(1958) 11 MAD CK 0033

In the Madras High Court

Case No : Application No. 456 of 1957 in Original Petition No. 73 of 1953

V.R. Shenoy and Others APPELLANT

Vs

K.R. Raghunath Shenoy and Others RESPONDENT

Date of Decision : 21-11-1958

Acts Referred:

Banking Companies (Amendment) Act, 1950 — Section 45(A), 45(B), 45(E), 45(F), 45(G)
Banking Companies (Amendment) Act, 1953 — Section 45(A), 45(B), 45C
Banking Companies Act, 1949 — Section 11
Companies Act, 1956 — Section 391
Displaced Persons (Debts Adjustment) Act, 1951 — Section 45B

Citation : (1959) ILR (Mad) 715

Hon'ble Judges : Ramachandra Ayyar, J

Bench : Single Bench

Advocate : G. Vasantha Pai and D. Padmanabha Pai, for the Appellant; M.L. Nayak, for the Respondent

Final Decision : Dismissed

Judgement

Ramachandra Ayyar, J.—This is an application purporting to be u/s 45 (B) of the Banking Companies Act for a decree for partition of the

properties set out in the schedule to the application free from the objection of the Respondents and a separate possession of a seven-eighth share

thereof.

2. Applicants 1 to 3 are the sons of K.R. Shenoy, the first Respondent. The fourth applicant is the mother of the latter. It is claimed that the

applicants, along with the first Respondent, formed members of a joint Hindu family. On 21st August 1941, K.R. Shenoy created a usufructuary

mortgage over the two items of properties set out in the application, along with another item in favour of his uncle Subbaraya Shenoy for a sum of

Rs. 18,000 borrowed by him. A period of twenty years was fixed for redemption. On 5th July 1943, Subbaraya assigned his mortgage right to the

third Respondent, the Agricultural and Industrial Bank, Limited, Coondapur, which shall hereafter be referred to as the Bank, and which is now

under liquidation under orders of this Court in Original Petition No. 73 of 1953. On 3rd May 1946, the mortgagor, K.R. Shenoy, sold the equity

of redemption in the two items mentioned in the application to his cousin one Vithaldas. The Bank assigned his rights under the mortgage to the

second Respondent, Security and Investment Corporation (India), Ltd., for a sum of Rs. 4,000. The second Respondent, thereafter, purchased

the equity of redemption in the two items of properties from Vithaldas on 10th December 1948. The result is that the second Respondent became

the full owner of the properties. On 23rd December 1948, the second Respondent created a mortgage by deposit of title deeds over the

properties in favour of the Bank for securing a sum of Rs. 75,000. The bank was ordered to be wound up on 6th April 1953. At the instance of

the official liquidator a preliminary and a final decree on the mortgage have been passed in Application No. 2221 of 1956.

3. Thereupon, the applicants filed the present application for partition claiming that they were entitled to a seven-eighth share in the two items of

properties. In the affidavit in support of their claim, the applicants stated that the properties were joint family properties in the hands of their

grandfather and on his death his widow, the fourth applicant, became entitled to a half share therein, the other half vesting in the three applicants

and the first Respondent in equal shares. It was then stated that all the aforesaid transactions were not supported by consideration, necessity, etc.,

and could not, therefore, operate to create any valid security in the property or any interest in it in favour of the bank for more than one-eighth

share of the first Respondent. Certain other objections to the validity of the assignment created by the third Respondent were also taken. It is clear

from the affidavit that there are other items of properties in the family but the applicants purporting to apply u/s 45(B) of the Banking Companies

Act have applied to this Court for a partition which in effect could only be a partial partition of the joint family properties. They also raised the

question as to the binding nature of the alienation made by the first Respondent in favour of Subbaraya Shenoy and Vithaldas.

4. This application is contested on behalf of the bank. For the present purpose it is unnecessary to refer to the objections raised by the official

liquidator other than the one regarding the maintainability of the application.

5. Mr. M.L. Nayak, learned Counsel for the official liquidator, has contended that an application u/s 45(B) for partition of the family properties

under the circumstances stated above could not be entertained and the remedy of the applicants, if any, was to file a suit in the appropriate Court.

