(1970) 04 AHC CK 0010

In the Allahabad High Court

Case No : Company Original Suit No. 4 of 1966

Anil Kumar Gupta APPELLANT

Vs

The Official Liquidator RESPONDENT

Date of Decision : 06-04-1970

Acts Referred:

Banking Companies Act, 1949 — Section 45A, 45B
Limitation Act, 1963 — Article 58
Uttar Pradesh Encumbered Estates Act, 1934 — Section 2, 7(2)

Citation : AIR 1971 All 25

Hon'ble Judges : W. Broome, J

Bench : Single Bench

Advocate : Sidheshwari Pd., B.L. Gupta and Rajeshwari Prasad, for the Appellant; A. Banerjee, for the Respondent

Final Decision : Dismissed

Judgement

W. Broome, J.—This suit was filed by Anil Kumar Gupta in this Court on 14-9-1966 in continuation of Company application No. 24 of 1965 (Under Order XXI, Rule 58. C. P. C. read with Section 45-B of the Banking Companies Act) which on 22-8-1966 was ordered to be converted into a suit. The defendants are the Benares Bank Limited fin Liquidation) and the Official Liquidator; and the relief sought is a declaration that the plaintiff is the owner in possession of the premises at No. 30 Burtolla Street, Calcutta, and that the aforesaid premises are not liable to attachment and sale in execution of a decree passed by this Court in September, 1942 against Jyoti Bhushan Gupta (father of the plaintiff) and Gokul Chand on an application u/s 187 of the Indian Companies Act, 1913 for a sum of Rupees 97,178-5-9, with future interest, as contributories of the Bank (in liquidation). The amount claimed represented call money due on the shares in the Benares Bank Limited held by Jyoti Bhushan Gupta and Gokul Chand, the call having been made by the official Liquidator in the year 1941. After the decree had been passed, it was transmitted to Calcutta for execution; and on 8-4-1946 the Calcutta High Court attached the premises at No. 30 Burtolla Street in those execution proceedings. The sale of the premises in pursuance of the attachment, however, appears to have been stayed by reason of an order passed by this Court in August 1950 in connection with another execution matter; and the stay was only vacated when an appeal arising out of that other execution was dismissed by the Supreme Court in October, 1964.

The plaintiff claims that the attached property is not liable for the satisfaction of the decree, being an ancestral property, in which he is one of the co-sharers; and he further pleads that the decree against his father Jyoti Bhushan is not binding on him because it arose out of speculation resulting in an avyavaharik debt. It has further been contended by the plaintiff that the execution proceedings are incompetent because of the pendency of proceedings under the U. P. Encumbered Estates Act, which were initiated by Jyoti Bhushan Gupta and Gokul Chand in the year 1936 and are still pending. All these averments are denied in the written statement filed by the defendants, who further plead that the suit is barred by limitation, is not maintainable by the plaintiff and is beyond the jurisdiction of this Court, since the property involved is situated at Calcutta. In addition, objection has been taken by the defendants to the valuation (Rs. 10,000/- placed on the suit) and to the implement of defendant No. 2.

2. The issues framed in this suit on 19-8-1968 are somewhat confused and repetitive, but I do not consider it necessary to amend them, since most of them are either not pressed or have become unsustainable by reason of the fact that the parties have not chosen to produce either documentary or oral evidence in this case. The issues framed are as follows:--

1. Whether the premises No. 30 Burtolla Street, Calcutta are an ancestral property of the plaintiff?

2. Whether the plaintiff is a co-sharer of the premises in suit. If so, to what extent?

3. Was the debt relating to the impugned decree vyavaharik''? If so, its effect?

4. Was the claim decreed on application u/s 187 of the Indian Companies Act against Jyoti Bhushan Gupta in a representative capacity?

5. Was the property in question not liable to attachment and sale in view of the U. P. Encumbered Estates Act?

6. Whether the premises in suit were one of the properties duly notified under the provisions of the U. P. Encumbered Estates Act. If so, its effect?

7. Was the debt, subject-matter of the decree of application u/s 187 of the Indian Companies Act, the subject-matter of the Encumbered Estates Act proceedings? If so, its effect?

