for final hearing.

2. By way of present appeal, the appellants have challenged the order passed by the learned Single Judge in W.P. No. 81/2009, thereby dismissing the writ petition filed by the present appellants.

3. The appellants have borrowed an amount of Rs. 1,80,00,000/- (rupees One Crore Eighty Lakhs) from the respondent No. 3 Bank. The respondent No. 3 bank had issued notice u/s 13(2) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act. (hereinafter referred to as "the said Act" for the sake of brevity). Since the appellants did not comply with the notice issued by the respondent No. 3 bank, an application came to be filed by the said bank before the District Magistrate, Aurangabad, for taking action u/s 14 of the said Act. The respondent No. 2 passed an order and allowed the application u/s 14 of the said Act. Accordingly, a notice was issued on 1/1/2009 by the Naib Tahsildar, directing the appellants to hand over the possession of the property owned by the appellants. Challenging the said notice, a writ petition bearing No. 81/2009 came to be filed by the appellants. The same came to be dismissed. Hence, the present appeal.

4. Shri Sapkal, learned Counsel appearing on behalf of the appellants submits that the powers u/s 14 are to be exercised by the District Magistrate alone. He submits that in the present case, the powers are not exercised by the District Magistrate, but the same are exercised by the Sub-Divisional Magistrate and as such, on this short ground alone, the writ petition ought to have been entertained by the learned Single Judge.

He further submits that the "District Magistrate" referred to, in Section 14 of the said Act is a Persona Designata and as such, he could not have delegated the powers to the Sub-Divisional Magistrate. He, therefore, submits that the exercise of jurisdiction by an authority not vested in it goes to the root of the matter and on this ground alone, the petition deserved to be entertained. He submits that the learned Single Judge has not taken into consideration this aspect of the matter.

5. He relies on the judgment of the Apex Court in the case of Hari Chand Aggarwal Vs. Batala Engineering Co. Ltd., , in the matter of State of M.P. Vs. Bhupendra Singh, , and the judgment in the matter of State of U.P. and Others Vs. Smt. Janki Devi Pal, .

He also relies on the judgment of the Division Bench of the Kerala High Court in the matter of Aseena Vs. Sub-Divisional Magistrate and Others, .

6. Shri Natu, learned Counsel appearing on behalf of the respondent bank, on the contrary submits, that "District Magistrate" referred to, in Section 14 of the said Act is not Persona Designata. He submits that Sub-section (2) of Section 14 itself empowers the District Magistrate or the Chief Metropolitan Magistrate to take such steps for securing the compliance with the provisions of Sub-section (1) of Section 14. He, therefore, submits that the appeal is not tenable and the same may be dismissed.

7. For appreciating the rival submissions, the nature of the powers and duties of the District Magistrate and Sub Divisional Magistrate, it would be necessary to refer to the provisions of Section 14 of the said Act, which reads thus:

14. Chief Metropolitan Magistrate or District Magistrate to assist secured creditor in taking possession of secured asset :- (1) Where the possession of any secured asset is required to be taken by the secured creditor or if any of the secured asset is required to be sold or transferred by the secured creditor under the provisions of this Act, the secured creditor may, for the purpose of taking possession or control of any such secured asset, request, in writing, to the Chief Metropolitan Magistrate or District Magistrate within whose jurisdiction any such secured asset or other documents relating thereto may be situated or found, to take possession thereof, and the Chief Metropolitan Magistrate or as the case may be, the District Magistrate shall, on such request being made to him:

(a) take possession of such assets and documents relating thereto; and

(b) forward such assets and documents to the secured creditor.

(2) For the purpose of securing compliance with the provisions of Sub-section (1), the Chief Metropolitan Magistrate of the District may take or cause to be taken such steps and use, or cause to be used, such force, as may, in his opinion, be necessary.

(3) No act of the Chief Metropolitan Magistrate or the District Magistrate done in pursuance of this section shall be called in question in any Court or before any authority.

