

(2010) 08 CAL CK 0038
In the Calcutta High Court
Case No : Writ Petition No. 14664 of 2010

Harun Ali Mallick

APPELLANT

Vs

State of West Bengal and Others

RESPONDENT

Date of Decision : 25-08-2010

Acts Referred:

Constitution of India, 1950 — Article 226
Criminal Procedure Code, 1973 (CrPC) — Section 20, 20(2)
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 14, 37

Citation : AIR 2011 Cal 45

Hon'ble Judges : Jayanta Kumar Biswas, J

Bench : Single Bench

Advocate : Ranjan K. Kali and Mitul Chakraborty, for State, for the Appellant; Pratik Dhar, Joyeeta Chakraborti, Rittik Pattanaik, R.S. De and D. Chakraborty, for the Respondent

Final Decision : Dismissed

Judgement

Jayanta Kumar Biswas, J.—The Petitioner in this Article 226 petition dated July 9, 2010 is questioning the order of the Additional District Magistrate (Dev.), Hooghly dated November 13, 2009 (at p. 33) u/s 14 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002.

2. The order was made on the basis of a Section 14 application dated April 7, 2009 filed by the Divisional Manager, Canara Bank,. Small & Medium Enterprises Branch, Kolkata. The relevant part of the order is quoted below:

...the undersigned on due notice to all the parties gave opportunity of being heard to them and heard the case on 11-9-2009 and finally decided that the case has merit and unless due Police Assistance is not given to the Creditor Applicant while taking possession of the Asset/Property by the Creditor Applicant, there may occur Law & Order problem and breach of peace on the spot. Hence ordered

that on requisition from the Creditor Applicant, the Superintendent-of Police Hooghly shall arrange for and ensure adequate Police Assistance in taking" physical possession of the Asset/Property by the Creditor Applicant personally or through authorized agents in accordance with law.

3. It is evident from, the order that the Petitioner was named therein as one of the three borrowers, and that a copy of the order was forwarded to him by a memo dated November 13, 2009. It is also evident that the borrowers named in ,the order had been served with notice of the application and were, heard by the Additional District Magistrate (Dev.), Hooghly.

4. The Petitioner has questioned the order on the ground that when the provisions" of Section 14 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 specifically empower the District Magistrate to entertain an application u/s 14 and make an order, the Additional District Magistrate (Dev.) could not make order in the Section 14 application of the Bank.

5. By an order dated July 22, 2010 the petition was admitted; and then by an order dated July 30, 2010 the Respondents were given opportunity of filing opposition. The Additional District Magistrate who made the impugned order has filed an opposition dated August 19, 2010. The Petitioner has filed a reply dated August 23, 2010.

6. With his opposition the Additional District Magistrate has produced a Notification No. 2420-PAR (WBCS)D-63/08 pt. dated July 8, 2008 issued by order of the Governor of the State of West Bengal by the O. S. D. and Ex-Officio Joint Secretary, Personnel & Administrative Reforms Department, W. B. C. S. Cell, Government of West Bengal. The relevant part of the Notification is quoted below:

In exercise of the power conferred by Sub-section (2) of Section 20 of the Code of Criminal Procedure, 1973 "(Act 2 of 1974), as amended subsequently., the Governor is pleased hereby to appoint Shri Soumya Purkait, WBCS (Exe.), an Executive Magistrate, to-be an Additional District Magistrate of the District of Hooghly, vice Shri Kajal Kumar Bandyopadhyay, WBCS (Exe.), since transferred and until further orders and to direct that he shall have all the powers of a district Magistrate under the said Code or under any other law for the time being in force."

7. In para 3b) of his opposition the Additional District Magistrate has stated as follows:

b) It is respectfully submitted that Section 20(2) of the Code of Criminal Procedure, 1973 also empowers the Additional District Magistrate to exercise all the powers of the District Magistrate not only under the Code of Criminal Procedure but also under any other law. Section 37 of the SARFAESI Act, 2002 Contains that the SARFAESI Act, 2002...shall be in addition to, and not in derogation of, the Companies Act, 1956 (1 of 1956); the Securities Contracts

(Regulation) Act, 1956 (42 of 1956), the Securities and Exchange Board of India Act, 1992 (15 of 1992), the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993) or any other law for the time being in force.

