Mst. Mooli Devi Vs. the Pareek Commercial Bank Ltd. and anr.

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Court : Rajasthan

Decided On : Sep-29-1969

Reported in : AIR1971Raj78; [1971]41CompCas625(Raj)

Judge : D.M. Bhandari, C.J. and; S.N. Modi, J.

Acts : Banking Companies Act, 1949 - Sections 45B, 45T and 45U; Code of Civil Procedure (CPC) - Sections 42 and 47 - Order 21, Rules 53, 58 and 63; Rajasthan High Court Rules - Rules 729, 732 and 736

Appeal No. : Civil Spl. Appeal No. 49 of 1968

Appellant : Mst. Mooli Devi

Respondent : The Pareek Commercial Bank Ltd. and anr.

Advocate for Def. : Guru Prakash, Adv. for Respondent No. 3

Advocate for Pet/Ap. : B.K. Acharya and; Hastimal, Advs.; C.D. Mundra, Adv.

Judgement :

Bhandari, C.J.

1. This special appeal from the judgment dated the 18th September, 1968 under Section 18 of the Rajasthan High Court Ordinance arises under the following circumstances. The respondent No. 1 in this appeal, the Pareek Commercial Bank Ltd. (hereinafter called the Bank) was ordered to be wound up on 31st July, 1952.

The Official Liquidator obtained certain orders from this Court for the realisation of various sums of money from Vastulal Pareek, respondent No. 2 in this appeal, who was Chairman of the said bank. The execution petition, for execution of these orders was transferred to the Court of District Judge, Bikaner and certain properties were attached. Shrimati Mooli Devi who is the appellant before us, filed an objection petition under Order 21, Rule 58, Civil P. C. before the District Judge which was rejected on 17th December 1960. Thereafter she applied for leave to this Court to file suit under Order 21, Rule 63, Civil P. C. and such leave was granted on 11th December 1961. Shrimati Mooli Devi then filed petition No. 17/67 in this Court stating herself plaintiff and opposite parties as defendants and praying that the properties attached may be released from attachment and the attachment order passed by the District Judge be set aside. The controversy arose whether this application should be treated merely an application under Rule 729 (1) of the High Court Rules which were framed by this Court in exercise of the powers conferred on it under Section 45U of the Banking Companies Act (hereinafter called the Act). The Company Judge held that it was a plaint on which court-fee should be paid as provided under the Court-fees Act. The appeal by the appellant was dismissed by the Division Bench on 24th July, 1962 on the ground that it was premature. Thereafter the Company Judge rejected the applicationon the ground that court-fee had not been paid even after the expiry of three months' time granted to make up the deficiency in the court-fee. Again an appeal was preferred to the Division Bench and it was argued that the appellant's application was not a suit but was merely an application under Rule 729 of the High Court Rules. This argument was accepted by the Division Bench and the case was remanded for disposal according to law. On a review petition filed by the Bank it was ordered that the Bank had a right to argue before the Company Judge that mere application for setting aside the order was not maintainable and the appellant should have filed a suit under Order 21, Rule 63, Civil P. C. The Company Judge then decided that the appellant should have filed suit under Order 21, Rule 63, Civil P. C. and that the application was not maintainable. Against this order, this appeal has been filed.

2. The first point that has been urged by learned counsel for the appellant is that because of the provisions contained in Section 45B of the Act, the appellant had

no right to file an application, under Order 21, Rule 58, Civil P. C raising objections to the execution application before the District Judge and that the District Judge had no jurisdiction to entertain and decide such application and as such the application filed by the appellant before the District Judge under Order 21, Rule 58. Civil P. C. should be entirely ignored or treated as non-existent and for this reason it must be held that the provision for filing a suit con' tained in Order 21, Rule 63, Civil P. C, did not apply and the appellant has a right to file an application before the Company Judge for setting aside the order under the relevant provision of the High Court Rules.