It may be noticed that neither the applicants nor their father, the first Respondent, are shown to be either a debtor, creditor or contributory of the

bank. The claim that is alleged in the application is substantially one for partition of the joint family properties against the first Respondent and for

possession against the second Respondent in respect of the properties if directed to be so divided.

6. The contention on behalf of the applicants is that Section 45(B) is wide enough to include a claim like the present one, as the applicants are also

challenging the extent of security held by the bank. Mr. Vasantha Pai, learned Advocate for the applicants, contends that although the first

Respondent has purported to sell the entire interest in the two items of property to strangers such sale could not validly convey the interest of the

applicants in the property and as the bank has got a security over the property created by the second Respondent, who derived title under the

impugned sale of the first Respondent, the question of the extent of security held by the bank would arise. That he contended being relevant for the

purpose of the liquidation of the bank, this Court could entertain an application for the partition of the suit property. Before considering the

contention of the learned Advocate for the applicants, it is necessary to refer to the provisions of Sections 45(A) and 45(B) of the Banking

Companies Act as amended in 1953.

7. Section 45-A states:

The provisions of this part and the rules made thereunder shall have effect notwithstanding anything inconsistent therewith contained in the Indian

Companies Act, 1956 (Act 95 of 1956) or the Code of Civil Procedure, 1908 (Act v. of 1908), or the Code of Criminal Procedure, 1898 (Act v.

of 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 rules made thereunder shall apply to all

proceedings under this part.

8. Section 45-B states:

The High Court shall, save as otherwise expressly provided in Section 45-C have exclusive jurisdiction to entertain and decide any claim made by

or against a banking company which is being wound up (including claims by or against any of its branches in India) or any application made u/s 391

of the Companies Act, 1956, by or in respect of a banking company or any question of priorities 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.

9. By the amending Act of 1950, Part III-A, containing Sections 45-A to 45-H was first inserted in the Banking Companies Act of 1949. That

part was recast and the present provisions of Sections 45-A to 45-X were introduced by the amending Act of 1953. Under the amending Act of

1950, Section 45-A stated that no other Court other than the High Court exercising jurisdiction in the place where the registered office of the

banking company, which was being wound up, was situate, shall have jurisdiction to entertain any matter relating to or arising out of the winding up

of a banking company. Section 45-B, under the amending Act of 1950, gave power to the High Court to decide all claims made by or against the

banking company and all questions or priorities and all other questions whatsoever whether of law or of fact, which may relate to arise in the

course of the winding up of the banking company coming within the cognizance of the Court. The new Section 45-B inserted by the amending Act

of 1953 takes place of Sections 45-A and 45-B of the amending Act of 1950. On a reference to the provisions of Sections 45-A and 45-B of the

1950 Act, it is clear that the jurisdiction conferred u/s 45-B on the High Court was in respect of those matters in which jurisdiction was excluded

from the other Courts by virtue of Section 45-A ; that is to say, that the matters should relate to or arise in the course of winding up of a banking company.

10. In Associated Banking Corporation of India Ltd. and Others Vs. Nazaralli Kassambhai and Co. and Others, , it is stated that Section 45-A of

the Banking Companies Act ousts the jurisdiction of Courts other than the High Court, and Section 45-B confers a special jurisdiction upon the

High Court. Therefore, the jurisdiction that was conferred on the High Court should relate to or arise out of the winding up of the company.

Section 45-B as enacted in 1953, is of a slightly wider import. Prom the section, as I have set out above, it is clear that exclusive jurisdiction is

given to the High Court to entertain and decide any claim made by the Banking Company, made against the Banking Company, and any question

of priorities arising in the course of the winding up, and any other question whatsoever of law or fact which may relate to or arise in the course of

the winding up of a banking company. In order that the High Court may have jurisdiction to entertain an application u/s 45-B, there should either

be a claim by or against the banking company or a question should arise which should relate to or arise in the course of the winding up.

