(2014) 02 KL CK 0063

In the High Court Of Kerala

Case No : Crl. M.C. No. 5651 of 2013

Rosamma Joseph and Another — APPELLANT

Vs

State of Kerala and Another — RESPONDENT

Date of Decision : 21-02-2014

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 482
Recovery of Debts Due to Banks and Financial Institutions Act, 1993 — Section 34, 34(1), 34(2)
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 13, 13(2), 14, 14(1), 14(3)

Citation : (2014) 2 KLJ 29

Hon'ble Judges : K. Ramakrishnan, J

Bench : Single Bench

Advocate : Praveen K. Joy, G. Manu Krishnan, T.A. Joy, Nixon Paul and Dinesh R. Shenoy, Advocate for the Appellant; Sareena George P. (PP) and Sathish Ninan, Advocate for the Respondent

Final Decision : Dismissed

Judgement

K. Ramakrishnan, J.—Crl.M.C. No. 5651/2013 was filed by the counter petitioners in Crl.M.P. No. 498/2012 on the files of the Chief Judicial Magistrate Court, Kottayam, to set aside the order passed thereon u/s 482 of the Code of Criminal Procedure.

2. Crl.M.C. No. 1041/2014 was also filed by the counter petitioners in CMP. No. 132/2012 on the files of the Chief Judicial Magistrate Court, Palakkad, to quash the order passed thereon u/s 482 of the Code of Criminal Procedure.

3. In both these cases, the 2nd respondent Bank filed application before the Chief Judicial Magistrate Court in respective places seeking assistance to get delivery of the secured interest invoking Section 14 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as ''the SARPAESI Act''). In both these cases,

properties of the petitioners were mortgaged to the banks as security for availing loan and they have committed default. Thereafter, notice u/s 13(2) of the SARFAESI Act was sent to them. Since they have not sent any objection or paid the amount within the specified time provided u/s 13 of the Act, they filed applications seeking assistance of the Chief Judicial Magistrate to take possession of the property secured. The learned Chief Judicial Magistrate after satisfying the contents of the applications and the documents produced, appointed an Advocate Commissioner to take possession of the property and deliver the same to the bank. The action of the Chief Judicial Magistrate appointing Advocate Commissioner to deliver the property is being questioned before this Court by the petitioners in both these cases.

4. In both these cases, the common question raised by the respective learned counsel for the petitioners was regarding maintainability of the application before the Chief Judicial Magistrate Court u/s 14 of the SARFAESI Act. Since common question arose for consideration in both these cases, these petitions were disposed of by this Court by a common judgment.

5. The counsel for the petitioners submitted that by virtue of Section 14 of the SARFAESI Act only Chief Metropolitan Magistrate or District Magistrate alone is entitled to entertain the application for this purpose. So, the Chief Judicial Magistrate has no jurisdiction to entertain the petition u/s 14 of the SARFAESI Act. Further, they have also argued that, wherever the Judicial First Class Magistrate has to exercise power, it has been specifically mentioned under the SARFAESI Act and so it cannot be said that the legislature was not aware of the difference between Chief Judicial Magistrate and Chief Metropolitan Magistrate while using the terminology Chief Metropolitan Magistrate or District Magistrate in that section. According to the learned counsel, it is settled law that the courts cannot supply casus omissus and purposive interpretation also is not available for the purpose of supply of casus omissus in such cases as there is no ambiguity in the terminology used in the section. They have relied on the Full Bench decision of the Madras High Court in K. Arockiyaraj Vs. The Chief Judicial Magistrate, Srivilliputhur and The Housing Development Finance Corporation Limited, , State of Mizoram Vs. Biakchhawna, , Chandra Kishore Jha Vs. Mahavir Prasad and Others, , Babu Verghese and Others Vs. Bar Council of Kerala and Others, and State of West Bengal Vs. B.K. Mondal and Sons, in support of the case and they wanted this Court to refer the matter to a Larger Bench to consider the question again as, according to them, the earlier two Division Benches of this Court did not consider the aspects, now considered by the Madras High Court and Bombay High Court in this regard.

6. On the other hand, the counsel for the respondents in both the cases submitted that it is clear from the intention of the Legislature that enacting the present Act itself was to provide a speedy remedy for enforcing the right of the financial institutions over their secured interest for realisation of the amount and wherever Chief Metropolitan Magistrates are not available, Chief Judicial

Magistrates are vested with the power to do all the works of the Chief Metropolitan Magistrate. Two Division Benches of this Court in Muhammed Ashraf and Smt. C. Arifa Vs. Union of India (UOI), and Radhakrishnan, V.N. Vs. State of Kerala and Another had held that the Chief Judicial Magistrates are empowered to do all the works of the Chief Metropolitan Magistrate in non metropolitan areas and in the latter decision, the request for reference to a Larger Bench for considering the same purpose was declined as well. So, under the circumstances, there is no merit in the submission made by the counsel for the petitioners.

