
(2008) 12 OHC CK 0055
In the Orissa High Court

Jholei Baba Agency and Others

APPELLANT

Vs

State Bank of India, Stressed Assets Resolution Centre

RESPONDENT

Date of Decision : 17-12-2008

Acts Referred:

Constitution of India, 1950 — Article 14

Citation : AIR 2009 Ori 109 : (2009) 107 CLT 368

Hon'ble Judges : B.S. Chauhan, C.J.;B.N. Mahapatra, J

Bench : Division Bench

Judgement

B.S. Chauhan, C.J.—This Writ Petition has been filed for quashing the Orders Dated 2.12.2008 (Annex.-2 series), passed by the Learned Presiding Officer, Debt Recovery Tribunal, Cuttack (hereinafter called the Tribunal, in O.A. Nos. 189 of 2008.

2. The facts and circumstances giving rise to this case are that the Defendant-Petitioner had taken loan from the Opposite Party-bank and as" it was not paid, the Bank filed a suit before the Tribunal on 01.9.2008 for making the recovery of the outstanding dues.The matter came up for hearing before the Tribunal on 22.10.2008 and notice was issued to the Defendant-Petitioner fixing 02.12.2008 as the date of hearing. The notice could not be served upon the Defendant-Petitioner personally as he was out of station and other adult members of his family did not accept the notice. When the fact came to the knowledge of the Defendant-Petitioner he filed an application before the Tribunal on 17.11.2008 along with IPO of Rs. 250/- to obtain a copy of the plaint and also submitted an application for giving some more time to file the written statement (hereinafter called the "WS"). He was served with the documents i.e. .copy of the plaint etc. on 24.11.2008. The matter came up before the Tribunal on 02.12.2008. The application submitted by the Defendant-Petitioner for granting some time to file WS was disposed of observing that WS could be filed on the very same date i.e. 02.12.2008 itself by 6.00 P.M. or by 10.12.2008 if the Defendant-Petitioner deposits 5% of the claimed amount. Thus the Defendant-Petitioner was directed

that in case he chooses to file the WS by 10.12.2008, he shall deposit Rs. 1,43,365/- being 5% of the outstanding dues as claimed by the Bank. Being aggrieved, this Writ Petition has been filed by the Defendant- Petitioner.

3. Mr. S.D. Das, Learned Senior Counsel for the Petitioner submitted that the Petitioner has shown his bona fide to defend the case. As he appeared before the Tribunal prior to the date fixed i.e. 02.12.2008 " to obtain the papers, he could have been given reasonable time to file the WS. More so, the Tribunal was not competent to pass a conditional order of 5% pre deposit while granting time to file WS. Hence the orders passed by the Tribunal are liable to be set aside.

4. On the contrary Mr. G.B. Das, Learned Counsel for the Opposite Party -Bank vehemently opposed the petition contending that this Court should take into consideration the scheme of the of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (hereinafter called the "Act, 1993") under which the Tribunal has been constituted and as the recovery is to be made in a most expeditious manner, the orders impugned do not warrant any interference and the petition is liable to be dismissed.

5. We have considered the rival submissions made by the Learned Counsel for the parties and perused the record.

6. So far as the issue of filing written statemer this concerned, even in the Civil Court after amendment of provisions of Order 8 Rule 1 CPC w.e.f. 1.7.2002, question arose as to whether amended provision providing for 30 days limitation for filing WS was mandatory in nature. The Supreme Court, while dealing with the case, held that the provisions are not mandatory in nature. However, it is the duty of the Defendant to file written statement within a prescribed period, but there is no prohibition under the law if the Court in a particular case allows some further period to file the written statement. Thus further time may be given to the Defendant to file written statement only in a case where the Court comes to the conclusion that there had been some justified cause for not filing the same in time. But time can certainly not be so granted in a routine manner. (Vide Kailash Vs. Nanhku and Others, ; Salem Advocate Bar Association, Tamil Nadu Vs. Union of India (UOI), ; Mr. Shaikh Salim Haji Abdul Khayumsab Vs. Mr. Kumar and Others, ; R.N. Jadi and Brothers and Others Vs. Subhashchandra, ; and Zolba v. Keshao and Ors. AIR 2008 SCW 2739 .