11. The connotation of the word '' claim'' has been considered by RAMASWAMI J., in Thangia v. Hanuman Bank AIR 1958 Mad. 403. The

learned Judge has held that it is a word of very extensive signification embracing the several species of legal demand, and that the word also

signifies a demand made of a right or a supposed right. But the claim contemplated under the section being one by or against the Banking

Company in liquidation, it should have a relation to the liquidation. Winding up or liquidation is a process by means of which the dissolution of the

company is brought about by the collection and realization of its assets and applying them in payment of its debts, and if there is surplus to return to

the shareholders the sums which they have contributed to the company. On the former aspect the essence of liquidation is realisation of the assets

of the company from its contributories as well as from outside debtors. The claim by the company could, therefore, be only against the debtors and

contributories. So far as the claim against the company is concerned, they may be by the creditors of or even by persons having claims regarding

their property against the company. It is the duty of the liquidator to put all unsecured creditors on an equal footing and pay them pari pasu. In order to effectuate that purpose power is given u/s 45-B to decide questions of priorities. It is, therefore, clear that only those matters that will

facilitate the winding up of the Banking Company, namely, realisation of its assets and distribution of the same amongst the various people entitled

to them that could properly be the subject-matter of enquiry u/s 45-B.

12. In Palmer''s Company Law, nineteenth edition, page 388, the duties of an Official Liquidator are set forth as follows:

They are to take possession of and protect the assets, to make out the requisite lists of contributories and of creditors, to have disputed cases

adjudicated upon, to realize the assets subject to the control of the committee of inspection (if any), in certain matters, and to apply the proceeds in

payment of the company''s debts and liabilities in due course of administration, and, having done, that to divide the surplus amongst the

contributories and to adjust their rights.

13. These are the relevant questions that can come in winding up proceedings, and which have to be adjudicated upon u/s 45-B. It cannot be said

that the claim of the applicants in the present cases for partition can come under any one of these categories. The second Respondent is the debtor

to the bank. There is no dispute between the second Respondent and the bank in regard to the validity of the mortgage. Such title as the second

Respondent had should be held to have been secured to the bank. The fact that the second Respondent''s title may be defective, if the first

Respondent had exceeded his powers as a Hindu father cannot make that question as one relating to or arising out of the winding up of the banking

company.

14. Mr. Vasantha Pai, in an able argument, referred me to the various decisions as supporting his contention. Dhirendra Chandra Pal Vs.

Associated Bank of Tripura Ltd. (In Liquidation), , was relied on to show that Section 45-B comprehends all sorts of claims which relate to or

arise in the course of the winding up of a banking company. Belying upon that decision, the learned Counsel contended that '' in the course of the

winding up of a company'' should be held to mean '' during the course of the winding up of a company''. That is to say, if any dispute arises while

the winding up proceedings of a banking company was pending, that question, if it affected in any way the banking company, should be investigated by the concerned High Court.

15. In this connexion, he relied upon the decision in Jadunath Roy and Others Vs. Bank of Calcutta Ltd., , where the learned Judges held that the

expression '' in the course of winding up '' mean '' during winding up ''. The decision in Dhirendra Chandra Pal Vs. Associated Bank of Tripura

Ltd. (In Liquidation), , related to a dispute between a person who was a tenant of the bank and the Official Liquidator and the Supreme Court held

that the dispute which culminated in the decree for ejectment of the tenant would come within Section 45-B. It is clear that the question arose at

the instance of a tenant of a bank in regard to property held by the bank. That would, therefore, be a claim against the bank.

16. Shri Ram Narain Vs. The Simla Banking and Industrial Co. Limited, , was next relied on. In that case there was an order against the bank in

favour of a displaced person under the provisions of the Displaced Persons Debt Adjustment Act of 1951. The banking company against whom

the order was passed went into liquidation. In execution of the order, certain properties of the bank were attached by the Bombay High Court.