8. From the perusal of Section 14 of the said Act, it would reveal that a secured creditor is entitled to make a request in writing to the Chief Metropolitan Magistrate or the District Magistrate within whose jurisdiction any such secured asset or other documents relating thereto may be situated or found, where possession of any secured assets is required to be taken by the secured creditor or if any of the secured assets is required to be sold or transferred by the secured creditor under the provisions of the said Act. It can further be seen that once such a request is made, the Chief Metropolitan Magistrate or the District Magistrate is required to take possession of such assets and documents relating thereto and forward the said assets and documents to the secured creditor. It can further be seen from Sub-section (2) of the said Section that for the purpose of securing the compliance of Sub-section (1) the Chief Metropolitan Magistrate or District Magistrate can take or cause to be taken such steps and use or cause to be used, such force, as may, in his opinion, be necessary.

It can thus clearly be seen that the powers exercised by the Chief Metropolitan Magistrate or District Magistrate, are purely executionery in nature. The said authority is only required to take action of taking possession of the assets or documents, once an application is made by the secured creditor pointing out that he is entitled to take possession of any secured assets under the provisions of the said Act. and that such assets are situated within the jurisdiction of the said Chief Metropolitan Magistrate or

District Magistrate.

9. From the perusal of Section 13, it would further reveal that if a notice under Sub-section (2) is served on the borrower by the secured creditor when the said borrower makes a default in repayment of secured debt or any installment thereof, and his account is classified by the secured creditor as non-performing asset, then, the borrower is required to discharge in full his liabilities to the secured creditor within sixty days from the date of notice, failing which, the secured creditor is entitled to exercise all or any of the rights under Sub-section (4). From the perusal of Sub-section (4) of Section 13 it can also be seen that in case the borrower fails to discharge the liability in full within the period specified in Sub-section (2) the secured creditor is entitled to take recourse to one or more measures stated in the said section to recover his secured debt. One of such measures is:

(a) take possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for releasing the secured asset.

It can thus clearly be seen that once a notice is issued to the borrower u/s 13(2) and he fails to comply with tho notice within the stipulated period, in view of sub-clause(a) of Sub-section (4) of Section 13, the secured creditor is entitled to take possession of the secured assets of the borrower. It can thus be seen that once the secured creditor is entitled to take possession in view of the provisions of Sub-section (4) of Section 13, the only thing he is required to do, is to make an application in writing to the District Magistrate or the Chief Metropolitan Magistrate. If the two conditions stipulated in Section 14 are satisfied, then the Chief Metropolitan Magistrate or the District Magistrate has no other option but to take steps for taking possession of the secured assets and documents relating thereto and forward such assets and documents to the secured creditor. It can thus clearly be seen that no element of quasi-judicial functions are to be performed by the District Magistrate or the Chief Metropolitan Magistrate while exercising powers u/s 14, but he is only required to perform act of executionery nature in taking possession and delivering it to the secured creditor.

10. In this respect, we may usefully refer to the observations of the Division Bench of this Court in the matter of "Trade Well and Anr. v. Indian Bank and Anr." reported in 2007(1) Bom.C.R. (Cri.)783. In the said case the argument was that the Chief Metropolitan Magistrate or the District Magistrate must find out whether the conditions for exercise of power are satisfied and before passing an order u/s 14, a notice to the borrower and 3rd party is necessary. Negating this contention, the Division Bench in para. Nos. 84 and 85, has observed thus :-

In our opinion, the petitioners can not draw any support from SBP and Co."s case (supra). The scheme, purpose and object of the NPA Act and the Arbitration Act are different. u/s 11(50) of the Arbitration Act, the conditions for the exercise of the power are clearly laid down. Adjudication is apparent from Section 11(6) of the Arbitration Act. In

fact, in SBP and Co."s case (supra) the Supreme Court has clearly stated that while exercising the power u/s 11(6) of the Arbitration Act, the Chief Justice has to consider whether the conditions laid down by the section exist or not. Whereas, in Section 11(6) of the Arbitration Act, the legislature has laid down conditions for exercise of the powers, no such conditions are found in Section 14 of the NPA Act. In SBP and Co."s case (supra) the Supreme Court has clearly stated that Section 11(6) of the Arbitration Act contemplates power to adjudicate. The Supreme Court has clarified that adjudication is involved in the constitution of the Arbitral Tribunal and, therefore, the Chief Justice has to inquire whether the conditions for exercise of his power u/s 11(6) of the Arbitration Act exist and only on being satisfied in that behalf, could he appoint an arbitrator or an Arbitral Tribunal on the basis of the request. So far as the NPA Act is concerned, adjudication is clearly excluded by the Supreme Court in "Mardia Chemicals" case (supra). In our opinion, therefore, the petitioners cannot draw any support from the judgment in SBP and Co."s case (supra).

