

(1968) 09 RAJ CK 0018

In the Rajasthan High Court

Case No : Company Application No. 16 to 19 of 1967

Rameshwarlal and Others

APPELLANT

Vs

The Pareek Commercial Bank Ltd.

RESPONDENT

Date of Decision : 18-09-1968

Acts Referred:

Banking Companies Act, 1949 — Section 45B, 45T
Civil Procedure Code, 1908 (CPC) — Order 21 Rule 58

Citation : AIR 1970 Raj 12 : (1971) 41 CompCas 635

Hon'ble Judges : P.N. Shinghal, J

Bench : Single Bench

Advocate : B.K. Acharya, for the Appellant; C.D. Mundhra, for the Respondent

Judgement

P.N. Shinghal, J.—There is a great deal of controversy about the maintainability of these four applications. Common questions of law and fact arise in all of them. They have been argued together, and I shall dispose them of by a single judgment as prayed by the learned counsel for the parties.

2. In order to bring out the controversy in bold relief, I may first state those facts regarding applications Nos. 16 and 17 which are no longer in dispute. The Pareek Commercial Bank Limited, respondent No. 1, hereinafter referred to as the Bank, was ordered to be wound up on July 31, 1952. Vastu Lal Pareek (respondent No. 2) was the Chairman of the Bank and orders were passed by this Court for the realisation of various sums of money from him. The Official Liquidator applied for execution of the Court's orders and the execution petitions were transferred by this Court to the Court of the District Judge of Bikaner on February 4, 1960. The District Judge attached certain properties on February 13, 1960 in execution of the decree, and claims or objections were filed by the present applicants under Order 21, Rule 58 of the Code of Civil Procedure. Rameshwarlal, Ishwarlal, Umesh Chandra and Herendra Kumar, sons of Vastulal Pareek, filed one such claim or objection, while Smt. Moolidevi, the daughter of Vastulal Pareek, filed another claim or objection. The claims or objections were filed on the ground

that the attached properties did not belong to Vastulal Pareek, but were the properties of the claimants or objectors. The claims or objections were however dismissed by the execution Court on December 17, 1960. The unsuccessful claimants or objectors then applied for leave of this Court to file suits under Order 21, Rule 63, Civil P. C. on the ground that "complicated questions" were involved in the dispute which could not be adjudicated "without proper enquiry and trial except by way of a regular suit". This Court gave notice to the Official Liquidator and made an order on December 11, 1961, in similar terms, in both the cases as follows:

"Heard learned counsel for the parties. Permission is granted to file a suit under Order 21, Rule 63 of the Code of Civil Procedure. The claim petition has already been filed in the Court of District Judge Bikaner and it has been rejected."

Thereupon two applications, which have now been renumbered as 16 and 17 of 1967, were filed the same day.

3. A dispute however arose about the Court fee payable on the applications. An order was made by this Court on April 19, 1962 for the payment of ad valorem court fee on the ground that the applicants had filed suits under Order 21, Rule 63 of the CPC which were independant proceedings. Two months' time was allowed to make up the deficiency in the court fee. But an appeal was preferred against that order before a Division Bench. It was dismissed as premature on July 24, 1962 and the applicants were directed to argue before the Company Judge whether their applications were in the nature of claims, and not suits, and were maintainable without the payment of ad valorem court fee. The matter therefore came before the Company Judge again on July 26, 1962. He rejected the plaints because the court fee was not paid in time, and observed that if the applicants thought that they had a remedy by way of an application u/s 45N(2) of the Banking Companies Act, 1949 (hereinafter referred to as the Act), they were free to move fresh applications thereunder.

