

(2008) 09 CAL CK 0004
In the Calcutta High Court
Case No : C.O. No. 2497 of 2008

Contai Co-operative Bank Ltd.

APPELLANT

Vs

Uday Chandra Dey

RESPONDENT

Date of Decision : 02-09-2008

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 7 Rule 11, 9

Specific Relief Act, 1963 — Section 38

West Bengal Co-operative Societies Act, 1983 — Section 132, 134, 134(2), 49, 86

Citation : (2008) 4 CALLT 353

Hon'ble Judges : Partha Sakha Datta, J

Bench : Single Bench

Advocate : S.R. Bhuiyan and Ashim Roy, for the Appellant; H.N. Mukherjee, A.K. Paul and M.P. Samanta, for the Respondent

Final Decision : Allowed

Judgement

Partha Sakha Datta, J.—The order dated 25th June, 2008 passed by the learned Civil Judge, Junior Division, 2nd Court, Sealdah in Title Suit No. 287/06 is under challenge at the instance of the defendant.

2. The plaintiff-opposite party instituted the suit against the petitioner namely Contai Co-operative Bank-Ltd. for a permanent injunction to restrain the petitioner and its men and agents from effecting seizure of the vehicle without lawful recourse. The Contai Co-operative Bank Ltd., the petitioner herein financed a sum of Rs. 80,600/- in favour of the opposite party for the purpose of procuring a vehicle being No. WB-O4C 536 which is now being run in route No. 215 from Laketown to Howrah. According to the plaintiff-opposite party, a loan-cum-hypothecation agreement/hire purchase agreement was executed between the plaintiff-opposite party and the bank in July 2004 and pursuant to that agreement the bank released and disbursed the amount for the purpose of purchase of the vehicle but for want of permit the vehicle could not be plid on the road because of an interim order of injunction issued by the High Court in

connection with same other matter and the High Court's order was modified in September 2005 whereafter permit could be obtained by the plaintiff-opposite party. However, the opposite party started depositing equated monthly instalment with the bank and paid as on the date of institution of the suit for a sum of Rs. 1.44 lakh. Due to non-plying of the vehicle the plaintiff failed to clear the EMI for few months. Allegedly, the defendant-bank sent their musclemen to seize the vehicle which according to the plaintiff-opposite party was not legally permissible. Since the financier without taking help of law is accosted to seize the vehicle the plaintiff apprehended that the men and agents of the defendant will repossess the vehicle. Hence the suit.

3. After the institution of the suit the defendant-bank filed the petition before the learned Trial Court under Order 7 Rule 11(d) read with Section 9 of the CPC praying for rejection of the plaint on the ground that the suit for permanent injunction to restrain a financier from taking repossession of the vehicle in terms of the agreement subsisting between the borrower and the lender is barred by law, and that in view of provision in Section 134(2)(d) of the West Bengal Co-operative Societies Act, 1983 the Civil Court loses its jurisdiction to entertain such suit and the only remedy available to the borrower is to take recourse to Section 95 of the West Bengal Co-operative Societies Act, 1983.

4. The learned trial Court rejected the petition upon hearing the learned Counsels for both the parties on the ground that there is no statement in the plaint which is barred by law.

5. Mr. Bhunia raised two-fold submissions. The first is that where admittedly in the plaint the bank financed the plaintiff-opposite party a certain sum of money namely 8,33,000/- for the purpose of procuring a vehicle for the plaintiff on condition of repayment of the amount with interest with regular monthly instalment in terms of the agreement between the bank and the borrower and where the agreement stipulates that in case the amount of loan is not paid by monthly instalments with interest it shall be lawful for the bank and its officers to call upon the plaintiff to deliver possession of the hypothecated vehicle and it shall be also lawful for the bank and its officers to take possession of the vehicle and sell the same without the intervention of the Court for adjustment of the loan amount it is not permissible for the court to entertain a suit for permanent injunction to restrain the defendant-bank from repossession of the same. It is submitted that in the context of the bilateral agreement between the parties the Court is not legally competent to make an order beyond the purview of the contract which cannot be said to be unlawful and illegal. The second submission of Mr. Bhunia is that Section 134(2) of the West Bengal Cooperative Societies Act 1983 (for short, the Act) clearly provides that no Civil Court shall have jurisdiction in regard to anything done or any action taken or any order passed under this Act and in particular with regard to any dispute required to be referred to the Registrar u/s 95 of the Act. Thus if the plaintiff-borrower wants to have any so called legal wrongs remedied he can take recourse to Section 95 of the

Act. In this connection reference has been made to a Division Bench decision of this Court in *Sisirkana Guha and Others Vs. Ayakar Grihanirman Samabaya Samity Limited and Another*, .

