

(1972) 01 GAU CK 0002
In the Gauhati High Court

Syed Abdur Rahman

APPELLANT

Vs

Tripura Modern Bank Limited (In Liquidation)

RESPONDENT

Date of Decision : 31-01-1972

Acts Referred:

Citation : (1974) 44 CompCas 201

Hon'ble Judges : P.K. Goswami, C.J;R.S. Bindra, J;Baharul Islam, J

Bench : Full Bench

Judgement

Goswami, C.J.—This miscellaneous appeal is directed against an order of the Assistant District Judge, Cachar, rejecting the objection of the judgment-debtor with regard to the maintainability of the execution proceeding before the court.

2. The facts material for decision in this case are as follows : The decree- holder is the Tripura Modern Bank Ltd. (in liquidation). The Calcutta High Court made an order under the provisions of the Banking Regulation Act, 1949 (Act X of 1949) (as amended), hereinafter called "the Banking Act", and sent a precept u/s 46 of the CPC to the District Judge, Silchar, in Matter No. 470 of 1955 in that court on the original side. That precept is dated 2nd June, 1967, and was received by the District Judge on 5th June , 1967, who forwarded the same to the Subordinate Judge , Cachar, for necessary action. The precept is in the following terms :

" Whereas by an order of this court made in this suit and dated the 30th day of May, 1967, it was ordered that a precept under the provisions of section 46 of the CPC should issue to your court in execution of the order made in this suit and dated the 3rd day of July, 1956, with directions to attach the property specified in the schedule hereto annexed, you are by this precept required to cause the said property specified in the said schedule to be attached and to hold the same under the provisions of the said section pending any application which may be made by the plaintiff above-named for execution of the said order."

3. The property mentioned in the schedule is described as the :

"sum of Rs. 18,222 lying in the hands of Executive Engineer, Investigation

Branch , E.& D. Division, District Cachar, Silchar, and payable to S. A. Rahman, also known as syed Abdul Rahman of Badarpur, Cachar, in the State of Assam being judgment-debtor, serial No. 91, in respect of the work named Protection of Karimganj Town from Erosion of River Kushiara under work Order F. C. 25/65/227 dated 3/4-12-1965."

4. The liquidator of the bank made an application in requisite form before the subordinate judge on 20th July , 1967, under Order XXI , rule 11, Civil Procedure Code, for execution of the order of the Calcutta High Court in Matter No. 470 of 1955. On the same day, the decree-holder also made a simultaneous application for an order of attachment of the identical bill mentioned in the above precept of the judgment-debtor lying with the Executive Engineer, Investigation Branch, E. & D. Division. The court passed an order on the same day in the following words :

"Put up after receipt of precept."

5. It appears the precept was duly received in the meantime and the court registered the execution case on 25th July, 1967, after receipt of the precept and ordered for putting up the case in presence of the lawyer for the decree-holder on 7th August, 1967, on which date after hearing the advocate for the decree-holder, the court issued conditional attachment of the bill with notice to the judgment-debtor to show cause. It is apparent that the court did not immediately attach the property on filing of the execution case, but ordered for attachment only after receipt of the precept which forms part of the records. The judgment-debtor, in his turn, after taking three successive dates for submission of objection, ultimately filed the same on 16th January ,1968, Challenging , inter alia , the jurisdiction of the court to entertain the execution application and also claiming that the application was barred by limitation. It appears that the judgment-debtor did not deny that there was an order passed against him as judgment-debtor in the Calcutta High Court, in execution of which the present proceeding was instituted in the court of the subordinate judge. He also did not deny liability under the decree. He stated in his objection that :

"the decree-holder has no right to ask for the attachment of other properties of the objector without first of all putting the mortgaged properties to sale either by auction sale or adjustment of the same against the decretal amount."