3. In order to appreciate this contention properly, it is necessary to refer to Sections 45A, 45B and 45T of the Act. Section 45A runs as follows:--

'The provisions of this part and the rules made thereunder shall have effect notwithstanding anything inconsistent therewith contained in the 'Companies Act 1956' or the Code of Civil Procedure, 1908 (Act V of 1908) or the Code of Criminal Procedure 1898 (Act V of 1898) or any other law for the time being in force or any instrument having effect by virtue of any such law; but the provisions of any such law or instrument in so far as the same are not varied by, or inconsistent with, the provisions of this part or rules made thereunder shall apply to all proceedings under this part.'

4. Section 45B runs as follows :--

'The High Court shall, save as otherwise expressly provided in Section 45C have exclusive jurisdiction toentertain and decide any claim made by or against a banking company which is being wound up (including claims by or against any of its branches in India) or any application made under 'Section 391 of the Companies Act, 1956' by or in respect of a banking company or any question of priorities or any other question whatsoever, whether of law or fact, which may relate to or arise in the course of the winding up of a banking company, whether such claim or question has arisen or arises or such application has been made or is made before or after the date of the order for the winding up of the banking company or before or after the commencement of the Banking Companies (Amendment) Act 1953.'

5. Thus under Section. 45B exclusive jurisdiction is vested in the High Court save as otherwise expressly provided in Section. 45C to entertain and decide any claim made by or against a banking company which is being wound up including claims by or against any of its branches in India.

6. It has been settled by the Supreme Court in Dhirendra Chandra Pal v. Associated Bank of Tripura Ltd., AIR 1955 SC 213, that Section 45B is not confined to claims for recovery of money or recovery of property, moveable or immovable, but comprehends all sorts of claims which relate to or arise in the course of winding up.' It has been further clarified in Ram Narain v. Simla Banking and Industrial Co., Ltd., AIR 1956 SC 614, that proceedings to execute the decree and the claims in matters which must necessarily arise in the course of execution fall within the scope of Section 45B. In view of these pronouncements of the Supreme Court, had Section 45B stood alone, there can be no doubt that an application even by a third party objecting to the attachment of property in execution of decree obtained by a Bank against the judgment-debtor would lie to the High Court because it is that Court which has to exercise the decree under Section 45B. But Section 45T (1) provides that 'all orders made in any civil proceeding by a High Court may be enforced in the same manner in which decrees of such Court made in any suit pending therein may be enforced.' The effect of this provision is that the High Court is competent to transfer any application for the enforcement of the order passed by it to any Court competent to execute the same. In the instant case, the Company Judge had transferred the application for enforcement of the orders passed by it to the Court of District Judge, and such transfer is not in anyway challenged. It is, however, urged that the District Judge has only the limited powers to proceed on to execute the decree and it had no power tohear any objection of the nature mentioned under Section 45B as this would mean encroachment of the exclusive jurisdiction conferred by law on the High Court. It is contended that Section 45T (1) must be held as limited in its application to the extent that the transferee Court can take any proceedings for enforcing any order but it cannot decide any claim by a third party or even by the judgment-debtor to the attachment or delivery of possession of any property.

7. We are unable to read Section 45T in this manner. In our opinion, the power of enforcing the order granted under Section 45B to the transferee court includes the power to decide any objection filed under Order 21, Rule 58, Civil P. C. Enquiries contemplated under Section 47 and other provisions of Order 21. Civil P. C. are part of the execution proceedings as the executing Court is directed to embark on such inquiries for the purpose of executing the order speedily. Section 45T which finds place after Section 45B slackens the rigour of the latter section. The Division Bench of the Calcutta High Court in Bharati Central Bank (in Liquidation) v. Ratindra Nath Sen, (1950) 54 Cal WN 975, held that Section 45H of the Act (now it is 45T) must be treated as exception to Section 45B. These two provisions must be read as a whole and not in the manner as if Section 45T is in conflict with Section 45B. This decision was adversely commented upon by P. B. Mukharji J. in Dhakuria Banking Corporation Ltd. v. Sm. Surabala Debi, AIR 1953 Cal 610 and learned counsel for the respondents have relied on the following observations made in that case;--

