

(1951) 08 GAU CK 0010
In the Gauhati High Court
Case No : Civil Revision No. 55 of 1950

Pioneer Bank Ltd.

APPELLANT

Vs

Mrs. Gyan Koer and another

RESPONDENT

Date of Decision : 30-08-1951

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 115

Citation : AIR 1952 Guw 82

Hon'ble Judges : T.V. Thadani, C.J; Ram Labhaya, J; Haliram Deka, J

Bench : Full Bench

Advocate : S.K. Ghose and P. Choudhari, for the Appellant;

Final Decision : Allowed

Judgement

Thadani, C.J.—This is an application under the provisions of S. 115, Civil P.C., directed against an order, dated 11-2-1950, passed by the learned Subordinate Judge, U. A. D., by which he dismissed the petitioner's suit for default of Appearance.

2. The petitioner bank brought a suit in 1947, being T. suit No. 16 of 1947, in the Court of the Subordinate Judge, Jorhat, against the defendants, two widows of the late Sardar Tara Singh, for the recovery of a sum of Rs. 18,405-1-3 by the sale of the properties mortgaged by their husband. After a series of adjournments, the suit was fixed for hearing on 11-2-1950. Meanwhile on 12-7-1949, the Calcutta High Court ordered a compulsory winding up of the petitioner bank and Mr. A.C. Ganguli, Barrister-at-law, was appointed Official Liquidator.

3. It appears that the Directors of the petitioner bank failed to furnish the Official Liquidator with a statement of pending suits and proceedings by and against the petitioner bank. On receipt of certain papers from the Jorhat branch of the petitioner bank, the Liquidator came to know that a suit by the bank was pending in the Court of the Sub Judge, Jorhat, and that papers relating to the suit were

with Mr. R. Hazarika, an Advocate of Jorhat. The Official Liquidator requested Mr. Hazarika to furnish him with all the particulars of the suit. On 16-2-1950, one Mr. S.C. Sarma informed the Liquidator that Mr. Hazarika had been appointed a Judge, and that the suit against Tara Sing's widows had come up for hearing on 11-2-1950, and was dismissed for default of appearance.

4. Some two months after the Calcutta High Court had ordered the compulsory winding up of the petitioner bank, an Ordinance called the Banking Companies (Amendment) Ordinance, 1949 (XXIII [23] of 1949) was promulgated on 19.9.1949, S. 3 of which provided for automatic transfer of all proceedings to the winding up Court. The Ordinance of 1949 has been replaced by the Banking Companies (Amendment) Act 1950, S. 11 of which corresponds to S. 8 of the Ordinance and is in these terms :

Where any proceeding for the winding up of a banking company or any other proceeding, whether Civil or Criminal, which has arisen out of or in the course of such winding up is pending in any Court immediately before the commencement of this Act, it shall stand transferred on such commencement to the Court which would have had jurisdiction to entertain such proceeding if this Act had been in force on the date on which the proceeding commenced, and the Court to which the proceeding stands so transferred shall dispose of the proceeding as if this Act and the amendments made thereby were applicable thereto.

Mr. Ghose for the petitioner bank contends that in view of the provisions of S. 8 of the Ordinance which was in force on 11-2-1950, the date on which the suit was dismissed, the learned Subordinate Judge had no jurisdiction to pass an order of dismissal as the suit stood automatically transferred to the Calcutta High Court. We think the contention is sound and must prevail.

5. Neither S. 3 of the Ordinance nor S. 11, Banking Companies (Amendment) Act, 1950 makes any reference to the date of the institution of the proceeding which stands, automatically transferred. It is true that in this case the suit was instituted in 1947 before the Banking Companies (Amendment) Ordinance, 1949, came into force, but it is equally true that the suit was pending when the banking Companies (Amendment) Ordinance, 1949, was promulgated. The question arises whether the suit which was dismissed for default by the learned Subordinate Judge, U. A D., on 11-2-1950, was a proceeding arising out of or in the course of the winding up. The words "arisen out of or in the course of or such winding up, is pending" are wide enough to include all proceedings without any reference to the date of their institution, so long as they are pending in the course of the winding up. The words "arisen out of or in the course of such winding up is pending" are not to be read as arising out of or arising for the first time after the date of the winding up.

