IN THE HIGH COURT OF JUDICATURE AT MADRAS
DATED: 12.04.2018
CORAM:
THE HON'BLE MR.JUSTICE S.MANIKUMAR
AND
THE HON'BLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

W.P.No.35085 of 2014
and
M.P.Nos.1 & 2 of 2014

Mrs.M.Aruvi
Proprietor M/s.Orchid Foundation ... Petitioner

vs.

1. Reserve Bank of India,
Fort Glacis,
Rajaji Salai,
Chennai - 600 001

2. The Chief Manager,
M/s.The Jammu & Kashmir Bank Limited,
No.60, Rainbow Arcade, Sir Theagaraya Road,
Pondy Bazaar, T.Nagar,
Chennai - 600 017. ... Respondents

WRIT Petition filed under Article 226 of the Constitution of India, praying for the issuance of a writ of Declaration, declaring that the respondents are not authorized to publish the name, photographs of the Loanee viz., the petitioner herein in any Newspapers both Local Newspapers as well as National Newspapers and that such publication will be in violative of Article 21 of the Constitution of India.

For Petitioner : No appearance

For Respondents : No Appearance (for R1)
Mr.J.Senthil Kumar (for R2)

ORDER

(Order of the Court was delivered by S.MANIKUMAR, J)

On 07.12.2014, the Jammu & Kashmir Bank Limited has sent a letter to M/s.Orchid Foundation, Chennai, the borrower and the guarantors, which is extracted hereunder

"Dear Sir,

Re: Recall Notice.

Refer to our various reminders, telephonic conversation; we have repeatedly and regularly advising you to regularize the account as it is showing the unwanted and undesirable signs.

On your request, the bank of 15.02.2013 sanctioned a cash credit facility of Rs.120.00 lacs in the name of M/s.Orchid Foundation (Proprietorship concern of Mrs.Aruvi) to meet the working capital requirements. But, surprisingly after availing the credit facility, the conduct of the account not remained satisfactory. The sales have not been routed through this account in spite of repeated reminders.

Since the inception the conduct of the account has remained unsatisfactory and you are even defaulting in servicing of interest. And it is evident that you have misutilized the funds of the bank, amounting to gross violation of law.

Now you are once again advised in your own interest to regularize the account without further delay, failing which the bank shall be constrained to initiate legal action against you as well as your guarantors for misutilization of funds.

----Sd----

Branch Head.

The Guarantors and Charted Accountant are also responsible for Misutilization of Funds and we are also planning action against them in consultation with senior advocates as well as other agencies handling such cases, besides publication in local as well as national papers. As such one last chance is being given to them to get this account regularized by Friday i.e. 12th of December 2014.

----Sd----

Branch Head.

2. Apprehending that the photographs of the borrower and others would be published in newspapers and contending inter alia that such publication would be violative of Article 21 of the Constitution of India, instant writ petition has been filed for a declaration, declaring that the respondents are not authorized to publish the name, photographs of the Loanee viz., the petitioner herein in any Newspapers both Local Newspapers as well as National Newspapers and that such publication will be in violative of Article 21 of the Constitution of India.

3. The issue as to whether Banks are empowered to publish the photographs of the borrowers/guarantors, who have defaulted in making payments, in dailies and electronic media, is no longer res integra.

4. After considering a catena of judgments relating to right to privacy, constitutional provisions, Universal Declaration of Human rights, dealing with privacy, the bankers obligation to maintain secrecy qua its customer, decided in Shankarlal Agarwalla Vs. State bank of India (AIR 1987 Calcutta 29) and other decisions, in K.J.Doraisamy Vs. The Assistant General Manager, State Bank of India, Erode branch and another {2006 (5) CTC - 829}, a learned Single Judge of this Court, at paragraph Nos.25 to 32, held as follows:-

> "25. Once it is seen that the right to privacy is not an absolute or inviolable right, then the next question that falls for consideration is as to whether the Bank, with whom the customer has a fiduciary relationship, is entitled to disclose or publicise the information in their possession, resulting in a breach of the duty of secrecy and confidentiality. Dealing with the duty of the Bank to maintain secrecy qua its customer, it was held in Shankarlal Agarwalla -vs.- State Bank of India (AIR 1987 Calcutta 29), as follows:-
>
> "10. The Banker is under an obligation to secrecy. According to Lord Halsbury's Laws of England 4th Edn. Vol.3 p.72 Article 97.
>
> "It is an implied term of the contract between a banker and his customer that the banker will not divulge to third person without the express or implied consent of the customer either the state of the customer's account or any of his transactions with the bank or any information's relating to the customer acquired through the keeping of his account unless the banker is compelled to do so by order of a Court or the circumstances give rise to a public duty of disclosure or protection of the banker's own interest requires it."
>
> "11. In the case reported in (1924) 1 KB 461 at 472 Tournier vs. National Provincial and Union Bank of England it was held that under four heads the bank could disclose such information's namely - (a) where the disclosure was under compulsion by law, (b) where there was a duty to the public to disclosure, (c) where the interest of the bank require disclosure and (d) where the disclosure was made by express or implied consent of the customer. It was held:-
>
> "An instance of the first class is the duty to obey an order under the Banker's Books Evidence Act. Many instances of the second class might by given.

