MRS. KALYANI BASKAR VS MRS. M.S. SAMPOORNAM, 2006 (13) SCALE 459-A CRITIQUE

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Mrs. M.S. Sampoornam preferred a complaint for an offence under Section 138 of the Negotiable Instruments Act, 1881 (N.I. Act hereinafter) against Mrs. Kalyani Baskar and her husband alleging that a cheque jointly signed by the couple on presentation was dishonoured for insufficiency of funds. The requisite notice of demand served on them remained without any response. On the complaint the Judicial Magistrate, Tambaram, Chennai issued process. On appearance the accused filed an application under Section 245 of the Code of Criminal Procedure, 1973 (the Code hereinafter) raising several preliminary objections, the most prominent among them being a challenge to the genuineness of the signature on the cheque. The prayer made in the application was for sending the cheque to a handwriting expert to test its genuineness. The Trial Court rejected the application saying that genuineness of the signature can be questioned only during trial. Thereafter at the trial on completion of the prosecution evidence the accused filed an application, this time, under Section 243 of the Code praying to send the dishonoured cheque to a handwriting expert for ascertaining the genuineness of her signature. The Trial Magistrate rejected the application. The High Court on revision concurred with the decision of the trial Court. On appeal by special leave the Supreme Court by the Judgment dated the 11th of December, 2006 MRS. KALYANI BASKAR VS MRS. M.S. SOMPOORNAM, 2006(13) SCALE 459 reversed the decision of the High Court. Because of a few unique features of the Judgment it seems worthwhile to appraise its value as a precedent. To trace the unique features of KALYANI BASKAR (Supra) it will be useful to start with the Trial Court.

1. THE TRIAL COURT

The kind of application filed before the Trial Magistrate by the accused in the complaint case is not of everyday occurrence. Generally in case of all manner of application before a Court, the first thing to determine is the existence of court's power to grant the prayer

made in the application. Once that is done the next step is to determine whether to exercise the power in the facts and circumstances of the case in which the application is made. Particularly since the prayer before the Trial Court was not usual it was the more necessary for the Trial Court to determine the power to grant the prayer. Unfortunately the Trial Magistrate on both, the occasion, that is in dismissing the application under Section 245 of the Code and also in dismissing the application under Section 243 of the Code assumed the existence of the power under those statutory provisions but refused to exercise the power. On the first occasion the Trial Court dismissed the application under Section 245 of the Code on the ground that the genuineness of the signature could be questioned only at the time of trial of the complaint. On the second occasion that is while dismissing the application under Section 243 of the Code the Trial Magistrate obeyed the letter of the provision under Section 243 of the Code. It was observed that Section 243 of the Code deals with summoning of defence witnesses for oral evidence or for causing any document or other thing to be produced through him. It was reasoned that the application in the case being bereft of any such particular deserved to be dismissed.

2. THE HIGH COURT

The High Court also was not persuaded to look at the power under Section 243 of the Code. The High Court disposed of the revision by upholding the impugned order of the Trial Magistrate in toto. Thus only the lack of particulars of any witness to be summoned or any document or thing to be produced by such a witness was the reason for dismissal of the revision and the application under Section 243 of the Code.

3. THE SUPREME COURT

In para 11 of the KALYANI BASKAR (Supra) the Supreme Court extracted the full text of Section 243 of the Code. Thereafter the Supreme Court at para 12 proceeded thus :

> **"***Section 243(2) is clear that a Magistrate holding an inquiry under the Cr.P.C. in respect of an offence triable by him does not exceed his powers under Section 243 (2) if, in the interest of justice, he directs to send the document for enabling the same to be compared by a hand writing expert because even in adopting this course, the purpose is to enable the Magistrate to*

> *compare the disputed signature or writing with the admitted writing or signature of the accused and to reach his* **own conclusion with the assistance of the expert."**

The Supreme Court went on to reason further that the dismissal of her application tantamounts to denial of opportunity to present her case in defence which is provided under Section 243 (2) of the Code.

