SUPREME COURT OF INDIA

Food Corporation of India

Vs.

Sukh Deo Prasad

C.A.No.380 of 2007

(R V Raveendran and Markandey Katju JJ)

24.03.2009

JUDGEMENT

R.V.RAVEENDRAN, J.

The Food Corporation of India (`FCI' for short) challenges the order dated 6.3.2006 of the Allahabad High Court, rejecting its appeal against the order dated 15.12.2004 passed by the Additional District Judge (Special judge EC), Jhansi ordering attachment of its properties under Order 39 Rule 2A of the Code of Civil Procedure (Code for short) to an extent of Rs. 1,12,24,792.99.

Facts of the case :

2. In the year 1976, the respondent (Sukh Deo Prasad) offered to construct and let out godowns to FCI. For that purpose, the respondent and his brother V.K.Shukla obtained a term loan of Rs.10 lakhs from the State Bank of India, Jhansi Branch (for short `the bank') on 31.8.1977 and as security therefor mortgaged their land (in Khard village) and house property (at Jhansi) in favour of the Bank by deposit of title deeds. The repayment of the said loan was also guaranteed by one Raj Narain Khare and Shri Kishan on 6.10.1977.

In addition, another sum of Rs.5 lacs was sanctioned by the bank, by way of term loan to the respondent on 29.8.1977, repayment of which was guaranteed by one Ram Kishore Gupta and Khachore.

3. Three godowns were constructed by the respondent and his brother and let out to FCI for a term of five years in the year 1978. On the instructions of the lessors, FCI credited the rents to the loan account of the landlords with the bank. FCI vacated the said godowns and surrendered back possession in December, 1983.

4. The bank filed Suit No.93/1991 (the court of the Special Judge, E.C. Jhansi) against the respondent (Defendant No.1), the wife and son of his brother V.K.Shukla (defendants 2 and 3), Raj

Narain Khare (Defendant No.4 - guarantor for the loan of Rs.10 lacs) and Ram Kishore Gupta and Khachore (defendants 5 and 6 -- guarantors for the loan of Rs.5 lacs) for recovery of Rs.20,68,120.74 with interest at the rate of 11% with monthly rents, by sale of the mortgaged properties and for recovery of the balance amount, if any, personally from the defendants.

5. Defendants 1 to 3 in the suit contested the claim. They inter alia contended that the loan was obtained for the purpose of constructing godowns for FCI, that FCI had agreed to continue in occupation of those godowns as tenant until the entire loan due by them (landlords) to the bank was cleared, that FCI had vacated the godowns prematurely, and that therefore it should be made a party to the suit and made liable for payment of the suit claim. Issue No.7 was framed in the suit, as to whether suit was bad for non-joinder of FCI, and considered as a preliminary issue. By order dated 18.5.1994, the court directed FCI be impleaded as the seventh defendant in the suit.

4 FCI was not given any opportunity to show cause before being impleaded.

6. In June 1994, during the pendency of the said suit, the respondent and his son Sunil Kumar offered a fresh lease of one of the three godowns and the appellant took it temporarily on a month to month tenancy on a rent of Rs.0.50 paise per sq. ft. The tenancy agreement made it clear that FCI could surrender back the godown without any notice, whenever the same was not required.

7. On 18.1.1996 the bank filed an application in its suit, seeking an interim direction to FCI to restrain it from paying the rent for the said godown to defendants 1 to 3 and for a further interim direction to FCI to deposit the rents relating to the godown, to the loan account of defendants 1 to 3 with the bank. In the said application, the bank averred that FCI had earlier taken the godowns on rent in the year 1978 and had vacated them on the expiry of the lease period of 5 years; that in June, 1994, FCI had again taken on lease one of the godowns; that inspite of having agreed that the bank was entitled to receive the rents from the tenant (FCI), defendants 1 to 3 were collecting the rent in respect of the said godown directly from FCI 5 with the intention of denying the same to the bank, and that therefore it was entitled to an interim direction.

8. The trial court allowed the said application by order dated 27.5.1996. It found that when FCI had earlier taken the godowns on rent for five years, the borrowers had authorized the Bank to receive the rent with the condition that if the lease was not continued by FCI, the borrowers would be liable to pay the loan amount from their own resources. It held that bank was authorized under the loan documents executed by the borrowers to receive the rents in respect of the mortgaged property directly from the tenant. But as the borrowers were disputing the amount of liability, it issued the following directions in regard to the rent for the godown :

(a) FCI shall deposit the rent payable to defendants 1 and 2 (landlords) up to 31.3.1996 with the Punjab National Bank by way of a fixed deposit in the name of the defendants 1 and 2.

