Bombay High Court
Chavan vs The Chief Judicial Magistrate on 8 May, 2009
Bench: Ranjana Desai, Rajesh G. Ketkar

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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.1188 OF 2009
ALONG WITH
CRIMINAL WRIT PETITION NO.1189 OF 2009
ALONG WITH

CRIMINAL WRIT PETITION NO.1190 OF 2009
ALONG WITH
CRIMINAL WRIT PETITION NO.1191 OF 2009

Arjun Urban Co-operative Bank
ig)
Limited, a Society registered)
under the relevant provisions of)
the Maharashtra Co-operative)

Societies Act, 1960, having its)
Registered Office at 714, East)
Mangalwar Peth, Kshatriya Galli,)
Vitthal Mandir Building, Solapur)

- 413 002, though its authorized)
officer Shri Yogendra Laxmansa)

Chavan, having office at 714,)
East Mangalwar Peth, Kshatriya)
Galli, Vitthal Mandir Building,)

Solapur - 413 002.) ... Petitioner

Versus

1. The Chief Judicial Magistrate,)
Solapur.)
2. Union of India, the Ministry of)
Banking Affairs, New Delhi,)
through its Secretary /)
Authorized person.)
3. State of Maharashtra.) ... Respondents

AJN

Mr. J. Shekhar i/.b J. Shekhar & Co. for the petitioner.

Mr. S.R. Borulkar with Mr. A.S. Gadkari, A.P.P. for the State.

Mr. Kiran Kandpile with Mr. S.R. Shinde for respondent 2.

CORAM : SMT. RANJANA DESAI &

R.G. KETKAR, JJ.

DATED : 8TH MAY, 2009.

ORAL JUDGMENT:-

(Smt. Ranjana Desai, J.)

1. In all these petitions, the petitioner is the Arjun Urban Co-operative Bank Limited. The petitioner is a Society registered under the relevant provisions of the Maharashtra Co-operative Societies Act, 1960 and is running a business of banking as per the provisions of the Banking Regulations Act, 1945. All the petitions can be disposed of by this common judgment because admittedly, issues involved in them are common.

2. We take Criminal Writ Petition No.1188 of 2008 as the lead petition.

AJN

3. The case of the petitioner is that one Mr. Nilamkumar D. Gangi, proprietor of Hindmata Cloth Emporium (for short, "the said borrower"), availed cash credit loan facility of Rs.7,00,000/- from the petitioner and offered security by mortgaging a flat being Flat No.T-5, sitauted at Modikhana, Gulmohar Building, 3rd floor, B Wing, Near Nath Plaza, Solapur. He is respondent 3 herein. One Mr. Rajan M. Habib, Prashant P. Gangi and Mr. Neeta Nirmalkumar Gangi stood as guarantors for him. In short, the case of the petitioner is that the said borrower failed and neglected to repay the loan amount. The petitioner, therefore, initiated action under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, (for short, "the NPA Act"). After following the necessary procedure since the borrower failed and neglected to repay the amount, the petitioner approached respondent 1 i.e. the Chief Judicial Magistrate, Solapur under Section 14 of the NPA Act for securing assistance in taking possession of the secured asset.

AJN

4. Learned counsel for the petitioner submitted that in Trade Well & Anr. v. Indian Bank & Anr., 2007 (1) Bom.C.R. (Cri.) 783, after referring to the Supreme Court's judgment in Transcore v. Union of India & Anr.

AIR 2007 SC 712, this court has made it clear that the Chief Metropolitan Magistrate (for convenience, "the CMM") or District Magistrate (for convenience, "the DM") acting under Section 14 of the NPA Act is not required to give notice either to the borrower or to the third parties.

Learned counsel submitted that it was, therefore, not necessary to make the borrower and the guarantors parties to the application before the Chief Judicial Magistrate (for convenience, "the CJM"). However, inadvertently, they were made parties to the said application. The CJM did not issue any notice to them and passed the order after hearing counsel for the petitioner.

Learned counsel, therefore, prayed that he may be permitted to delete the names of the borrower and the guarantors from the instant writ petitions and respondents 1 to 4 in the criminal applications filed before AJN the CJM. We have permitted him to delete the names of the borrower and the guarantors from the instant writ petitions and also from the criminal applications filed before the CJM in view of the law laid down by this court in Trade Well.

5. Learned counsel for the petitioner submitted that the CJM ought to have followed the judgment of this court in Trade Well, which is based on the judgment of the Supreme Court in Transcore. He submitted that instead of following it, the CJM went on to observe that except documents of loan transaction, there are no other documents to show what follow up action was taken by the respondents after completion of statutory period of sixty days after service of demand notice dated 21/11/2008. Learned counsel submitted that inasmuch as the CJM has exceeded his jurisdiction, the impugned order be set aside.