7. Section 19(4) of the Act, 1993 provides that Defendant may file written statement written thirty days from the service of summon on him. However, Sub-section (5) thereof enables the Tribunal to grant further time.

8. Rule 12 of Debt Recovery Tribunal (Procedure) Rules, 1993 (hereinafter called the "Rules, 1993) provides for filing written statement within one month of the service of notice of filing of the application on him. However, Sub-rule (3) thereof confers discretion on the Tribunal allowing the Defendant to file written statement after expiry of the period referred to hereinabove.

9. Sub-rule (4) thereof provides that in case written statement is not filed within a period of limitation prescribed by Rule. 12 or within further period granted by the Tribunal, it may proceed without giving further time to the Defendant to file written statement.

10. A conjoint reading of the aforesaid rules referred to hereinabove, make it crystal clear that in case the written statement is not filed within 30 days, the Tribunal is competent to grant further reasonable time to the Defendant in an appropriate case. No straitjacket formula can be laid down for providing as what would be the reasonable period, as it would depend upon the facts and issues involved in a particular case.

11. Deciding anything or passing any order in haste amounts to arbitrariness and is hit by Article 14 of the Constitution of India.

12. In *Dr. S.P.Kapoor v. State of Himachal Pradesh and Ors.* AIR 1981 SC 2181; the Hon'ble Supreme Court held that in a case if thing is done in a haste, mala fide would be presumed. The said Judgment was referred to and relied upon by the Supreme Court in *Bahadursinh Lakhubhai Gohil v. Jagdishbhai M. Kamalia and Ors.* AIR 2004 SC 1159; wherein the apex Court held that order passed in haste may be held as not having been passed acting in a bona fide manner.

13. In *Madhya Pradesh Hasta Shilpa Vikas Nigam Ltd. Vs. Devendra Kumar Jain and Others*, ; the Supreme Court considered the same issue and held that such an order may be pronounced as having not been passed in public interest.

14. In *V.K. Industries and Others Vs. Madhya Pradesh Electricity Board, Rampur, Jabalpur*, , the Apex Court while dealing with application under Order 9 Rule 13 CPC for setting aside the ex parte Judgment and decree held that in an appropriate case where the Court is satisfied that application deserves to be allowed, it may direct the applicant to deposit part of the decretal amount as a condition for setting aside such decree. But the Court should be satisfied that there was sufficient cause for non-appearance and the condition so imposed should be reasonable. Court should not impose a harsh condition.

15. Same view has been reiterated by the Hon'ble Supreme Court in *Tea Auction Ltd. Vs. Grace Hill Tea Industry and Another*, .

16. This Court in *M/s. Bata India Ltd. v. Amiya Sankar Patra* 2008 (II) OLR 794 has dealt with the issue elaborately and held that pre-deposit condition of any amount whatsoever cannot be a condition precedent for consideration of any application before any Court unless the statute itself so provides e.g. pre-deposit Conditions in fiscal statutes for grant of interim relief before the Appellate forum. It is only if the Court comes to the conclusion that an ex parte Judgment and decree is liable to be set aside, only then a reasonable condition can be imposed. But it is not permissible for the Court to impose any condition which may be arbitrary or unreasonable.

17. The rule of law inhibits arbitrary action and such action is liable to be

invalidated. Every action of the State or its instrumentalities should not only be fair, legitimate and above-board but should be without any affection or aversion. It should not be suggestive of discrimination. (Vide Haji T.M. Hassan Rawther Vs. Kerala Financial Corporation,).

18. In State of Andhra Pradesh and Another Vs. Nalla Raja Reddy and Others, the Constitution Bench of the Apex Court observed as under:

Official arbitrariness is more subversive of doctrine of equality than the statutory discrimination. In spite of statutory discrimination, one knows where he stands but the wand of official arbitrariness can be waved in all directions indiscriminately.

19. In the said Judgment, the Apex Court has referred to the Judgment in United States v. Wunderlich (1951) 342 US 98, wherein it has been observed as under:

Law has reached its finest moments, when it has freed men the unlimited discretion of some ruler where discretion is absolute, man has always suffered.

