

(1958) 01 CAL CK 0013
In the Calcutta High Court
Case No : Matter No. 388 of 1957

Kuver Bank Ltd. (In Liquidation)

APPELLANT

Vs

State of West Bengal

RESPONDENT

Date of Decision : 14-01-1958

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 46, Order 21 Rule 49, Order 30 Rule 1, 38

Citation : AIR 1960 Cal 81 : 63 CWN 21

Hon'ble Judges : H.K. Bose, J

Bench : Single Bench

Advocate : R. Chaudhuri, for the Appellant; R.C. Deb, for Patuakhali Bank Ltd., for the Respondent

Judgement

H.K. Bose, J.—This is an application for an order directing the Court Liquidator and certain other parties to pay certain sums of money which are lying in their hands, for appropriating the said sums towards satisfaction of the claim of the petitioner in respect of a decree which the petitioner obtained in Suit No. 2393 of 1947 which was filed in this Court and which sums the petitioner claims to be entitled in priority to the claims put forward by certain other persons.

2. The facts which give rise to this application are as follows:

3. On the 22nd of August 1947 the petitioner, Kuver Bank Ltd. filed a suit in this Court being Suit No. 2393 of 1947. In this suit as originally filed, three persons namely Kazi Latful Khabir, Kazi Giasuddin Ahmed and one Sushil Kumar Sen were impleaded as defendants and they were described in the cause title as carrying on business in co-partnership under the name and style of K. G. Ahmed and Co. In paragraph 4 of the plaint it was alleged that the defendants agreed in writing that all their partnership assets including the book debts would remain charged with repayment of the dues which are referred to in earlier paragraphs of the plaint. In the prayers of the plaint there was a prayer asking for a declaration that the stock-in-trade and all the assets of the business carried on under the

name and style of K. G. Ahmed and Co. be charged with the repayment of the plaintiff's claim. There was also a prayer for sale of the partnership assets and appropriation of the sale proceeds in protanto satisfaction of the plaintiff's claims and there was a further prayer of appointment of a Receiver, if necessary, to realise the book debts of the partnership. There were certain other prayers also.

4. On the 18th November 1947, a decree was passed in the said suit by consent of parties. Prior to the passing of the said decree Messrs, Bengal Pioneers Ltd., a private limited company was added as a party defendant to the suit. The said decree, inter alia, provided as follows:

(a) There would be a decree in favour of the plaintiff Bank against all the defendants for a sum of Rs. 2,78,651/4/7 with interest at 6 per cent per annum from the date of the decree and for costs, settled at Rs. 1,000/-.

(b) It was declared that the stock-in-trade and all assets of the business carried under the name and style of Messrs. K. G. Ahmed and Co., including its book debts and claims and demands against various departments of Government in respect of works done and/or goods or labour supplied or otherwise and also against other public and private bodies and individuals would stand charged with the repayment of the decretal amount.

(c) Mr. S. K. Chakravarty, the managing director of the plaintiff bank was appointed Receiver of all stock-in-trade, book debts and also of all claims submitted to the Civil Supplies and other Depts. of Govt. etc., with powers to the said Receiver to get in and collect all such bills and claims of the said Messrs. K. G. Ahmed and Co. and/or its partners or in both from the Government Departments or private and public bodies or individuals and upon such collection the Receiver was to forthwith pay to the plaintiff bank the decretal amount and costs.

5. On the 4th February 1952 Mr. S. K. Chakravarti was discharged from further acting as Receiver and the Official Receiver was appointed Receiver and by order of this Court dated 1-4-1955, the Court Liquidator was appointed Receiver in place and stead of the Official Receiver. In the meantime, on 29-8-1947, a Bank known as the Patuakhali Bank Ltd., filed a suit in this Court being Suit No. 2480 of 1947 on an overdraft account and Guarantee against a private limited company known as Ujjala Match Factory Ltd. which was impleaded as defendant No. 1 and against the Bengal Pioneers Ltd. which was made defendant No. 2 and against K. L. Khabir and Kazi Giasuddin Ahmed who were impleaded as defendants "Nos. 3 and 4. In the plaint which was filed in that suit it was inter alia alleged that the defendants 3 and 4 were the Managing Directors of Bengal Pioneers Ltd., and the said defendants 3 and 4 had agreed personally to stand as guarantee in respect of the overdraft cash credit account which was opened by the Patuakhali Bank Ltd. in favour of the defendant Ujjala Match Factory Ltd. and it was on the basis of this guarantee that decree was claimed in the suit as against defendants 3 and 4. It is alleged that thereafter on the 3rd of September

