
(2002) 10 RAJ CK 0004
In the Rajasthan High Court
Case No : Civil Special Appeal No. 103 of 1990

Darshan Singh Bagga

APPELLANT

Vs

Asstt. Registrar Co-operative Societies and Others

RESPONDENT

Date of Decision : 23-10-2002

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 151, 47
Constitution of India, 1950 — Article 14

Citation : (2003) 1 WLC 414 : (2003) 1 WLN 364

Hon'ble Judges : Maghraj Calla, J;Arun Madan, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Arun Madan, J.—This special appeal is directed against the order of the learned Single Judge passed on April 4, 1990 whereby Civil Writ Petition No. 4587/1989 has been dismissed.

2. Facts in nutshell leading to the special appeal are stated thus. After having become a member of the Ajmer Urban Cooperative Bank Ltd. (respondent No. 2-Bank) Darshan Singh Bagga (petitioner appellant) took loans from the Bank against the pledge of his goods (bicycles) but he failed to repay the loan amount thereby, a notice was issued on 12.11.1983 for the payment of Rs. 95,535/- as principal and Rs. 16,320/- as interest thereon, to which objections were raised by filing an appeal under Rule 92(3) of Rajasthan Cooperative Societies Rules, 1966 (for short "the Rules"). His appeal was dismissed by the Additional Registrar (II) Cooperative Societies vide order dt. 10.10.1985 (Ann. 6).

3. It is pertinent to mention here that order dt. 10.10.1985 (Ann. 6) has not been challenged by the writ petitioner and as such, it is final, as has rightly been pointed out by the learned Single Judge.

4. Since no payment whatsoever had been made by the writ petitioner as demanded by the notice dt. 12.11.1983, the respondent Bank put Plot No.

179/11 of the writ petitioner to attachment on 8.9.1989 vide Memo (Ann. 16), which was notified in the newspapers also and the Bank proceeded to sell the afore-attached plot alongwith the pledged goods by public auction. At that time, the grievance of the petitioner was that the Bank was not authorised to attach his immovable property and sell it for the recovery of outstanding dues. Further grievance was that outstanding amount to the tune of Rs. 3,08,521.43 shown in Notice dt. 8.9.1989 (Ann. 15) has wrongly been calculated. Hence, in his writ petition the petitioner challenged orders/notices dt. 15.9.1983, 12.11.1983, 10.10.1985, 3.11.1987, 8.10.1987, 8.9.1989, 30.9.1989 (Ann. 4, 6, 9, 12, 14, 15, 16 & 19 respectively). Though, the petitioner also sought relief for declaring Section 118 of Rajasthan Cooperative Societies Act, 1965 (for short "the Act") as ultravires to Article 14 of the Constitution of India but, as is evident from order dt. 25.10.1989 learned counsel for the writ petitioner did not press the question as to the validity of Section 118 of the Act and thereupon, the writ petitioner was placed before the learned Single Judge for its disposal. However, the learned Single Judge vide order dt. 1.11.1989 stayed the public auction under notice dt. 30.9.1989 and the writ petitioner was also restrained from transferring or alienating and disposing of the attached Plot No. 179 B/2.

5. The respondent Bank in its reply contesting the petition contended that since the disputed questions of facts as to the amount shown in notice dt. 8.9.1989 (Ann. 15) or subsequent public auction notice have been raised by the petitioner, such questions of facts disputed in nature cannot be decided in writ jurisdiction. Such as case of the respondent was accepted by the learned Single Judge by holding that the question as to whether the outstanding amount shown in various notices issued from time to time to the writ petitioner stands due or not cannot be decided in the writ petition.

6. As regards the issue as to whether the respondent could recover the amount from the writ petitioner by attachment and sale of his immovable property, the learned Single Judge held that once the appeal u/s 124 of the Act challenging the recovery of amount from him was dismissed on 10.10.1985, which could nowhere be challenged by the writ petitioner, had become final and therefore, the outstanding amount could be recovered by attachment or sale of his property. Hence, this special appeal.

7. The learned Counsel for the appellant contended that the declaration of dispute as to the outstanding amount of Rs. 3,08,521.43 by the impugned order of the learned Single Judge holding it to be disputed and complicated questions of fact is misconceived inasmuch as, the interest having been charged over the amount under order dt. 15.9.1983 (Ann. 4) is without jurisdiction and void ab-initio, and thereby, it was a pure question of law which the learned Single Judge failed to consider.

