

(1959) 09 KL CK 0016
In the High Court Of Kerala
Case No : B.C.S. No. 3 of 1959

New Model Bank Ltd.

APPELLANT

Vs

P.A. Thomas

RESPONDENT

Date of Decision : 30-09-1959

Acts Referred:

Banking Companies Act, 1949 — Section 45B, 45C, 45C(2), 45C(3), 45C(4)
Companies Act, 1956 — Section 446, 537
Travancore Chitties Act, 1920 — Section 17(1)

Citation : AIR 1960 Ker 243 : (1960) 30 CompCas 135

Hon'ble Judges : P.T. Raman Nayar, J

Bench : Single Bench

Advocate : Mani J. Meenattur, for the Appellant; P.H. Sankara Narayana Iyer, for the Respondent

Judgement

P.T. Raman Nayar, J.—On 4-11-1957 the defendant obtained a decree for money, charged on the property now in suit, against the plaintiff banking company. This was in O. S. No. 384 of 1957 on the file of the Munsiff's Court, Alleppey. On 15-11-1957 the plaintiff company was ordered to be wound up by this court. On 13-12-1957 nearly a month later, the defendant applied to the Munsiff's Court Alleppey for execution of the decree he had obtained and, in pursuance thereof, the property was brought to sale and bought by the defendant himself on 3-3-1958. All this he did without obtaining the leave of court required by Sections 446 of the Companies Act, 1956 and, in due course, on 16-7-1938 he obtained delivery of the property he had bought.

On 26-2-1959, the plaintiff bank came forward with the present suit asking for a declaration of its title to the property and for possession with mesne profits, past and future. In doing so it averred that the execution proceedings and the defendant's purchase therein were completely void and gave no title whatsoever to the defendant because

(a) no leave of the winding up court had been obtained as required by Sections

446 of the Companies Act, 1956 and

(b) because the Alleppey Munsiff's Court had no jurisdiction to entertain the execution application in view of Sections 456 of the Banking Companies Act under which exclusive jurisdiction is vested in this court.

2. The defendant's contention is that since the liquidator and not moved this court and had the proceedings transferred to it under Sections 456 of the Banking Companies Act, the Munsiff's Court, Alleppey continued to have jurisdiction. That being so, Sections 446 of the Companies Act does not apply. Further, that the suit property was trust property in the hands of the liquidator, and the defendant being, to the best of his knowledge, the sole beneficiary, the execution proceedings were valid.

3. The following issues were framed:

1. Were the execution proceedings and the sale after the winding up order and are they void on the ground that the court had no jurisdiction?

2. Is the plaintiff entitled to any mesne profits and if so, to how much?

3. Is the valuation excessive?

4. To what reliefs?

4. Issue No, 1 is compendiously framed to cover both the contention based on Sections 446 of the Companies Act and the contention based on Section 456 of the Banking Companies Act. Taking first the latter contention it is quite clear from a mere reading of Sections 456 that an execution proceeding of the present nature is covered by that, section and that this court alone has jurisdiction to entertain and decide it. If authority were necessary for this, it is to be found in *Shri Ram Narain Vs. The Simla Banking and Industrial Co. Limited*, The argument that, because the liquidator did not make a report under Sections 456(2) and have the execution proceedings transferred to this Court, the Munsiff's Court acquired jurisdiction, is based on a misreading of the section.

In the first place, the section applies only to proceedings pending at the time of the winding up order, and, as we have seen, the execution proceeding now in question was not then pending but was subsequently instituted. Therefore Sections 456 of the Banking Companies Act has no application whatsoever, and I am not impressed with the argument that a suit must be deemed to be pending even after decree, that an execution must be deemed to be a continuation of the suit, and that the suit finally terminates only either after satisfaction has been obtained or the decree has become barred. The, argument that the suit itself was pending and that the liquidator not having had the suit transferred to this court, the defendant could by reason of Sections 456(4) continue the suit by filing an execution application therein in the Munsiff's Court, seems to me altogether without basis. And I might also add that a reading of Sections 456(4) as a whole makes it quite clear that it is only after the liquidator has reported a particular

suit "or proceeding under Sections 456(2), and this court has, acting under Sections 456, decided not to transfer the suit or proceedings to itself, that the court before which it was pending gets jurisdiction u/s 456(4).

5. It follows that the execution proceeding, and the sale pursuant thereto, being before a court which had no jurisdiction, the sale is void and confers no title on the defendant.

6. Even if it be assumed for purposes of argument that the Munsiffs Court did have jurisdiction in the matter, it is quite apparent that the sale is void under Sections 537 of the Companies Act for want of the leave required by Sections 446. That the plaint does not expressly refer to Sections 537 of the Companies Act but contents itself with saying that the sale is void for having been held without the leave of this court, cannot of course preclude the application of that section.