(b) In regard to the rent payable from 1.4.1996, in respect of every 12 months rent, 2 months rent shall be paid directly to defendants 1 and 2 (towards building maintenance) and balance 10 months' rent shall be deposited with plaintiff Bank, to be invested in the name of the landlords/defendants 1 and 2 by way of MCC periodical deposits.

(c) If FCI failed to deposit the rent as aforesaid, it shall be liable to pay interest @ 13% per annum on the rent defaulted.

(d) The amounts so deposited will be dealt with in terms of decision on issue No.10 as to the

amount due to the bank, in the final judgment to be rendered.

9. FCI vacated the said godown taken on rent in June 1994 on 7.2.1997. Before doing so, it issued a notice dated 31.12.1996 to the landlords (respondent and his son) that tenancy would stand terminated on expiry of 30 days from the date of service of the said notice and called upon them to take possession. It informed the landlords that it had deposited the rents upto December 1996 in the Bank in terms of the order dated 27.5.1996 and sent the FD receipt to the court. It also issued a public notice in the Daily Newspaper `Dainik Jagran' dated 18.2.1997 that it had vacated the godown taken on rent on 18.6.1994, on 7.2.1997.

10. The respondent herein filed an application under Order 39 Rule 2A of the Code (Contempt Application 31/1996) on 6.11.1996 alleging that FCI had disobeyed the order dated 27.5.1996 and consequently the District Manager of FCI (Shri Ashraf Ali) should be sent to civil jail and properties of FCI should be attached and auctioned. The said application was dismissed for default on 12.11.1997.

11. Thereafter the respondent filed yet another application (Misc.

49/1998) under Order 39 Rule 2A of the Code against FCI, its Senior Regional Manager and three District managers. In the said application respondent prayed that action should be taken against FCI and its officers for contempt, by seizing and auctioning the movable and immovable properties of FCI and by sending its four officers to prison for not depositing the rents in terms of order dated 27.5.1996.

In the said application, the respondent contended that in view of the interim order dated 27.5.1996, FCI became liable to deposit the rent for the three godowns from 1.12.1983 till 31.3.1996 and also continue to pay the rents from 1.4.1996. The application was resisted by FCI and its officers.

12. The trial court by order dated 15.12.2004 allowed the said application. It interpreted the order dated 27.5.1996 as directing FCI to deposit of rent of three godowns from December, 1983 up to 31.3.1996. Consequently, it held that FCI was liable to pay the said arrears with interest at 13% per annum. Acting on a calculation sheet provided by the respondent, it held that a sum of Rs.1,12,24,792.99 was due by FCI towards such rent and interest; and as the said 8 amount was not deposited, FCI was liable to be punished under Order 39 Rule 2A of the Code for disobedience of the order dated 27.5.1996. It therefore directed that the assets of FCI, both movable and immovable, should be attached under order 39 Rule 2A CPC in respect of the said sum of Rs.1,12,24,792.99.

13. Feeling aggrieved, FCI filed an appeal (FAFO No. 343/2005) before the Allahabad High Court. The High Court dismissed the appeal by a brief order dated 6.3.2006, without prejudice to the rights of FCI to challenge the order of injunction, with an observation that it was not competent to consider the validity of the `injunction order' in an appeal against an order passed under order 39 Rule 2A of the Code, for disobedience of the `injunction order'. The High Court assumed that in the appeal against the order dated 15.12.2004 passed under Order 39 Rule 2A, FCI was trying to challenge the validity of the `injunction order' dated 27.5.1996. The said order is challenged by FCI in this appeal by special leave.

Questions for decision

14. On the contentions urged, the following questions arise for consideration :

(i) What is the purport and effect of the order dated 27.5.1996 described by the trial court and the High Court as the `injunction order'.

(ii) Whether the respondent, who was the first defendant in the mortgage suit filed by the bank, could maintain an application under order 39 Rule 2A of the Code for the alleged disobedience by FCI (a co-defendant), of the order dated 27.5.1996 made in an application filed by the plaintiff bank? (iii) Whether the trial court was justified in allowing such application under Order 39 Rule 2A of the Code, holding that FCI was liable to pay the rents for three godowns from December, 1983 to 31.3.1996 and interest thereon and direct attachment of the assets of FCI to an extent of Rs.1,12,24,792.99? (iv) Whether the High Court was justified in disposing of FCI's appeal in a summary manner? Re : Question (i) :

15. At the outset it should be made clear that we are considering only the purport and effect of the interim order dated 27.5.1996 and not the correctness or validity of the said order, as what is under challenge is not the order dated 27.5.1996, but the order dated 15.12.2004 under Order 39 Rule 2A of the Code holding that FCI had disobeyed the order dated 27.5.1996.