'The powers of the transferee Court are clearly laid down in Section 42 of the Code which provides that a transferee Court 'shall have the same powers in executing such decree as if it had been passed by itself'. The words 'powers in executing such decrees' in Section 42 of the Code cannot reasonably be said to include jurisdiction to execute where such jurisdiction has been expressly taken away by statute. That conclusion appears to be supported by the subsequent words that follow 'as if it had been, passed by itself'. These words indicate that though the transferee Court itself did not pass the decree the law deems it as though it had passed it. How can it be deemed and how can this implication, of law be still drawn where Section 45A expressly provides 'notwithstanding anything to the contrary in any other law for the time being in force' no other Court shall have jurisdiction. Left to myself, I should have thought these provisions override Section 42, Civil Procedure Code.'

8. In our opinion, the power of the transferee Court to enforce an orderis comprehensive enough to authorise it to tread the entire road which may be necessary in order that there may be complete enforcement of the order.

9. When the law says that the High Court shall have power to enforce its orders under the Act in the same manner in which the decree is enforced, it means that the entire provisions for the execution of a decree as provided in Civil Procedure Code will be available to it for the enforcement of the order. Under Section 42, Civil P. C. the transferee Court has the same powers in executing such decree as if it had been passed by itself. The transferee Court can also avail of all the provisions of the Civil Procedure Code in enforcing the order. Nothing contained in Section 45B can hinder it from doing so because Section 45T overrides Section 45B to that extent.

10. There is yet another S. B. Judgment of the Calcutta High Court in Comrade Bank Ltd. (in liquidation) v. Jyoti Bala Dassi, AIR 1962 Cal 86, in which it has been held that the provisions of the Act leave no scope for doubt that the High Court alone to the exclusion of other Court possesses the power to decide all claims by or against a Banking Company in liquidation and that investigation of a claim preferred under Order 21, Rule 58, Civil P. C. cannot be entertained by an executing Court. However, the Division Bench of the Calcutta High Court in the recent case Kartic Chandra Pal v. Noakhali Union Bank Ltd. (in Liquidation), AIR 1969 Cal 158, has taken the contrary view. It was observed by P.N. Mookerjee J. as follows:--

'If there is a valid transfer of the decree for execution to the Alipore Court, it must be taken that the order of transfer embraces the whole process of execution, or, in other words, the transferee Court, unless the order of transfer is recalled or modified by the transferor Court, will have full powers in the matter of the execution in question, and, indeed, the same powers as the transferor or the original Court to proceed with and complete the entire process of execution. That would necessarily, involve consideration by it of all objections to the said process, namely, whether under Section 47 of the Code or under Order 21, Rule 58. Indeed these claims are really incidental to the main execution and are as such integral parts of the same as objections under Section 47, the only difference between the two sets of proceedings being that, while, in one case, claim or objection is made by a third party, who again, under the terms of Order 21, Rule 58 itself, would be deemed to be a party to the execution proceeding, in cases ofobjections under

Section 47, they are put forward by the judgment-debtors. In substance, there is no difference between the two. Both are for the purpose of resisting the execution of the decree in the manner, desired by the decree-holder. There can be no question that objections under Section 47 of the Code to execution proceedings would have to be dealt with by the executing Court, even if it is the transferee Court, and the transferee Court will have full jurisdiction to deal with the same. There can be no adequate or valid reason for making a distinction or difference in the case of claims under Order 21, Rule 58 of the Code.'

11. The same view has been taken by the Madras High Court in Malli Selva lyer v. Madurai Mercantile Bank, Ltd. (in Liquidation), 1962-2 Mad LJ 251.

12. We are in respectful agreement with the view expressed in Calcutta and Madras High Courts in the aforesaid decisions. In our opinion, as held by the learned Single Judge, the District Judge, Bikaner, had the jurisdiction to entertain and decide the objection application filed under O. 21, R. 58 of the Code of Civil Procedure by the appellant.