In para 13 of the judgment the Supreme Court after allowing the appeal directed thus :

> **"***The learned Magistrate shall take appropriate steps for obtaining the report of the handwriting expert whether the signature in the cheque is that of the accused ……."*

4. THE UNIQUE FEATURES

(i) To say the least it is most surprising that the learned counsels of MRS. M.S. SAMPOORNAM, the complainant in the Trial Court, the High Court as well as the Supreme Court did not oppose the prayer in the application under Section 243 of the Code on the Single most potent ground that the section is not al all applicable in the case. The offence complained of was under Section 138 N.I. Act. The maximum punishment for the offence is at the relevant time was one year. Even now it is only two years. The case is triable under procedure provided in Chapter XX of the Code for Trial of summons cases by Magistrate. Both Section 243 and 245 of the Code are in Chapter XIX of the Code laying down the procedure for trial of warrant cases by Magistrate.

(ii) Even if the above may be passed over on the ground that the substance as distinguished from the label of the application only is material it is the meaning put upon the words of the section that is unique and difficult to understand. In this connection it is necessary to notice that the correct provision of law applicable in the facts and circumstances of KALYANI BASKAR (Supra) is Section 254 (2) of the Code which says that " the Magistrate may, if he thinks fit, on the application of the prosecution or the accused issue a summons to any witness directing him to attend or to produce any documents or other thing". The crucial words in Section 243(2) of the Code such as – if the accused applies to the Magistrate to issue any process for compelling the attendance of any witness or production of any documents or other thing- in their content as well as intent are almost the same as those in

Section 254 (2) of the Code. Question is does any principle of interpretation support the meaning put upon the crucial words in the statutory provision by the Supreme Court ? For the sake of emphasis the crucial words in the provisions of the code may be summarized as a power bestowed on the Magistrate to summon any witness to attend or to produce any document or thing." These words do not suffer from any ambiguity, are not amenable to alternative meanings and as such no Court need go beyond the plain meaning Rule or the Rule of Literal interpretation.

5. THE ANALYSIS OF THE REASONING

Before the Supreme Court the learned counsel for Mrs. Kalyani Baskar the appellant, going by what has been recorded in para 7 of the Judgment, contended that the dismissal of the application amounted to debarring the accused from entering upon her defence and thus caused miscarriage of justice to the appellant. Because of the nature of the submission steeped in generalities the Supreme Court was not persuaded to look at the particulars of the provisions ensuring adequate defence to the accused. Section 4 and 5 of the Code lays down that adequate defence and fair trial to the accused has to be provided in accordance with the provisions of the Code or any other provisions mandated by law. The provisions of Section 254 of the Code (the one applicable) and of Section 243 of the Code (the one wrongly thought to be applicable) cannot be read by adding words there. It is trite to say that Courts cannot presume existence of a Casus Omissus in a provision and supply it by interpretation.

From ROBERT WIGRAM CRAWFORD VS RICHARD SPOONER, 4 M.I.A. 179 dated 11th/ 15th of December, 1846 rendered by a Four member Judicial Committee of the privy Council to LALU PRASAD @ LALU PRASAD YADAV VS STATE OF BIHAR 2006 (13) SCALE 91 dated the 6th of December 2006 just five days ahead of KALYANI BASKAR (Supra) the law on the subject of Casus Omissus has remained uniform and well settled for over a century and a half. Some samples of the statement of law are extracted hereunder.

In ROBERT WIGRAM Crawford (Supra) of 1846 the law was stated thus :-

> **"***We cannot fish out what possibly may have been the intention of the Legislature; we cannot aid the Legislatures defective phrasing of the Statute; we cannot add, and mend, and, by construction, make up deficiencies which are left there. If the Legislature did*

intend that which it has not expressed clearly; much more, if the Legislature intended something very different; if the Legislature intended something pretty nearly the opposite of what is said, it is not for Judges to invent something which they do not meet with in the words of the text (aiding their construction of the text always, of course, by the context); it is not for them so to supply a meaning, for, in reality, it would be supplying it: the true way in these cases is, to take the words as the Legislature have given them, and to take the meaning which the words given naturally imply, unless where the construction of those words is, either by the preamble or by the context of the words in question, controlled or altered; and, therefore, if any other meaning was intended than that which the words purport plainly to import, then let another Act supply that meaning, and supply the defect in the previous Act."

The above statement of law emanated from the question before the Judicial Committee whether it is permissible to import into the words, in the relevant statute there, "owned by British Subjects" a totally different consideration and make it as if it had been, "then, and upto that time, and all times, continuously owned by British Subjects".

On the 16th December 1932 a Four member Bench of the Judicial Committee of the Privy Council in HANSRAJ GUPTA VS OFFICIAL LIQUIDATORS OF DEHRADUN –MUSSOORIE, ELECTRIC TRAMWAY COMPANY LIMITED, AIR 1933 P.C. 63 dealing with a contention under Section 3 of the Limitation Act 1908 said thus :-

" *The application by the liquidators cannot therefore be dismissed as being a "suit instituted" after the prescribed period of limitation ……*

……..