7. The necessary averment of fact having been made, it is not necessary that the relevant provision of law should be pleaded; the legal consequences must necessarily follow whether the provision of law is pleaded or not. It is however argued that Sections 456 of the Banking Companies Act overrides Sections 446 and 537 of the Companies Act and that, if by reason of Sub-section (4) of the section a court has jurisdiction to continue and decide a proceeding, the bar under Sections 446 and 537 of the Companies Act does not obtain. But, as pointed out in (S) Shri Ram Narain Vs. The Simla Banking and Industrial Co. Limited, this argument loses sight of Sections 2 of the Banking Companies Act which makes it quite clear that the provisions of the Act. are in addition to and not, save as expressly provided, in derogation of the Companies Act on any other law for the time being in force. It is nevertheless argued that, under Sections 45A of the Banking Companies Act, the provisions of Part IIIA of that Act in which Sections 456 appears, override all other laws including the Companies Act. That is true enough, but the next step of the argument, namely that Sections 446 and 537 of the Companies Act are overridden and have no application when a court having jurisdiction under Sections 45C (4) of the Banking Companies Act is seized of a proceeding is fallacious. For, one law can override another only if both deal with the same matter and not if they deal with entirely different matters. Section 45C of the Banking Companies Act is concerned with the forum that is to try a pending proceeding falling within the scope of Sections 45B. It is concerned with the question of jurisdiction, whether it is the High Court or the court before which the proceeding was pending at the time of the winding up order, that has jurisdiction. Sections 446 and 537 of the Companies Act are concerned with an entirely different matter and lay down that even a court having jurisdiction to try a proceeding (whether the jurisdiction be under the ordinary law, or whether it be the special jurisdiction conferred on this court itself by Sections 45B of the Banking Companies Act or whether it be a jurisdiction saved from Sections 45B by Sections 45C (5) of that Act, makes no difference) shall not do so after a winding up order has been made unless leave of the

winding up court has been obtained and, further, that any execution or sale, without such leave shall be void. There can therefore be no question of Sections 45C operating to override either Sections 446 or Sections 537 of the Companies Act; in fact it was held in the Supreme Court case already referred to that the passing of the Banking Companies Act did not in any way affect the corresponding provisions of the Companies Act of 1913,

8. It is next contended that the plaintiff Banking Company is not the real owner of the suit property but only holds it in trust for the subscribers to a chitty it was running (of whom the defendant was one, his decree being in an enforcement of a claim thereunder) in whose favour it had charged the property under Sections 17(1) of the Travancore Chitties Act 26 of 1120. Even assuming that the bank is only a trustee I fail to see how that can help the defendant. Legal title would still be with the bank (no doubt on behalf of the beneficiaries) and if that were not so one fails to see how the defendant could obtain any manner of title by buying the property in execution sale against the bank. The decree and the execution, it will be remembered, were solely against the bank, and, in fact, paragraph 10 of the written statement expressly says that the suit property belonged to the bank. Even if the bank were only a trustee in whom title legally "vested for the benefit of some others, it would be entitled to sue and recover the property from the hands of a person like the defendant who has no title whatsoever. If, as he claims, the" defendant is a beneficiary he can only seek his remedy in appropriate proceedings against the bank. The Privy Council case, AIR 1935 104 (Privy Council) cited on behalf of the defendant has little relevance. That was a case of insolvency and there the insolvent had, before bankruptcy, parted with the property by executing a deed of trust. The transfer was found to be valid, and the insolvent having no title to the property, legal or equitable, it was held that the property had ceased to form part of his estate and did not therefore vest in the receiver.

9. But, in fact, the bank is in no way a trustee. It is clearly the beneficial owner of the property. Ext. D-4 is the bond on which the defendant relies, and a perusal of that document shows that it is nothing more than a bond under Sections 17(1) of the Travancore Chitties Act charging the property in favour of two of the subscribers to the chitty, in trust for all, for the proper conduct of the chitty. The bank is in no sense a trustee of the property for the chitty subscribers, but has only subjected its property to a charge held in trust "by two of the subscribers. It is these two subscribers and not the bank that are trustees. Thus the chitty subscribers are merely in the position of secured creditors and must work out their rights in the winding up proceedings. Ganesh Export and Import Co. Vs. Mahadeolal Nathmal, on which reliance is placed by the defendant is an altogether different case. There the asset in question was held by the company in liquidation in "a species of trust," whereas, as we have seen that is not the case here. Even so it might be remarked that that decision does not lay down that property held by a company in liquidation as a trustee is not a property or an effect of the company so as to rule out the application of Sections

537 of the Companies Act but only lays down that it is not an asset available for distribution among the general body of creditors but is an asset which must be made over to the beneficiary of the trust. I find that the execution proceedings and the sale pursuant thereto in favour of the defendant are void and that the defendant acquired no title by his purchase.

10. Issue No. 2: It follows that the defendant is a mere trespasser and that the plaintiff is entitled to mesne profits. So far as the quantum of mesne profits is concerned even the evidence tendered by the defendant himself as D. W. U shows that the claim in the plaint is by no means excessive.

11. Issue No. 3: This issue has really a bearing only on the question of costs, and in particular, of the advocate's fee. The plaint values the property at Rs. 13600/- but according to file defendant's evidence, the property is worth only Rs. 3000. I do not think that the mere oral assertion of the defendant is entitled to any weight) in the face of the valuation of Ex, D-4 to which the defendant was, in effect, a party. In that document (which it will be remembered was taken by two of the subscribers on behalf of all the subscribers including the defendant) it is said that the property is worth over Rs. 20,000. Ext. D-3 shows that the property was bought in court auction by the plaintiffs predecessor in 1952 for Rs. 4,375/-, but it is notorious that in court auctions properties are usually sold at a fraction of their real value. That in the void sale in execution of his decree, the defendant was, as his sale certificate Ext. D-2 shows, able to buy the property for Rs. 1079/- is, of course, nothing to go by. I find that the valuation in the plaint is not excessive.

12. I decree the suit with costs as prayed for in the plaint,