16. The order dated 27.5.1996 was passed on an application dated 12.1.1996 filed by the plaintiff bank. It was not filed either under Rule 1 or 2 of Order 39 of the Code. In fact, the application did not mention the provision of law under which it was filed. The bank did not claim that FCI had any privity of contract with it, nor claim that FCI was a co-obligant. In the application, the bank specifically stated that the relief sought by it in the said application for deposit of rent was in regard to the godown belonging to defendants 1 to 3 that was taken on rent by FCI during June, 1994. There is a further clear averment in the application that FCI had vacated the godowns earlier taken by it on lease, after the lease period (of 5 years) and that FCI had again taken one godown on rent during the pendency of the suit and that the application related to that godown. The order dated 27.5.1996 did not consider any claim for rent in regard the to three godowns which were vacated in December 1983, nor consider the contention of defendants 1 to 3 in their written statement that FCI had agreed to continue beyond five years. The court did not hold or direct that FCI was liable to pay any amount by way of rent or otherwise in regard to the three godowns for the period December, 1983 to 31.3.1996. In fact there was no reference to the three godowns at all 11 except to the statement of the bank that FCI had vacated those godowns after the lease period (in December 1983). The court was of the view that having regard to the dispute raised by the defendants/borrowers in regard to the amount claimed by the bank, it will not be proper to direct FCI to pay the rents directly to the bank.

As the bank had stated that FCI had not paid the rent for the godown which it had taken on lease in June, 1994, for non-fulfilment of the formalities by the landlords, the court directed FCI to deposit the rents in regard to that godown up to 31.3.1996 and the same be kept in a fixed deposit with some other nationalized bank. It also directed that in regard to the rent accruing in regard to that godown from 1.4.1996 from out of rent payable during every year, two months rent in a year should be paid to defendants 1 and 2 towards repairs and maintenance and remaining 10 months rent should be deposited with the bank, for being invested in a MCC deposit. It also directed that in the event of non-payment of such rent by FCI, it shall pay interest at 13% per annum. Thus there was no application for an `injunction', nor any order of `injunction' by the court. An interim direction to a defendant-tenant in a suit by the creditor against the landlords/borrowers, to deposit the arrears of rent in court and to 12 continue the deposit the rents in court with a condition that the tenant will have to pay interest if the rent was not so deposited, cannot be considered to be an order of `injunction'. In a general sense, though every order of a court which commands or forbids is an

injunction, but in its accepted legal sense, an injunction is a judicial mandate operating in personam by which, upon certain established principles of equity, a party is required to do or refrain from doing a particular thing [see Howard C. Joyce - A Treatise on the Law relating to injunctions (1909) S. 1 at 2-3]. A direction to pay money either by way of final or interim order, is not considered to be an `injunction' as assumed by the courts below.

17. Admittedly the application dated 12.1.1996, on which the order dated 27.5.1996 was passed, did not fall under Rule 1 of Order 39 as the prayer therein did not relate to any of the three matters mentioned in clauses (a), (b) and (c) of the said rule. It did not also fall under Rule 2 of Order 39 as admittedly there was no contract between the bank and FCI nor any allegation that FCI was committing any injury of any kind to the bank. Therefore, the order dated 27.5.1996 was not an order under either Rule 1 or Rule 2 of Order 39 of the Code. The suit itself was for recovery of the amounts due by the borrowers, by 13 sale of the mortgaged properties belonging to the borrowers (defendants 1 to 3) and to recover the balance personally from the borrowers and guarantors (defendants 1 to 6). When FCI was subsequently added as seventh defendant at the instance of defendants 1 to 3, no relief was sought against FCI nor was the prayers amended seeking any decree against FCI. If there was no prayer in the suit against FCI, obviously no interim relief could have been sought against FCI as a defendant. Even assuming that the final relief was sought against FCI also, the position is that FCI was only a `garnishee defendant' and not a `principal defendant'. The order dated 27.5.1996 was not an injunction order, but an interim prohibitory (garnishee) order by way of attachment before judgment, in regard to the rents payable for one godown taken by it on lease in June, 1994.

