(1979) 07 CAL CK 0026

In the Calcutta High Court

Case No : Suit No. 108 of 1971

Bank of Tokyo Ltd. APPELLANT

Vs

Soorajmull Nagarmull and Others RESPONDENT

Date of Decision : 12-07-1979

Acts Referred:
Civil Procedure Code, 1908 (CPC) — Order 21 Rule 52

Citation : AIR 1980 Cal 118

Hon'ble Judges : Padma Khastgir, J

Bench : Single Bench

Advocate : B.K. Bachawat and Tarun Kumar Basu, S.K. Gupta, on behalf of D.K. Jalan and others and supported Bachawat, P.K. Das, appeared on behalf of Mohan Lal Jalan and supported Bachawat, Subrata Roy Chowdhury, appeared on behalf of Sudhir Jalan, Jayanta Mitra, appeared on behalf of Radha Debi Jalan, for the Appellant;

Final Decision : Dismissed

Judgement

Padma Khastgir, J.—This application has been taken out by Bank of Tokyo Limited against Soorajmull Nagarmull, a firm, being defendant No. 1 and the other defendants as the partners of the said firm,

2. The facts of this case shortly are that the defendant No. 1 had pledged with the plaintiff''s Bank ? 90,000 stock of Bombay Gas. Company contained in Stock Certificate No. 235; ? 15,000 shares in Asiatic Textiles Company Limited; ? 6,000 shares in Coochbehar Trading Company Private Limited; ? 4,500 in the Haldibari Jute Company Private Limited; ? 7,200/- in Rajasthan Investment Company Private Limited; & 7,008 in Oriental Trading Company Private Limited. A suit for dissolution of partnership was filed in this High Court being Suit No. 1886 of 1963 on 22nd of October, 1963 and an ad interim order was passed restraining the parties from transferring, selling or dealing with the said shares save and except in the usual course of business. On May 4, 1967 the said order was confirmed. Thereafter in July, 1970 another suit was filed being Suit No. 290 of

1970 for a declaration that the firm, Soorajmull Nagarmull stood dissolved and for accounts. On March 13, 1971 the plaintiff Bank filed against the defendants a suit for recovery of a sum of Rs. 38,78,552.58 and also for a declaration that the stocks and shares mentioned in the letter dated 31st of August, stood charged in favour of the bank and for sale of the said shares and other consequential reliefs. In the said suit on March 15, 1971 Joint Receivers were appointed of the stocks and shares charged and pledged by the defendants, In the meantime by a deed of hypothecation executed by the munim and gomesta of the said firm on 7-9-77 and 14-9-77, hypothecation of Script No. 235 was made in favour of Sri Sudhir Jallan, son of Keshardeo Jalan, a deceased partner of Soorajmull Nagarmull, who instituted a suit being suit No. 171 of 1978 in the High Court at Delhi against the defendant No. 1 and others praying for a declaration that the stocks of the value of ? 20,518 of Bombay Gas Company Limited contained in the said stock Certificate No. 235 stood charged in favour of the trust by way of first charge and stock of the value of ? 90,000 comprised in the said stock certificate No. 235 are charged In favour of the said trust subject to prior charge of the Bank of Tokyo. In the said suit Sudhir Jalan also asked for splitting up of the said stock Certificate No. 235 and for transfer to the plaintiff of the said stock of the face value of ? 20,518; but no relief for money decree was claimed in the said suit.

3. Smt. Radha Debi Jalan instituted a suit against the defendant No. 1, the Bombay Gas Company Limited and Rajasthan Investment Private Limited in the High Court at Bombay being Suit No. 295 of 1978, inter alia, for spliting up of the said stock Certificate No. 234 of Bombay Gas Company and for delivery of the face value of ? 50,450 and for transfer of 7,200 shares of Rajasthan Investment Private Limited in favour of the plaintiff and for other reliefs. The said stock and shares were hypothecated in favour of the plaintiff in terms of a deed of hypothecation dated 7th of September, 1977.