13. The second contention thathas been urged by learned counsel for the appellant is that granting that the District Judge Bikaner had the jurisdiction to hear and decide the application filed under Order 21, Rule 58, Civil P. C., yet after the dismissal of the application, the only remedy open to the appellant is to file an application under Rule 729 of the High Court Rules, because she could not have filed any suit under Order 21, Rule 63, Civil P. C. The argument is that rules framed by this Court bar the filing of any suit in the High Court and the? only remedy open to the appellant is to file an application under Rule 729. Another line of argument adopted is that Order 21, Rule 63. Civil P. C. should be so construed as permitting the appellant to get rid of the order passed by the District Judge by pursuing the present application before the Company Judge, and the application filed by the appellant in this Court should be deemed to be a suit for the purposes of Order 21, Rule 63, We may refer to the relevant rules which call for consideration in this connection, namely Rules 729 (1) to (3),, 732 (1) and 736 (a) :--

Rule 729 (1), (2) and (3).

'729.--(1) An application under Part III or Part III-A of the Banking Companies-Act, 1949 (hereinafter in these rules referred to as 'the Act') in respect of a Banking Company having its registered office or, in the case of a company incorporated outside India, its principal place of business, within the State ofRajasthan, shall be filed in the office of the Registrar, High Court.

(2) Applications under Part III or Part III-A of the Act shall be instituted in the matter of the Act and in the matter of the Banking Company and where necessary in the matter of the Act under which the Banking Company has been ordered to be wound up.

(3) An application under Part III or Part III-A of the Act shall be made by petition and shall be signed and verified in the same manner as a plaint. The petition shall be supported by an affidavit and shall be presented to the Judge taking company winding up matters or to such other Judge as the Chief Justice may direct- The Judge may reject the application summarily or pass such orders and give such directions as he may deem proper including directions for notice of the petition being given to such person or persons as may seem to him likely to be affected by the proceedings.'

Rule 732 (1)

'732 (1)-- Applications for the determination of all questions of priorities and all other questions whatsoever, whether of law or fact, which may relate to or arise in the course of the winding up of a Banking Company, shall be made by petition. The petition shall contain a statement of facts relied on and the nature of the relief asked for. The petition shall be signed and verified in the same manner as a plaint and shall be supported by an affidavit.' Rule 736 (a)

'736 (a) -- Suits in respect of claims made by or against any Banking Company in liquidation including claims by or against any of its branches in India which are filed in the High Court or transferred to it under the Act shall be entered in a separate list to be maintained by the office of the Registrar and shall be treated as expedited suits. If such suits have been filed before the date of the order for winding up the Official Liquidator shall furnish to the Registrar a list of such suits.'

These rules only provide in what manner the applications are to be drawn up and where they are to be presented. Neither Rule 729 nor Rule 732 lays down that no suit can be filed in the High Court. On the other hand. Rule 736 impliedly contemplates filing of the suit in the High Court as Rule 736 (a) lays down that suits in respect of claims made by or against any Banking Company in Liquidation including claims by or against any of its branches in India which are filed in the High Court or transferred to it under the Act shall be entered in a separate list to be maintained by the office of the Registrar and shall be treated as expedited suits.

14. It has, however, been urged by learned counsel for the appellant that there are observations in AIR 1955 SC 213; AIR 1956 SC 614; Vastulal Pareek v. Pareek Commercial Bank Ltd., 1964 Raj LW 235 = (AIR 1964 Raj 202) and M/s. Brahmayya & Co., Official Liquidators, Hanuman Bank Ltd. (in Liquidation) v. V. S. Ramaswami Aivar, AIR 1966 Mad 247, which show that only an application can be filed in this Court and not a suit. In Dhirendra Chandra Pal's case, AIR 19S5 SC 213, the observations are:--

'It appears to us that, consistently with this policy and with the scheme of the Amending Act, where the liquidator has to approach the Court under Section 45-B for relief in respect of matters legitimately falling within the scope thereof, elaborate proceedings by way of a suit involving time and expense, to the detriment of the ultimate interests of the company under liquidation, were not contemplated. In the absence of any specific provision in this behalf in the Act itself and in the absence of any rules framed by the High Court concerned under Section 45-G, the procedure must be taken to be one left to the judgment and discretion of the Court, having regard to the nature of the claim and of the Question therein involved.'