7. It is an admitted fact that in both these cases, the banks have filed applications before the respective Chief Judicial Magistrate Courts namely Kottayam and Palghat for enforcing their secured interest invoking Section 14 of the SARFAESI Act. Section 14 of the SARFAESI Act (as stood prior to amendment) reads as follows:

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 asset 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 assets, 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 asset 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.

8. Though Section 14 of the SARFAESI Act was amended by Amendment Act 1 of 2013, which came into force from 4.1.2013, there is no change made by the amendment to Section 14(1) of the SARFAESI Act.

9. It is true that, in Section 14 it has been mentioned that, the application has to be filed before the Chief Metropolitan Magistrate or District Magistrate. In the decision reported in Arockiyaraj''s case (supra), the Full Bench of the Madras High relying on the decisions of Bombay High Court in IndusInd Bank Ltd.,

(formerly known as Ashok Leyland Finance Ltd.) Vs. The State of Maharashtra, and Arjun Urban Co-operative Bank Ltd., Solapur v. C.J.M. Solapur Court, 2009 (2) DRTC 431 (Bom) held that only Chief Metropolitan Magistrates or District Magistrates are empowered to entertain the application u/s 14 of the SARFAESI Act. But, the Division Bench of this Court in Muhammed Ashraf and Smt. C. Arifa Vs. Union of India (UOI), has held that the powers of the Chief Judicial Magistrate in non metropolitan area and the Chief Metropolitan Magistrate in metropolitan area are one and the same and the application u/s 14 of the SARFAESI Act can be entertained by the Chief Judicial Magistrate in a non metropolitan area. The question whether this is casus omissus was considered by the Division Bench in para 5 of the decision which reads as follows:

5. Learned counsel for the petitioners argued that so long as the word ''Chief Judicial Magistrate '' is not mentioned in S. 14 of the Securitisation Act, merely because Chief Metropolitan Magistrate is mentioned in S. 14, it cannot be stated that Chief Judicial Magistrate in non metropolitan areas also has the power under S. 14. Relying on the decision of the Hon''ble Supreme Court in AIR 2003 SC 2103 it was argued that the Court cannot supply the omissions by the Legislature. While interpreting a provision, the Court only interprets the law and cannot legislate it. It is for the legislature to amend, modify or repeal it if it is deemed necessary. By the principle of casus omissus, Court cannot supply the law. In the above case, the Hon''ble Supreme Court was considering the Recovery Debts Due to Banks and Financial Institutions Act (RDBI Act). Under S. 34(1) of the above Act, it was mentioned that the provisions of that Act have overriding effect over other Acts. But, the question is whether RDBI Act was enacted in addition to other acts. Sub-section (2) of S. 34 of the above Act provides that it is in addition to certain specified Acts like Financial Corporation Act etc. Uttar Pradesh Public Monies (Recovery of Dues) Act, 1972 (UP. Act) was not included under S. 34(2) of the RDBI Act. Therefore, the Hon''ble Supreme Court has held that Financial Corporation can approach for recovery of dues under the RDBI Act or under the Financial Corporation Act, but, not under the U.P. Act, 1972 as it was not enacted in addition to the U.P. Act, 1972. Here, the position is entirely different. The question is whether the term "Chief Metropolitan Magistrate" in metropolitan areas will include Chief Judicial Magistrate in non metropolitan areas. We are of the view that legislation has to be understood in a reasonable manner. In the context of the definition in the Cr.P.C., it can be gathered that a Chief Judicial Magistrate in non metropolitan area and Chief Metropolitan Magistrate in metropolitan area are used in legal parlance similarly. As held in Holmes v. Bradfield Rural District Council, 1949 (1) All ER 381 (page 384) and Sri Nasiruddin Vs. State Transport Appellate Tribunal, this Court has to adopt ''just reasonable and sensible'' interpretation. In this connection, we refer to the following observations of the Denning L.J. in Seaford Court Estates Ltd. v. Asher, 1949 (2) All ER 155, p. 164(CA):