20. Therefore, Rule of Law may be said to be the sworn enemy of caprice. The Apex Court has also referred to and quoted with approval Lord Mansfield in Rex V. John Wilkes (1770) 4 Burr 2527, wherein it has been observed as under:

Discretion means sound discretion guided by law. It must be governed by rule, not by humour; it must not be arbitrary; vague and fanciful Even the Courts are bound to exercise their discretion "according to well established judicial principles, according to reason and fair play, and not according to whim and caprice"?. Discretion when applied to a Court of justice, means sound discretion guided by law. It must be governed by rule, not by humour; it must not be arbitrary, vague and fanciful, but legal and regular

(Emphasis added)

21. Discretion of the Government/Authority/Court cannot be absolute and unjustifiable. It should not be lacking bona fide and made in colourable exercise of the power. The rule of law from this point of view means that decision should be made by the application by known principles and rules and in general, such decision should be predictable and a person should know where he stands. It should not be capricious or perverse or ultra vires. Discretion is known through law what is just and decision should be based on relevant and reasonable reasons carrying even any resemblance of nexus in adjudging the facts. The judicial courts have an obligation to exercise the discretion in judicious manner i.e. the Court examines the facts, is aware of law and then decides the case objectively and rationally what serves the interest better. The Court cannot pass an order whimsically or arbitrarily. The Judgment is to be guided by reasonableness and fairness, (vide Nagendra Nath Bora and Another Vs. The Commissioner of Hills Division and Appeals, Assam and Others, ; Sitaram Ramcharan etc. Vs. M.N. Nagarshana and Others, ; Sarpanch, Lonand Grampanchayat Vs. Ramgiri Gosavi and Another, ; Channabasappa Basappa

Happali Vs. The State of Mysore, ; State of Punjab and Another Vs. Gurdial Singh and Others, ; Suman Gupta and Others Vs. State of Jammu & Kashmir and Others, ; Delhi Transport Corporation Vs. D.T.C. Mazdoor Congress and Others, ; Bangalore Medical Trust Vs. B.S. Muddappa and others, ; Hansraj H. Jain Vs. State of Maharashtra and Others, ; Amarnath Ashram Trust Society v. Governor of U.P. AIR 1998 SC 477; Kumaon Mandal Vikas Nigam Ltd. v. Girja Shankar Pant and Ors. AIR 2001 SC 24; Dwarka Das and Others Vs. State of Haryana, ; National Insurance Co. Ltd. Vs. Keshav Bahadur and Others, ; Union of India v. Kuldeep Singh AIR 2004 SC 827; Union of India v. Kuldeep Singh AIR 2004 SC 827; Reliance Airport Developers Pvt. Ltd. Vs. Airports Authority of India and Others,).

22. In view of the above, law can be summarised that the Tribunal is competent to grant time for filing the WS beyond the period prescribed under the statute. What should be the reasonable time to be granted would depend upon the facts of the case and complexity of the issues involved therein. However, the Court or Tribunal should not proceed in hot haste, rather exercise the discretion judiciously. The Tribunal does not have the power to impose a condition of pre-deposit of any part of the claim amount while considering the application for grant of time for filing the WS. Undoubtedly, in such a case the Tribunal can impose a cost if the facts so require.

23. The instant case is required to be examined in the light of aforesaid settled legal proposition.

24. The suit was filed by the Bank on 01.09.2008. It came up for hearing before the Learned Tribunal on 22.10.2008. Thus the Registry of the Tribunal took 52 days, in scrutinizing the papers and placing the matter before the Tribunal. The Tribunal issued notice returnable on 02.12.2008 i.e. after 40 days from the date of issuance of notice. The Defendant- Petitioner appeared on 17.11.2008 i.e. within 25 days from the date of issuance of notice. There is nothing on record to show as on what date the deemed service of notice was made on the Defendant-Petitioner as it is alleged that he was not present on the given address and other family members had refused to accept the notice. When the matter came up before the Tribunal on 02.12.2008 and application for grant of some time to file the WS, was taken up, the Tribunal passed the following order:

Counsel for applicant bank present. Sri M.M. Swain filed vakalat for D1 to D3 and filed petition for grant of time to file WS. The said petition is dismissed vide separate order. The Counsel for Defendants submitted that he will file WS today by 6 PM before the Registry. He is at liberty to file the same and if he files today it will be accepted. Counsel for applicant bank filed evidence on affidavit. Since the Petitioner Defendant also given chance to file their WS in the petition file by then 10.12.2008 by depositing 5% of the claim amount with the applicant bank and by filing a petition to accept the same. Hence call on 10.12.2008.

