IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD

CRIMINAL WRIT PETITION NO. 535 OF 2011

Mr. Niranjan s/o Shripatrao Jadhav,
age 41 years, occupation:business/
service, r/of Plot Nos. 18 and 34,
CIDCO, N-3, Opp. Hotel Ajanta
Ambassador, Aurangabad - 431 003. Petitioner

versus

1. State of Maharashtra,through the
Police Station In-charge, Bidkin
Police Station, Taluka Paithan,
District Aurangabad.

2. Abhudaya Cooperative Bank Ltd.
K.K. Tower, Abhudaya Bank Lane,
Off. G.D. Ambekar Marg,
Parel Village, Mumbai-400 012,
through its Managing Director. Respondents

Shri V. M. Thorat, Advocate, instructed by
Shri Suresh S. Mundhe, Advocate, for Petitioner.
Smt. S.D.Shelke, A. P. P. for Respondent No.1.
Smt. Sadhana S. Jdhav, Advocate,instructed by
Shri V.P. Raje, Advocate, for Respondent No.2.

Coram: A.H. Joshi and A.R. Joshi, JJ.
Judgment reserved on : 12.10.2011.
Judgment pronounced on : 20.10.2011.

Judgment : (Per: A.H.Joshi, J.)

01. Rule. Rule made returnable forthwith, by consent.

02. Petitioner herein is named as accused No. 1 in Crime No.147/11, dated 4.5.2011 registered with Bidkin Police Station, District Aurangabad. Offences have been registered under Sections 406, 424, 420 read with Section 34 of the Indian Penal Code.

03. By this petition, the petitioner has moved this court under Articles 226, 227 and 21 of the Constitution of India.

04. Learned Advocate for the Petitioner has urged various points in support of his plea which can be summarized as follows:-

(i) The property for which FIR is lodged by the complainant for dishonest misappropriation etc., was of absolute and full ownership of the borrower company, namely, M/s J Square Steels Pvt. Ltd. (hereinafter referred for short as "The company"). Said absolute ownership of the plant and machinery continued with the company in spite of its hypothecation.

(ii) Rights of the Bank whatsoever in the goods, are only by way of security, and rights of the borrower of absolute ownership, possession, use, enjoyment, and its disposal, are not affected / abridged, or taken away by any of the stipulations in the Deed of Hypothecation.

(iii) If it was the grievance of the bank that the hypothecated goods were not available in the factory premises, the Bank was under obligation to give to the petitioner, a notice as provided in clauses 12 and 13 of the hypothecation agreement.

(iv) The borrower, as absolute owner of the property, had unfettered right to deal with the property, including disposal of the same and such removal or disposal does not amount to breach of trust.

(v) Intention of cheating at the inception of the promise, was not shown in the FIR to be in existence.

(vi) Therefore, the FIR is liable to be quashed.

05. In order to substantiate these contentions, learned Advocate for the petitioner has relied upon the stipulations contained in the deed of hypothecation, particularly clause Nos. 7, 12 and 13 thereof.

06. The learned Advocate for the petitioner has, in support of his submissions, placed reliance on following judgments:-

(i) Ubaidulla Abdul Aziz Farid vs. Sharafuddin Abdul Fakih and others, 1986(3) Bom C.R.207.

(ii) Central Bureau of Investigation,SPE, SIU(X) vs. Duncans Agro Industries Ltd. AIR 1996 SC 2452

(iii) Indian Oil Corporation vs. NEPC India Ltd & ors. AIR 2006 SC 2780.

(iv) S.V.L.Murthy vs. State Rep.by CBI, Hyderabad AIR 2009 SC 2717.

(v) V.Y. Jose and anr. vs. State of Gujarat and anr. (2009) 3 SCC 78.

07. According to the learned Advocate for the petitioner:-

The judgment in the case of **CBI vs. Duncans Agro Industries Ltd.** (supra) still holds the field.

The hypothecated goods continue to be under the ownership of the person who has offered those by way of security and a floating charge is created thereon.

Therefore sale or removal of any or all goods under hypothecation does not amount to dishonest misappropriation to debtor / borrower's gain and unlawful loss to the creditor / lender enjoying rights under hypothecation.