6. It is not disputed that the winding up was in course from 12-7-1949 and is in course till the present day the order of dismissal having been passed on 11-2-1950 in the course of the winding up of the petitioners bank--was an order

which the learned Subordinate Judge, U. A. D., had no jurisdiction to pass. We have before us a certified copy of an order in civil Rule 540 of 1950 (cal) passed by the Calcutta High Court in exactly the same circumstances as in the present case. In the case before the Calcutta High Court, the suit was brought by the petitioner bank in 1948 and the learned Subordinate Judge passed an order in that suit on 14-8-1950. The learned Judges of the Calcutta High Court observed :

It is quite clear that by reason of S. 11, Banking Companies (Amendment) Act of 1950, these proceedings are automatically transferred to the High Court as they were civil proceedings arising out of the winding up pending when that Act was passed. The Subordinate Judge has no jurisdiction further to deal with this matter which, as I have said, has been automatically transferred to the High Court by reason of this Section.

With respect we agree with the interpretation put upon S.11, Banking Companies (Amendment) Act of 1950 by the learned Judges of the Calcutta High Court.

7. In this view of the matter, the order passed by the learned Judge, Jorhat, dated 11-2-1950, must be set aside as having been passed without jurisdiction. The suit stands automatically transferred to the Calcutta High Court which has passed the winding up order in the matter of the petitioner bank in liquidation.

8. The result is that the revision application is allowed, but we make no order as to costs.

Ram Labhaya, J.

9. This petition of revision is directed against the order of the Subordinate Judge, U. A. D. dated 11-2-1960, dismissing plaintiff's suit for default.

10. The contention raised is that the learned Subordinate Judge had no jurisdiction to dismiss (The suit for default as before the date of the dismissal, the suit had stood automatically transferred to the Calcutta High Court under S. 8, Banking Companies (Amendment) Ordinance, 1949. Section 8 of the Ordinance provided that

where any proceeding for the winding up of a banking company or any other proceeding, whether civil or criminal, which has arisen out of or in the course of such winding up, is pending in any Court immediately before the commencement of this Ordinance it shall stand transferred on such commencement to the Court which would have had jurisdiction to entertain such proceeding if this Ordinance had been in force on the date on which the proceeding commenced, and the Court to which the proceeding stands so transferred shall dispose of the proceeding as if this Ordinance and the amendments made thereby were applicable thereto.

11. The suit was instituted on 17-6-1947. The order for the compulsory winding up of the Pioneer Bank, the plaintiff in the case, was made on 12-7-1949. If S. 3 of the Ordinance applied to the case, the suit stood transferred to the Calcutta

High Court on 19-9-1949. According to S. 3, the automatic transfer was to take place on the date of its promulgation. There is no provision for such transfers after the date of promulgation. The conditions for the automatic transfer of a proceeding are that it should be pending on the date of the promulgation of the Ordinance and that it should have arisen out of or in the course of the winding up. The suit may be a proceeding within the meaning of S. 3 of the Ordinance. It was pending on the date of the promulgation of the Ordinance. What remains to be seen is whether the proceeding, in this case the suit, had arisen before the promulgation of the Ordinance out of or in the course of the winding up.

12. Mr. Ghose concedes that the suit could not be said to have arisen out of the winding up. His contention is that it has arisen in the course of the winding up and this is the only question in the case that requires determination.

13. The winding up commenced on 12-7-1949. The ordinance was promulgated on 19-9-1949. The proceeding must have arisen before the 19-9-1949 and during the course of the winding up viz., between 12-7-1949 and 19-9-1949. The dictionary meaning of the word "arisen" with reference to legal proceedings would be to originate or spring from. A suit instituted by the liquidator may be a matter arising in the course of the winding up. But can a suit instituted before the order for winding up came into existence be said to be a proceeding which has arisen in the course of the winding up? It is contended that such a suit, if pending on the date of the promulgation of the Ordinance, would be deemed to arise in the course of the winding up if this was the intention, the Ordinance could have provided that all proceedings connected with or affecting the winding up and pending on the date of the promulgation in any Court shall stand transferred. It should not then have been necessary to provide that the proceedings should have arisen out of or in the course of winding up. The contention raised involves reading a great deal into the section which it does not contain. It also loses sight of the significance attaching to the words "has arisen in the course of the winding up." A comparison of S. 3 of the Ordinance with S. 45 B of the Act will amply illustrate my meaning. By that section the Court has been given the power to dispose of all claims made by or against a Banking Company and all questions of priorities and all other questions which may arise in the course of the winding up of a Banking Company coming within the cognisance of the Court or which the Court may deem it expedient or necessary to decide. The powers conferred by this section on the Court concerned with the winding up are very wide. The comprehensive language used in the section could have been employed far more effectively if it had been intended to lay down that all pending proceedings wherever pending including claims by or against the Company shall stand transferred. It may be urged that the words "has arisen" may not be given a very restricted meaning, A pending proceeding may possibly be said to have arisen in the course of the winding up for purpose of S. 3 even though it commenced before the winding up order was passed.