8. Is the claim and the decree in suit null and void and unenforceable for the reasons alleged in paras 20 to 26 of the plaint?

9. Whether the plaintiff is entitled to the reliefs claimed.

10. To what relief, if any, is the plaintiff entitled?

11. Whether the claim and suit of the plaintiff is barred by time.

12. Whether the premises No. 30 Burtolla Street, Calcutta is liable to attachment and sale in execution of the decree passed by this Hon''ble Court.

13. Whether the plaintiff is entitled to sue and move a petition under Sections 45-A and 45-B of the Banking Companies Act.

14. Whether this Court has no jurisdiction to try the suit for the reasons alleged in para 42 of the additional pleas of the written statement.

15. Is the suit and the claim undervalued? If so, its effect?

16. Whether the defendant No. 2 is not a necessary party and has been wrongly impleaded.

FINDINGS

3. Issues 13, 14, 15 and 16. The pleas on which these issues were framed have not been pressed by learned counsel for the defendants; and I hold therefore that the plaintiff is entitled to sue under Sections 45-A and 45-B of the Banking Companies Act, that this Court has jurisdiction to entertain the suit, that the suit has not been undervalued and that defendant No. 2 has not been wrongly impleaded.

4. Issues 1, 2, 3 and 4. Learned counsel for the plaintiff concedes that since no evidence has been produced to substantiate the pleas on which these issues were based, they cannot be decided in his favour. There is nothing before me to show that the disputed premises are ancestral property, in which the plaintiff has only a share, or that the debt that forms the basis of the impugned decree was avyavaharik. And since the house is not shown to be ancestral, the question of Jyoti Bhushan''s acting in a representative capacity as head and karta of the family does not arise.

5. Issues 5, 6, 7 and 8. These issues all relate to the effect on the present suit of the proceedings initiated by Jyoti Bhushan Gupta and Gokul Chand under the U. P. Encumbered Estates Act in 1936. Applications u/s 4 of the Act were presented by these persons on 21-10-1936; and on the same day the S. D. O. passed an order u/s 6, transmitting the applications to the Special Judge. A copy of the relevant Gazette has been produced before me, showing that both the premises at No. 30 Burtolla Street, Calcutta, and the shares in the Beneres Bank were shown among the assets of the applicants. I understand that no progress has been made in the two cases and they are still pending with the Special Judge.

6. Learned counsel for the petitioner first of all argued that the proceedings before the High Court in 1941 and 1942 for the realisation of the call money were barred by Section 7(1) of the Encumbered Estates Act, which runs:--

"7(1). When the Collector has passed an order u/s 6 the following consequences shall ensue:

(a) all proceedings pending at the date of the said order in any civil or revenue court in Uttar Pradesh in respect of any public or private debt to which the landlord is subject, or with which his Immovable property is encumbered, except an appeal, review or revision against a decree or order, shall be stayed, all attachments and other execution processes issued by any such court and then in force in respect of any such debt shall become null and void, and no fresh process in execution shall except as hereinafter provided be issued;

(b) no fresh suit or other proceedings other than an appeal, review or revision against a decree or order, or a process for ejectment for arrears of rent shall, except as hereinafter provided, be instituted in any civil or revenue court in Uttar Pradesh in respect of any debts incurred before the passing of the said order but if for any reason whatsoever such a suit or proceeding has been instituted, it shall be deemed to be a proceeding pending at the date of the said order within the meaning of Clause (a)."

The contention is that as soon as a person purchases shares which are not fully paid up, he incurs a liability for the balance of the money due on the shares; and such liability, it is urged, comes within the definition of ''debt'' given in Section 2(a) of the Act (which runs: "debt means any pecuniary liability except a liability for unliquidated damages"). The result, is according to learned counsel for the plaintiff, that the liability of Jyoti Bhushan Gupta and Gokul Chand to pay the call money for which the decree was passed in 1942, was a debt incurred before the passing of the order u/s 6 of the Encumbered Estates Act in 1936, thereby attracting the provisions of Clause (b) of Section 7(1), quoted above; and the proceedings in the High Court for realisation of the call money were therefore barred. Reliance is further placed on the concluding part of Clause (b), which says that

"if for any reason whatsoever such suit or proceeding has been instituted, it shall be deemed to be a proceeding pending at the date of the said order within the meaning of Clause (1)";

and if this is so, it is argued, all attachments previously made in respect of such debt become void and no fresh process in execution can issue, as laid down in Clause (a).