4. The applicants again preferred appeals to the Division Bench. It was argued there that the applications were in the nature of claims and not suits. The Division Bench upheld the plea and decided in its judgment dated July 19, 1965 that the applications filed on December 11, 1961 were not plaints, but were claims u/s 45-B of the Act. As the appellants had already paid the required court fee, the order of rejection passed by the Company Judge was set aside in both the cases. The cases were thus "remanded" for disposal according to the law. Review petitions were filed by the Bank against the judgments of the Division Bench. While dismissing those petitions, an order was made by the Division Bench to the following effect,--

"On the consideration of the tenor of the petition, and no more, we came to the conclusion that it could only be regarded as a claim petition and not a suit for purpose of seeing what court-fee was payable. We do not think that our judgment would stand in the way of the petitioner raising the question about the

maintainability of a claim petition u/s 45B of the Banking Companies Act in the circumstances on which the appellant non-petitioner relies."

5. It is in these circumstances that the controversy regarding the maintainability of the applications continues to rage even after the lapse of a period of almost 8 years, although there is no dispute about the correctness of the facts set out above.

6. As has been stated, there is no dispute that the orders of this Court for the realisation of the various sums of money from respondent Vastulal Pareek were final and executable. There is also no dispute that the applications for the realisation of those sums of money by execution were rightly sent to the District Judge of Bikaner. In other words, there is no dispute about the jurisdiction of the District Judge to execute the orders by taking the necessary steps for the realisation of the amounts by attachment of the properties of respondent Vastulal Pareek. But there is a serious controversy regarding the maintainability of the claims or objection petitions which were filed under; Order 21 Rule 58 of the CPC in the Court of the District Judge, to which reference has been made above, for while the applicants now contend that they were not maintainable and could not be decided by the District Judge, it has been argued on behalf of the Bank that they were maintainable and were rightly disallowed.

7. In this connection it has been argued by Mr. B. K. Acharya, the learned counsel for the applicants, that any claim or objection to the attachment of the properties at the instance of the present applicants fell within the purview of Section 45B of the Act and the High Court alone was competent to decide it so that the orders of the execution Court dated December 17, . 1960 rejecting the claims or objections under Order 21, Rule 58 of the CPC were a nullity. The learned counsel has cited Hemanga Coomar Mookherjee and Others Vs. M.C. Chakravarty, and Comrade Bank Limited (in Liquidation) Vs. Jyoti Bala Dassi, in support of his argument.

8. In order to appreciate the controversy it is necessary to refer to Sections 45A and 45B which occur in Part III-A of the Act. According to Section 45A, the provisions of Part III-A and the rules made thereunder override anything inconsistent therewith contained in the Companies Act or the Code of Civil Procedure, or any other law for the time being in force. So if any provision of CPC is not inconsistent with the provisions of Part III-A of the Act or the rules made thereunder, it shall apply to the proceedings under that Part. The High Court has made Rules under the Act and these are to be found in Chapter XXIX of the High Court Rules. Rule 745 (2) of these Rules reads as follows :

"745 (2). The provisions of the Code of Civil Procedure, the Code of Criminal Procedure and the Rules of the High Court, 1952, unless inconsistent with these rules, shall apply mutatis mutandis to Civil and Criminal Proceedings and appeals under these rules."

There can therefore be no doubt that both by virtue of Section 45A and Rule 745

(2), these provisions of the CPC which are not inconsistent with the provisions of Part IIIA of the Act apply to proceedings under that part.

9. Section 45-B of the Act deals with the power of the High Court to decide all claims in respect of Banking Companies. Its relevant provisions read as follow--

"45-B. The High Court shall have exclusive jurisdiction to entertain and decide any claim made by or against a Banking Company which is being wound up, or any other question whatsoever, whether of law or fact, which may relate to or arise in the course of the winding up of a Banking Company, whether such claim or question has arisen or arises or such application has been made or is made before or after the date of the order for the winding up of the Banking Company or before or after the commencement of the Banking Companies (Amendment) Act, 1953."