8. In para 3.c) of his opposition the Additional District Magistrate has contended as follows:

c) It is respectfully submitted that the Parliament having framed the Code of Criminal Procedure, 1973 and having empowered the Additional District Magistrate to discharge the functions of the District Magistrate, clearly show the intention of the legislature. If the legislatures had wanted to take a different view, the Parliament could have done so by defining the word "District Magistrate". The legislatures having not done so and on the contrary having incorporated Section 37 of the SARFAESI Act, 2002, surely wanted that the exercise of power u/s 14 of SARFAESI Act can be done also by the Additional District Magistrate by virtue of Section 20(2) of the Code of Criminal Procedure, 1973. Accordingly, it is respectfully submitted that the Additional District Magistrate has correctly exercised the power u/s 14 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002.

9. In para 4 of the reply, dealing with para., 3 of the opposition of the Additional District Magistrate, the Petitioner has stated as follows:

4. ...The language laid down in the Act is sacrosanct and cannot be liberally construed. It is further submitted that Section 14 is an enabling provision and is not a deeming provision and inasmuch as the SARFAESI Act is a special statute and has been specifically enacted for the purpose of recovery of the dues of the bank. The said Act will have an overriding effect over the Indian Penal Code in case of a conflict between the statutes. It is well settled that when a particular authority is vested with certain power and authority by the statute to do certain things, act obligations such authority cannot be conferred or delegated to any other authority unless, the same is expressly provided under the statute. When a statute provides certain things acts to be done by a particular authority, body, person the same cannot be construed liberally by delegating the power to do such things or acts in contravention of the statutory provision. In the instant case, the notification dated 8-7-2008 issued by the Government of West Bengal Personnel & Administrative Reforms Department W. B. C. S. Cell, cannot confer authority upon the Respondent Nos. 2 & 4 to pass necessary order u/s 14 of the SARFAESI Act, since the said notification has been issued in exercise of the power conferred by sub-section 2 of Section 20 of Code of Criminal Procedure, 1974 has amended subsequently cannot override the SARFAESI Act which is a special statute and shall prevail over the I.P.C. in case of the conflict between the two statute. It is further submitted that the legislature has enacted the SARFAESI Act, 2002 for a special purpose of recovery of dues of the bank. If the intention of the legislature to empower or vest certain authority to do certain act the such authority is bound to discharge its obligation and function as per the act

and cannot conferred to any other authority in contravention of the statute thereby defending the intention of the legislature.

10. Mr. Kali, counsel for the Petitioner, has elaborated the case stated by the Petitioner in para 4 of his, reply; and Mr. Dhar, counsel for the State, besides elaborating the case stated by the Additional District Magistrate in para 3 of his opposition, has pointedly argued that the conspicuous absence of the definition of the expression "District Magistrate" in the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 is sufficient to lead to the conclusion that the Parliament, enacting necessary provision in the Code of Criminal Procedure, 1973, an earlier Act, was of the view that it was not necessary to define the expression in the subsequent Act, though it was a special statute.

11. Mr. Kali has relied on a passage from G. P. Singh's Principles of Statutory Interpretation (10th ed.) p. 974 (saying: The width of delegation will depend upon the terms of the order of delegation); Ramchandra Keshav Adke (Dead) by Lrs. and Others Vs. Govind Joti Chavare and Others, (referring to Taylor v. Taylor (1875) 1 Ch D 426 and saying in para 25 : A century ago Jessel M.R. adopted the rule that where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all and that other methods of performance are necessarily forbidden.); Chandrika Jha Vs. State of Bihar and Others, (Holding in para 11: The Executive cannot, however, go against the provisions of the Constitution or of any law); A.K. Roy and Another Vs. State of Punjab and Others, (saying in para 12: The maxim delegates non potest delegare merely indicates that this is not normally allowable but the Legislature can always provide for sub-delegation of powers.); State of Uttar Pradesh and Others Vs. Maharaja Dharmender Prasad Singh and Others, holding in para. 23A : If the parent Act does not delegate to the subordinate legislative authority to make a provision, the provision in the subordinate legislature is ultra vires.); Sahni Silk Mills (P) Ltd. and Another Vs. Employees' State Insurance Corporation, (saying in para 5 : The Courts are normally rigorous in requiring the power to be exercised by the persons or the bodies authorised by the statutes. It is essential that the delegated power should be exercised by the authority upon whom it is conferred and by no one else.); Aseena Vs. Sub-Divisional Magistrate and Others, (holding that the District Magistrate is not authorised to delegate his power u/s 14 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 to a Sub-Divisional Magistrate.); and M/s. Sundaram BNP Paribas Home Finance Ltd. Vs. State of Kerala and Others, holding that Section 14 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 does not authorise delegation of power u/s 14 thereof.).

12. The provisions of Section 14 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 are quoted below:

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 if 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 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 or 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.