7. I am not prepared to agree, however, that the definition of ''debt'' given in Section 2(a) of the Act is meant to cover a mere contingent liability for the payment of call-money on shares which are not fully paid up. In such a case there is no real liability, creating a debt, until a call is actually made. This is the view taken by a Division Bench of this Court in Benares Bank, Ltd. and Another Vs. Maharaj Kishore Khanna and Another, , in which it was held that a debt for call-money was incurred only on a call being made and not before. The argument based on Section 7(1) of the Act, therefore, is without substance. The call in the

present case not having been made until 1941, it cannot be said that the debt which was decreed by the High Court in 1952 was in existence before the passing of the order u/s 6 of the Encumbered Estate Act in 1936.

8. Next, learned counsel for the plaintiff relies on Section 7(2) of the Act, which runs:--

"7(2). After the passing of the said order and until the application is dismissed by the special Judge under Sub-section (3) of Section 8 or proceedings under this Act are quashed u/s 20 or until the Collector has liquidated the debt under Chapter V no decree obtained on the basis of any private debt incurred by the landlord after the passing of the order u/s 6 shall be executed against any of his property, other than proprietary rights in land, which has been mentioned in the notice u/s 11 and the landlord shall not be competent without the sanction of the Collector to make an exchange or gift of, or to sell, mortgage or lease, any of that property."

The decree passed by this Court in September, 1942 against Jyoti Bhushan Gupta and Gokul Chand was obviously a decree obtained on the basis of a private debt incurred by the landlord after the passing of the order u/s 6; and it is contended therefore that this decree cannot be executed against the premises at No. 30 Burtolla Street, Calcutta, which was one of the properties mentioned in the notice u/s 11. According to learned counsel for the plaintiff, the Official liquidator had no right to execute his decree by transferring it to the Calcutta High Court, and the only course open to him was to file a claim before the Special Judge u/s 9 of the Encumbered Estates Act (after satisfying the Special Judge that he had sufficient cause for not presenting it within the period initially prescribed for the presentation of claims) so as to become eligible for a share in the debtor''s assets, along with the other creditors whose claims are being dealt with by the Special Judge.

9. Learned counsel appearing for the official Liquidator on the other hand contends that the provisions of Section 7 (2) of the Encumbered Estates Act are not binding on this Court in winding up proceedings under the Banking Companies Act. In this connection he places reliance on Sections 45-A and 45-B of the Banking Companies Act, which are included in Part IIIA of the Act, under the heading "Special Provisions For Speedy Disposal of Winding up Proceedings". Section 45-A lays down that the provisions of this Part of the Act shall have effect notwithstanding anything inconsistent therewith contained in the Indian Companies Act, 1913, the Code of Civil Procedure, 1908, the Code of Criminal Procedure, 1898 or any other law for the time being in force (though the provisions of such law which are not inconsistent with the provisions of this Part shall apply to proceedings under this Part). And Section 45-B gives the High Court exclusive jurisdiction to entertain and decide claims made by or against a banking company which is being wound up. Section 7(2) of the Encumbered Estates Act, it is urged, runs counter to the provisions of Section 45-A and Section 45-B of the Banking Companies Act, firstly because it would defeat the

basic object of these sections of the latter Act, namely the speedy disposal of the winding up proceedings, and secondly because it would deprive the High Court of its exclusive jurisdiction to decide claims made by or against a banking company which is being wound up.