6. In this case, it is not necessary for us to go into this AJN aspect because, in our opinion, the petitioner has chosen a wrong forum. Section 14 of the NPA Act is clearly worded. It states that an application can be made by the secured creditor for taking possession of the secured assets to the Chief Metropolitan Magistrate (for convenience, "the CMM") or to the DM. The petitioner, therefore, could not have filed the application before the CJM.

The CJM ought not to have entertained the application.

7. Learned counsel for the petitioner has drawn our attention to Muhammed Ashraf & Anr. v. Union of India & Ors., AIR 2009 Kerala 14. In that case, the Kerala High Court was considering similar question. The point which was raised before the Kerala High Court was that the CJM is not vested with the power and jurisdiction to deal with application under Section 14 of the NPA Act. It was contended that since the authority under Section 14 is not exercising any judicial or quasi judicial function and no adjudicatory process is involved, only the authority AJN specified under Section 14 can render assistance to the secured creditor.

8. The Kerala High Court considered Section 2(k), Section 3(1)(a), Section 3(1)(d) and Section 3(2) of the Criminal Procedure Code (for short, "the Code"). Reliance was placed on Section 3(2) of the Code which states that in the Code, unless the context otherwise requires, any reference to the Court of a Judicial Magistrate shall, in relation to a Metropolitan area, be construed as a reference to the Court of the Metropolitan Magistrate for that area. The Kerala High Court observed that powers of the CJMs in non-metropolitan areas and CMMs in metropolitan areas are one and the same. Only difference is that the CMM exercises powers of the CJM in metropolitan areas. The Kerala High Court referred to several judgments, particularly to the judgment in M/s.

Unique Butyle Tube Industires Private Limited v.

U.P. Financial Corporation & Ors., AIR 2003 SC 2103 and in Padmasundara Rao v. State of Tamil Nadu, AJN AIR 2002 SC 1334. The Kerala High Court recorded its dissent from the judgment of this court in Indusind Bank Limited v. The State of Maharashtra, 2008 (4) Bom.C.R. 501. The Kerala

High Court observed that in this case, there is no casus omissus and observed that the CJM in a non-metropolitan area stands on the same footing as CMM in metropolitan area and their designations are used synonymously to denote the authority depending upon where one is situated and, therefore, apart from the DM, the powers can be exercised by the CJM also.

9. In order to appreciate this point, it is necessary to quote Section 14 of the NPA Act. It 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 assets is required to be taken by the secured creditor or in any of the secured assets 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 AJN asset, request, in writing, 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 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 asset 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 Magistrate 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."

10. Section 14 is clear and admits of no confusion. It clearly refers to CMM and DM. Request in writing for taking possession and control of any secured asset must be made to the CMM or DM.

AJN

11. Before the Kerala High Court reliance was placed on M/s. Unique Butyle's case and it was argued that the court can only interpret the law and cannot legislate it. By the principle of casus omissus, the court cannot supply the law. The Kerala High Court came to a conclusion that there was no casus omissus in this case. We will examine what is meant by casus omissus because that will lend support to the view which we propose to take in this case.

12. Casus Omissus has been defined in Law Lexicon 1997 Edition as a point unprovided for by the statute. In Padmasundara Rao's case, the Constitution Bench was considering whether after

quashing of notification under Section 6 of the Land Acquisition Act, 1984, fresh period of one year is available to the State Government to issue another notification under Section 6. It was argued that a bare reading of Section 6 as amended by Act 68 of 1984 leaves no manner of doubt that the declaration under Section 6 has to be issued within the specified time and AJN merely because the court has quashed the concerned declaration an extended period is not to be provided. The question was whether it would mean reading something into the statute which is not there and in effect would mean legislation by the court. The Supreme Court considered what is meant by 'casus omissus' and observed as under:

> "Two principles of construction - one relating to casus omissus and the other in regard to reading the statute as a whole - appear to be well settled. Under the first principle a casus omissus cannot be supplied by the Court except in the case of clear necessity and when reason for it is found in the four corners of the statute itself but at the same time a casus omissus should not be readily inferred and for that purpose all the parts of a statute or section must be construed together and every clause of a section should be construed with reference to the context and other clauses thereof so that the construction to be put on a particular proviso makes a consistent enactment of the whole statute. This would be more so if literal construction of a particular clause leads to manifestly absurd or anomalous results which could not have been intended by the Legislature. "An intention to produce an unreasonable result", said Danckwerts, L.J., in Artemiou V. Procopiou (1966) 1 QB 878), "is not to be imputed to a statute if there is some other construction available".