1947 there was an order for interim attachment before judgment made by this Court in favour of the Patuakhali Bank in respect of a sum of Rs. 26,000/- which was lying with the Controller of Finance, Civil Supplies Department and which was payable to K. L. Khabir and Kazi Giasuddin Ahmed in their business of K. G. Ahmed and Co. It is alleged that the said attachment was actually effected on 12-9-1947. On the 20th November 1947 the interim order of attachment in favour of the Patuakhali Bank Ltd., was made absolute. Thereafter, on the 21st of April 1952, the Income Tax Department issued a notice u/s 46 (5A) of the Income Tax Act to the Chief Secretary, Government of West-Bengal for Rs. 3812/8/- due from the State of West Bengal to Messrs. K. G. Ahmed and Co. By an order dated 19-5-1955 made in this Suit No. 2480 of 1940, it was directed that the Secretary, Finance Department, would out of the sum of Rs. 87,043/8/9 which had been passed by the Application Committee of the Government of West Bengal, retain in the first instance the sum of Rs. 12,067/5/- in their hands until further order of this Court and the Secretary, Finance Department, would after making certain other payments within certain date make over the balance then remaining due, namely, Rs. 24,576/3/9 to the Court Liquidator as the Official Liquidator of the petitioner Bank and also as the Receiver appointed in Suit No. 2393 of 1947 to be held by him subject to further orders of this Court, Pursuant to the said order dated 19-5-1955, the Secretary, Finance Department, is holding the sum of Rs. 12,067/5/- until further orders of this Court. The petitioner in the application admits that a sum of Rs. 6019/- which is claimed by the State of West Bengal out of the said sum of Rs. 12,067/- and odd is due and payable to them but out of the balance of the said sum, the sum of Rs. 3812/8/- which is claimed by the Income Tax Department and the sum of Rs. 2,235/13/- which is claimed by one Tarapada Das in respect of a decree passed in favour of the said Tarapada Das against K. G. Ahmed and Co. in Suit No. 4284 of 1949 are not payable to the Income Tax department or the said Tarapada Das but they should be made over to the petitioner. This Tarapada Das has not appeared at the hearing of this application nor has Kunjalal Mistri who claims to be an attaching creditor for Rs. 1528/2/9 appeared in the present application.

6. At the hearing of the application the Patuakhali Bank Ltd., has contested the claim for priority of the petitioner and the Union of India has also appeared through Mr. Balai Pal, Advocate, and has stated that if the decree which the petitioner obtained on 18-11-1947 and the execution of which the petitioner seeks in this application was a valid decree, then, in that case, the claim of the Income Tax Department pursuant to the notice given on 21-4-1952 for the sum of Rs. 3812/8/- must be postponed to the claim of the petitioner. The State of West Bengal claiming the sum of Rs. 6019/- out of the said sum of Rs. 12,067/5/- has also appeared at the hearing.

7. Mr. R. Choudhury, the learned counsel for the petitioner, has argued that the alleged attachment which was sought to be effected on 12-9-1947, pursuant to the interim order made on 3-9-1947, was not a valid attachment inasmuch as the order for attachment that was made was made under the provisions of Order