85. In our opinion, at the time of passing order u/s 14 of the NPA Act, the CMM/DM will have to consider only two aspects. He must find out whether the secured asset falls within his territorial jurisdiction and whether notice u/s 13(2) of NPA Act is given or not. No adjudication of any kind is contemplated at that stage.

11. We can gainfully reproduce the conclusions from Sr. No. 1 to 4 in para. 90 of the said judgment, as under:

1. The bank or financial institution shall, before making an application u/s 14 of the NPA Act, verify and confirm that notice u/s 13(2) of the NPA Act is given and that the secured asset falls within the jurisdiction of CMM/DM before whom application u/s 14 is made. The bank and financial institution shall also consider before approaching CMM/DM for an order u/s 14 of the NPA Act, whether Section 31 of the NPA Act excludes the application of Sections 13 and 14 thereof to the case on hand.

2. CMM/DM acting u/s 14 of the NPA Act is not required to give notice either to the borrower or to the 3rd party.

3. He has to only verify from the bank or financial institution whether notice u/s 13(2) of the NPA Act is given or not and whether the secured assets fall within the jurisdiction. There is no adjudication of any kind at that stage.

4. It is only if the above conditions are not fulfilled, that the CMM/DM can refuse to pass an order u/s 14 of the NPA Act by recording that the above conditions are not fulfilled. If these two conditions are fulfilled, he can not refuse to pass an order u/s 14.

12. In so far as the judgment relied upon by the learned Counsel for the appellants, in the matter of "Harichandra Agrawal v. Batala Engineering" (supra) is concerned, it can be seen that the Apex Court in the said case was considering the powers to be exercised under the Defence of India Act, 1962 for requisition of the property. Under the said Act,

power of requisition was required to be exercised by the Central Government. Section 40(1) of the said Act empowered the Central Government to delegate powers to be exercised by it under the said Act, to the District Magistrate. However, in the said case, the power was exercised by the Additional District Magistrate.

Taking into consideration the drastic nature of the power to be exercised by the Central government, the Apex Court observed thus:

9. It has not been disputed that the powers of requisitioning are of a very drastic nature and involve the fundamental rights in respect of property guaranteed under Article 19(1)(f) of the Constitution. The Central Government while making the delegation of its power u/s 29 of the Act must ordinarily be presumed to be fully conscious of this aspect of the matter and it was for that reason that an officer or authority of the high status of a District Magistrate in the District was empowered to exercise that power.

It can thus be clearly seen that taking into consideration the drastic nature of powers and the nature of the quasi judicial functions, in the facts of the said case, the Apex Court had held that the power which was delegated by the Central Government to the District Magistrate was required to be exercised by the District Magistrate alone and not by the Additional District Magistrate.

13. In the case of "State of M.P. v. Bhupendra Singh" (supra), for launching prosecution under the Explosive Substances Act, consent of the Central Government was required. The Central Government had delegated the said power to the District Magistrate. In the said case also, the power was exercised by the Additional District Magistrate. It was contended that power u/s 7 of the said Act delegated by the Central Government has now been delegated to the Additional District Magistrate by the State Government and as such, the sanction granted by the Additional District Magistrate was valid. Negating this contention, the Apex Court, in para.5, observed thus:

It is difficult to accept the submission. The power of granting consent u/s 7 of the said Act rests with the Central Government. The Central Government had delegated it to the District Magistrate. It is, in our view, not competent for the State Government to further delegate to the Additional District Magistrate a power of the Central Government which the Central Government has delegated to the District Magistrate.

The Apex Court in the said case had found that the power of the Central Government which was delegated to the District Magistrate could not have been delegated to the Additional District Magistrate by the State Government.

Thus it can clearly be seen that in both these cases, the Apex Court held that the drastic power, which was to be exercised by the Central Government, was delegated by it specifically to the District Magistrate and as such, it was not permissible for the State Government to delegate it to the Additional District Magistrate.