The Punjab High Court, in whose jurisdiction the Banking Company was situate set aside the order of the executing Court on the ground that the

former Court alone had jurisdiction u/s 45-B of the Act. The Supreme Court held that the proceedings to execute the decree and claims and

matters which necessarily arose in the course of execution fell within the scope of Section 45-B and that the execution proceedings would be within

the exclusive jurisdiction of the Punjab High Court. It may be noticed that in both the cases which went before the Supreme Court the claim was

either by the bank in respect of its property, or against the bank in respect of its liability.

17. I have already referred to the decision in Jadunath Roy and Others Vs. Bank of Calcutta Ltd., . That was a case for partition of the properties

as against the bank which evidently had a share therein. Pending the suit for partition, the winding up of the bank ensued. It was held that the

proceedings for final decree for partition should be transferred to the High Court u/s 45-B. There again the question related to the property held by

the bank in which a co-sharer wanted to have a partition. In Associated Banking Corporation of India Ltd. and Others Vs. Nazaralli Kassambhai and Co. and Others, , the suit was filed by the Official Liquidator against a debtor of the bank in the City Civil Court, Bombay. A question arose

as to whether the suit had to be filed in the High Court u/s 45-B of the Act or whether it was only cognizable by the City Civil Court as the value of

the subject-matter was within its competence. It was held that the phrase '' relating to winding up '' is of wider and of more extensive import than

the expression '' arising out of the winding up '', and that a suit filed for recovery of a debt due by the debtor to the bank is helping to wind up the

affairs of the company and assisting in the ultimate distribution of the assets of the company.

18. In Discount Bank of India Ltd., Delhi Vs. Triloki Nath and Others, , there was a claim by the bank against its constituent by way of a suit

against the constituent. That was sought to be transferred to the High Court u/s 11 of the Banking Companies Act. It was held that the realisation

of a debt due to the bank is a matter relating to the winding up.

19. In Gurbinder Singh and Others Vs. Munshi Ram and Others, a question arose as to whether a suit by an assignee of a mortgage from a bank

on the mortgage against a third party would come under the provisions of Section 45-B of the Act. The bank was subsequently impleaded as a

party to the suit and the learned Judges held that there were certain pleas which would affect the bank, and would amount to a claim against the

bank, and the suit was, therefore, exclusively triable by the High Court.

20. In Thangia v. Hanuman Bank AIR 1958 Mad. 403, RAMASWAMI J., held that an application for patta under the Madras Estates Land Act,

though made under a special Act, could be entertained only by the Court in charge of the liquidation of the bank. The learned Judge considered all

the relevant authorities on the subject. In that case, the claim was in regard to a property held by the bank, so that it was really a claim against the

bank.

21. There are two decisions of the Orissa High Court to which reference should be made now. In H. Naik, O.L. Puri Bank Ltd. Vs. Jitendranath

Das, , it was decided that the question as to whether a debtor of a banking company under liquidation should be adjudged an insolvent and should

get the protection of the Insolvency Act is a matter relating to the winding up of the banking company, and consequently the High Court alone had exclusive jurisdiction to decide that question and all other questions arising out of the same, and that the District Court which had jurisdiction, under

the Provincial Insolvency Act was not competent to entertain the petition of the judgment-debtor. The learned Judge held that the solvency of the

debtor of a banking company, and the question as to whether he should be given protection under the Insolvency law were matters so intimately

connected with the realisation of the assets of the banking company, that it should be fairly inferred that they relate to the winding up of the

company. I have great doubts, in my mind, as to the correctness, of that decision. The adjudication of an insolvent involves a question of status and

it is only the Courts which have got a jurisdiction in that regard that can adjudicate a person as an insolvent. Though the adjudication of a debtor

ultimately leads to realisation by the creditor of his dues, it cannot be said that adjudication of an insolvent is a method of collecting the debt. It may

be difficult to say that an adjudication of a debtor as an insolvent, which depends upon acts of insolvency being committed and other statutory

requirements being satisfied is a matter so intimately connected with the realization of the bank''s assets. Although an argument of convenience is

not always a safe guide for the interpretation of an enactment, I must point out that if adjudication of debtors to the bank is transferred to the High

Court u/s 45-B of the Banking Companies Act, it will lead to complications; for in the process of administering the affairs of the bank, a Court will

have to administer the estate of all its insolvent debtors which will bring in its train various problems and difficulties.