10. It is not in dispute, as has been stated earlier, that the execution Court (District Judge, Bikaner) was competent to execute the orders of this Court and realise the various sums of money referred to in those orders, from respondent Vastulal Pareek, by attachment and sale of his properties. As is obvious, the execution Court could do so under the provisions of the CPC for there is nothing to the contrary in Part IIIA of the Act or the rules made thereunder. Order 21 Rule 58 of the Code deals with the investigation of claims and objections to attachment of property in execution proceedings on the ground that such property is not liable to attachment, and it is for the execution Court to investigate that claim or objection "with the like power as regards the examination of the claimant or objector, and in all other respects, as if he was a party to the suit." The objections which were filed by the present applicants in the execution Court, and which were expressly labelled as "objections under Order 21 Rule 58 of the Code of Civil Procedure," were therefore required to be investigated and decided by the execution Court. Being defensive proceedings, it was not necessary to obtain the leave of the Court for filing those claims or objections u/s 171 of the Companies Act. The execution Court was therefore quite competent to decide them one way or the other in accordance with the provisions of the CPC relating to their investigation. The orders of the District Judge dated December 12, 1962 disallowing the claims or objections were therefore quite legal. I am fortified in this view by the decision in *Malli Salva Iyer v. Madurai Mercantile Bank, Ltd.* 1962 MLJ 251. In that case also a claim was made for raising the attachment on the ground that the claimants, were entitled to possession of the properties in their own right. The claims were resisted by the Official Liquidator, inter alia, on the ground that the petitions filed under Order 21 Rule 58 of the CPC could not be entertained by the execution Court by reason of Section 45-B of the Act as only the High Court had the jurisdiction to entertain all claims against a bank in liquidation. The objection found favour with the execution Court, but the matter was taken to their Lordships of the Madras High Court. They rejected the contention of the Official Liquidator on the ground that, if accepted, it would "lead to the anomaly that while the attachment is

made by one Court, where such Court is not the High Court, the claim petition has to be decided only by the High Court." They therefore held that Order 21 Rule 58 of the CPC conferred jurisdiction only on the execution Court even though the decision given on such a claim petition was of a summary nature concerning the question of possession and was subject to the result of a suit under Order 21 Rule 63 C. P. C. Their Lordships therefore held that as a Banking Company is able to execute a decree in a subordinate Court either by obtaining transfer of the decree from the High Court or otherwise, it should in principle be held that the claim petition should be entertainable by that Court, They observed however that if a suit was filed under Order 21 Rule 63 of the CPC after the disposal of the claim petition, different considerations would arise and Section 45-B of the Act would apply to that case. I am in respectful agreement with this view.

11. In fact, as has been stated Part III-A of the Act or the rules made thereunder do not contain any provisions which could be said to run counter to this view. On the other hand, Section 45-T may be said to strengthen the view I have taken. It provides for the enforcement of the orders of High Court in any Civil Proceeding as a decree and provides further that the amount found due to a banking company may be recovered as an arrear of land revenue. The Collector has therefore been authorised to proceed to make the recovery as if it were an arrear of land revenue and to exercise all the powers of a Civil Court. It could not therefore be the intention that claims or objections in those proceedings should not be heard by the Collector but should be referred to the High Court. Any other view will defeat the very purpose of securing expeditious realisation or the amount as an arrear of land revenue.

12. I should not however be understood to say that it is obligatory for a claimant or objector to apply to the execution Court under Order 21 Rule 58 of the CPC when he feels aggrieved by the attachment of any property in a case like the present. It appears to me that two alternative courses will be open to such a claimant or objector. He may either proceed under Order 21 Rule 58 of the CPC and take a decision from the execution court, or he may prefer a claim in the High Court u/s 45-B of the Act. The choice therefore lay with the present claimants or objectors. But if they chose to take resort to the procedure laid down in the CPC and preferred claims or objections under order 21 rule 63, the provisions of that and the ancillary rules will govern their cases so that the orders of the execution court shall be conclusive subject to the result of the suit, if any, instituted by the aggrieved party under order 21 rule 63 of the Code of Civil Procedure.