8. It has also been contended by Shri Rajendra Prasad Sharma that proceedings under Sections 117 and 118 of the Act are extraordinary one because u/s 117 only a charge being created by Section 38(1) can be enforced, whereas Section

118 envisages for execution of order u/s 117 only to the extent it is permissible by such order and in case of the writ petitioner since Section 38(1) does not apply to his property, no order for recovery out of sale of the immovable property of the writ petitioner could have been made by respondent No. 1 therefore, the respondents had no authority to sell his immovable property u/s 118(1)(c) of the Act.

9. Reiterating the reply to the writ petition, Shri Hanuman Choudhary, learned Counsel for the respondent Bank contended that the respondents initiated proceedings for recovery of loan and interest outstanding against the petitioner, whereunder demand notice was issued on 12.11.1983 to him under Rule 92(3) of the Rules, 1966 against which an appeal was filed which was dismissed after hearing both the parties on merits. The powers under Sections 117 and 118 having been delegated to the respondent Bank on 16.2.1987, therefore, petitioner was served with another notice by letter dt. 3.11.1987 (Ann. 9) for auction of pledged goods and upon assessment of value of the pledged goods in a godown, auction was cancelled because in an auction, value of the pledged goods was assessed only at Rs. 8000/- which being insufficient and only 1/20 part of due amount therefore, attachment of his plot number 179/2 was ordered on 8.9.1989 (Ann. 16). Shri Hanuman Choudhary vociferously contended that admittedly credit limit of the writ petitioner had ended on 20.11.1980 and after expiry of this limit, the petitioner was legally duty bound either to deposit outstanding amount with interest to the respondent Bank or to apply for renewal of such limit and thereby, he became wilful defaulter of the Bank inasmuch as, he was also liable for any shortage or damage to the pledged goods in the godown which was physically in his possession and under his care and custody of the godown because the key of lock to the godown was handed over to the petitioner whenever he demanded to put or to take bicycle from godown or to check it up.

10. Shri Rajendra Prasad Sharma learned Counsel for the appellant placed reliance upon the decisions in (1) Babul Ali Vs. Smt. Khirada Dutta and Others, (2) S.K. Engineering Works and Others Vs. New Bank of India, Batala, (3) Central Bank of India Vs. Grains and Gunny Agencies and Others, (4) M. Ramnarain Pvt. Ltd. and Another Vs. The State Trading Corporation of India Limited, & (5) State of Punjab and others Vs. Krishan Dayal Sharma, .

11. In Ramnarain (P) Ltd. v. State Trading Corporation (supra), the Bombay High Court held that the drawer can file suit against acceptor only after payment is made by drawer to payee and endorsement is obtained in favour of drawer. It was further held that in case of bill of exchange after acceptance the primary liability is of the acceptor and the drawer is liable only as a surety.

12. In Babul Ali v. Khirada Dutta (Supra) the High Court of Gauhati held that the question regarding the excess acquisition of land in execution can be decided only in an application u/s 47 CPC and not by a separate suit. It was a case where a complaint was made regarding taking over property in an execution of decree which was outside the decretal property, therefore, it was held that it was not

only the duty of the party who alleged such excess, but also of the Court to find out the truth in order to further do the justice.

13. In *State of Punjab v. Krishan Dayal* (supra) a suit for declaration was filed by the Government servant that he was entitled to promotion and consequential benefits, rights and privileges and that suit was decreed and during the course of execution of the decree, the Executing Court granted interest on amounts due while the interest was not claimed in suit and no direction was issued by the Court in that regard, so the Apex Court held grant of interest by executing court as illegal.

14. In *S.K. Engg. Works v. New Bank of India* (ibid), the High Court of Punjab & Haryana held that where a pledgee files a suit for recovery of debt, thought he is entitled to retain the goods, he is bound to return them on payment of debt and the right to sue on debt assumes that he is in a position to redeliver the goods on payment of debt, and, therefore, if he has put himself in a position where he is not able to redeliver the goods, he cannot obtain a decree. It was a case where the trial Court decreed the suit for recovery of debt in favour of the plaintiff Nationalised Bank, with future interest @ 12.5% per annum on decretal amount but the High Court held that the Bank is entitled to contractual rate of interest.

15. In *Central Bank of India v. Grains & Gunny Agencies* (supra) the M.P. High Court held that it was open to the bailee to contract himself out of any liability due to his own negligence; that a contract of exemption from liability for any loss of damage due to the fault, carelessness or negligence of the staff binds the parties and is not hits by Section 23 of the Contract Act; that in cases governed by Sections 151 & 152, the loss of damages of goods entrusted to a bailee is prima facie evidence of negligence and therefore the burden to disprove negligence lies on the bailee; and that even if the Bank was entitled to claim exemption by virtue of special contract including negligence of its servants, still the Bank had to show that it took as much care of the pledged goods as an ordinary prudent man under similar circumstances takes of his own goods of the same quality and value as required by Section 151 CPC.