21, Rule 46 of the CPC whereas the proper mode of execution which should have been resorted to by the said Patuakhali Bank Ltd. was that prescribed by Order 21, Rule 49 (2) of the Code of Civil Procedure. It is pointed out by Mr. Chowdhury that the decree which was obtained by Patuakhali Bank Ltd., on the basis of the plaint which was filed in suit No. 2480 of 1947 was not a decree which was passed against the partnership firm of K. G. Ahmed and Co., nor was such decree passed against the partners K. L. Khabir and Kazi Giasuddin Ahmed as such, but in their individual capacity, and, in the circumstances, the attachment made under Order 21, R 46 was irregular and ineffective. The learned counsel has placed reliance on the decision of this Court reported in *Kurseong Hydro-Electric Supply Co. Ltd. Vs. Lakshmi Narayan Sukhani and Another*, , where it is laid down that in view of the provisions of Order 21, Rule 49 (1) of the Code of Civil Procedure, a debt due to a partnership firm cannot be attached under the provisions of Order 21, Rule 46 of the Code in execution of a decree obtained not against the firm or the partners as such, but against a person in his individual capacity, even though such person happens to be a partner of the firm. The provisions of Order 21, Rule 49 (2) of the Code apply to such a case and the interest of such person in the partnership property may be proceeded against in execution with or without the appointment of a Receiver. The said principle has been discussed at some length at pp. 394-396 of the report (ILR Cal): (at pp. 366-367 of AIR), & I do not think it necessary to set it out here again for the purpose of this judgment. The same principle is reiterated in a decision of the Rangoon High Court, reported in AIR 1940 Rang 153 at p. 154, *Ramaswamy Chettyar v. Kuttain Chetiyar*. In that case the scope of the charging order is indicated and reference is also made to Section 48 of the Partnership Act which in subsection (b) gives an indication as to the order in which the debts of the partnership firm have to be paid out to different claimants. It may be pointed out in this connection that Section 49 of the Partnership Act also embodies this spirit of the rule of distribution which is envisaged in Order 21, Rule 49 (2) of the Code. It appears to me that this contention of Mr. Chowdhury is right and the attachment which is alleged to have been effected at the instance of the Patuakhali Bank Ltd., is not a valid attachment.

8. Mr. R. C. Deb, learned counsel for the Patuakhali Bank Ltd., has contested the claim of the petitioner on various grounds. It is contended by Mr. Deb that the consent-decree which has been obtained by the petitioner in suit No. 2393 of 1947 is not a valid decree against the firm of K. G. Ahmed and Co., and therefore this application for execution is not maintainable. It is submitted by the learned counsel that the firm of K. G. Ahmed and Co., was not a party to the suit at all but the three partners in their individual capacities were impleaded as defendants in the suit. So in such a suit no decree could be passed against the firm. But it 19 to be pointed out that the provisions of Order 30 of the CPC which deal with suits by or against firms and persons carrying on business in names other than their own allow by the terms of its provisions in Rule 1 the individuals constituting the partnership firm to sue or be sued in the name of the firm. The

privilege is given to the persons who constitute the firm. It has been repeatedly held by this Court and other Courts that the CPC or the Partnership Act does not treat the firm as a juristic person or entity. A suit by or against the firm is really a suit by or against a group of individuals and the name of the firm is the collective name of the individuals. Reference may be made to *Ram Prosad Chimonlal Vs. Anundji and Co.*, ; *Seodoyal Khemka and Another Vs. Joharmull Manmull and Others*, ; *Brojo Lal Saha Banikya Vs. Budh Nath-Pyari Lal Das*, and to the decision of the Supreme Court reported in *Commissioner of Income Tax, West Bengal Vs. A.W. Figgies and Co. and Others*, . Mr. Deb referred to a decision of the Privy Council reported in AIR 1948 100 (Privy Council) ., in order to support his argument that a firm is a juristic entity different from the individuals composing the firm, but I may point out that the uniform view of this Court is that a firm is not a juristic person apart from the individuals constituting the firm.

9. The view of the Supreme Court appears to be also to the same effect. In that view of the matter I propose to adhere to the view adopted by this Court and the Supreme Court in preference to the decision of the Privy Council. It may, however, be pointed out that the Privy Council case referred to by Mr. Deb, also did not purport to lay down as wide a proposition as is contended for by Mr. Deb, but the scope of the observations made in that case must be limited to the case of retiring partners the effect of whose retirement on the constitution of the firm was the question which was for consideration before the Privy Council in that case.