Re : Question (ii)

18. An application under Order 39, Rule 2A of the Code is maintainable only when there is disobedience of any `injunction' granted or other order made under Rule 1 or Rule 2 of Order 39 or breach of any of the terms on which the injunction was granted or the order was made. We have already noticed that the application by the bank, on which the said order dated 27.5.1996 was passed, was 14 neither under Rule 1 nor under Rule 2 of Order 39 CPC and none of the ingredients required for an application under either Rule 1 or Rule 2 of Order 39 existed was found in the application by the bank.

As the order dated 27.5.1996 was neither under Rule 1 or 2 of Order 39, the application under Rule 2A of Order 39 was not maintainable.

19. Even otherwise, the respondent had no locus to file an application under Order 39 Rule 2A alleging disobedience of the order dated 27.5.1996. The plaintiff bank which filed the application dated 12.1.1996 on which the said order dated 27.5.1996 was passed, did not complain of any disobedience or breach of the order dated 27.5.1996, nor sought any action or relief against FCI alleging non- compliance or disobedience of the order dated 27.5.1996. As the interim order dated 27.5.1996 was not made on an application made by the respondent and as the interim order was not intended for the benefit to the respondent who was the first defendant in the suit, he could not be said to be a person aggrieved by the alleged disobedience or breach of the order dated 27.5.1996.

20. The garnishee proceedings are governed by Rules 46 and 46A to 46F of Order 21 of the Code. Sub-para (1) of Rule 46 A provides that in the case of a debt (other than a debt secured by a mortgage or a 15 charge) which has been attached under Rule 46, upon the application of the attaching creditor, the court may issue notice to the garnishee liable to pay such debt, calling upon

him either to pay into court the debt due from debtor or to appear and show cause why he should not do so. Rule 46B provides that where the garnishee does not forthwith pay into court the amount due from him to the debtor and does not appear and show cause in answer to the notice, the court may order the garnishee to comply with the terms of such notice, and on such order, execution may issue as though such order were a decree against him. Rule 46C provides that where the garnishee disputes liability, the court may order that any issue or question necessary for the determination of liability shall be tried as if it were an issue in a suit, and upon the determination of such issue shall make such order or orders as it deems fit. It would thus be seen that the amount due by a garnishee, if disputed has to be determined as if it was an issue in the suit and the court can appropriate order determine the extent of liability of the garnishee. In this case, there was no adjudication of the amount payable by FCI. Whatever amount that was due in pursuance of the order dated 27.5.1996 in regard to one godown taken on lease in June 1994, was deposited by FCI and the plaintiff 16 bank at whose instance the order was made has no complaint or grievance.

21. At all events, if a garnishee, or a defendant, who is directed to pay any sum of money, does not pay the amount, the remedy is to levy execution and not in an action for contempt or disobedience/breach under order 39 Rule 2A. This is evident from Rule 46B of Order 21 read with Rule 11A of Order 38 of the Code.

Contempt jurisdiction, either under the Contempt of Court Act, 1971, or under Order 39 Rule 2A of the Code, is not intended to be used for enforcement of money decrees or directions/orders for payment of money. The process and concept of execution is different from process and concept of action for disobedience/contempt.

Re : Question (iii)

22. The application dated 12.1.1996 filed by the bank did not claim or seek a direction for payment of alleged arrears of rent relating to three godowns taken on lease in the year 1978 and vacated in December 1983. In particular, it did not make any claim for rent, for the period December, 1983 to 31.3.1996 when FCI was not in occupation of three godown. As noticed above, the bank stated in its application that FCI had vacated those godowns after completion of the lease period (that is in December, 1983) and that subsequently during the pendency of the suit the appellant had taken one of those godowns again on rent in June, 1994. The relief claimed in the application was that in regard to the godown taken on rent by FCI in June, 1994, it should be directed to deposit the rents in court as the borrowers/debtors were attempting to collect the said rent and thereby deny the benefit of rent to the bank even though the borrowers had agreed under the loan documents that the rents in regard to the godowns could be directly received by the bank. Therefore when the application itself was only in regard to the rent for one godown from June, 1994 onwards, we fail to understand how the trial court could come to the conclusion that the said order dated 27.5.1996 directed FCI to deposit the rent for three godowns for the period December, 1983 to 31.3.1996 and that failure to do so was punishable under Order 39 Rule 2A of the Code. The trial court by a convoluted reasoning based on a baseless interpretation of the order dated 27.5.1996 held that FCI had not placed any evidence in the proceedings under Order 39 Rule 2A that it had vacated the three godowns in December, 1983 and therefore, it continued to be liable to pay the rents for three godowns from December 1983 onwards.