16. Having considered the decisions cited by Shri Rajendra Prasad Sharma on behalf of the appellant, in our considered view, none of them does render any help in advancing the cause of the present appellant.

17. We have heard the learned Counsel for the parties, considered their rival contentions and material on record with reference to the assertions for the challenge to the attachment of the property in question.

18. It is an admitted fact that upon the credit limit of the bank having expired on 20.11.1980, the petitioner was obliged being duty bound to either deposit the outstanding principal so also the interest thereon or to apply for extension or renewal of such bank limit but, the writ petitioner having neither deposited the outstanding amount nor renewed the bank limit therefore, he was wilful

defaulter. For the first time, when an order u/s 117 of the Act was passed on 15.9.1983 (Ann. 4) after having issued notice on 30.9.1982 to the writ petitioner, followed by demand notice dt. 12.11.1983 (Ann. 5), the petitioner went in appeal which too was dismissed by judgment dt. 10.10.1985 (Ann. 6) by the appellate authority, and that too was not challenged by the petitioner and, therefore, the appellate order became final and cannot be challenged by the petitioner in the writ petition filed in the year 1989 during the course of execution of order passed u/s 117 of the Act.

19. Be that as it may, the writ petition has been filed by the petitioner challenging the execution proceedings when his property was put to public auction in exercise of powers vested in the Registrar u/s 118 of the Act. Provisions relevant for the present issue are contained in Sections 117 & 118(1) (c), which read as under:

117. Enforcement of charge.--Notwithstanding anything contained in Chapter IX, or any other law for the time being in force, but without prejudice to any other mode of recovery provided in this Act, the Registrar or any person subordinate to him empowered by the Registrar in this behalf, may on his own motion or on the application of a co-operative society, make an order directing the payment of any debt or outstanding demand due to the society by any member or past or deceased member, by sale of the property or any interest therein, which is subject to a charge under Sub-section (1) of Section 38:

Provided that no order shall be made under this section unless the member, past member or the nominee, heir or legal representative of the deceased member, has been served with a notice of the application, and--

(i) where such person dispute the debt or demand, such dispute is finally adjudicated u/s 77; or

(ii) where such person does dispute the debt or demand, he fails to pay such debt or demand within seven days from the date of the service of such notice as aforesaid.

118. Execution of orders, etc.--(1) Every order made by the Registrar under Sub-section (2) of Section 74 or u/s 117, every decision or award made u/s 77, every order made by the liquidator u/s 80 and every order made by the Tribunal under Sections 123, 125, 126 or 127 and every order made u/s 124, shall, if not carried out.--

(a) xxx xxx xxx (b) xxx xxx xxx

(c) be executed by the Registrar or any other person subordinate to him empowered by the Registrar in this behalf by the attachment and sale or sale without attachment, of any property of the person or a co-operative society against whom the order, decision or award has been obtained or passed.

20. A careful and conjoint reading of Section 118(1) & Section 117 of the Act

makes it explicit clear that every order made by the Registrar u/s 117, if not carried out, shall be executed in any one of the modes envisaged in Clauses (a) to (c) of Section 118(1) viz.--(a) in the same manner as a decree of such court on a certificate signed by the Registrar or any person authorised by him which shall be deemed to be a decree of a Civil Court or (b) according to law and under the rules for the time being in force for the recovery of arrears of land revenue; or (c) by the Registrar or any other person subordinate to him empowered by him by the attachment and sale or sale without attachment, of any property of the person or a co-operative society against whom the order, decision or award has been obtained or passed.

21. Clause (c) to Sub-section (1) of Section 118 empowers the Registrar to execute the order passed u/s 117 of the Act by the attachment and sale or sale without attachment of any property of the defaulting member of the co-operative society against whom the order u/s 117 has been passed or obtained. Thus three alternatives modes are specified (i) by the Civil Court, or (ii) by the Collector, or (iii) by the Registrar. And this privilege is given to the society only which in the instant case is the Bank Society (respondent) and a certificate of the Registrar is needed in cases of modes (i) & (ii). The attachment and sale of any property as envisaged in Section 118(1)(c) at the instance of the Registrar or person only authorised by him is permissible for the recovery of debt or outstanding demand due to the society against any member thereof, and that apart the Registrar or the officer empowered u/s 117 or 118 is required to pass an order asking the defaulting member to pay the debt or outstanding demand due to the society against him.

22. It is the case of the appellant that u/s 117 of the Act only a charge being created by Section 38(1) can be enforced. Now the question arises as to whether Section 117 of the Act is applicable only for the sale of property or whether sale of the property is restricted to a charge u/s 38(1) of the Act?

