

(1971) 10 KL CK 0005

In the High Court Of Kerala

Case No : Application No. 175 of 1970 in B.C.C. No. 587 of 1962 in B.C.P. No. 4 of 1961

M.T. Devassia

APPELLANT

Vs

Catholic Bank of India Ltd. (In Liquidation)

RESPONDENT

Date of Decision : 22-10-1971

Acts Referred:

Banking Regulation Act, 1949 — Section 45A, 45B, 45D, 45T
Constitution of India, 1950 — Article 246, 254

Citation : (1971) 10 KL CK 0005

Hon'ble Judges : P. Govindan Nair, J; M.U. Isaac, J

Bench : Division Bench

Advocate : Kalathil Velayudhan Nair and T.K.M. Unnithan, for the Appellant; T.V. Ramakrishnan, for the Respondent

Judgement

Govindan Nair, J.—This is an application by a debtor of a banking company that is being wound up under the Banking Regulation Act, 1949, praying for a declaration that no amount is due from him to the banking company in view of the provisions in the Kerala Agriculturists' Debt Relief Act, 1970 (hereinafter referred to as "the Act"). The official liquidator objected to the application. His contention, very briefly stated, was that the Act would not apply as the matter was regulated by the Banking Regulation Act, 1949. Isaac J. who heard the application referred the question to a Division Bench for decision.

2. The question to be considered is whether there is conflict between the provisions in the Banking Regulation Act, 1949, and those in the Act. Such a conflict can arise even if the two enactments are in pith and substance respectively referable to the entries in List I and List II in the Seventh Schedule to the Constitution. The legislative entries in the Constitution have to be interpreted not in a narrow or in a strict sense but in a broad manner. This is the meaning that has been attributed to the words "with respect to" occurring in Article 246 of the Constitution. And on such an interpretation it is possible that a statute which is in pith and substance within the competence of a State

Legislature may encroach in an incidental and an ancillary manner on subjects reserved for Parliament under List I in the Seventh Schedule to the Constitution. Similarly, legislation by Parliament in pith and substance pertaining to any of the items in List I in the Seventh Schedule to the Constitution can encroach upon State subjects in an incidental and ancillary manner.

3. Such encroachments are considered permissible and as long as there is no conflict arising between statutes passed by the Central legislature and the State legislature there is no question of any invalidity. Difficulties will, however, arise when incidental and ancillary encroachment by a statute is coupled with conflict with the provisions of another statute. In such cases, the rule is that the Central legislation must prevail. It is the liquidator's contention that that should be the case here considering the provisions in the Act and the Banking Regulation Act, 1949. So, we must first examine the provisions in these enactments briefly, and before we do so, we would like to state that it is not contended before us that the Act is not within the competence of the State legislature. The Act in pith and substance relates to a matter which is covered by entry 30 of List II in the Seventh Schedule to the Constitution which is in these terms :

" Money-lending and money-lenders; relief of agricultural indebtedness. "

4. The Act applies only to agriculturists and it is in relief of their indebtedness; the main and substantial provisions of the Act relate to the above subject and we have no hesitation in holding that the Act is in pith and substance within entry 30 of List II in the Seventh Schedule to the Constitution. We feel equally certain that the Banking Regulation Act, 1949, in pith and substance relates to entries 43 and/or 45, more particularly to entry 43 of List I in the Seventh Schedule to the Constitution. These entries read thus:

"43. Incorporation, regulation and winding up of trading corporations, including banking, insurance and financial corporations but not including co-operative societies

45. Banking ".

5. Part III-A of the Banking Regulation Act, 1949, makes special provisions for speedy disposal of winding-up proceedings and Section 45 A states that the provisions in that part will have effect notwithstanding anything inconsistent therewith contained in the Companies Act or the CPC or the Code of Criminal Procedure or any other law in force. The last part of that section also provides that such laws as have not been varied and which are not inconsistent with the provisions of Part III-A of the Banking Regulation Act, 1949, will apply to proceedings under that Part. Exclusive jurisdiction is conferred on the High Court to decide all claims in respect of banking companies (Section 45B). Transfer of proceedings pending in courts other than the High Court to it is directed by Section 45C and Section 45D deals with the settlement of the list of debtors and the determination by an order passed by the High Court for the payment of the amount due from each debtor and such order, subject to the provisions for

appeal, will be final and binding for all purposes as between the banking company and the person against whom the order is passed and all persons claiming through or under him and, in such cases, the High Court has to issue a certificate and such certificate will be deemed to be a decree.