This line of argument appears to me to be sound. There can be no denying that if the Official Liquidator is obliged to lodge a claim with the Special Judge u/s 9 of the Encumbered Estates Act, it will take years for that claim to be decided and disposed of, with the result that the winding up proceedings will be subjected to prolonged delay and this would clearly be inconsistent with the provisions of Part III-A of the Banking Companies Act, which is specially designed to ensure the speedy disposal of winding up proceedings. Section 45-A, as already pointed out, lays down that the provisions of part III-A of the Act must prevail over anything inconsistent in any other law; and the provisions of Section 7(2) of the Encumbered Estates Act must definitely be considered inconsistent with the provisions of Part III-A of the Banking Companies Act, since they must inevitably tend to delay the disposal of the winding up proceedings instead of expediting them. Moreover, by giving jurisdiction to the Special Judge to decide the claims, the provisions of Section 7(2) read with Section 9 of the Encumbered Estates Act run counter to Section 45-B of the Banking Companies Act, which confers exclusive jurisdiction on the High Court; and on this ground too Section 7(2) of the Encumbered Estates Act must be deemed inconsistent with the provisions of Part III-A of the Banking Companies Act. A similar view was taken by the Orissa High Court in H. Naik, Official Liquidator, Puri Bank Ltd. Vs. Kanhu Charan Das, , in which Sections 45-A and 45-B of the Banking Companies Act were held to override the provisions of the Orissa Estates Abolition Act, so far as claims by and against a banking company in liquidation were concerned.

10. I hold therefore that neither Section 7(1) nor Section 7(2) of the Encumbered Estates Act can have any effect on the present suit. No other argument has been advanced before me regarding the provisions of this Act. The issues relating to this part of the case, therefore, must all be decided against the plaintiff. As regards issue No. 6, it is no doubt a fact that the premises in suit were mentioned in the Notification published under the provisions of the Encumbered Estates Act; but this will not have any effect on the impugned execution proceedings. As regards issue No. 7, I hold that the debt which was decreed was not a debt that could be considered in the Encumbered Estates Act proceedings. Issues 5 and 8 are decided in the negative.

11. Issue No. 11. One of the main contentions advanced on behalf of the Official Liquidator is that this suit is barred by time. Both parties are agreed that the relevant article of the Limitation Act, 1963, is Article 58 prescribing for suits relating to declaration (other than those in respect of forged instruments or invalid adoptions) a limitation of 3 years, starting from the time when the right to sue accrues". The plaintiff appears to have been a minor at the time when the impugned attachment was made on 8-4-1946. Consequently, by virtue of Section

6 of the Limitation Act, he could file the suit when his minority came to an end, which was in the year 1956 (since he was admittedly 27 years of age when he swore the affidavits marked A-5, on 20-5-1965). The right to sue therefore accrued to the plaintiff in 1956 and he should have filed his suit by 1959; but he did not file Company Application No. 24 of 1965 (which was subsequently ordered to be converted into a suit) until 20-5-1965, long after the period of limitation had expired. There is a vague suggestion in paragraph 11 of that application that "it was very recently that the present objector came to know of the aforesaid attachment of the property at Calcutta"; and curiously enough the very same words are repeated in paragraph 11 of the plaint, although that was filed more than a year later, on 14-9-1966. No details are given as to precisely when or how the petitioner came to know of the attachment and I am not prepared to accept his plea of ignorance.

It is significant that when he was examined in this Court on 5-12-1966, he stated; "After attachment the Calcutta High Court appointed a receiver and that receiver was collecting the rent. I have heard about the receiver collecting rent even before I became major". He then tried to avoid the implications of this admission by asserting that the receiver had been appointed in connection with some other case, but was unable TO give any particulars about it. I have no hesitation in the circumstances in holding that the plaintiff knew of the attachment well before he attained majority, and that there was nothing to prevent him from filing the suit within three years of his attaining majority in 1956.

12. Learned counsel for the plaintiff has tried to argue that there was no point in filing this suit between October, 1964, as the execution remained stayed up to then. But that stay would not affect the position at all; it merely prevented the attached property from being put to sale, but did not alter the attachment which had already taken place. If the plaintiff wished to challenge the attachment he could and should have filed his suit, irrespective of whether further proceedings in execution had been stayed. Limitation commenced to run from 1956 and could not be interrupted by the stay order.

13. The present suit is thus clearly time-barred; and the issue is decided accordingly, against the plaintiff.

14. Issues 9, 10 and 12. In view of my findings on the foregoing issues, it is clear that the plaintiff is not entitled to any declaration that the premises No. 30 Burtolla Street, Calcutta are not liable to attachment and sale in execution of the decree passed by this Court in 1942 or to any other relief.

ORDER

15. The suit is accordingly dismissed with costs.

