
(2009) 03 MAD CK 0184

In the Madras High Court

Case No : Writ Petition (MD) No. 1773 of 2009 and M.P. (MD) No. 1 of 2009

A. Moses

APPELLANT

Vs

The Branch Manager, ICICI Bank

RESPONDENT

Date of Decision : 11-03-2009

Acts Referred:

Banking Regulation Act, 1949 — Section 5
Constitution of India, 1950 — Article 12, 226

Citation : (2009) 03 MAD CK 0184

Hon'ble Judges : K.K. Sasidharan, J

Bench : Single Bench

Advocate : Party in Person, for the Appellant;

Judgement

K.K. Sasidharan, J.—Though the Writ Petition is for a Writ of Mandamus forbearing the respondent from seizing the hypothecated vehicle, the main grievance of the petitioner is in respect of the alleged illegal action taken by the respondent to take possession of the vehicle by deputing musclemen.

2. Factual matrix:

The petitioner has taken financial assistance from the respondent bank to the tune of Rs. 11,40,000/- for the purpose of purchasing a lorry and with the said loan, he purchased a lorry and the same was assigned the registration mark, "TN-76-C-7683 and the factum of hypothecation has also been indicated in the Registration Certificate. As per the terms and conditions of the agreement, the petitioner has to pay the loan amount in 47 monthly installments at the rate of Rs. 32,078/- and for the period from 05.09.2007 to 05.07.2011. The petitioner has regularly paid the installments and the satisfactory way of making payment is also evident by the accounts statement issued by the respondent for the period from 30.07.2007 to 08.12.2008. The lorry purchased by the petitioner was engaged in the business of transporting sand from the State of Tamil Nadu to other States and on account of the order passed by the Government of Tamil Nadu prohibiting transportation of sand to any place outside Tamil Nadu, the

transport business of the petitioner was affected and as a result, he was not in a position to pay the dues with effect from January 2009. The petitioner met the Branch Manager of the respondent and requested to grant few months time to clear the arrears. However, to the surprise of the petitioner, the respondent sent Goondas to his residence on 18.02.2009 and 03.03.2009 and abused his wife in filthy language and threatened that they would take away the lorry and ransack the house, in case the dues were not cleared. Therefore, the petitioner apprehends that the vehicle would be seized by the respondent without following the procedure and as such, he has come up with the present Writ Petition.

3. Maintainability of Writ Petition:

The respondent is a private bank doing banking business and without any duty of public nature and as such, the bank is not amenable to the writ jurisdiction under Article 226 of the Constitution of India. The terms and conditions of the agreement entered into between the petitioner and the bank governs the matter and as such, this Court, exercising writ jurisdiction under Article 226 of the Constitution of India, cannot alter or vary such terms and conditions. In case the agreement contains a provision that the bank is entitled to seize the vehicle on account of the default committed by the petitioner, no Mandamus could be issued to forbear the respondent from seizing the vehicle. The bank as well as the customer is bound by the terms of contract. This Court cannot re-write the terms of contract for the parties and jurisdiction under Article 226 of the Constitution of India is not intended for such purposes.

4. The composition of a banking company and its nature of working was considered by the Hon'ble Supreme Court in *Federal Bank Ltd. v. Sagar Thomas and Ors.* reported in JT 2003 (Supp 1) SC 470, wherein it was held thus:

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But in the present case we are concerned with a banking company which has its own resources to raise its funds without any contribution or shareholding by the State. It has its own Board of Directors elected by its share-holders. It works like any other private company in the banking business having no monopoly status at all. Any company carrying on banking business with a capital of five lacs will become a scheduled bank. All the same, banking activity as a whole carried on by various banks undoubtedly has an impact and effect on the economy of the country in general. Money of the shareholders and the depositors is with such companies, carrying on banking activity. The banks finance the borrowers on any given rate of interest at a particular time. They advance loans as against securities. Therefore, it is obviously necessary to have regulatory check over such activities in the interest of the company itself, the shareholders, the depositors as well as to maintain the proper financial equilibrium of the national economy. The banking companies have not been set up for the purposes of building economy of the State on the other hand such private companies have been voluntarily established for their own purposes and interest but their

activities are kept under check so that their activities may not go wayward and harm the economy in general. A private banking company with all freedom that it has, has to act in a manner that it may not be in conflict with or against the fiscal policies of the State and for such purposes, guidelines are provided by the Reserve Bank so that a proper fiscal discipline, to conduct its affairs in carrying on its business, is maintained. So as to ensure adherence to such fiscal discipline, if need be, at times even the management of the company can be taken over. Nonetheless, as observed earlier, these are all regulatory measures to keep a check and provide guideline and not a participatory dominance or control over the affairs of the company. For other companies in general carrying on other business activities may be manufacturing, other industries or any business, such checks are provided under the provisions of the Companies Act, as indicated earlier. There also, the main consideration is that the company itself may not sink because of its own mismanagement or the interest of the shareholders or people generally may not be jeopardized for that reason. Besides taking care of such interest as indicated above, there is no other interest of the State, to control the affairs and management of the private companies. The care is taken in record to the industries covered under the Industries (Development and Regulation) Act, 1951 that their production which is important for the economy may not go down yet the business activity is carried on by such companies or corporations which only remains a private activity of the entrepreneurs/companies.