13. The provisions of Section 20 of the Code of Criminal Procedure, 1973 are quoted below:

20. Executive Magistrates.- (1) In every district and in every metropolitan area, the State Government may appoint as many persons as it thinks fit to be Executive Magistrates and shall appoint one of them to be the District Magistrate.

(2) The State Government may appoint any Executive Magistrate to be an Additional District Magistrate, and such Magistrate shall have such of the powers of a District Magistrate under this Code or under any other law for the time being in force as may be directed by the State Government.

(3) Whenever, in consequence of the office of a District Magistrate becoming vacant, any officer succeeds temporarily to the executive administration of the district, such officer shall, pending the orders of the State Government, exercise all the powers and perform all the duties respectively conferred and imposed by this Code on the District Magistrate.

(4) The State Government may place an Executive Magistrate in charge of a subdivision and may relieve him of the charge as occasion requires; and the Magistrate so placed in charge of a subdivision shall be called the Sub-divisional Magistrate.

(4A) The State Government may, by general or special order and subject to such control and directions as it may deem fit to impose, delegate its powers under

Sub-section (4) to the District Magistrate.

(5) Nothing in this section shall preclude the State Government from conferring under any law for the time being in force, on a Commissioner of Police, all or any of the powers of an Executive Magistrate in relation to a metropolitan area.

14. It seems to me that the issues concerning delegation, definition of the expression "District Magistrate", absence of the definition in the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, etc. raised by the parties are absolutely irrelevant for the purpose of deciding the short question whether the Additional District Magistrate making the impugned order u/s 14 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 was competent to make the order.

15. It is evident from the provisions of Section 14 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 that the power thereunder to give necessary assistance to the secured creditor in taking possession of secured asset is to be exercised by the District Magistrate within whose jurisdiction the secured asset or other documents may be situated or found.

16. In view of the provisions of Section 20 of the Code of Criminal Code, 1973, the district Magistrate is only one of the Executive Magistrates appointed by the State Government. The State Government has been empowered to appoint an Executive Magistrate to be an Additional District Magistrate. The provisions of Section 20 empower the State Government to appoint as many persons as it thinks fit to be the Executive Magistrates, but it shall appoint one of them to be the District Magistrate and may appoint any Executive Magistrate to be an Additional District Magistrate. Section 20 further provides that when the State Government appoints an Executive Magistrate to be an Additional District Magistrate, such Magistrate shall have such of the powers of a District Magistrate under the Code of Criminal Procedure, 1973 or under any other law for the time being in force as may be directed by the State Government.

17. It is, therefore, evident that the provisions of Section 20(2) of the Code empowers the State Government to appoint an Executive Magistrate to be an Additional District Magistrate empowering such Additional District Magistrate to exercise the powers of a District Magistrate u/s 14 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. Appointment of an Executive Magistrate to be an Additional District Magistrate and empowering such Additional District Magistrate to exercise the power of the District Magistrate u/s 14 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, does not amount to delegation of the Section 14 power of the District Magistrate to an Additional District Magistrate either by the State Government or by the District Magistrate.

18. There is no question of conflict between the provisions of the two Acts. The provisions of Section 20 of the Code empower the State Government to appoint an Executive Magistrate to be an Additional District Magistrate and to empower him to exercise power of the District Magistrate u/s 14 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. the question should not be whether the person exercising the power u/s 14 of this Act is designated as a District Magistrate. The question rather can be whether he has been specifically empowered under any law to exercise the power of the District Magistrate u/s 14 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002.

19. When Section 20(2) of the Code specifically empowers the State Government to appoint an Executive Magistrate as an Additional District Magistrate and empower such Additional District Magistrate to exercise the power of the District Magistrate under the laws mentioned in the order of appointment, I am unable to see how it can be argued that simply because the person's designation is Additional District Magistrate, he will not be competent to exercise the power of the District Magistrate u/s 14 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002.

20. In this case, it is evident from the order appointing the Additional District Magistrate who issued the impugned order that the State Government appointing him as such clearly empowered him to exercise all powers of the District Magistrate. Therefore, there cannot be any doubt that he was empowered to exercise the power of the District Magistrate u/s 14 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002.

21. Two decisions of the Kerala High Court, in my view, are of no assistance at all. It is evident from the decisions that there the Section 14 orders in question were not passed by any Additional District Magistrate appointed u/s 20(2) of the Code of Criminal Procedure, 1973 empowered to exercise all the powers of the District Magistrate.

22. For these reasons, I hold that there is no merit at all in the contentions raised by counsel for the Petitioner. The petition is, accordingly, dismissed. The prayer for stay is misconceived. There is nothing to stay. Nor is there any scope for making an interim restraining order after dismissing the petition. No costs. Certified xerox.