08. Points urged in reply of Respondent No.2, are the following:-

(i) Admittedly, the plant and machinery and goods, were hypothecated.

(ii) Stipulations contained in the hypothecation agreement are incorporated in clause Nos.14,15 and 16.

(iii) According to the language of stipulations, which is not in dispute, the borrower is under obligation "to use" the hypothecated goods and machinery in "proper and efficient manner".

(iv) The Borrower Company is not entitled to remove or cause to be removed or dismantle any of the hypothecated machinery / goods without the written consent of the Bank. In the event any movement of such machinery / goods is necessary, notice thereof is to be given to the bank and without the Bank's inspection of such machinery / goods in peculiar circumstances prescribed in those stipulations.

(v) The borrower is under an obligation to keep the hypothecated machinery / goods in a good and perfect working condition etc.

(vi) The machinery does not form part of the class of the "goods" which are capable of "sale" and "free movement outside factory premises". Free ingress and egress like any other 'stock-in-trade, stores or consumables' is not an express or implied condition attached to the terms of hypothecation of plant and machinery.

(vii) Therefore, though machinery, under absolute ownership of the debtor, yet the debtor does not possess the right, much less 'absolute right', to move the machinery outside the factory premises for sale or otherwise dispose of the same without written consent of the Bank.

(viii) At any point of time, whether in the past or in the present writ petition, the petitioner or debtor company has not disclosed, or honestly informed or revealed to the Bank as to where and how the machinery has gone, or moved outside factory premises. This conduct of the borrower company amounts to dishonest misappropriation and breach of trust.

(ix) The complaint contains due description of commission of offence, as is spelt out from unnumbered para fourth to six at page 24 of the paperbook of the writ petition.

(x) Whether an offence has been committed, is required to be investigated, and the process of investigation can not be throttled by use of disputed propositions of facts or law how-so-ever ingeniously and intelligently raised.

09. In order to understand the fact of the matter and to aaalyze the submissions, it would be necessary to have an insi*ht of the compass and arena of the concept of hypo-hecation, its historic and contemporary purport. It woul* be better to advert to the facts, after this resume.

10. A review of the law on the point reveals that the term "hypothecation" is a concept which is a product of practise, custom etc. in trade & commerce, academic elucidation and judicial pronouncements.

The definition and compass of the term "Hypotheca-Hypothecation" varies from place to place and country to country.

11. The term "hypothecation" as defined in "The Law Lexicon" by P Ramanatha Aiyar, means:-

HYPOTHECATION

> "A right which a creditor has over a thing belonging to another, and which consists in the power to cause it to be sold in order to be paid his claim out of the proceeds."

(quoted from page No.861of "The Law Lexicon" by P Ramanatha Aiyar, 2nd Edition, 1997)

12. Hypothecation pre-supposes a charge on movables continued in possession of the owner, over which the creditor has a right, to sell, in order to have his claims paid out of proceeds of sale of the goods / property which is hypothecated.

Thus, the hypothecation pre-supposes right of ownership and possession with the borrower, with a rider or clog on the creditor's right to sell those.

13. It would be of no avail to rely on a particular definition, found either in the dictionary or law lexicon, in isolation. However, it would definitely be useful to see the definition, examine its academic, jurisprudential perspective and commercial purport, and stipulations actually agreed between the parties.

14. Thus, the exercise of understanding the purview of term "Hypothecation", however, would finally be governed by stipulations of the promise relating to the hypthecation as agreed to between the parties.

15. The property hypothecated can be of two categories, namely,

<u>1st category.</u>

(i) Movables which can be purchased, stored, used, consumed, treated, converted, stocked, sold and replenished, by virtue of express or implied condition of hypothecation.

<u>2nd category.</u>

(ii) Other movables, which may be fixed or not fixed to the earth and can be used as an aid in manufacturing, or other processes, have to be maintained, repaired, upgraded, replaced etc., but are not to be freely alienated, due to the character of the goods being such that they are not brought as tradable goods or salable commodity. These movables are ingredients in

> the activity, and are not brought in the premises as primarily tradable or salable goods and have to remain and continue as a security, such as, plant and machinery or movables of said class and character, by express or implied conditions as regards hypothecation.