5. The question as to whether a private bank is amenable to writ jurisdiction was also considered by the Hon'ble Supreme Court in the Federal Bank Ltd's case and it was held thus:

41. Such private companies would normally not be amenable to the writ jurisdiction under Article 226 of the Constitution. But in certain circumstances a writ may issue to such private bodies or persons as there may be statutes which need to be complied with by all concerned including the private companies. For example, there are certain legislations like the Industrial Disputes Act, the Minimum Wages Act, the Factories Act or for maintaining proper environment say Air (Prevention and Control of Pollution) Act, 1981 or Water (Prevention and Control of Pollution) Act, 1974 etc. or statutes of the like nature which fasten certain duties and responsibilities statutorily upon such private bodies which they are bound to comply with. If they violate such a statutory provision a writ would certainly be issued for compliance of those provisions. For instance, if a private employer dispense with the service of its employee in violation of the provisions contained under the Industrial Disputes Act, in innumerable cases the High Court interfered and have issued the writ to the private bodies and the companies in that regard. But the difficulty in issuing a writ may arise where there may not be any non-compliance or violation of any statutory provision by the private body. In that event a writ may not be issued at all. Other remedies, as may be available, may have to be resorted to.

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46. Merely because the Reserve Bank of India lays the banking policy in the interest of the banking system or in the interest of monetary stability or sound economic growth having due regard to the interests of the depositors etc. as provided u/s 5(c)(a) of the Banking Regulation Act does not mean that the private companies carrying on the business of or commercial activity of banking, discharge any public function or public duty. These are all regulatory measures applicable to those carrying on commercial activity in banking and these companies are to act according to these provisions failing which certain consequences follow as indicated in the Act itself. Provision regarding acquisition of a banking company by the government, it may be pointed out that any private property can be acquired by the government in public interest. It is now judicially accepted norm that private interest has to give way to the public interest. If a private property is acquired in public interest it does not mean that the party whose property is acquired is performing or discharging any function or duty of public character though it would be so for acquiring authority.

6. The question as to whether ICICI bank would come within the meaning of "other authorities" as defined under Article 12 of the Constitution of India was considered by the Division Bench of our High Court in ICICI Bank Ltd. v. Lakshminarayanan 2008 (3) LLN 320 and after considering the matter in extenso, the Division Bench held that the writ petition is not maintainable against ICICI bank. The said judgment was followed by another Division Bench in W.A. No. 480 of 2007 (S. Sundaram and Ors. v. ICICI Bank Ltd and Anr., judgment dated 09.02.2009), wherein it was clearly held that ICICI bank would not come within the purview of Article 12 of the Constitution of India.

7. Even though this Court cannot interfere in the realm of contract entered into between the petitioner and the respondent bank, still the bank cannot be heard to say that they are entitled to proceed against the petitioner without resorting to the procedure recognized by law. The respondent bank is bound to act as per the directions and guidelines issued by the Reserve Bank of India from time to time. The practice adopted by the respondent bank in hiring recovery agents and deputing musclemen to seize the vehicles were deprecated by the Hon''ble Supreme Court in Manager, ICICI Bank Ltd. Vs. Prakash Kaur and Others, . While supplementing the judgment delivered by His Lordship Mr. Justice Altamas Kabir, His Lordship Mr. Justice A.R. Lakshmanan was pleased to indicate certain factors, which were prevailing in the banking industry in the matter of recovery. The factors so indicated would run thus:

Now the bank is the aggressor and the public is the victim. The first step to

recovery of the money due is through the so-called recovery/collection agents. A very dignified term used for paid recovery agents who are individual and independent contractors hired by the banks both to trace the defaulters and to physically, mentally and emotionally torture and force them into submitting their dues.

A man's self-respect, stature in society are all immaterial to the agent who is only primed at recovery. This is the modernised version of Shylock's pound of flesh. No explanation is given regarding the interest charge and the bank takes cover under the guise of the holder of the card or loan having signed the agreement whose fine print is never read or explained to the owner.

When a harassed man approaches the court or the police station he is not armed with a recording phone and finds it difficult to give evidence of the abuse he has suffered. Here the bank gets away with everything. Young and old members of the family are threatened on streets, institutions and also at home at godforsaken hours by these agents who have the full support of their contractor bank. The stance taken by the bank in any suit alleging such incidents is that no such agent has been appointed by them or their agents do not misbehave in the manner aforesaid and if found guilty the agents have to bear the cross and the bank gets away scot-free.

Using of the abusive language for recovery is the norm of the day for most nationalised or multinational banks or non-nationalised banks. Though some are smart enough to record the abuse and proceed to establish the same through the court of law, most of them are unfortunate not to have recourse to it. Such people form the majority and such litigations are pending in large volumes before the civil and consumer courts. Again the banks escape liability since these agents are not salaried employees of the bank and hence not directly liable for anything.

8. The Hon'ble Supreme Court in Prakash Kaur's case strongly deprecated the practice of the respondent bank in removing the vehicle from the possession of the debtor by hiring recovery agents in the following words:

16. Before we part with this matter, we wish to make it clear that we do not appreciate the procedure adopted by the Bank in removing the vehicle from the possession of the writ petitioner. The practice of hiring recovery agents, who are musclemen, is deprecated and needs to be discouraged. The Bank should resort to procedure recognized by law to take possession of vehicles in cases where the borrower may have committed default in payment of the installments instead of taking resort to strong-arm tactics.

9. The respondent bank being the appellant in the Prakash Kaur's case cited supra, must take note of the strong observation made by the Hon'ble Supreme Court in the matter of recovery, while taking steps to proceed against the hypothecated vehicle involved in the present writ petition and their action should be in accordance with the contract entered into between the parties and it should also be in accordance with the procedure recognized by law.

10. It is needless to mention that recovery through musclemen giving them the title "Recovery Agents" is not permitted by law.

11. The Writ Petition is disposed of, subject to the above observation. Consequently, the connected miscellaneous petition is closed. There shall be no order as to costs.