6. Before the subordinate judge two questions were raised, namely , that the execution application was barred by limitation and that the court had no jurisdiction to proceed with the execution case since the liquidator did not submit with his application the certificate of the Calcutta high Court. The objections were overruled by the learned judge.

7. Mr. J.P. Bhattacharjee, the learned counsel for the judgment-debtor , has not pressed before us the question of limitation.

8. The learned counsel submits that the executing court had no jurisdiction to entertain the application for execution when a certificate granted under sub-

section (6) of section 45D of the Banking Act was not produced before the court along with the application , in conformity with section 45T(2) of that Act. We may , therefore, read the provisions which will be material for our purpose, which find place in Part III-A of the Banking Act, providing , as it states, for "Special provisions for speedy disposal of winding-up proceedings" :

"45A. The provisions of this part and the rules made thereunder shall have effect notwithstanding anything inconsistent therewith contained in the Companies Act, 1956, or the Code of Civil Procedure, 1908, or the Code of Criminal Procedure, 1898, or any other law for the time being in force or any instrument having effect by virtue of any such law : but the provisions of any such law or instrument in so far as the same are not varied by, or inconsistent with, the provisions of this Part or ruled made thereunder shall apply to all proceedings under this part."

"45D. (5) Every such order shall, subject to the provisions for appeal, be final and binding for all purposes as between the banking company on the one hand and the person against whom the order is passed and all persons claiming through or under him on the other hand, and shall be deemed to be a decree in a suit.

(6) In respect of every such order, the High Court shall issue a certificate specifying clearly the reliefs granted and the names and descriptions of the parties against whom such reliefs have been granted, the amount of costs awarded and by whom, and out of what funds and in what proportions such costs are to be paid ; and every such certificate shall be deemed to be a certified copy of the decree for all purposes including execution."

"45T. (1) All orders made in any civil proceeding by a High Court may be enforced in the same manner in which decrees of such court made in any suit pending therein may be enforced.

(2) Notwithstanding anything to the contrary contained in the Code of Civil Procedure, 1908, a liquidator may apply for the execution of a decree by a court other than the one which made it on production of a certificate granted 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....."

9. We may also set out the provisions of section 46 of the CPC under which the Calcutta High Court issued a precept to the District Court at Silchar (Assam) :

"(1) Upon the application of the decree-holder the court which passed the decree may , whenever it thinks fit, issue a precept to any other court which would be competent to execute such decree to attach any property belonging to the judgment-debtor and specified in the precept.

(2) The court to which a precept is sent shall proceed to attach the property in the manner prescribed in regard to the attachment of property in execution of a decree :

Provided that no attachment under a precept shall continue for more than two months unless the period of attachment is extended by an order of the court which passed the decree or unless before the determination of such attachment the decrees has been transferred to the court by which the attachment has been made and the decree-holder has applied for an order for the sale of such property."

10. It is clear that an attachment made in pursuance of a precept u/s 46, Civil Procedure Code, is in force only for a period of two months unless that period is extended by the court issuing the precept or unless before the expiry of that period the decree has been transferred from the original court to the executing court and the decree-holder has made an application for an order for the sale of the property. In the instant case, there was a precept from the Calcutta High Court dated 2nd June, 1967, received by the Court at Silchar in due course and the order of attachment was made on 7th August, 1967, after receipt of the application for execution from the liquidator.

11. IT is submitted that no application for execution could be entertained in the absence of a certificate u/s 45D(6) of the Banking Act. In other words , we are invited to hold that the application for execution is not maintainable because the same was not accompanied by the certificate which is at par with the certified copy of the decree. IT is not denied that in all other respects the application is in form.