14. The winding up Courts may have to take notice of the proceedings

commenced at the instance of the Bank or pending proceedings against it at some stage of the winding up. As these proceedings come to the notice of the Court, it will have to take cognisance of them. When cognisance of these proceedings is taken, they may be said to have arisen during the course of the winding up. But this is not the position in this case. The order for compulsory winding up was passed on 12-7-1949 the Ordinance came into force on 19-9-1949. The matter must have arisen in the course of the proceedings before 19-9-1949. It cannot be said to have arisen before that date as so far as the winding up Court and the liquidator are concerned the matter had not even come to their notice. From a perusal of Para. 5 of the petition, it is clear that the liquidator got some clue about this claim of the Bank in January 1950. Before that date, the Court and the liquidator were completely ignorant about the existence of this suit. They had not taken notice or cognisance of it before that date. It seems to me that a proceeding which had not come to the notice of the Court concerned with the winding up or the liquidator was not intended to be covered by S. 3 of the Ordinance. I find it difficult to hold that merely because the suit was pending between the two relevant dates, it must be held to have arisen in the course of the winding up proceedings in the circumstances of this case.

15. An unreported decision of the Calcutta High Court in Civil Rule No. 540 of 1950 (All), has been relied on by Mr. Ghose. This case is easily distinguishable. The suit in that case was instituted on 4-11-1948 by the Pioneer Bank Ltd. During the pendency of the suit, the Bank was ordered to be wound up on 12-7-1949 and an interim official liquidator was appointed. After this appointment, it appears that the plaint in the case was amended and the plaintiff was shown as the Pioneer Bank Ltd., in liquidation. After this, the plaintiff, viz., the Pioneer Bank in liquidation applied to the Court of the Sub Judge for sending the records of the case to the Calcutta High Court on the ground that it had stood automatically transferred to that Court by virtue of S. 3 of the Ordinance. The learned Sub-Judge declined to transfer the case on 14-3-1950. On 18-3-1950, the Ordinance was repealed by S. 12, Banking Companies (Amendment) Act of 1950, Section 3 of the Ordinance was replaced by S. 11 of the Act. The learned Judges of the Calcutta High Court held that the proceedings stood automatically transferred to the High Court by reason of S. 11 of the Act. It may be noted that on the date of the order, the suit was still pending in the Court of the Sub Judge. It could possibly be said to have arisen in the course of the winding up as after the order for winding up, the plaint was amended on the application of the interim Official Liquidator. The suit, had come to the notice of the winding up Court, and not only cognisance of the matter had been taken but an amendment of the plaint had been asked for and was allowed after the order for winding up of the Bank was passed. The matter, therefore, might have been said to have arisen in the course of the winding up before the Banking Companies Act came into force. Under S. 11 it could then be said to have stood automatically transferred to the winding up Court. This may be a possible view of

the matter but such cognisance of the suit after the winding up order as occurred in the Calcutta case has not taken place in this case, As stated above, the Court and the Official Liquidator were ignorant about the existence of this suit at Jorhat till after the date of the promulgation of the Ordinance. The matter, therefore, had not arisen before that date in relation to the winding up proceeding.