13. I have considered the two cases cited by Mr. Acharva. In Hemanga Coomar Mookherjee's case AIR 1952 Cal 732 the Bank of Commerce Limited filed a claim petition under Order 21 Rule 58 of the CPC in the execution Court and the proceedings were transferred to the High Court at the instance of the Official Liquidator. It was held that the proceeding under Order 21 Rule 58 of the CPC

was a proceeding arising in the course of the winding up of the Bank within the meaning of Section 11 of the Banking Companies (Amendment) Act. In that case their Lordships were primarily concerned with that Section. Their judgment therefore bears on its provisions and I do not think it is directly in point for that reason even though there are observations" in the judgment to the effect that Sections 45-A and 45-B deprive all courts except the High Court of jurisdiction in such matters. Besides, their Lordships were not required to consider the Rules similar to those made by this Court under Part III-A of the Act providing for the disposal of Civil Proceedings in accordance with the provisions of the Code of Civil Procedure. It may be mentioned that the decision in Hemanga Coomar Mookherjee and Others Vs. M.C. Chakravarty, was considered in Malli Selva Iyer Vs. The Madurai Mercantile Bank, Ltd. and Another, and it was observed that there was nothing in it to support the contention that an objection to an attachment effected at the instance of a banking company could not be entertained by the court which effected the attachment. The other case on which reliance has been placed by Mr. Acharya is Comrade Bank Limited (in Liquidation) Vs. Jyoti Bala Dassi, In that case it has no doubt been held that an investigation of a claim under Order 21 Rule 58 of CPC cannot be undertaken by the execution court and that it must be investigated and decided by the High Court in terms of Sections 45-A and 45-B of the Banking Companies Act, but the decision seems to be based upon Hemanga Coomar Mookherjee and Others Vs. M.C. Chakravarty, and I need not deal with it separately.

14. In the present cases, the claims or objections of the applicants (in cases Nos. 16 and 17) under Order 21 Rule 58-C. P. C. were disallowed by the execution-Court on December 17, 1960. It appears that it was for this reason that they expressly applied for and obtained leave of this Court to file suits under order 21 rule 63 of the Code of Civil Procedure.

15. It is however an admitted fact now that the applicants (of cases Nos. 16 and 17) did not actually institute suits under order 21 rule 63 of the CPC for which they obtained the leave of this Court. As has been stated, they filed the present applications on December 11, 1961 and at one time they were treated as suits under Rule 63. But the applicants later on insisted that this was not so and that the applications were in the nature of claims, other than suits, u/s 45-B of the Act,. The Division Bench has upheld this contention in its judgment dated July 19, 1965. It is therefore quite apparent that the applicants in the two cases have not filed suits under Order 21 Rule 63 of the Code of Civil Procedure. This had the effect of making the Orders of the execution court dated December 17, 1960 conclusive by virtue of the provisions of Order 21 Rule 63 and it is not possible to re-agitate the matter by preferring a claim u/s 45-B of the Act for that reason.

16. There is one more reason why applications Nos. 16 and 17 must be rejected. The scope and nature of the proceedings u/s 45-B of the Act have been examined and defined by their Lordships of the Supreme Court in Dhirendra Chandra Pal Vs. Associated Bank of Tripura Ltd. (In Liquidation), Their Lordships

have considered the provisions of Sections 45-A and 45-B with due regard to the policy and the scheme of the Amending Act by which they were incorporated for the speedy winding up of Banks, and have made the following important observation,--

"It appears to us that, consistently with this policy and with the scheme of the Amending Act, where the liquidator has to approach the Court u/s 45-B for relief in respect of matters legitimately falling within the scope thereof, elaborate proceedings by way of a suit involving time and expense, to the detriment of the ultimate interests of the company under liquidation, were not contemplated. In the absence of any specific provision in this behalf in the Act itself and in the absence of any Rules framed by the High Court concerned u/s 45-G, the procedure must be taken to be one left to the judgment and discretion of the Court, having regard to the nature of the claim and of the question therein involved."

Their Lordships then went on to make the following further observation which also bears on the present controversy,--

"The question is not whether Section 45-B permitted summary proceedings but the question is whether the Section prescribed definitely a particular method of proceeding and whether consistently with the policy of the Act it was not to be presumed that a speedy and cheap remedy was to be available to the Liquidator, unless the Court in its discretion thought fit to direct or the Rules of the High Court provided that a claim of a particular nature had to be pursued by a suit.