4. In the Calcutta Suit on May 29, 1978 a decree for Rs. 38,78,552.58 with interest and cost was passed in favour of the plaintiff Bank and it was directed that the stock and shares which were charged in favour of the plaintiff Bank be sold and the sale proceeds to be directed to be paid to the plaintiff in pro tanto satisfaction of its claim. In the Bombay Suit on 11th of July, 1978 a consent decree was passed and it was agreed that the Bombay Gas Company will split up the Stock Certificate No. 234 and deliver the same and also 7,200 shares of Rajasthan Investment Private Limited to the plaintiff. In the Calcutta Suit on an application on 26th of September, 1978 Sri S. K. Dhar, Advocate on record of M/s. Fox and Monday was appointed the Receiver over the stock and shares charged and pledged and deposited by the defendant No. 1 with the plaintiff Bank, that is, Stock Certificate No. 234 and also over No. 235. Thereafter the Receiver held several meetings between November 15 and December 6, 1978 and the notification of sale was finalised on 10th of January, 1978. In the Delhi Suit on December 13, 1978 Sri S. K. Dhar was appointed Receiver of the stock Certificate No. 234 and the Receiver was directed to retain the Stock certificate till further order of that court. Thereafter the defendant No. 1 took out an

application for setting aside the orders dated 26th of September and 10th of November, 1978 and ultimately on December 21, 1978 the said application was dismissed. The defendant No. 1 preferred an appeal from the said order on 29th of January, 1979. By a decree passed in the Delhi Suit it was, inter alia held that the plaintiff, that is, the Bank of Tokyo, was entitled to a first charge to the extent of ? 20,518/- and second charge to the extent of ? 90,000 comprised in the said stock certificate No. 235 and the plaintiff was entitled to Second charge in respect of the shares of Asiatic Textiles Company Limited, The Coochbehar Trading Company Private Limited, The Haldibari Jute Company Private Limited subject to the first charge of the present plaintiff and that order further held that said order was without prejudice to the rights of the Bank of Tokyo in the Calcutta Suit. Thereafter on the 10th of January 1979 Sri S. K. Dhar was appointed a Receiver in the Bombay Suit in respect of Stock Certificate No. 234 and an order of injunction was passed on the Receiver restraining him from selling said shares and the Receiver was directed to hold the same till further order of that court. On January 29, 1979 in the Calcutta Suit, the Appeal Court on the application of the defendant directed the sale of the stock and shares in terms of the order dated 26th of September, 1978 and 10th of November, 1978 and directed that the sale would be effected by public ruction which would be subject to the confirmation of the court.

5. Mr. B. K. Bachwat appeared in support of the petition and submitted that this application has been made under Order 21 Rule 52 of the CPC and further submitted that this Court should decide priority in terms of Order 21 Rule 52, amongst the various decree holders.

6. From the Notice of Motion it would appear that the petitioner before me is asking for an order that the claims of the plaintiffs in Bombay and Delhi Suits be determined by this Hon''ble Court and be declared that the plaintiff Bank of Tokyo is entitled to proceed against the stocks and shares held by the Receiver to the exclusion and/or in priority to those of the plaintiffs in Delhi and Bombay Suits and the same to be sold and entitling the plaintiff herein to appropriate the sale proceeds in pro tanto satisfaction of the decree passed in Bank''s favour on 29th of May, 1978. Again in prayer (b) the petitioner has asked that the Receiver, Sri S. K. Dhar, be directed to sell the stocks and shares in execution of the decree dated May 29, 1978. The petitioner has further applied for an injunction restraining the decree-holders Smt. Radha Debi Jalan and Sudhir Jalan from taking any further steps in execution of the decree passed in their favour,

7. Mr. S. K. Gupta appeared on behalf of D. K. Jalan and others, supported Mr. Bachawat. Mr. P. K. Das appeared on behalf of Mohon Lal Jalan and also supported Mr. Bachwat.

8. Mr. Subrata Roy Chowdhury appeared on behalf of Sudhir Jalan and submitted that his client has obtained a valid decree passed by the Delhi High Court Where all the facts were truly and correctly set out in the plaint wherefrom and also from the decree it would appear that Sudhir Jalan is entitled to and obtained a