These observations do not mean that there is any bar to the filing of a suit in the High Court. On the other hand, it was laid down that cheaper remedy by way of application was available to a company for declaration that an ex parte decree was a nullity. It has been pointed out that the Company Court had the discretion to direct that the particular claim must be brought by a suit or the rules of the High

Court may provide so. In the instant case, on an application of the appellant, the High Court had permitted her to file a suit. This apart, there is a specific provision under Order 21, Rule 63 C. P. C. that the remedy for setting aside the order passed by an executing Court dismissing an application under Order 21, Rule 58 is by a a suit. Here there is the injunction of law that a suit might be filed. It cannot be urged on the basis of Dhirendra Chandra Pal's case, AIR 1955 SC 213 that a suit is barred by vitrue of anything contained in Section 45B or the Rules of this Court.

15. In AIR 1966 Mad 247 the question was whether proceedings to obtain particular relief should not be pursued by way of an application and should be pursued by way of a suit and it was held that the proceedings could be pursued by applications, otherwise the Banking Companies would have to pay for heavy court-fees for filing suits and their position would be worse than other companies under the Companies Act. This authority does not in any way lay down that no suit is maintainable.

16. Coming to our own High Court, the learned counsel has relied on the following observations in 1964 Raj LW 235 = (AIR 1964 Raj 202).

'A claim like the one before us by or against a banking company would only be made by a petition and a suit would not be necessary.'

The Division Bench referred to Rule 732 and interpreted it in the light that the provisions contained in Rule 736 should not be understood to refer to claims which are filed before the High Court after winding up proceedings have commenced. In our humble opinion, this interpretation is doubtful, but nothing in this authority lays down that no suit can be filed in the High Court with regard to claims by a third person after winding up proceedings have commenced.

17. We are in agreement with the learned Single Judge that order passed under Order 21, Rule 58 would be conclusive if it is not challenged by filing a suit under Order 21, Rule 63, Civil P. C. and in view of the fact that filing of such suit is not expressly or impliedly barred by any provision of the Act or under the rules framed thereunder, it was incumbent on the appellant to have filed a suit under Order 21,

Rule 63, Civil P. C. Such suit however could only be entertained by the High Court in view of the provisions contained in Section 45B.

18. The last argument urged on behalf of learned counsel for the appellant is that her application may be treated as suit. The learned Single Judge has observed that the appellant herself had taken the firm stand before the Division Bench that she had not instituted any suit and that she had merely filed an application in the nature of claim and the appellant could not be allowed to resile from her stand. Learned counsel for the appellant has urged that all this was done under the misapprehension that the appellant had no right to file a suit and her claim should not be defeated merely on the technical ground that she had not filed a suit but had filed an application to challenge the order of the District Judge. The appellant had no doubt adopted an obdurate attitude but part of this obduracy may be due to the fact that the law was not in a settled position and the appellant has reason to construe the Division Bench authority of this Court in Vastulal Pareek's case, 1964 Raj LW 235 = (AIR 1964 Raj 202), in her favour. It is also to be noted that any suit filed by the appellant under Order 21, Rule 63 was to be filed in the High Court in which she had filed the claim. Taking all these things into consideration, we areInclined to take a lenient view in the matter.

19. We therefore give further opportunity to Mst. Mooli Devi to pay the deficit court-fee within one month from today. If the same is not paid within one month, the appeal shall be deemed to be dismissed. If it is paid within one month, the case shall be remanded to the Company Judge to decide it in accordance with law. Costs so far incurred by the Bank shall be paid by Mst. Mooli Devi to the Bank.