It is to be remembered that Section 45-B is not confined to claims for recovery of money or recovery of property, moveable or Immoveable but comprehends all sorts of claims which relate to or arise in the course of winding up. Obviously the normal proceeding that the Section contemplated must be taken to be a summary proceeding by way of application."

It would thus appear that the normal procedure for the adjudication of a claim u/s 45-B is to make an application where elaborate proceedings by way of a suit are not contemplated, and the procedure for such application is left to the judgment and discretion of the Court. A suit need not therefore be filed unless (i) the Court in its discretion thinks fit to direct that the remedy should be sought by means of a suit, or (ii) the Rules of the High Court provide that the claim of a particular nature should be pursued by a suit.

17. In the instant case, the Court had given a direction in its discretion on December 11 1961 that the remedy should be pursued by a suit. In doing so, the Court gave a very good reason for it stated that leave to file the suit under Order 21 Rule 63 was granted because "the claim petition has already been filed in the Court of District Judge of Bikaner and it has been rejected." In the face of such a clear direction of the Court, the applicants had no option but to seek their remedy by a suit. Moreover, Rule 745 (2) of the High Court Rules, to which reference has been made above, clearly provides that the provisions of the Code

or Civil Procedure shall apply *mutatis mutandis* to the civil proceedings under the rules contained in Chapter XXIX unless they were inconsistent with them. Since there was no such inconsistency, this provision of the rule also had the effect of attracting the application of Rules 58-63 of Order 21 of the Code of Civil Procedure. It would thus appear that under the Rules also, it was necessary for the applicants to seek their further remedy (against the decisions of the execution Court dated December 17, 1960) in the two cases by means of suit under Order 21, Rule 63 of the CPC and not by mere applications.

18. It has of course been argued, at this late stage, that the two claims may now be treated as suits; but this is an argument of despair. As has been stated, the applicants themselves took the firm stand before the Division Bench that they had not instituted any suits and that they had merely filed applications in the nature of claims, and they cannot be allowed to resile from that stand. In fact the judgment of the Division Bench dated July 19, 1965 is binding in these two cases and it has clearly been decided there that the applications filed by the applicants on December 11, 1961 were not plaints. This is quite a sufficient answer to the belated attempt to retrieve the harm voluntarily caused by the applicants to their cases.

19. In these facts and circumstances I am constrained to hold that applications Nos. 16 and 17 are not maintainable and should be dismissed with costs.

20. Application No. 19 has been filed by Smt. Mooli Devi, daughter of Vastulal Pareek, and it is admitted before me that it relates to the attachment of the same property which was the subject-matter of the proceedings under Order 21, Rule 58 which resulted in the order of rejection dated December 17, 1960. As that order became conclusive for the reasons mentioned earlier, it would operate as a bar against the maintainability of application No. 19 on the general principles of *res judicata*. That application has also therefore to be dismissed with costs.

21. This leaves application No. 18 for consideration. It relates to five properties and it is admitted that four of these properties are the same for which a claim or objection was filed by the four sons of Vastulal Pareek under Order 21, Rule 58 and resulted in the order of rejection dated December 17, 1960. As that order has also become conclusive in the absence of a suit under Order 21, Rule 63, it would bar the present application, so far as the aforesaid four properties are concerned, on the general principles of *res judicata*, and to that extent the claim is not maintainable and has to be rejected. The claim will however survive so far as the fifth property is concerned and I shall proceed to try it after settling the procedure by a separate order.

22. In the result, applications Nos. 16, 17 and 19 of 1967 are dismissed with costs on the ground that they are not maintainable. Application No. 18 of 1967 is dismissed so far as it relates to the four properties mentioned above, while the claim regarding the fifth property shall be investigated and tried by this Court. In

respect of this application the parties will be entitled to proportionate costs.