They may be summed up in the language of Lord Finlay in Weld-Blundell vs. Stephens where he speaks of cases where a higher duty than the private duty is involved, as where "danger to the State or public duty may supersede the duty of the agent to his principal". A simple instance of the third class is where a bank issues a writ claiming payment of an overdraft stating on the face of the writ the amount of the overdraft. The familiar instance of the last class is where the customer authorises a reference to his banker."

26. Thus even the English law recognized that the "duty of the Bank to disclose information to the public" or the "interest of the Bank requiring disclosure" supercedes the duty of secrecy.

27. The extent of liability of a Bank to maintain secrecy towards its customers, fell for consideration in Kattabomman Transport Corporation Ltd., -vs.- State Bank of Travancore (AIR 1992 Kerala 351), which arose out of the dismissal of an employee of a public sector undertaking, set aside by the High court. The High court directed reinstatement with back wages subject to the condition that the employee was not gainfully employed anywhere. The employer came to know that the employee was actually employed in a foreign country and was making remittances to the Bank. Therefore the employer requested the Bank to provide details of the remittances made by the employee but the same was resisted by the Bank on the ground that they were under an obligation to maintain secrecy and fidelity. Analysing the law on the duty of secrecy and fidelity for the Bank, the Division Bench of the Kerala High Court held in paragraphs 14, 15 and 17 as follows:-

"14. In J. Milnes Holden's "The Law and Practice of Banking", Volume 1 (at page 67), adverting to duty to the public to disclose the author refers to the above said cases. The author refers to the observations of Bankes, L.J. in Tournier's case, (1924) 1 KB 461, wherein Atkin, L.J., considered that the right to disclose exists "to the extent to which it is reasonably necessary .... for protecting the bank, or persons interested, or the public, against fraud or crime". The author also refers to the report of the Committee on Privacy (the 'Younger Committee') (Cmnd 5012 (1972))."

"15. In Tannan's "Banking Law and Practice in India", 18th Edition, 1989 (at page 175) the banker's obligation to secrecy is considered and reference is made to the decision in Tournier case, (1924) 1 KB 461. The author states that there are limitations in the rule to the extent mentioned in Tournier's case."

"17. From the aforesaid principles, it is clear that the banking practices and usages customary among bankers in India are same as in England. There can be gathered from Paget's Law of Banking, J. Milnes Holden's "The Law and Practice of Banking" and Tannan's "Banking Law and Practice in India". The principles laid down therein have therefore been accepted in India too."

28. In District Registrar -vs.- Canara Bank ((2005) 1 SCC 496)) the Supreme Court was concerned with a State Amendment brought forth by the State of Andhra Pradesh, to section 73 of the Indian Stamp Act, by which, a person authorised by the Collector was empowered to search and seize any registers, books, records, papers, documents or other proceedings in the custody of a Bank for the purpose of discovering any fraud or omission in relation to the stamp duty payable on a document. The Banks themselves challenged the vires of the said amendment on the ground that it offended both the right to privacy of their customers, as well as the duty of the Banks to maintain secrecy and confidentiality. Tracing the origin of the right to privacy, the Supreme court held in paragraph 18 of its judgment as follows:-

"18. The right to privacy and the power of the State to "search and seize" have been the subject of debate in almost every democratic country where fundamental freedoms are guaranteed. History takes us back to Semayne's case decided in 1603 where it was laid down that "Every man's house is his castle." One of the most forceful expressions of the above maximum was that of William Pitt in the British Parliament in 1763. He said: "The poorest man may in his cottage bid defiance to all the force of the Crown. It may be frail - its roof may shake - the wind may blow through it - the storm may enter, the rain may enter - but the King of England cannot enter - all his force dare not cross the threshold of the ruined tenement."

Listing out the circumstances under which such right could be curtailed, the Supreme court held in para 34 as follows:-

"34. Intrusion into privacy may be by - (1) legislative provisions, (2) administrative/executive orders, and (3) judicial orders. The legislative intrusions must be tested on the touchstone of reasonableness as guaranteed by the Constitution and for that purpose the Court can go into the proportionality of the intrusion vis-à-vis the purpose sought to be achieved. (2) So far as administrative or executive action is concerned, it has again to be reasonable having regard to the facts and circumstances of the case. (3) As to judicial warrants, the Court must have sufficient reason to believe that the search or seizure is warranted and it must keep in mind the extent of search or seizure necessary for the protection of the particular State interest. In addition, as stated earlier, common-law-recognised rare exceptions such as where warrant less searches could be conducted but these must be in good faith, intended to preserve evidence or intended to prevent sudden danger to person or property."