23. The obvious question that ought to have been posed is if rents were payable from December, 1983 onwards by FCI, why the respondent as landlord, did not take any action to recover the same;

and if the bank was entitled to receive the said rents, why the bank did not take action to recover the same. Obviously any claim for rent against the defendant in regard to any period beyond three years would be barred by limitation, in the absence of any acknowledgement or payment on account. It is un-understandable how in a suit filed in the year 1991 by the bank against the borrowers for enforcement of mortgage, an order made on the bank's application for deposit of rents relating to a godown taken by FCI on rent from the borrower in June, 1994, can be interpreted by the court considering the application under order 39 Rule 2A of the Code, as containing a direction for deposit of rents in regard to three godowns vacated in December 1983, for the period December, 1983 to 31.3.1996. The absurdity, perversity and arbitrariness of the order dated 15.12.2004 becomes evident from the following :

(i) FCI is held liable for payment of rent of Rs.1,12,24,792/99 in a collateral supplemental proceedings under Order 39 Rule 2A of the Code, initiated by a person who was not a `person aggrieved'.

(ii) Such liability is created in respect of a time barred claim for rent by the landlord.

(iii) FCI is made liable for the said sum without the landlords filing a suit for recovery of rents and without adjudication of the claim for such rent;

(iv) Such liability is inferred by interpreting a garnishee order obtained by the landlord's creditor in regard to a different lease relating to a different period.

24. The power exercised by a court under order 39, Rule 2A of the Code is punitive in nature, akin to the power to punish for civil contempt under the Contempt of Courts Act, 1971. The person who complains of disobedience or breach has to clearly make out beyond any doubt that there was an injunction or order directing the person against whom the application is made, to do or desist from doing some specific thing or act and that there was disobedience or breach of such order. While considering an application under order 39 20 Rule 2A, the court cannot construe the order in regard to which disobedience/breach is alleged, as creating an obligation to do something which is not mentioned in the `order', on surmises suspicions and inferences. The power under Rule 2A should be exercised with great caution and responsibility. It is shocking that the trial court had entertained an application under Order 39 Rule 2A from a person who was not entitled to file the application, has accepted an interpretation of the order which does not flow from the order, and has created an liability where none existed, resulting in attachments of the assets of FCI to an extent of more than Rs.1.12 crores. The order dated 15.12.2004 cannot be supported or sustained under any circumstances.

Re : Question (iv)

25. FCI filed an appeal contending that the order of the trial court dated 15.12.2004 under Order 39, Rule 2A of the Code directing attachment of its assets to an extent of Rs. 1,12,24,792.99 was erroneous, without jurisdiction and liable to be set aside. In that context it raised contentions about the scope and ambit of the order dated 27.5.1996. It also incidentally mentioned that the 27.5.1996 21 being a garnishee order was patently erroneous and without jurisdiction, in a mortgage suit. The High Court however assumed that FCI was not challenging the order dated 15.12.2004 passed by the trial court under Order 39 Rule 2A but was only challenging the `injunction order' dated 27.5.1996 for disobedience of which the application under Order 39 Rule 2A was filed. As a consequence, it dismissed the appeal of FCI without examining the several contentions raised by the

FCI as to the maintainability of the application under Order 39 Rule 2A or the jurisdiction of the trial court to pass such an order under Order 39 Rule 2A and the errors and perversities pointed out in such order.

26. It is unfortunate that the High Court has failed to even refer to these aspects and has dismissed the appeal on a wholly baseless and erroneous assumption that the appellant was trying to challenge only the order dated 27.5.1996, in the appeal against the order dated 15.12.2004. We feel dismayed that when a huge liability of Rs.1,12,24,792.99 was sought to be created on the FCI in a proceedings under Order 39 Rule 2A, the High Court did not even bother to refer to the facts and merits, and chose to summarily dispose 22 of the appeal thereby allowing perpetration of a patent abuse of process of court by the respondent. The travails of the FCI could have been avoided if the trial court and the High Court had been diligent to ensure that its process were not misused and abused by the respondent.

Conclusion

27. We therefore allow this appeal with costs of Rs.25,000/- payable by respondent, set aside the order of the High Court and the trial court and dismiss the application filed by the respondent under Order 39 Rule 2A of the Code.