16. I am fortified in this opinion by the provisions contained in S. 45-B occurring in Part III A of the Act which was introduced in the Banking Companies Act of 1949 by S. 2 of the Ordinance. It confers jurisdiction on the Court as defined in S. 45-A to decide all claims made by or against any Banking Company, all questions of priorities and all other questions whatsoever, whether of law or fact, which may arise in the course of the winding up of the Company coming within the cognizance of the Court, or which the Court may deem it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property in any such case. It is noteworthy that though the power is given to decide certain claims and matters, the Courts is not bound to decide all these matters itself. So far as matters coming within the purview of this section are concerned the jurisdiction of the Court as defined in S. 45 A is thus not exclusive. It was, therefore, not necessary to order automatic transfer of matters dealt with or covered by S. 45 B (1). This section specifically deals with claims made by or against any Banking Company. There is no reference in S. 3 of the Ordinance to claim by or against Banking Companies and the scheme of the Ordinance indicates that such a reference was not necessary. Section 3 of the Ordinance was intended to transfer such cases to the Court as defined in S. 45-A which could be dealt with by it alone. According to S. 45 A, the Court means the High Court exercising jurisdiction in the place where the registered office of a Banking Company (incorporated in India) which is being wound up is situate. The definition of the Court contained in this section is for purposes of Part III and Part III A of the Banking Companies Act of 1949 as amended by the Ordinance. Part III of the Banking Companies Act, deal with the suspension of business and winding up of Banking Companies. This part regulates winding up proceedings in the Court. Part III-A, which has been introduced into the Banking Companies Act by S. 2 of the Ordinance makes special provisions for speedy disposal of winding up proceedings. Before the Ordinance came into force, the jurisdiction of the High Court in matters relating to the winding up was not exclusive. By S. 45-A, which has been introduced into the Banking Companies Act by S. 2 of the Ordinance, the Court was defined for purposes of Part III and Part III A as the High Court exercising jurisdiction in the place where the registered office of the Banking Company which was being wound up at the time the Ordinance was promulgated was situate. The section further provided that no other Court shall have jurisdiction to entertain any matter relating to or arising out of the winding up of a Banking Company. As the definition is for purposes of parts in and III A of the Banking Companies Act as amended and was applied to banking companies which were being wound up, it follows that the intention was that so far as winding up proceedings were concerned no other Court except the

High Court should have jurisdiction. Other Courts were deprived of the jurisdiction to entertain any matter relating to or arising out of the winding up of a banking company. Matters relating to winding up mean winding up proceedings. A reference to S. 40 Banking Companies Act, would support this view. Matters arising out of the winding up would be part of the winding up proceedings. It is in respect of these matters that exclusive jurisdiction was conferred on the High Courts and other Courts were debarred from entertaining them. It became necessary, therefore, that proceedings covered by S. 45-A and pending in Courts other than High Courts be transferred to the High Courts as from the date of the promulgation of the Ordinance they were to cease to have jurisdiction in them. Section 3 of the Ordinance fulfils this need. It provides for automatic transfer of pending proceedings in winding up to the Courts invested with jurisdiction under the Ordinance. The proceedings for the winding up or other proceedings, Civil or Criminal, which had arisen out of or in the course of the winding up were to stand transferred automatically to the High Court concerned by virtue of the provisions contained in S. 3 of the Ordinance. Seen in the light of Ss. 15 A and 45 B it would appear that pending proceedings in winding up and such proceedings as arose out of them or in the course of the winding up and were pending in the winding up Court which could not exercise jurisdiction after the promulgation of the Ordinance were intended to be transferred from that Court. It is for this reason that we do not find any reference in S. 3 to claims by or against Banking Companies pending in Courts other than the Courts exercising jurisdiction under the Companies Act. The heading of the section also points to that conclusion. It is as follows: "Transfer of pending proceedings in winding up to the Court exercising jurisdiction under this Ordinance." It seems to me that proceedings in winding up and connected proceedings arising out of or in the course of winding up and pending in the winding up Court are alone covered by S. 3. The section yields to this interpretation but even if we do not go as far as that, I find it difficult to hold that suits by or against companies pending in Courts other than the Court exercising jurisdiction in proceedings in winding up were intended to be covered by S. 3 even though the Court concerned with the winding up had not in any way taken cognizance of those matters.

17. The petitioner cannot avail of the Banking Companies (Amendment) Act. In the Calcutta case, the suit was pending when the Rule came up for hearing. The suit in this case is not pending and therefore the matter cannot be dealt with under the Banking Companies (Amendment) Act. In the view of the matter that I take, the suit did not stand automatically transferred to the Calcutta High Court before the date on which it was dismissed for default. That order whether right or wrong is not without jurisdiction and this petition of revision, therefore, ought to fail.

18. The question is not entirely free from difficulty. The language of the relevant provisions is involved and far from clear. The case has been heard *ex parte*. We did not have the advantage of hearing any one on behalf of the opposite party.

My Lord the Chief Justice and my learned brother Deka J., have preferred to give an extended meaning of S. 3 of the Ordinance and I have pro found regards to their views. In these circumstances it is with considerable hesitation that I have come to the conclusion stated above.

Deka J.