29. The above discussion makes it clear that from the point of view of the individual, his right to privacy is not absolute and from the point of view of the Bank, the duty to maintain secrecy is superceded by a larger public interest as well as by the Bank's own interest under certain circumstances.

30. Coming to the authority of law, by which the Bank may be allowed to publish the photograph of the defaulter, it is seen that section 13 (4) of the SARFAESI Act authorizes the Bank to take possession of the secured asset and sell it. The procedure for such sale is prescribed under Rule 8 of the Security Interest (Enforcement) Rules, 2002. Sub-rule (1) of Rule 8 reads as under:-

"8. Sale of immovable secured assets.--(1) Where the secured asset is an immovable property, the authorised officer shall take or cause to be taken possession, by delivering a possession notice prepared as nearly as possible in Appendix IV to these rules, to the borrower and by affixing the possession notice on the outer door or at such conspicuous place of the property."

Appendix IV to the said Rules which contains the Form in which the Possession Notice is to be issued by the Bank, steers clear any doubt that one may have. Para 2 and 3 of the Format of Notice under Appendix IV reads as follows:-

"The borrower having failed to repay the amount, notice is hereby given to the borrower and the public in general that the undersigned has taken possession of the property described herein below in exercise of powers conferred on him/her under Section 13(4) of the said Ordinance read with rule 9 of the said Rules on this ..... day .... of the year........

The borrower in particular and the public in general is hereby cautioned not to deal with the property and any dealings with the property will be subject to the charge of the .... (name of the Institution) for an amount Rs....... and interest thereon."

Thus the Statutory rules themselves provide for a notice not merely to the defaulting borrower, but also to the public in general. Therefore the threat held out by the Bank to publish the photograph of the borrower and the surety, is also authorized by the statutory rules.

31. Lastly, with the advent of the Right to Information Act, 2005, the Bank has become obliged to disclose information to the public. Section 3 of the said Act entitles all citizens to a right to information. Section 4 (2) of the said Act provides as follows:-

"(2) It shall be a constant endeavour of every public authority to take steps in accordance with the requirements of clause (b) of sub-section (1) to provide as much information suo moto to the public at regular intervals through various means of communications, including internet, so that the public have minimum resort to the use of this Act to obtain information."

Public Authority is defined under section 2 (h) of the Act to include "any body owned, controlled or substantially financed. Therefore, the respondent Bank is a Public Authority within the meaning of the Act and they owe a duty to disseminate information even suo moto.

Certain exemptions are listed out under section 8 of the Right to Information Act, 2005, two of which are of significance and they read as follows:-

"8.Exemption from disclosure of information:-

(1) Notwithstanding anything contained in this Act, there shall be no obligation to give any citizen--

(a)- - - - - ..
(b)- - - - - ..
(c)- - - - - ..
(d)- - - - - -..

(e) information available to a person in his fiduciary relationship, unless the competent authority is satisfied that the larger public interest warrants the disclosure of such information;

(f)- - - - ..
(g)- - - - ..
(h)- - - - ..
(i)- - - - ..

(j) information which relates to personal information the disclosure of which has not relationship to any public activity or interest or which would cause unwarranted invasion of the privacy of the individual unless the Central Public Information Officer or State Public Information Officer or the appellate authority as the case may be, is satisfied that the larger public interest justifies the disclosure of such information”

Thus the aforesaid provision leaves no room for any doubt that the “Right to Privacy” fades out in front of the “Right to Information” and “larger public interest”.

32. If borrowers could find newer and newer methods to avoid repayment of the loans, the Banks are also entitled to invent novel methods to recover their dues. Moreover, the petitioner is not entitled to seek the relief of a writ of mandamus for the following reasons also:-

(a) It is a fundamental principle of the Law of Writs that a Writ of Mandamus can be issued only to compel the performance of a statutory or public duty. But the prayer made in the present writ petition is to prevent the Bank from the performance of its public duty.

(b) What is challenged in the present writ petition, is a notice under section 13 of the SARFAESI Act. The petitioner has a statutory remedy of appeal under section 17 of the Act, without exhausting which, he is not entitled to invoke the writ jurisdiction of this court.

Hence I find no violation of any right or legal provision in the threat held out by the respondent Bank to publish the photographs of the borrower and the surety for the non repayment of the loan. Consequently the writ petition fails and is dismissed. No costs. Consequently, connected miscellaneous petitions are also dismissed.”