12. So far as material for our purpose, a perusal of the proviso to section 46, Civil Procedure Code, will show that attachment will remain in force if, prior to the determination of the attachment on the expiry of the period of two months, the decree is transferred to the executing court and the decree- holder makes an application for an order of the sale of the attached property. In other words, the precept u/s 46, Civil Procedure Code, is an interim measure in aid of the decree-holder for a temporary period pending appropriate steps by him to execute the decree in the appropriate court. In the usual course, the decree-holder has to make an application to the court passing the decree for transfer of the decree if the property which is sought to be attached and sold lies beyond the jurisdiction of that court. Sections 38,39 and 40 of the CPC deal with the transfer of decrees from one court to another. This normal procedure of transfer laid down under the Code is dispensed with by the special provision made u/s 45T(2) of the Banking Act. Thus, without making any application for transfer of the decree and obtaining orders of transfer from the original court, the liquidator, as decree-holder, can directly make the application for execution in the court of the subordinate Judge, Silchar, within whose jurisdiction the property is to be attached. This he has done.

13. In order that the attachment under a precept should continue beyond the period of two months , the proviso to section 46, Civil Procedure Code, requires two things to be done by the decree-holder. firstly, he has to obtain an order transferring the decree to the executing court and, secondly, he has to take

further steps in the course of the execution by making an application for sale of the property. Here we have to see the interplay of section 46 ,Civil Procedure Code, and section 45T(2) of the Banking Act in order to harmonise the process. Section 45T(2) dispenses with the requirement of obtaining an order of transfer of the decree from the original court as provided in the Code of Civil Procedure. Hence , all that the liquidator was required to do in the case, while the attachment under the precept was in force, was to take the further step in execution to bring the attached property to sale. The liquidator in this case made a regular application under Order XXI, rule 11,in accordance with the CPC and obtained appropriate orders. It is true that the order of attachment does not in terms refer to the precept. Since, however, after receipt of the execution application of the liquidator, the same was ordered to be put up after receipt of the precept and the precept was in fact produced before the court, the order of attachment of 7th August, 1967, cannot be held to be one beyond the jurisdiction of the subordinate judge. On that date, the subordinate judge had full jurisdiction to pass an order of attachment even on the precept which was already before him. But, in the instance case, he had both the precept as well as the application of the liquidator when he passed the order of attachment. The liquidator, under the proviso to section 46, CPC , can keep the attachment alive by making an application for sale of the property. Therefore, by making a formal application for executing the decree by attachment of the bill in question he cannot, in this case, be said to have done anything less than or different from what he is required to do under the law. u/s 46(1) , Civil Procedure Code, a precept is sent to attach a property belonging to the judgment-debtor and the court, on receipt of the precept , has no other alternative than to attach the property, and, in the instance case, the property being not in the possession of the judgment-debtor , in accordance with Order XXI, rule 46, Civil Procedure Code. No valid objection , therefore, could be taken to the maintainability of the execution proceedings not even to the order of attachment made by the court below in this case.

14. We may look at the matter from another aspect. Under Order XXI, rule 11, Civil Procedure Code, by sub-rule (1) thereof, even an oral application is permissible in the specified case mentioned therein. By sub-rule (2) thereof, every application for execution of a decree shall be in writing , signed and verified by the applicant and shall contain in a tabular form the particulars mentioned in (a) to (j) of that sub-rule. By sub-rule (3) :

"The court to which an application is made under sub-rule (2) may require the applicant to produce a certified copy of the decree."

15. Thus, under Order XXI, rule 11, production of a certified copy of the decree is not a mandatory requirement. We may now read Order XXI, rule 17(1), as applicable to Assam in this context :

"On receiving an application for the execution of a decree as provided by rule 11, sub-rule (2) , the court shall ascertain whether such of the requirements of rules

11 to 14 as may be applicable to the case have been complied with : and , if they have not been complied with, the court shall allow the defect to be remedied then and there, or within a time to be fixed by it. If the defect is not remedied within the time fixed, the court may reject the application."