6. Mr. Mukherjee, learned advocate appearing for the opposite party submits that the learned trial Court was not wrong when it held that on the face of the averment of the plaint there was nothing that can draw the attention of the learned Court to hold that the suit was not legally entertainable. A suit for permanent injunction to restrain the bank from effecting seizure of the vehicle except in accordance with law is very well maintainable and the law does not command that seizure of the vehicle can be effected by applying force. Secondly it is submitted that the provision of Section 134(2)(d) as referred to by Mr. Bhunia relates to ouster of jurisdiction of the Civil Court in the matter relating to the dispute which can be referred to the Registrar u/s 95 of the Act, but Section 95(2) clearly provides that any dispute mentioned in Sub-section (1) than a dispute relating to recovery of money shall be referred to the Registrar within two months from the date on which the cause of action arises.

7. Having heard the submissions of the learned Counsels for the parties it appears to me that the learned trial Court has missed to note the point that it cannot pass a decree for permanent injunction in matters relating to personal contract between the parties. The agreement under which loan was advanced has been referred to in the plaint itself and the original agreement has been produced by the learned advocate for the petitioner. In the agreement it has been very explicitly made clear that the parties agree that in case the amount of loan was not paid by the borrower it shall be lawful for the bank and its officers to call on him to deliver possession of the hypothecated vehicle. Again it has been further reiterated in the agreement that in case of default on the part of the borrower it shall be lawful for the bank and its officers to take possession of the vehicle and sell the same without the intervention of the court for adjustment of loan amount. Where the parties agree as between themselves that in the event of the borrower failing to repay the loan amount ? in terms of the agreement the bank and its officers shall be entitled under the agreement to take repossession of the vehicle, one of the parties cannot ask for injunction contrary to the agreement. Therefore where the parties have agreed to stipulating repossession of the vehicle by the financier in the event of the borrower failing to act in terms of the agreement, the financier can repossess the vehicle. A suit for permanent injunction to restrain the bank from taking repossession of the vehicle is clearly barred by Section 38 of the Specific Relief Act. Section 38 of the Specific Relief Act does not operate in a field where the parties are to act in terms of the contract. The learned advocate for the opposite party submitted that it is not lawful for the bank to take repossession of the vehicle except in accordance with the due process of law, meaning thereby that without the intervention of the Court the bank cannot repossess the vehicle. But that is not the terms of the contract by and between the parties. The parties have agreed to put in a clause for repossession of the vehicle without intervention of the Court, and in such

circumstances a suit for permanent injunction to restrain the bank from repossession of the vehicle is clearly unwarranted in the law. Learned advocate for the opposite party submitted that it is not lawful for the bank to take possession of the vehicle by applying force or by unlawful means. Taking recourse to violence is not the point here. Where without the intervention of the court the vehicle can be legally repossessed by the bank because of the default committed by the borrower perpetual injunction against the bank so as to restrain the bank from acting in terms of the agreement which the defendant-opposite party is legally bound by is clearly not maintainable. And to entertain a suit for permanent injunction for the purpose of restraining permanently to bank from taking repossession of the vehicle from the custody of the opposite party-plaintiff is virtually to re-write the contract by the Court and to override the provisions of the agreement so as to suit the requirement of the borrower.

8. While saying so it is not to suggest that the bank will take its musclemen to perpetrate violence upon the borrower for the purpose of seizure of the vehicle the point is that the vehicle can be lawfully repossessed under the agreement which cannot be said to be unlawful. The bank's right of repossession of the vehicle is guaranteed under the contract and while repossessing the vehicle the bank will act only in terms of the agreement and not beyond that.

9. Therefore considered in this background, it can be said that the law does not permit the Court to entertain a suit for permanent injunction against a financier so as to restrain it from taking repossession of the vehicle in terms of the agreement and such entertainability would be against the provision of Section 38 of the Specific Relief Act. Therefore as rightly submitted by Mr. Bhuian the proposed suit cannot be said to be a suit of civil nature within the meaning of Section 9 of the CPC.

10. Section 134(2) of the West Bengal Cooperative Societies Act 1983 provides as follows:

Save as provided in this Act. no Civil Court or Revenue Court shall have Jurisdiction in regard to:

- (a) The registration of a cooperative society or its by-laws or an amendment of its by-laws; or
- (b) The dissolution or the supersession of the board of a co-operative society and the management of such cooperative society on such dissolution or supersession; or
- (c) Any directive issued by the State Government u/s 49; or
- (d) Any dispute referred to the Registrar u/s 95; or
- (e) Any matter concerned with the winding up or dissolution of a cooperative society.