AJN

13. The same principles were reiterated by the Supreme Court in M/s. Unique Butyle Tube Industries Ltd.'s case where the question was whether the plea that the mode of recovery under the Uttar Pradesh Public Money (Recovery of Dues) Act, 1972 has to be read into sub-

section (2) of Section 34 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993.

14. In this case, Section 14 clearly refers to CMM and DM. Two distinct authorities are provided by the statute.

We concur with the Kerala High Court that there is no casus omissus here. This is not a case where literal construction of Section 14 leads to any absurd results and, therefore, one authority needs to be added to the two authorities provided therein. It is well settled that at the stage of Section 14, there is no adjudication of any issues. The authorities have to only render assistance to the secured creditor to recover possession. It is reasonable to assume that keeping this in mind in non-

AJN metropolitan areas the legislature has conferred the jurisdiction on DM. Nothing prevented the legislature from adding the words CJM in Section 14. Adding one more authority in Section 14 with the aid of the provisions of the Code will in our opinion be not ironing out creases as observed by Lord Denning in Seaford Court Estates Ltd. v. Ashar (1949) 2 All E.R. 155, to which the Kerala High

Court has made a reference, but it would materially alter the section. In Inco Europe Ltd. & Ors.

v. First Choice Distribution (a firm) & Ors. [2000 (2) All E.R. 109 (115), it is held that a Court can add words in its interpretative process in suitable cases if omission or inadvertence of drafting is noticed to give effect to the purpose of the legislation, but not otherwise.

We do not see any inadvertence in drafting in this case.

15. The Kerala High Court has also referred to the Supreme Court's judgment in National Insurance Company Limited v. Laxmi Narain Dhut, AIR 2007 SC 1563 where the Supreme Court has inter alia AJN observed that a statute has to be construed according to the intent of those who make it and if it is open to more than one interpretation, the court has to choose that interpretation which represents the true intention of the legislature. In this case, it is not possible to say that Section 14 is open to more than one interpretation. Once it clearly says that an application can be made to the CMM or the DM, there is no question of it being open to more than one interpretation. To go by a circuitous way and say that the Code equates the CMM with the CJM and, therefore, apart form the DM even the CJM can deal with applications under Section 14 of the NPA Act, in our opinion would be doing violence to Section 14. If in Section 14 of the NPA Act, the legislature had only provided that an application could be made to the CMM, then out of necessity reasonable interpretation could have been placed on the said provision by stating that the term "the CMM" in metropolitan area will include the term "CJM" in non-metropolitan areas. Here, it cannot be said that there was such necessity because the legislature has AJN categorically stated that the applications can be made to the CMM or to the DM.

16. We shall now turn to the intention of the legislature.

It is true that literal meaning of the enactment is to be followed where it is in accordance with the legislative purpose and strained meaning is to be applied where the literal meaning is not in accordance with the legislative purpose. This is what purposive interpretation means.

17. Having regard to the settled position that under Section 14, the CMM or the DM have not to adjudicate any issues but have to only render assistance to recover possession, we do not find anything wrong in the legislature assigning this task to the DM in non-

metropolitan areas. In fact, we are of the opinion that the legislature has purposely left out the CJM while drafting Section 14. That is the legislative intent. Section 14 does not lead to any absurdity. There is no necessity to add CJM when legislature has provided that applications AJN should be made to the DM. Nothing has been pointed out to us to indicate that because this work is entrusted to the DM, there is no effective implementation of Section 14 of the NPA Act. It is well settled that ordinarily the courts have to resort to literal interpretation and departure from this has to be for very sound and weighty reasons. We, therefore, respectfully disagree with the Kerala High Court. We agree with the conclusions drawn by this court in Indusind Bank's case.

18. In view of the above, we pass the following order.

19. The order dated 2/4/2009 in Misc. Criminal Application No.348 of 2009 impugned in Criminal Writ Petition No.1188 of 2009 is quashed and set aside. For the same reasons, orders dated 2/4/2009 impugned in Writ Petition No.1189 of 2009, Writ Petition No.1190 of 2009 and Writ Petition No.1191 of 2009 are quashed and set aside. It will, however, be open to the petitioner to make fresh applications under Section 14 of the NPA Act AJN before the proper forum after following proper procedure.

We make it clear that we have not expressed any opinion on the merits of the case. The contentions raised by the petitioner are kept open.

[SMT. RANJANA DESAI, J.] [R.G. KETKAR, J.]