16. Therefore, on facts of present case, we have to see as to what are the stipulations attached to the hypothecation.

17. It is seen from stipulation Nos. 13 and 14 that the company is obliged to keep the plant and machinery to be kpet 'perfect working order and condition'.

18. As regards right of removal etc. of machinery/goods, clause 15 of the agreement, provides as follows :-

> "15. The Borrowers shall not remove or cause to be removed or dismantle any of the hypothecated machinery/goods now in use in the Borrower's premises without the consent in writing of the Bank except in case where such removal or dismantling shall in the opinion of the Borrower's be rendered necessary by reason of the same being worn out, injured, damaged or broken and shall also whenever necessary renew or replace all such parts of the hypothecated machinery with others of a like nature and value as now used or henceforth to be used for the purpose of or in connection with the business of the Borrowers when and as the same shall be worn out, injured, damaged or

broken and intimate the same to the Bank and give inspection of the hypothecated machinery. "

19. The stipulation as to freedom to alienate which is always attached to tradable goods, consumables and stores, is seen to be absent today as regards the plant and machinery-the movables under hypothecation.

As is essential and indelible corollary, the borrower company has an inescapable obligation to preserve and conserve within the factory premises entire plant and machinery without any exception.

20. The proposition relied on by the learned Advocate for the petitioner, based on reported judgments mentioned above, refer to the tradable stocks, consumables, stores, replenishment etc. Even live-stock could fall in this category, as held in respect of buffaloes in **1986(3) Bom.C.R. 207 (supra).**

21. Admittedly, goods hypothecated, but disposed, for which breach of trust is alleged are machinery, to which the stipulation of 'free alienability' and 'free physical movement' is attached.

22. The submissions advanced on behalf of the petitioner are based on ingenious reading of the

hypothecation agreement, and moulding the interpretation to suit his own cause. Cases are always to be decided not by closing eyes, but with open eyes on the facts of given case.

23. The stipulation on free alienability, which is an essential ingredient of stock in trade, does not, by any connotation, apply to plant and machinery of the borrower company in present set of facts.

24. The proposition that the hypothecated properties continue to be under ownership of the borrower, is as clear as day light. However, due to stipulation as to restriction on alienability, the proposition that hypothecated goods being property of borrower, are absolutely alienable, is not an absolute rule of law or of practice in trade, commerce and Banking.

25. Hypothecated properties can always be classified in two categories, namely, alienable and non-alienable, and alleged absoluteness of right always carries a clog on inalienability, and right of liquidation by redemption available with the lender, operates as a strong and rigid clog on alienability.

26. On the sole ground that stipulation of free alienability was not attached to machinery, the borrower

company was under a positive obligation to the contrary i.e. to preserve, conserve and to maintain those in usable and worthy condition.

27. Hypothecation of plant and machinery is *sui generis* in nature and is distinct from generic hypothecation of freely tradable-salable and deliverable goods. The goods covered by generic hypothecation are freely movable, analogous to currency. Goods with restriction on saleability are inambulate due to the promise to that effect. Promise and Trust is the spinal cord of life, including trade and commerce.

28. What else would be the breach of Trust, if promise to preserve and conserve the property in one's possession for the benefit and security of other, is betrayed. Had the Bank a grievance that stock-in-trade, or other tradable goods and consumables etc. were sold, such grievance could have been rebuffed as a cantankerous plea. Goods which did not carry a qualification of saleability, attract the obligation of trust, and breach of such obligation would, prima facie, become a breach of Trust.

29. Therefore none amongst the cases relied upon by the petitioner would apply to the facts of the present case.

30. The result is that, the entire foundation of the petition is fictional and in the nature of hide and seek, and therefore, petition does not deserve any further indulgence

31. The observations made hereinbefore, were necessary to have the reasons leading to conclusion duly spelt out and made vivid. The FIR is still at the stage of investigation. Therefore, the Investigating Officer shall be free to proceed on what emerges upon investigation, since whatever we have opined and expressed is what appears to us prima facie. The Investigating Officer in the process of investigation, and the trial court in case of a charge-sheet, shall not be influenced by observations made hereinbefore and would be governed by the facts and evidence as would surface.

32. Hence, petition is dismissed. Rule discharged with costs.

(A.R.JOSHI, J.) (A.H.JOSHI, J.)

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