25. Thus, it is evident from the aforesaid order that the written statement was

directed to be filed either on the same day by 6 P.M. or by 10.12.2008 if Defendant-Petitioner deposits 5% of the claim amount with the applicant bank. Second order dealing in the suit is also in the same language directing the Defendant-Petitioner to deposit the amount of Rs. 1,43,365/- being 5% of the outstanding dues as claimed by the bank against the Petitioner.

26. It is very much evident from the said order that the Learned Tribunal had not given any reasonable time to the Defendant- Petitioner to file the WS. In such a fact situation, if it is assumed that the Tribunal had taken up the matter at 4.00 O'clock, and asked the Defendant-Petitioner to file the WS by 6.00 O' Clock on the same day, it would be tantamount to asking somebody to do an impossible act.

27. The Court has to consider the scope and application of legal maxims "*lex non cogit at impossibilia*" (the law does not compel a man to do what he cannot possibly perform) and "*impossibilium nulla obligatio est*" (the law does not expect the party to do the impossible). The scope of the application of the said doctrine of impossibility has elaborately been considered and applied by the Supreme Court in *Chandra Kishore Jha Vs. Mahavir Prasad and Others*, ; and *Mohammed Gazi v. State of M.P. and Ors.* (2000) 4 SCC 342. These maxims which have also been expressed as *impotentia excusate lege* must be understood in the qualified sense that *impotentia* excuses when there is a necessary or invincible disability to perform the mandatory part of the law or to forbear the prohibitory. These maxims are akin to the maxim of Roman Law *Nemo Tenetur ad Impossibilia* (no one is bound to an impossibility) which is derived from common sense and natural equity and has been adopted and applied in law from time immemorial. (Vide *Eagar v. Furnivall* 17 Ch. D. 115).

28. In Special Reference No. 1 of 2002; Ref. by President, , the Apex Court observed as under:

The maxim of law *impotentia excusat legem* is intimately connected with another maxim of law *lex non cogit ad impossibilia*. *Impotentia excusat legem* is that when there is a necessary or invincible disability to perform the mandatory part of the law that *impotentia* excuses. The law does not compel one to do that which one cannot possibly perform. Therefore, when it appears that the performance of the formalities prescribed by a statute has been rendered impossible by circumstances over which the persons interested had no control, like an act of God, the circumstances will be taken as a valid excuse.

29. The law is understood to disclaim all intention of compelling to impossibilities and the administration of laws must adopt that general exception in the consideration of all particular cases. Therefore, there are implied obligations not to force a person to do something which is rendered impossible by causes beyond his control. (Vide *Hick v. Rodocanachi* 1899 (2) QB 626).

30. Similar view has been reiterated by the Apex Court in *Hira Tikkbo v. Union Territory, Chandigarh and Ors.* AIR 2004 SC 3649; and *Haryana Urban*

Development Authority and Anr. v. Dr. Babeswar Kanhar and Anr. AIR 2005 SC 1491.

31. Thus, as a person is not supposed to do impossible thing, we fail to understand as under what circumstances", the Learned Tribunal proceeded with the matter in an unusual hot haste.

32. In view of the fact that the Tribunal ought not to have proceeded with such a haste and as we have already reached the conclusion that direction of pre-deposit of any part of the outstanding claim cannot be directed to be deposited while considering the application for grant of time to file the WS, the orders impugned cannot be sustained in the eyes of law.

33. Petition succeeds and is allowed. The Orders Dated 02.12.2008, passed by the Tribunal, are hereby set aside.

34. In the facts and circumstances of the case, the Defendant-Petitioner is directed to file written statement within a period of seven days from today. Rejoinder affidavit if any, may be filed by the bank within three days thereafter. Learned Tribunal may proceed with the case from the stage of completion of pleadings and for that purpose, parties are directed to appear before the Tribunal on 29.12.2008. Learned Tribunal is requested to proceed with the case in accordance with the law and dispose of the matter expeditiously.

B.N. Mahapatra, J.

I agree.