When a defect appears a Judge cannot simply fold his hands and blame the draftsman. He must set to work on the constructive task of finding the intention of Parliament and then he must supplement the written words so as to give ''force and life'' to the intention of the Legislature. A Judge should ask himself the question how, if the makers of the Act had themselves come across this ruck in the texture of it, they would have straightened it out? He must then do as they would have done. A Judge must not alter the material of which the Act is woven, but he can and should iron out the creases. Though the above view was criticised by House of Lords in Magor and St. Mellons R.D.C. v. Newport Corporation, 1951 (2) All ER 839 (HL), it was quoted with approval by the Hon''ble Supreme Court in M. Pentiah and Others Vs. Muddala Veeramallappa and Others, , Bangalore Water Supply and Sewerage Board Vs. A. Rajappa and Others, , NEPC Micon Limited and Others Vs. Magma Leasing Limited, . But, House of Lords in Inco Europe Ltd. and Others v. First Choice Distribution (a firm) and Others, 2000 (2) All ER 109, p. 115) held that 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 Legislature. In Padmasundara Rao and Others Vs. State of Tamil Nadu and Others, a Constitution Bench of the Supreme Court held that "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...". After referring to the decisions in Reserve Bank of India Vs. Peerless General Finance and Investment Co. Ltd. and Others, and Kehar Singh and Others Vs. State (Delhi Administration), and various other decisions on the point, the Hon''ble Supreme Court in National Insurance Co. Ltd. Vs. Laxmi Narain Dhut, has considered how statute should be interpreted. The hon''ble Supreme Court held as follows:

34. A statute is an edict of the Legislature and in construing a statute, it is necessary to seek the intention of its maker. A statute has to be construed according to the intent of those who make it and the duty of the Court is to act upon the true intention of the Legislature. If a statutory provision is open to more than one interpretation the Court has to choose that interpretation which represents the true intention of the Legislature. This task very often raises difficulties because of various reasons, in as much as the words used may not be scientific symbols having any precise or definite meaning and the language may be an imperfect medium to convey one''s thought or that the assembly of Legislatures consisting of persons of various shades of opinion purport to convey a meaning which may be obscure. It is impossible even for the most imaginative Legislature to foresee all situations exhaustively and circumstances that may emerge after enacting a statute where its application may be called for. Nonetheless, the function of the Courts is only to expound and not to legislate. Legislation in a modern State is actuated with some policy to curb some public evil or to effectuate some public benefit. The legislation is primarily directed to the problems before the Legislature based on information derived from past and present experience. It may also be designed by use of general words to cover similar problems arising in future. But, from the very nature of things, it is impossible to anticipate fully the varied situations arising in future in which the

communicate such indefinite referents are bound to be in many cases lacking in clarity and precision and thus giving rise to controversial questions of construction. The process of construction combines both literal and purposive approaches. In other words the legislative intention i.e., the true of legal meaning of an enactment is derived by considering the meaning of the words used in the enactment in the light of any discernible purpose or object which comprehends the mischief and its remedy to which the enactment is directed, (see District Mining Officer and Others Vs. Tata Iron and Steel Co. and Another, .

35. It is also well settled that to arrive at the intention of the legislation depending on the objects for which the enactment is made, the Court can resort to historical, contextual and purposive interpretation leaving textual interpretation aside. Francis Bennion in his book "Statutory Interpretation" described "purposive interpretation" as under: "A purposive construction of an enactment is one which gives effect to the legislative purpose by-- (a) following the literal meaning of the enactment where that meaning is in accordance with the legislative purpose, or (b) applying a strained meaning where the literal meaning is not in accordance with the legislative purpose.

Here, in this case, there is no casus omissus also. Chief Judicial Magistrates in metropolitan areas are designated as Chief Metropolitan Magistrates and vice versa mutatis mutandis by implication and by reference to the area of jurisdiction. Chief Judicial Magistrate in a non metropolitan area stands in the same footing as Chief Metropolitan Magistrate in metropolitan area and, their designations are used synonymously to denote the authority depending upon where one is agree with the view of the learned Single Judge that in non metropolitan areas, apart from the District Magistrate, the powers can be exercised by the Chief Judicial Magistrate also. A similar view was taken by the Madras High Court in 7312 of 2004 (The Dhanlakshmi Bank Limited Vs. Kovai Foods and Beverages and Others,) and we are unable to agree with the decision of the Bombay High Court (Aurangabad) in IndusInd Bank Ltd., (formerly known as Ashok Leyland Finance Ltd.) Vs. The State of Maharashtra, which took a contrary view).

10. This was affirmed by another Division Bench of this Court in Radhakrishnan V.N''s case (supra). In that case also a request was made to refer the matter to a Larger Bench to consider the question as to whether the Chief Judicial Magistrate has got power to entertain the application u/s 14 of the SARFAESI Act and the Division Bench in that case held that there is no necessity to refer Muhammed Ashraf''s case (supra) to a Larger Bench for consideration and concurred with the decision in Muhammed Ashraf''s case (supra).