11. Section 95 as referred to in Clause (d) of Sub-section (2) of Section 134 of

the Act is as follows:

any dispute concerning the business of a cooperative society capable of being the subject of civil litigation or any dispute relating to the affairs of a cooperative society shall be referred in the prescribed manner to the Registrar, if the parties thereto are among the following:

- a) A co-operative society or its board or an officer, agent, employee or liquidator of a co-operative society, or
- b) A member or a past member or a person claiming through a member or a past member or on behalf of a deceased member of a cooperative society or a financing bank of a co-operative society; or
- c) A surety of a member or past member or deceased member of a cooperative society, whether surety is or is not a member of the cooperative society; or
- d) Any other co-operative society or any person including any financing bank having transaction with a cooperative society or any liquidator of a co-operative society.

12. Thus in terms of Section 95(1)(d) any dispute concerning the, business of a cooperative society capable of being the subject matter of civil litigation with "any person including any financier bank having transaction with a cooperative society" comes within the purview of Section 95(1)(d) of the West Bengal Co-operative Societies Act, 1983. In *Anjan Chowdhury v. Anandaneer Co-operative Registrar Housing Society and Ors.* reported in AIR 1993 Cal 380 a Special Bench of this Court has elucidated the concept as follows:

As we have already indicated, the "dispute", in order to come within the provisions of Section 86 of the old Act and Section 95 of the new Act and thus to go out of the jurisdiction of the Civil Courts under the provisions of Section 132 of the old Act and Section 134 of the new Act, must be disputes, not just concerning or involving a cooperative society, but concerning the business or relating to, the affairs of the society, such business-of affairs which the society is authorised to be concerned with or be involved in order to carry out its objectives under the Act and as chartered by and in its rules and bye-laws. A loan granted by a society which is only a co-operative Housing Society, and not a Co-operative Credit Society, or a tenancy granted in respect of a portion of its property by a society which is a Co-operative Society and not a Co-operative Housing Society, cannot thus give rise to a dispute concerning the business or relating to the affairs of the society. But, as already stated, if the dispute concerns or relates to something which the society is legally authorised to and required by its rules and bye-laws to undertake, it would squarely come within the provisions of Section 95 of the new Act, corresponding to Section 86 of the old Act and can't be entertained by the Civil Court if the parties to the dispute are as specified in those sections. And once these conditions are satisfied, the dispute must be referred to the Registrar and cannot be taken cognizance of by the Civil Courts,

however complicated the questions of law the dispute may involve. If that be, and we think that to be, the law made by our legislature and that law does not suffer from any Constitutional infirmity, then it is simply useless to express any anxiety, as manifested in the order of reference as to whether the Registrar, not being expected to be "properly well-equipped as a Civil Court", would be able to decide the dispute effectively. Even if a legislative measure appears to be unwise, we must leave it at that, for neither we can review legislative wisdom nor should be presumptuous to think that wisdom is our sole monopoly. Justice Holmes once said to Justice Stones that if the legislature enacts a measure and "I can't find anything in the Constitution expressly forbidding them to do, I say, whether I like it or not, "Goddamit, let them do it.

13. This Special Bench decision has been referred to by a Division Bench of this Court in *Sisirkana Guha* (supra). The facts before the Division Bench were that lands belong to cooperative societies. There was a registered agreement for sale. Defendants agreed to sell the suit property to the plaintiff for consideration money but refused to complete the sale transaction. The plaintiff instituted the suit for specific performance of contract. Their Lordships held that this was dispute within the purview of any person having transaction with the society" and, accordingly, the dispute has to be referred to the Registrar and there was exclusion of the jurisdiction of the Civil Court. In the case at hand the dispute is between a cooperative society and a person having financial transaction with the society. u/s 95(1) the Civil Court's jurisdiction is ousted when the dispute concerning the business of the society is with a person or society as enumerated in Clause (a) or (b) or (c) or (d). No person who does not come within any of the clauses as aforesaid cannot be claimed against by the society with the aid of Section 95(1) of the Act. Clearly, the opposite party-plaintiff is any person having transaction with the society" bank. Having regard to the provision of Section 95(1)(d) the Civil Court loses its jurisdiction to entertain the suit in terms of Section 134(2)(d) of the Act. The submission of the learned Counsel for the plaintiff-opposite party that Sub-section (2) of Section 95 bars the jurisdiction of the Registrar under the West Bengal Co-operative Societies Act 1983 is not correct. The said Sub-section (2) simply provides that any dispute mentioned in Sub-section (1) other than a dispute relating to recovery of money shall be referred to the Registrar within two months from the date on which the cause of action arises.

14. Thus on both the counts as argued by the learned Counsel for the petitioner the application has to succeed. The learned trial Court has got no jurisdiction to entertain the suit and application taken out by the petitioner under Order 7 Rule 11(d) was quite maintainable and it should have been allowed.

15. Thus, the revisional application is allowed. The order dated 25th June, 2008 passed by the learned Civil Judge (Junior Division) 2nd Court, Sealdah to T.S. No. 287/06 is set aside.

16. In view of the suit being not maintainable the plaint stood rejected.

17. A copy of the order shall be sent to the learned trial Court for information and taking necessary action.