10. It is also clear from the provisions of Order 30, Rule 1 of the Code that the rule is merely permissive in character and it does not enjoin that the only manner in which a suit by or against a firm can be brought is in the form prescribed by this rule. A plaintiff bringing a suit against a firm may implead all the members of the firm as defendants in that suit and conversely, the members of a firm can sue jointly in their individual names. Such a suit will none the less be a suit against the firm or by the firm. As I have indicated already, the name of the firm is only a compendious description of the partners in reference to the common interest which they possess in a certain concern and when the firm is arrayed as a defendant, all the partners should be deemed to be in that array of the defendants in their capacity as partners. (See *Motilal Jasraj Vs. Chandmal Hindumal*, ; *The Administrator General of Bombay Vs. Haji Sultanalli Sushtary and Company*, ; *Atma Ram v. Umar Ali* AIR 1940 Lah 256 and *Mt. Jagpati Kuer Vs. Sukhdeo Prasad and Another*, . The scope of a suit is determined not by the cause title of the suit alone but also from the body of the plaint and the prayers of the plaint. It is clear from the cause title, the body of the plaint and the prayers of the plaint in the suit No. 2393 of 1947 that the suit was intended to be a suit against the partnership firm of K. G. Ahmed and Co., and the decree that was passed was also intended to be a decree against the assets of the partnership.

11. Mr. Deb also contended that the consent decree that was passed on the 18th

November 1947 was not a valid decree inasmuch as the terms of settlement on the basis of which the consent decree was passed were not signed by the parties to the suit nor were they signed by persons who had any authority to compromise the suit. It appears, however, from the original terms of settlement which were filed in this case that K. G. Ahmed has signed the terms for the firm of K. G. Ahmed and Co., and as managing partner thereof. The terms of settlement are also signed by Mr. B. Sen as the solicitor for the firm of K. G. Ahmed and Co., and as solicitor for the defendant No. 4, Bengal Pioneers Ltd. Mr. B. Sen has filed an affidavit stating that he was duly given a warrant of attorney for acting in that suit and this warrant was signed by K. G. Ahmed as managing partner. Mr. Deb has challenged this fact on the ground that no such warrant can be traced in the records of this Court relating to the suit in question. It is possible that this warrant has been temporarily mislaid, but there is no reason to disbelieve this statement of the solicitor on oath that he had been authorised by a warrant signed by the managing partner of the firm to act on behalf of the firm in this suit. It is difficult to believe that the steps for filing the terms of settlement in a suit and for drawing up and settlement of the decree and all other necessary steps were taken by a solicitor who is an officer of this Court without having been authorised to do so by a warrant as is required under the rules of this Court. I have come across cases in which Warrants of Attorney could not be traced from the records kept in the court at the material time but subsequently they were found out from the records of a different case. It is clear from a decision cited by Mr. R. Chowdhury that a managing partner has implied authority to enter appearance and to give a warrant to or to employ a solicitor for defending an action against a firm. This case is reported in (1896) 1 QB 386, *Tomlinson v. Broadsmith*. Furthermore, it is to be noted that these questions whether the managing partner had express authority to enter into the compromise or Mr. B. Sen, the solicitor, had such authority or not cannot be gone into in this application for execution. It has been repeatedly held by this Court that an executing court cannot go behind the decree except for certain limited purposes. In *Gora Chand Halder and Another Vs. Prafulla Kumar Roy and Others*, it has been laid down by a Full Bench of this Court that where the decree presented for execution was made by a Court which apparently had no jurisdiction whether pecuniary or territorial or in respect of the judgment-debtor's person, to make the decree, the executing court is entitled to refuse to execute it on the ground that it was made without jurisdiction. Within these narrow limits, the executing court is authorised to question the validity of a decree.