declaration of first charge in respect of 20,000 shares which admittedly were never pledged with the plaintiff Bank and for the balance of 90,000 shares he claimed a second charge subject to the first charge in favour of the Bank of Tokyo. As such there is no conflict of interest between Sudhir Jalan and also the Bank of Tokyo. Various allegations that have been made in the petition regarding collusion and other extraneous factors should not be taken into consideration by this Court as this Court is not sitting over appeal of the decree that has been passed in favour of Sudhir Jalan by the Delhi High Court, The plaintiff has come before this Court as an executing court and this Court as an executing court cannot go behind the decree which has been validly passed in favour of Sudhir Jalan. Thirdly he submitted that this application is not maintainable at all as the plaintiff Bank cannot come under Order 21 Rule 52 and take advantage of the said provision as the said stock Certificate in the hands of the Receiver has not been attached by any of the decree-holders and Order 21 Rule 52 simply provides a procedure by which money lying in the custody of any court or public officer may be attached and the proviso thereunder would only apply provided the property in the hands of the Court has already been attached by different creditors, then only the question of determining priority would arise. As such the present application is wholly misconceived and should be dismissed with costs.

9. Mr Jayanta Mitra appeared on behalf of Smt. Radha Debi Jalan and submitted that his client has a valid decree in her favour and obtained such a decree in respect of stock certificate No. 234 which was never the subject matter of hypothecation or charge in favour of the plaintiff Bank. As such the plaintiff Bank''s interest is (in) no way affected by passing of the decree in favour of Radha Debi Jalan by Bombay High Court. Simply because Mr. S. K. Dhar has been appointed Receiver over the said stock certificate No. 234 that would not entitle the plaintiff to get any priority inasmuch as the decree passed by the Bombay High Court is prior to Mr. S. K. Dhar, the Receiver, taking possession of the said stock certificate No. 234. He reiterated the points taken by Mr. Chowdhury regarding the maintainability of this application. In this respect Mr. Roy Chowdhury craved reference to a case reported in AIR 1952 Mad 540 which held that proviso under Order 21 Rule 52 would only apply after there is attachment.

10. In the case reported in Khetramohan Nayak Vs. Sri Sidha Kamal Nayana Ramanuj Das, it has been held that "the custody court can enquire into the matter only if the claim is based upon any assignment or prior attachment by the claimant. The proviso to Order 21 Rule 52 is only to the effect that where the attached property is in the custody of a court any question of title or priority arising between a decree-holder and any other person not being the judgment-debtor claiming to be interested in such property by virtue of any assignment, attachment or otherwise shall be determined by such court".

11. In the case reported in E.M. Visvanadhan Chetti and Others Vs. Arunachalam Chetti, it was held that "when the property in the custody of the Court is subject

to several attachments in execution of the several decrees, the custody court must award priority to the first in point of time."

12. In the case reported in Kamini Kumar Choudhuri Vs. Sasanka Sekhar Choudhuri and Others, it was held that "the proviso authorises the custody court to determine any question of priority only in the case of any assignment or attachment". It further held that "the custody court under Order 21 Rule 52 has no authority to make any rateable distribution unless it be the attaching Court as well. Under that rule it can only determine the question of priority and thereafter act under the instruction of the attaching court and in that case where money was lying as surplus sale proceeds which was attached by several decree-holders in execution of their decrees the learned Munsiff made a rateable distribution of money in his court. But the Munsiff''s court being the custody court had no right under Order 21 Rule 52 to make rateable distribution".

13. Mr. Bachawat appearing with Tarun Kumar Basu in reply submitted the point taken by Mr. Chowdhury that Order 21 Rule 52 would only come into operation provided there is attachment of the property, relied on a decision reported in G. Narappa Naidu Vs. Thummalur Chinna Asethu Reddi and Another, and submitted that the appointment of a Receiver is a form of attachment.

14. But from the said case it would appear that the question for determination before the Court arose, as to whether before appointment of a Receiver it is necessary to attach the property wherefrom it was held that the CPC does not contemplate attachment as necessary preliminary to the appointment of Receiver as there is no practical reason to attach such property before appointment of Receiver and it was held that appointment of Receiver is not bad merely because there has been no prior attachment.

15. Mr. P. K. Das in reply submitted that if no other provisions applied u/s 151 this Court should entertain this application and pass necessary orders, if necessary, by even remodelling the prayers.

16. In view of the facts and law as indicated above I am of the view and hold that this application is not maintainable under Order 21 Rule 52 as none of the decree-holders have attached the property in the hands of the Receiver, Sri S. K. Dhar; as such the question for determination of priority of different claims is not called for. Moreover in view of the order passed by the Appeal Court for sale of the shares in the hands of the Receiver, I find no reason to pass any order on this application for sale. As a result I dismiss this application with costs.