23. Section 117 envisages for enforcement of the charge, to which non-obstante clause is also added. Enforcement of charge u/s 117 is applicable without prejudice to any other mode of recovery provided in the Act, 1965. No doubt, the expression, "which is subject to a charge under Sub-section (1) of the Section 38" is envisaged in Section 117 but it does not mean that sale of the property or interest therein is restricted only to charge u/s 38(1) of the Act, whereas a bare reading of Section 38, itself, shows that it gives a privilege of the first charge of Co-operative Society on certain assets but subject to any prior claim of the Government in respect of land revenue or any money recoverable as land revenue.

24. Even u/s 38(1)(a) any debt or outstanding demand owing to a cooperative society by any member is the first charge upon crops and other agriculture produce, cattle, fodder for cattle, agricultural or industrial implements, or machinery, raw material for manufacture and any finished products manufactured from such raw materials belonging to such member. u/s 38(1)(b)

any outstanding demands or dues payable to a Co-operative Society formed with the object of providing its members with dwelling houses by any member in respect of rent, shares, loans or purchase money or any other rights of amount payable to such society is a first charge upon his interest in the immovable property of the society.

25. Thus viewed, it is crystal clear that u/s 117 sale of property or any interest therein is permissible with preference or privilege to be given to a charge being first charge u/s 38(1). In other words, if there is any charge u/s 38(1), then it shall be the first charge as provided under Sub-section (1) of Section 38, which means that preference will be given as privilege to the Co-operative Society subject to provisions of Sub-section (1) of Section 38 in respect of any debt or outstanding demand or dues payable to a Co-operative Society, which are first charges according to the privileges provided thereunder.

26. However, under proviso to Section 117 of the Act, before making an order u/s 117, a notice is required to be served upon the defaulting member for the payment of any debt or outstanding demand due to the society, and under Sub-Clause (ii) if defaulting person does not dispute the debt or demand and fails to pay such debt or demand within seven days from the date of the service of such notice issued under proviso to Section 117, then the Registrar or its authorised officer may order directing the payment of any debt or outstanding demand due to the society by sale of the property.

27. In the instant case, admittedly order was passed on 15.9.1983 by the Asstt. Registrar who was authorised by the Registrar of Co-operative Societies directing the appellant to pay the outstanding demand due to the Society Bank and for sale of his property, inasmuch as before making such an order u/s 117, a notice was also issued on 30.9.1982 in compliance of requirement under proviso to Section 117, to which he did not dispute the debt or demand nor he raised objection thereto at that time, rather he failed to pay such debt or demand within seven days from the date of the service of such notice dt. 30.9.1982. Hence we do not find that any illegality or irregularity has been committed by the respondents authorities either in making order u/s 117 or proceeding u/s 118 for execution of order passed u/s 117, or that the respondents had no authority or jurisdiction to have passed order u/s 117 or 118 of the Act by directing attachment and sale of the property of the appellant in exercise of powers u/s 118(1)(c). Moreover once the order made by the respondents authority u/s 117 has been challenged in appeal by the appellant (writ petitioner) and which stood upheld the appellate authority dismissing the appellant's appeal by order dt. 10.10.1985 which having not been challenged in any Court of law--it had become final, such an order cannot be allowed to be challenged in writ jurisdiction while assailing the execution proceedings under special law viz. Rajasthan Co-operative Societies Act, 1965, especially at the stage of attachment and sale of the property by way of disputing the debt or demand, itself raised in the notice issued u/s 117 on 30.9.1982, after a delay of about more than seven years,

whereas the appellant ought to have disputed at the earliest point of time i.e. service of the notice issued u/s 117, and not in the writ petition, wherein such disputed questions of fact cannot be allowed to be raised or gone into, alike appeal against execution of the decree. Hence the learned Single Judge has committed no error of law or jurisdiction while declining to consider the disputes as to the debt or demands due to the Society Bank, in writ jurisdiction.

28. In our considered view the learned Single Judge rightly held that Clause, (c) to Sub-section (1) of Section 118 empowers the respondents to recover the outstanding amount from the writ petitioner by the attachment and sale of his any property because Clause (c), *ibid*, is not confined only to the immovable property and therefore, the respondents could proceed against the immovable property of the petitioner for the recovery of the outstanding dues, thereby notice (Ann. 15) dt. 8.9.1989 and attachment proceeding (Ann. 16) thereof does not suffer with any vice.

29. Resultantly, we find no merit in any of the contentions urged on behalf of the appellant and therefore there is no substance in this appeal and accordingly this appeal fails and is hereby dismissed with no order as to costs.