12. This principle has been followed in other decisions of this Court reported in *Bindeswari Charan Singh v. Lakpat Nath Singh*, 15 Cal WN 725; *Kali Charan Singha Vs. Bibhuti Bhusan Singha*, ; *Krishna Chandra Vs. Radha Kanta Saha Choudhury and Others*, ; *Ganeshdas v. Surya Kumar*, 50 Cal WN 307 at p. 308 and *Amalabala Dasi Vs. Sarat Kumari Dasi and Another*, .

13. Mr. R. C. Deb, however, drew my attention to a decision of the Bombay Court

reported in *M. and S.M. Rly. Vs. Rupchand Jitaji and Others*, , where it was held that the principle that an executing court cannot challenge the validity of the decree holds good only between the parties to the decree. When the third party against whom an order is served moves the executing court to decide the validity of the decree, the executing court has inherent jurisdiction to do it, but it must be pointed out that the observation to the above effect, made in that case, must be limited to the facts of that case. There the applicant who challenged the validity of the decree before the executing court was not a party to the decree and he was a complete stranger to the decree and it could not be said by any stretch of imagination that the applicant was claiming through the judgment-debtor in that case. In the case before me not only the petitioner but also the Patuakhali Bank and the Union of India are claiming the amount which is lying in the hands of the Government departments through the judgment-debtor namely, the partnership firm of K. G. Ahmed and Co. The amount in respect of which the claim is being put forward is payable by public bodies or Government departments in respect of bills of K. G. Ahmed and Co. Both the petitioner and Patuakhali Bank Ltd. and the Union of India are claiming the said sums On the basis that they have, by virtue of the decrees obtained against the partnership firm, and by virtue of the assessment of Income Tax, stepped into the shoes of the judgment-debtor and are therefore, entitled to claim the amounts lying in the Government departments in pro tanto satisfaction of their claims.

14. Therefore, in my view, it is not open to Patuakhali Bank Ltd., to challenge the validity of the decree on the various grounds which have been urged before me by Mr. Deb. Mr. Deb tried to bring his case within the decision of the Full Bench reported in *Gora Chand Haldar and Another Vs. Prafulla Kumar Roy and Others*, , on the ground that the case before me was a case of a consent decree which was passed without jurisdiction with repaid to the person against whom the decree was passed inasmuch as the partnership firm was not a party to the suit but the terms of settlement had been signed on behalf of the firm by K. G. Ahmed. I have pointed out already that there is no substance in this contention of Mr. Deb and the suit was really a suit against the partnership firm and the decree that was obtained was also against the partnership assets.

15. Mr. Deb also referred to a decision of the Privy Council, reported in AIR 1933 61 (Privy Council) . There also the question-that was allowed to be raised was a question relating to the jurisdiction of a Court to pass a decree on an award although there were under the provisions of the old Arbitration Act no such powers vested in a Court to pass a decree in respect of an award. All that was provided in the old Arbitration Act was that an award when filed in court might be treated as a decree. The Privy Council came to the conclusion that as the Court had purported to pass a decree in respect of the award, such a decree was a nullity as it was without jurisdiction. So it is clear that when there is a question of want of jurisdiction involved, it is open to the executing court to go behind the decree for the purpose of finding out whether in fact the decree was passed without jurisdiction. But beyond that the executing court cannot go. The remedy

in such a case, if at all, is by a separate suit These are all the points which have been raised in this case and in my view, therefore, this application should succeed.

16. There will, therefore, be an order in terms of prayer (a) directing payment of a sum of Rs. 24,576/3/9 to the petitioner. There will be order in terms of prayer (c) directing payment to the petitioner of only Rs. 5798/5/- out of Rs. 12,067/5/- and there will also be order in terms of cls. (d) and (e) of the summons directing payment of a sum of Rs. 5370/11/- to the petitioner. The Patuakhali Bank Ltd. will pay the costs of the applicant including fees of two counsel. Costs of the State of West Bengal assessed at Rs. 250/-and the sum of Rs. 6019/- due to the State of West Bengal will be retained out of the sum of Rs. 12,067/5/- in their hands. Liberty to the Union of India to add their costs including fee of the counsel to their claim. The operation of the order is stayed for one month.