16. So, even under the ordinary procedure laid down in the Civil Procedure Code, the proceeding in execution is not without jurisdiction because of failure to produce a certified copy of the decree as any defect in the application for execution of the same may be rectified by order of the court. Under Part III- A of the Banking Act, special provisions have been introduced in order to provide for speedy disposal of winding-up proceedings and also for better and quicker realisation of the dues of the bank in liquidation, notwithstanding the provisions of the CPC and the Limitation Act. It is, therefore, difficult to accede to the argument that non-production of the certificate of the High Court as laid down u/s 45T(2) of the Banking Act is such a defect as will deprive the executing court of its jurisdiction to proceed in the matter. As a matter of fact, no question of jurisdiction at all arises in this case . What is permissible and possible under the CPC cannot be made to be unavailable to the decree-holder in executing the decree u/s 45T(2) of the Banking Act. It is also clear that under this Chapter, no particular procedure has been laid down as to how, after the making of the application by the liquidator, the executing court will proceed. Since there is no special procedure laid down under the Banking Act, the procedure laid down under the CPC will have to be followed. u/s 45A of the Banking Act, the provisions of the CPC as are not varied by or inconsistent with the provisions of Part III-A or the rules made thereunder shall apply to all proceedings under this part. The executing court, therefore, had the power to entertain the application filed on 20th July, 1967, not only under the proviso to section 46, Civil Procedure Code, but also u/s 45T(2) of the Banking Act read with the relevant provisions under the Civil Procedure Code. The objection which has assumed a different form in the High Court was not even specifically taken before the subordinate judge and, if it had been , it would have been open to the court to order for production of the certificate of the Calcutta High Court. The application for execution could not be dismissed because of this defect.

17. We may, in this connection, refer to a decision of the Supreme Court in *Mohanlal v. Benoy Krishna* 1, where S.R. Das J., as he then was , observed as follows :

" The CPC does not prescribe any particular form for an application for transmission of a decree u/s 39. Under sub-section (2) of that section the court can even suo motu send the decree for execution to another court . It is true that Order 21, rule 6, provides that

(1) *Mohanlal Goenka Vs. Benoy Krishna Mukherjee and Others*, .

the court sending a decree for execution shall send a copy of the decree, a certificate setting forth that satisfaction of the decree had not been obtained by

execution within the jurisdiction of the court and a copy of the order for the execution of the decree, but there is authority to the effect that an omission to send a copy of the decree or an omission to transmit to the court executing the decree the certificate referred to in clause (b) does not prevent the decree-holder from applying for execution to the court to which the decree has been transmitted. Such omission does not amount to a material irregularity within the meaning of Order 21, rule 90, and as such cannot be made a ground for setting aside a sale in execution."

18. The principle which has been upheld in dealing with a case under Order XXI, rule 6, Civil Procedure Code, is applicable to the instant case where the liquidator was making an application u/s 45T(2) of the Banking Act. By order XXI, rule 6, Civil Procedure Code," the court sending a decree for execution shall send --- (a) a copy of the decree; (b) a certificate.....; (c) a copy of any order for the execution of the decree....." Even though the word "shall" is used in Order XXI, rule 6 , the Supreme Court held in only to be directory and the omission to send a copy of the decree or to transmit a certificate as respectively required under (a) and (b) of rule 6 is held not to amount to even a material irregularity, far less illegality, affecting the entire proceeding or the jurisdiction of the court.

19. It is apparent that in the provisions of the Banking Act, the procedure is sought to be abridged and made more convenient and effective and the matter relating to a procedure therefore cannot affect in this case the jurisdiction of the executing court. Rules of procedure are only handmaids of justice, and I cannot resist the temptation of quoting the famous words of Lord Penzance :

"Procedure is but the machinery of law after all the channel and means whereby law is administered and justice reached. It strangely departs from its proper office where in place of facilitating, it is permitted to obstruct and even to extinguish the legal rights and is made to govern where it ought to subserve."

20. The appeal is, therefore, without any merit and is dismissed with costs.

R. S. BINDRA J. -- I agree. BAHARUL ISLAM J. -- I agree.

21. Appeal dismissed.