11. There is no dispute regarding the proposition laid down in the decisions reported in State of Mizoram Vs. Biakchhawna, , Chandra Kishore Jha Vs. Mahavir Prasad and Others, , Babu Verghese and Others Vs. Bar Council of Kerala and Others, and State of West Bengal Vs. B.K. Mondal and Sons, regarding the question as to whether the courts have got power to supply casus

omissus when there is no ambiguity in the'' provisions and when certain procedures are provided under the statute, it has to be done in the same manner as it is provided etc. Further, in the decision reported in Raman Gopi and another Vs. Kunjuraman Uthaman, , the Full Bench of this Court held that when a Bench of higher number of judges of the concerned court decided a question on the subject, then that is binding on the Bench of co-equal judges or lesser number of judges of that court. So, under the circumstances, the decisions on the subject rendered by two Division Benches of this Court in Muhammed Ashraf''s case and Radhakrishnan V.N''s case (supra) are binding on this Court. Further, it is settled law that, if a decision has been rendered by the same High Court, then any decision rendered by any other High Court is not binding on the other High Court but it has got only persuasive value. This was so held in the decision reported in Commissioner of Income Tax Vs. Thana Electricity Supply Ltd., relying on the decision reported in H.H. Maharajadhiraja Madhav Rao Jivaji Rao Scindia Bahadur of Gwalior and Others Vs. Union of India and Another, held as follows:

The general principles with regard to precedents are:

(a) The law declared by the Supreme Court being binding on all courts in India, the decisions of the Supreme Court are binding on all courts, except, however, the Supreme Court itself which is free to review the same and depart from its earlier opinion if the situation so warmth. What is binding is, of course, the ratio of the decision and not every expression found therein.

(b) The decisions of the High Court are binding on the subordinate courts and authorities or Tribunals under its superintendence throughout the territories in relation to which it exercises jurisdiction. It does not extend beyond its territorial jurisdiction.

(c) The position in regard to the binding nature of the decisions of a High Court on different Benches of the same court, may be summed up as follows:

(i) A single judge of a High Court is bound by the decision of another single judge or a Division Bench of the same High Court. It would be judicial impropriety to ignore that decision. Judicial committee demands that a binding decision to which his attention had been drawn should neither be ignored nor overlooked.

(ii) A Division Bench of a High Court should follow the decision of another Division Bench of equal strength or a Full Bench of the same High Court. If one Division Bench differs from another Division Bench of the same High Court, it

should refer the case to a larger Bench.

(iii) Where there are conflicting decisions of courts of co-ordinate jurisdiction, the later decision is to be preferred if reached after full consideration of the earlier decisions.

(d) the decision of one High Court is neither binding precedent for another High Court nor for courts or Tribunals outside its territorial jurisdiction .

12. The same view was reiterated by our High Court in the decision reported in Josekutty Vs. State of Kerala, wherein it has been held that Single Judge is bound to follow the Division Bench decisions. The Single Judge cannot make a reference to Division Bench for the reason that the views of the Division Bench are not in agreement with his views. A Full Bench of this Court in Peter Vs. Sara, also expressed the same view. Further,'' another Single Bench of this Court in the decision reported in Federal Bank Limited Vs. A.V. Punnus, has held that the Madras decision is not binding in view of the Division Bench decision of this Court on this aspect. In view of the above discussions, there is no merit in the submission made by the counsel for the petitioners that the Chief Judicial Magistrate has no jurisdiction to entertain the application u/s 14 of the SARFAESI Act and there is no need to refer the matter to a Larger Bench for reconsideration in view of the fact that, that request was turned down by a Division Bench of this Court in Radhakrishnan V.N''s case (supra). Further, in the decision reported in Radhakrishnan V.N''s case (supra), it has been held that since the proceedings sought to be challenged is not one taken under the provisions of the Criminal Procedure Code, but it is one u/s 14 of the SARFAESI Act, the application filed u/s 482 of the Code of Criminal Procedure is not maintainable in view of the statutory bar contained u/s 14(3) of the SARFAESI Act. Further in the decision reported in Standard Chartered Bank Vs. V. Noble Kumar and Others, , the Hon''ble Supreme Court has held that the remedy of the petitioners in such cases is to file appeal before the Debt Recovery Tribunal after dispossession u/s 17 of the Act. That was also a case went from Tamil Nadu against an action taken by the Chief Judicial Magistrate invoking the power u/s 14 of the SARFAESI Act. So, under the circumstances, there is no merit in these petitions and these petitions are liable to be dismissed.

In the result, these petitions are dismissed.