The result is that from either point of view the application by the Liquidators, if otherwise properly made under and within the provisions of S. 186 of the Indian Companies Act, is not one which must be dismissed by reason of S.3 of the Indian Limitation Act. It is either an application made within time, or it is an application made for which no period of limitation is prescribed. <u>The case may be a casus omissus. If it be so, then it is for others than their Lordships to remedy the defect</u>." (underlining supplied.)

On the 29th of January 1953 a Three Judge Bench of the Supreme Court in NALINAKHYA BYSACK VS SHYAM SUNDAR HALDER, AIR 1953 S.C. 148 relying on 4 M.I.A. 179 (Supra) and AIR 1933 P.C. 63 (Supra) declined to read the words "decree for recovery of possession" in Section 18(1) of West Bengal Premises Rent Control) Temporary Provisions) Act 1950 as including an order for recovery of possession made under Chapter VII of the Presidency Small Cause Courts Act, 1882 by observing thus :-

> **"***The Court must proceed on the footing that the Legislature intended what it has said. Even if there is some defect in the phraseology used by the Legislature the Court cannot, as pointed out in Crawford Vs Spooner 6, Moo. P.C.1 aid the Legislature defective phrasing of an Act or add and amend or, by construction make up deficiencies which are left in the Act. Even where there is casus omissus, it is, as said by Lord Russel of Killowen in HANSRAJ GUPTA V. DEHRASUN –MUSSOORIE ELECTRIC TRAM WAY CO. LTD,. AIR 1933 P.C. 63, for others than the Courts to remedy the defect." (underlining supplied).*

On the 23rd of August 2001 a Five Judge Constitution Bench decided DADI JAGANNADHAM VS JAMMULU RAMULU AND OTHERS, (2001) 7 SCC 71. Laying down the law on the question the Five Judge Bench there, amongst others, said the following :

> **"***The Court could not add words to a statute or read words into it which are not there, especially when the literal reading produces an intelligible results***."**

On the 13th of March, 2002 another Five Judge Constitution Bench of the Supreme Court in PADMASUNDARA RAO VS STATE OF T.N. , AIR 2002 S.C. 1334 dealing with a contention on the provisions of Section 6 of the Land Acquisition Act, 1894 unanimously spoke thus on the subject –

> **"***The legislative casus omissus cannot be supplied by judicial interpretative process. Language of Section 6(1) is plain and unambiguous. There is no scope for reading something into it, as was done in Narasimhaiah's case (Supra).*

Decisions of Two Judge Benches of the Supreme Court on the topic are superabundant. Only three among them are noted here primarily because of their recent origin.

STATE OF JHARKHAND VS. GOBIND SINGH , AIR 2005 S.C. 294 decided on the 3rd December, 2004 contains a detailed discussion regarding casus omissus at para 8 to 22 of the Judgment.

On the 13th of February 2006 the decision VEMAREDDY KUMARSWAMY REDDY VS STATE OF A.P. (2006) 2 SCC 670 was delivered where from para 15 to 19 the principles governing casus omissus were reiterated.

Most recently on the 6th of December 2006 the Supreme Court in LALU PRASAD (Supra) considered the plea of casus omissus in relation to Section 197 of the Code and Section 19 of the Prevention of Corruption Act, 1988 at para 7, 8 and 9 of the Judgment and reiterated the same principles of interpretation on the question.

In KALYANI BASKAR (Supra) the Supreme Court by way of reasoning simply observed that the court would not exceed the power under Section 243 (2) if the prayer for sending the cheque involved in the case to a handwriting expert is allowed. The statutory provision of Section 243 (2) of the Code demonstrably misapplied as well as those of Section 254 (2) of the Code do not contain any words enabling the Court to send any documents to an expert, enabling a would be witness to conduct a scientific investigation as to handwriting and thereby create a document and then attend and produce the same in Court. If the provisions are to be construed as comprising the powers indicated above there can be no question that it will amount to adding words into them which the Legislature did not enact. Such an interpretation would fly in the face of the settled law uniformly prevailing over the years spanning a century and a half from ROBERT WIGRAM of 1846 (Supra) to LALU PRASAD of 2006 (Supra) considered here. Thus the holding in para 12 of KALYANI BASKAR (Supra) quoted at para 3 of this essay being per incuriam need not be followed as a precedent on Section 243 (2) of the Code. In view of the submission of the learned counsels, in its anxiety to subserve the interest of justice to the accused the Court had to do some "judicial heroics" (see para 3 of BANGALORE WATER SUPPLY VS RAJAPPA, AIR, 1978 S.C. 548) to accommodate the prayer in the application for sending the cheque to a handwriting expert. Is there a legal way to meet the necessities of the case for the defence ? An answer to the query is attempted in the next paragraph.