6. Under Sub-section (7) of Section 45D, the High Court has power on the application of the official liquidator to pass any order for the realisation, management, protection, preservation or sale of any property given as security to the banking company and to give such powers to the official liquidator as the High Court thinks fit. Under Sub-section (8) the High Court has the power to sanction a compromise in respect of any debt and to order the payment of any debt by instalments. Section 45T enacts that the orders of the 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 official liquidator is given authority notwithstanding the provisions in the CPC to apply for the execution of a decree by a court other than the one which made it on production of a certificate under Sub-section (6) of Section 45D and on his certifying to such other court in writing the amount remaining due or relief remaining unenforced under the decree. There is also power in the High Court to direct the liquidator to have any amount due according to the certificate issued by the High Court realised as an arrear of land revenue.

7. A reading of Part III-A of the Banking Regulation Act, 1949, and particularly the provisions that we have referred to, bearing in mind the provisions in Sections 45A and 45B, that the provisions of the Banking Regulation Act, 1949, in that part (Part III-A) must apply notwithstanding any other law, there can be little doubt that the Banking Regulation Act in Part III-A purports to provide a complete code and a complete machinery for the realisation of debts due to banking companies that are being wound up. Counsel appearing for the debtor and for the State emphasised the words " amount due by each debtor " in Sub-section (4) of Section 45D and contended that the amount due from a debtor must be determined with reference to the provisions in the Act and urged that it was not meant by Parliament in enacting the Banking Regulation Act that the provisions of the Act should be abrogated. This contention is difficult to accept in view of the provision in Sub-section (5) of Section 45D that an order passed under Sub-section (4) of Section 45D shall be final.

8. The determination of the amount due could have taken place before the Act came into force and such determination and the power under Sub-section (4) of Section 45D must equally well apply to a period antecedent to the date of the Act as well as to a period subsequent to it. Once such determination had taken place, it has to be final under Sub-section (5) of Section 45D and there is no provision in the Banking Regulation Act, 1949, to scale it down, to alter or amend the amount determined by the final order by applying the provisions of the Act. A plain reading of the sections also does not warrant the interpretation that the determination must be in accordance with the provisions in the Act. We are

fortified in this view by the power given to the High Court to sanction a compromise on terms to be determined by the High Court or at least approved by the High Court and further to direct instalment payments, giving a discretion in terms untrammelled by the provisions of any other statute. Such a discretion we find it difficult to visualise co-existing with a rigid scaling down provided by the Act.

9. The Act, in Section 4, permits instalment payments. In Section 5 interest is stipulated as far as banking companies are concerned at 7 per cent. or at the contract rate, whichever is less, and Sub-section (5) of Section 4 provides that where any instalment of a debt is not paid on the due date the creditors will be entitled to recover the same as provided in Section 10 of the Act, and that section permits execution being taken only of the defaulted instalments which a debtor should have paid in accordance with Section 4 or the defaulted instalments provided in the order passed on an application u/s 7. There is also provision made for amendment of decrees and in what terms decrees should be passed in pending matters. Section 20 provides for setting aside of sales of immovable property held in execution of decrees and a special provision is made in Sub-section (3) of Section 20 for the setting aside of sales of immovable property in which an agriculturist had an interest which had been sold in execution of any decree for the recovery of a debt or sold under the provisions of the Revenue Recovery Act for the time being in force for the recovery of a debt due to a banking company in liquidation on or after the 14th day of July, 1958.

10. What we have stated clearly indicates that there is conflict. If the Act stood by itself, that is, in the absence of the Banking Regulation Act, it will have full sway in regard to all the matters for which provision has been made in the Act, for, we consider that in pith and substance the Act relates to "relief of agricultural indebtedness" and the encroachment on the central subject "winding up" of banking companies falling under item 43 of List I in the Seventh Schedule to the Constitution is only incidental or ancillary. It cannot be doubted that in making provision for winding up of a banking company Parliament can enact and provide a machinery for the manner in which and the method by which the debts due to banking company should be determined and recovered. This is what has been done by enacting the provisions in Part III of the Banking Regulation Act, 1949. Unfortunately, it is impossible to reconcile the provisions of the Banking Regulation Act, 1949, with that of the Act and so we consider that the Banking Regulation Act, 1949, must prevail. Similar questions have arisen on many occasions. We may at the outset refer to a decision of the Federal Court in AIR 1941 47 (Federal Court) and to certain passages from the judgment of Sulaiman J.--a dissenting judgment on a different point--which very lucidly, if we may say so with very great respect, enunciated the principles in matters such as these. The learned judge, after referring to the decisions in *Attorney-General for Ontario v. Attorney-General for the Dominion of Canada*, [1894 A.C. 189 (P.C.)] and in *Grand Trunk Railway of Canada v. Attorney-General of Canada* [1907] A.C. 65 (P.C.) and a number of other decisions, summed up the position thus:

" No Canadian case has been cited before us in which although the subject of legislation was substantially within Section 92, it not only incidentally encroached upon a subject mentioned in Section 91, but at the same time actually clashed with an existing Dominion legislation. The principles laid down by their Lordships have gone only so far as to permit an incidental encroachment, provided the Dominion field is unoccupied. In no case so far decided have their Lordships tolerated a trespass as well as a clash. If a clash with the Dominion legislation were also allowed, then a provincial legislature would be in a position, though indirectly, to nullify the Dominion legislation even inside the field exclusively open to the Dominion, which would make the position intolerable.