5. Judgment in K.J.Doraisamy Vs. 1. The Assistant General Manger, State Bank of India, Erode branch, Erode 638 001 and another has been affirmed in W.A.No.1529 of 2006, by a Hon'ble Division Bench of this Court.

6. The abovesaid judgment has been considered by a Hon'ble Division Bench of this Court in M/s. GAIN-N-NATURE FOOD PRODUCTS & OTHERS Vs. GALAXY AMAZE KINGDOM LTD & OTHERS (W.P.No.31536 and 32688 of 2007 dated 27/3/2008) reported in CDJ 2008 MHC - 1717. At paragraph No.13, a Hon'ble Division Bench has repelled the objections of the borrowers regarding publication of their photographs, in dailies and electronic media and accepted the version of the Bank. Paragraph 13 of the judgment of the Hon'ble Division Bench, in M/s.GAIN-N-NATURE FOOD PRODUCT's case is extracted hereunder:-

"In so far as the objection relating to the publication of photographs is concerned, the issue is already settled in K.J.Doraisamy Vs. Assistant General Manager, State Bank of India, Erode Branch and another

{2006 (5) CTC 829}. Therefore, the said objection is also not tenable in law."

7. Added further, a Hon'ble Division Bench of Bombay High Court has also taken a similar view in D.J.EXIM (INDIA) Pvt. Ltd & OTHERS Vs. STATE BANK OF INDIA & OTHERS (CDJ 2014 BHC - 1310). Paragraph Nos.11 and 13 of the said judgment are reproduced hereunder:-

> "11. A perusal of the said Rule clearly indicates that the bank has the right to publish the name of the defaulters by giving their names and addresses and two fold purpose is served as a result of the said publication of the names, firstly the fact that these persons are wilful defaulters is made known to the public at large and secondly it also tends to caution the prospective buyers who may be offered the property which is mortgaged by these defaulters with the bank. This being the primary objective for the publication of the notice, in our view, there would be no impediment in publication of photographs of wilful defaulters and particularly those defaulters who have committed various acts of misfeasance.
>
> 13. We are also of the view that in each and every case whenever person is declared as a wilful defaulters bank should not publish the photographs in a routine manner and only after following mechanism of examining the facts and circumstances of each case the bank should consider whether the photographs should be published. We are satisfied that the decision taken by the bank in this case cannot be faulted."

Ultimately, the Bombay High Court held as follows:-

> "....The Apex Court has therefore clearly held that whatever has to be done fairly and is also regarded as incidental to or consequential upon those things which the legislature has authorised to do ought not to be held by judicial construction to be ultravires. In the present case, Rule 8 specifically authorised the bank to publish the names and addresses of the wilful defaulters. There is no legal bar either in the said rule or under any provisions of the Act which expressly prohibits the bank from publication of photographs and therefore, the action of the bank in publishing the photographs cannot be held to be ultravires."

8. Further, in the decision of the Hon'ble Apex Court, wherein the Hon'ble Supreme Court, in Special Leave to Appeal (C) No.37726 of 2013 with T.P.(C) No.691 of 2014, dated 14/7/2014, reported in CDJ 2014 SC 617, has confirmed the views of the Bombay High Court and held as follows:-

"We find no merit in this Special Leave Petition and the same is dismissed. However, we leave it open to the petitioners to work out their remedy in accordance with law."

9. M/s. Revati Cements Private Limited Vs. Allahabad Bank, through its Head Office at 2, N.S.Road, Kolkata and branch office at New Palasia, Indore, W.A.No.549 of 2015, dated 4/12/2015, after considering K.G.Doraisamy's case and the dismissal of the challenge by the Hon'ble Apex Court, a Hon'ble Division Bench of Madhya Pradesh High Court, Indore, held as follows:-

"…. Moreover, considering Clause 24 in its proper prospective, we find that the respondent Bank was entitled to publish the names and photographs of the appellant/defaulter on other grounds also: such as failure of the borrower to pay the outstanding loan amount, or interest on due dates, or is declared to be NPA."

10. In the light of the above said decisions, the prayer sought for by the writ petitioner, cannot be granted. Writ petition is dismissed. No costs. Consequently, the connected Miscellaneous Petitions are closed.

Sd/-
Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

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To

1. Reserve Bank of India,
Fort Glacis,
Rajaji Salai,
Chennai - 600 001

2. The Chief Manager,
M/s.The Jammu & Kashmir Bank Limited,
No.60, Rainbow Arcade, Sir Theagaraya Road,
Pondy Bazaar, T.Nagar,
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+1 cc to M/s.J.Senthil kumar Advocate sr 28025

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aa24/04/2018