22. In H. Naik, Official Liquidator, Puri Bank Ltd. Vs. Kanhu Charan Das, an estate which was subject to a mortgage in favour of a bank under

liquidation was taken over by the Government under the provisions of the Orissa Estates Abolition Act (Act I of 1952). That Act provided for a

compensation being given to the owners in instalments. The question arose as to whether the amount due to the banking company could be realized

in one lump sum or in instalments. It was held that such a question would come within the exclusive jurisdiction of the High Court. The learned

Judge held that the provisions of Section 37(3) of the Orissa Estates Abolition Act should give way before Section 45-B of the Act and that the

Official Liquidator should apply to the Court and not before the Claims Officer for the determination of the amount payable to the company out of the total compensation payable for the acquisition of the estate of the debtor. I am of the view that this decision may require reconsideration.

Section 45-B is only a rule of procedure, and it creates no substantive right in the bank over the security higher than what its own mortgagor had. If

the right of the debtor was only to obtain compensation in the manner prescribed by the statute, Section 45-B cannot be read so as to confer a

higher right on him and invest power in a civil Court to decide what it was prohibited to do.

23. It is clear from the decisions referred to above, except the two decisions of the Orissa High Court, that Section 45-B would apply only to

cases where there is a claim by or against the banking company, i.e., questions which related to or affected the realization or disposal of the assets

held by the bank. Such claims would necessarily have a connexion with the winding up of the company. The present case is one for partition as

against the father, the first Respondent. The banking company itself is not the owner of the property ; so that it cannot be said that it is a claim

against the bank. It is no doubt true that the banking company has got a security over the property and perhaps is interested in the full security

being preserved to it intact to enable the realization of its dues. That interest is nothing more than a commercial interest. The mere fact that the bank

is interested in the security cannot mean that the applicants have a direct claim against the bank. It may be that the share of the first Respondent

alone may be sufficient to cover the dues to the bank, or it may be that the bank may decide to bring to sale the right, title and interest of its debtor,

leaving it to the purchaser to get the quantum of rights in the property agitated in a proper Court ; or the bank may sell the outstanding itself to a

third person. In none of these cases will the bank be interested in the claim of the applicants. In an ordinary partition suit by a member of a joint

Hindu family, the creditor or mortgagee is not a necessary party. In certain cases the creditors are impleaded as proper parties, so that their claims

can be adjudicated upon and provision made for the payment of the debt. But no decree can be passed in favour of the creditor in the partition

suit. The mortgagee not being a necessary party, it cannot be held that in the partition suit the claim is against the bank who is the mortgagee.

24. In Krishnamurthy Pillai v. Sundaramurthi Pillai ILR (1931) Mad. 558, RAMESAM J., observed that the function of the Insolvency Court was

to distribute the assets between the creditors and not decide partition suits, or other questions between the insolvent and the rest of the world. I am

of opinion that that principle would apply to the present case as well. To hold otherwise would be to make the Court in charge of liquidation

proceedings take upon itself the administration of the properties of the constituents of a bank in liquidation. A partition suit generally comprised

several claims, claims of the sharers, of maintenance-holders, of creditors of the family, etc. It is but proper that such suits are disposed of in the

usual course rather than in the summary procedure envisaged by Section 45-B of the Act. If Section 45-B is so construed as to result in bringing

into Court in charge of liquidation proceedings the family partition of the bank''s debtors, it would not merely encumber the work of the Court, but

entangle the liquidation proceedings in endless litigation, and far from achieving the speedy disposal of the liquidation of the company, the liquidator

would be faced with almost perpetual litigation. Besides these, it will involve great hardship upon the various members and debtors of the family

who may have to come from far off places to agitate the partition claim in the High Court.

25. I am, therefore, of opinion that the claim in the present case is not congnizable by this Court u/s 45-B of the Banking Companies Act, and I

dismiss the application. No costs. The official liquidator can take the costs out of the funds in his hands.