It seems to me that the principles of interpretation laid down by their Lordships in the Canadian cases cannot be brushed aside by simply saying that they relate to a different Constitution. Those principles are not only of the greatest weight, but must be a guide to us even in interpreting the Indian Constitution. Of course, we cannot interpret the language of any section in the Indian Act in the light of the interpretation of the corresponding section in the Canadian Constitution. That has to be avoided; but the principles of interpretation that have been established cannot be ignored. At the same time, it would be dangerous to import only a part of the doctrine and exclude another part. Partial application may frustrate the very object for which the rule of law was deduced. The two doctrines of incidental encroachment and unoccupied field are closely related. I would go further and say that they are indissolubly connected. We cannot import the doctrine of incidental encroachment in favour of the Provinces, and refuse to import the doctrine of unoccupied field which is in favour of the Centre. The two must go hand in hand. To allow provincial legislatures to encroach upon the exclusive federal field, even though in an indirect way, when there is a Central legislation already occupying the field, would be to give the former a free-hand in nullifying Central Acts relating to matters in the federal list. Such a carte blanche could hardly have been contemplated. The scheme of Section 100 of the Act is to exclude completely from the authority of the provincial legislature the power to legislate with respect to subjects in List I. If in consequence of certain difficulties that provincial legislatures would experience by a rigid enforcement of such an exclusion we must in interpreting the words " with respect to" import the Canadian doctrine of permissibility of incidental encroachment, we must then at the same time import the other allied doctrine also that such an encroachment is permissible only when the field is actually unoccupied. It is only in this way that actual clash between the Centre and the Provinces can be avoided, which I think we must. "

11. To similar effect is the pronouncement in *Attorney-General of Alberta v. Attorney-General for Canada* AIR 1913 P.G. 80. The relevant passage is at page 80 of the report, which reads thus :

" It follows that legislation coming in pith and substance within one of the classes specially enumerated in Section 91 is beyond the legislative competence of the

provincial legislatures u/s 92. In such a case it is immaterial whether the Dominion has or has not dealt with the subject by legislation, or to use other well-known words, whether that legislative field has or has not been occupied by the legislation of the Dominion Parliament. The Dominion has been given exclusive legislative authority as to "all matters coming within the classes of subjects" enumerated under 29 heads, and the contention that, unless and until the Dominion Parliament legislates on any such matter the Provinces are competent to legislate is therefore unsound (*Attorney-General for the Dominion of Canada v. Attorney-General for the Provinces of Ontario, Quebec and Nova Scotia* [1898] A.C. 715 (P.C.)). There were, however, cases in which matters which were only incidental or ancillary to the main subject which was within the exclusive legislative powers of the Dominion Parliament were dealt with by the provincial legislation in the absence of Dominion legislation. Since the year 1894, it has been a settled proposition that if a subject of legislation by the province is only incidental or ancillary to one of the classes of subjects enumerated in Section 91 and is properly within one of the subjects enumerated in Section 92, then legislation by the Province is competent unless and until the Dominion Parliament chooses to occupy the field by legislation (*Attorney-General for Ontario v. Attorney-General for the Dominion of Canada*). It is this proposition which from the nature of the case too often leads to difficulty. Legislation since the year 1867 has assumed many forms in dealing with the greater complexity of modern trade and civilisation. It is sometimes difficult to determine whether a particular matter, the subject of a provincial Act, is in "pith and substance" within one of the enumerated heads of Section 91 or whether it is merely ancillary or incidental to one of the subjects there enumerated. This may raise questions as to the precise meaning to be attached to one or more of the enumerated heads of Section 91 and Section 92 ; and finally, there may be a doubt whether the legislative field is or is not clear. "

12. The principles of applying the pith and substance rule as well as the rule that incidental or ancillary encroachment should be upheld provided the field encroached was unoccupied have been accepted and applied by the Supreme Court. It is only necessary to refer to two decisions of the Supreme Court in *A.S. Krishna Vs. State of Madras*, and *The State of Rajasthan Vs. G. Chawla and Dr. Pohumal*, .

13. In the light of what we have stated, we hold that the Banking Regulation Act, 1949, must exclusively govern the determination of the question of the amount due from the applicant in Application No. 175 of 1970 and that he cannot claim the benefits of the provisions in the Act in support of his plea that no amount is due from him. Other matters, if any, arising from the application will be dealt with by the winding-up court.