6. MEETING THE NECESSITIES OF THE CASE

The phrase "interest of justice" and the word "compare" in the extract from KALYANI BASKAR (Supra) quoted at para 3 of this writing provided the starting point for the search for a legal way to meet the prayer for expert investigation as to genuineness of the signature on the cheque involved in the case. Unlike Section 151 of the Code of Civil Procedure 1908 the Code does not contain any such provision for inherent power to subserve the ends of justice or interest of justice. As indicated by a Three Judge Bench in RANJIT SINGH, AIR 1998 S.C. 3148, though in a different context, perhaps had Judicial Magistrate, Tambaram, Chennai been a mistake for a Metropolitan Magistrate the way could have been a reference to the High Court to exercise power under Section 482 of the Code. But a Judicial Magistrate cannot make a reference. The word compare led the writer to Section 73 of the Evidence Act. It was found that the Supreme Court itself has showed the legal way to accommodate the requirement of the accused in his defence. In STATE (DELHI ADMINISTRATION) VS PALIRAM, AIR 1979 S.C. 14 the matter of taking specimen signature of the accused and sending the disputed signature alongwith the specimen signature for expert investigation arose in the context of the inquiring Magistrate allowing it and the High Court disagreeing on a narrow view of Section 73 of the Evidence Act . The Supreme Court went into the legislative history of Section 73, considered the position obtaining in English Law in this regard, discussed several cases from the High Courts and then at held that comparing by Court provided in section 73 will comprise comparing with the help of an expert as well and that the two paragraphs of Section 73 of the Evidence Act are not mutually exclusive but are complementary to each other. The excerpt from paragraph 25 of PALIRAM (Supra) reads thus :

> **"** *Section 73 is therefore to be read as a whole, in the light of Sec.45. Thus read, it is clear that a Court holding an inquiry under the Code of Criminal Procedure in respect of an offence triable by itself or by the Court of Session, does not exceed its powers under Section 73 if, in the interests of justice, it directs an accused person appearing before it, to give his sample writing to enabling the same to be compared by a handwriting expert chosen or approved by the Court, irrespective of whether his name was suggested by the prosecution or defence , because even in adopting this course, the purpose is to enable the court before which he is ultimately put up for trial, to compare the disputed writing with his (accused's) admitted writing. And to*

*reach its own conclusion with the assistance of the exper***t."**

It is surprising that the unmistakable footpint of the above excerpt from PALIRAM (Supra) on the extract of para 12 of KALYANI BASKAR (Supra) quoted at paragraph 3 of this writing has unwittingly fallen on Section 243(2) of the Code.

Section 243 (2) of the Code where it is applicable enacts a right of the accused, Section 254 (2) for a summons case like the one in KALYANI BASKAR (Supra) provides a similar right of the accused but the right is blended with a discretion vested in the Court. Section 73 of the Evidence Act comprises entirely a discretionary power of the Court. However the accused or the prosecution may, as the necessities of the case may require, apply to the Court to exercise its discretion in that regard. In the case before the Magistrate at Tambaram, the accused could have first applied under Section 91 of the Code directing the Bank to produce the specimen signature card of the accused kept by the Bank. After its production the accused could apply to the Court to use the discretion under Section 73 of the Evidence Act to send the cheque and the specimen signature card for an expert investigation by a handwriting expert whether named by the accused or not. Later the expert may be called as a Court witness under Section 311 of the Code.

7. THE CONCLUDING COMMENTS

There can be no quarrel with the direction in KALYANI BASKAR (Supra) for expert investigation of the signature on the cheque. Only the procedural part of the direction has been surprising. This has probably happened because of the nature of the submission of the learned counsels. The upshot is that KALYANI BASKAR (Supra) may not be read as law laid down under Section 243 (2) or under Section 254 (2) of the Code and may be read only as a Judgment on facts of the case.