19. I agree with the view taken by my Lord the Chief Justice but would like to add the following :

20. In this case, the suit was instituted on 17-6-47, the plaintiff Bank went into liquidation on 12-7-49 and the Ordinance No. 23 of 1949 by which the suit (T.S. No. 18 of 1947) is alleged to be governed came into operation on 19 9 49 and the said Ordinance was replaced by the Banking Companies (Amendment) Act of 1950 on 18-3-50 or thereabouts. The suit was dismissed for default under O. 9, Civil P.C., on 11-2-50 by the Subordinate Judge, U. A. D., when the Ordinance was in force.

21. The only point for decision is whether S. 3 of the Ordinance No. 23 of 1949 (an Ordinance to amend the Banking Companies Act) applied to the suit brought by the Pioneer Bank, now in liquidation and the learned Subordinate Judge passed the order of dismissal without jurisdiction.

22. It is common ground that the Ordinance applied to suits or proceedings (pending at the time the Ordinance was passed) that arose out of or in the course of such winding up. According to my Lord the Chief Justice, this suit was a proceeding that had arisen "out of or in the course of the winding up" of the plaintiff Bank. Ram Labhaya J., has held a contrary view.

23. If S. 3 of the Ordinance is read with S. 45-A of Act X [10] of 1949 the banking Companies Act, it would be clear that Civil or Criminal proceedings stand automatically transferred provided they are pending in the course of the winding do and regarding other matters which are also pending but come up for the first time after the course of the winding up has begun, any other Court will have no jurisdiction to entertain those matter and they shall have to be transferred to the Court as provided under S. 45 A. Section 46 A says that no other Court shall have jurisdiction to entertain any matter relating to or arising out of the winding up of the banking company. This makes it clear that S. 8 of the Ordinance applies to Civil or Criminal proceedings that arose previous to the passing of the Ordinance and were pending. Suits or proceedings filed thereafter shall be hit by S. 45. A.

24. It comes to this, therefore, that if the present suit satisfies two tests viz., first, that it has arisen out of or in the course of such winding up, and second that it was pending, it will stand automatically transferred by virtue of S. 3 of the Ordinance to the Court as contemplated by S. 45-A, Banking Companies (Amendment) Act.

25. The Calcutta view is as appears from the copy of toe judgment in an

unreported case, civil Rule No. 540 of 1950 (cal.), that such proceedings are considered to have arisen out of winding up and pending. This view proceeds on the interpretation that the words "has arisen out of or in the course of" mean that for the purpose of automatic transfer as provided under S. 3 of the Ordinance, it is sufficient that the proceeding is connected with or related to the winding up of the banking company. In my view this interpretation is quite correct reading the phrase as a whole.

26. I do not quite agree with my learned brother Ram Labhaya J., when he says that the word "arise" would mean only "to originate or spring from,"; it also means "to come up so as to be heard," and to my mind, this is the sense in which the words "has arisen" have been used in S. 8 of the Ordinance.

27. The matter came up before the learned Subordinate Judge for hearing on 11-3-50 and he ought to have held that the proceeding had "arisen" and was pending within the meaning of S. 3 of the Ordinance and he ought to have held that the suit should automatically be transferred to the liquidating Court, and that he had no jurisdiction to pass any order.

28. The next point for consideration is whether S. 3 of the Ordinance was limited to proceedings that were started in between the date of the winding up order and of the passing of the Ordinance, as the words used are "in the course of the winding up." the Ordinance is silent as to when the proceedings should have started. In the absence of any words to signify that the intention of the Ordinance was to limit this section only to Civil or Criminal Proceedings started after the winding up order, we should give a liberal interpretation and hold that S. 3 was meant to apply to all proceedings arising out of or in the course of winding up and pending, irrespective of the time when they were started.

29. I am unable to share the view of Ram Labhaya J., that the proceeding should be taken cognizance of by the Court or taken notice of by the liquidator with a view to bring it under the category of cases meant to be covered by S. 3 of the Ordinance.

30. My learned brother has stated in his judgment that it is conceivable that a pending proceeding may possibly be said to have arisen for purpose of S. 3 even though it commenced before the winding up order was passed, and if that is so, there is no reason why we should give a narrower interpretation to the words of the Ordinance, which have later on been incorporated in a Statute by the State legislature.

31. In this view of the matter, I agree with my Lord the Chief Justice that the order by the learned Subordinate Judge, U. A. D., on 11-2-1950 was passed without jurisdiction and that the suit stood automatically transferred to the Court as provided under the Statute.

32. The result is that the revision petition is allowed but I am not in favour of allowing any cost as there was no contest.