14. In so far as the reliance on the judgment in the matter of "State of UP v. Janki Devi Pal" (supra) is concerned, the preliminary enquiry as required under the U.P. Kshettra Panchayats and Zila Panchayats (Removal of Pramukhs, Up-Pramukhs, Adhyakshas and Upadhyakshas) Enquiry Rules, 1977, in the case of removal of Zilla Adhyaksha, was conducted by the Additional District Magistrate. Rule 4 of the said Rules, which provided for preliminary enquiry, reads thus:

Rule 4. Preliminary enquiry:

(1) The State Government may, on the receipt of a complaint referred to in Rule 3, or otherwise, appoint an officer not below the rank of an Additional District Magistrate in the case of a Pramukh or Up-Pramukh and District Magistrate in the case of an Adhyaksha or Upadhyaksha to conduct a preliminary enquiry with a view to finding out if there is a prima facie case for a formal enquiry in the matter.

(2) The officer appointed under Sub-rule(1) shall conduct the preliminary enquiry as expeditiously as possible and submit his report to the State Government within a fortnight of his having been so appointed.

Finding that the legislature has itself distinguished the power to be exercised by the Additional District Magistrate and the District Magistrate, the Apex Court, in the facts of the said case, found that the legislature itself had provided for a preliminary enquiry in the case of Pramukh or Upa-Pramukh, by the Additional District Magistrate and in the case of Adhyaksha and Upadhyaksha, by the District Magistrate. The Apex Court observed thus:

The very rule, consisting of one sentence, cleraly suggests that the two terms are used in two different meanings. The High Court appears to be right in holding that an inquiry against a Pramukh or Up-Pramuhk can be held by an officer not below the rank of an Additional District Magistrate while as against the Adhyaksha or Upadhyaksha - these two being democratically elective offices, higher in status than that of Pramukh or Up-Pramukh - the inquiry should be held by the District Magistrate.

15. Thus, it can be clearly seen that in all the aforesaid cases, the powers to be exercised by the District Magistrate were either quasi judicial powers or drastic powers which required some amount of application of mind for taking a drastic step, as provided under the said statutes.

16. In the matter of Maharashtra State Financial Corporation Vs. Jaycee Drugs and Pharmaceuticals Pvt. Ltd. and Others, , while construing the term "District Judge" used in Section 31(1) of the State Financial Corporation Act, 1951, while considering the provisions of execution of a decree against a surety who had given his personal guarantee, referring to the judgment of the Apex Court of the Bench consisting of 3 Judges in the case of Grindlays Bank Ltd. Vs. Central Government Industrial Tribunal and Others, , has held that the District Judge is not a persona Designata but a court of ordinary civil jurisdiction. The Apex Court observed in para.26, as under:

26. We may now state our reasons for holding that even if Section 46B of the Act was not there the provisions of the Code for the execution of a decree against a surety who had given only personal guarantee would, in the absence of any provision to the contrary in the Act, be applicable. In view of the decision of this Court in Central Talkies Ltd. Kanpur, v. Dwarka Prasad, where it was held that a persona designata is a person selected as an individual in his private capacity and not in his capacity as filling a particular character or office, since the term used in Section 31(1) of the Act is "District Judge" it cannot be doubted that the District Judge is not a persona designata but a court of ordinary civil jurisdiction while exercising jurisdiction u/s 31 and 32 of the Act.

17. Taking into consideration that the nature of powers that are exercised by the District Magistrate or Chief Metropolitan Magistrate u/s 14 of the said Act are purely executionery in nature and particularly when no element of quasi judicial functions or application of mind is required while exercising the said powers, we are unable to accept the contention of the appellants, that the District Magistrate is a persona designata and that he cannot delegate the powers to other officer. In any case, Sub-section (2) of Section 14 of the said Act permits the District Magistrate or Chief Metropolitan Magistrate to take steps for giving effect to the provisions of Sub-section (1) of Section 14 of the said Act.

18. For the reasons recorded above, we are unable to accept the view taken by the Kerala High Court in the matter of "Aseena" (supra).

19. In that view of the matter, we do not find any substance in the appeal. The appeal stands dismissed.

At this stage, the learned Counsel for the appellants seeks an order for continuation of the interim protection granted earlier to the appellants. We are not inclined to grant the same in view of the decision in the Letters Patent Appeal. Hence, the application is rejected.