State Bank of India

Vs

Ghamandi Ram (Dead) through Gurbax Rai

Civil Appeal No. 449 of 1966

(J.C. Shah, V. Ramaswami -I, A.N. Grover JJ)

13.02.1969

JUDGMENT

RAMASWAMI, J. -

1. Messers Ghamandi Ram Gurbax Rai, a joint Hindu family firm consisting of Ghamandi Ram, since deceased, Gurbax Rai, Chaman Lal and Jagan Nath, used to carry on business in Bhawalpur State now forming part of West Pakistan, before the partition of India. Shri Ghamandi Ram was the manager and Karta of the said joint Hindu family firm during the material period. Before the partition of India, the joint Hindu family firm had a cash credit account in its name in the then Imperial Bank of India, Bhawalpur State, now within Pakistan territory. The said firm had pledged goods as security for the repayment of the advances made in the said account. On the partition of India, the joint Hindu family and its members admittedly became evacuees and the then Imperial Bank of India, Bhawalpur State, sold the pledged goods in the year 1948 for the realisation of its dues in the said cash credit account and credited a sum of Rs. 2,541/11/- left as surplus balance after the adjustment of the dues of the Imperial Bank of India, in the said account. On October 15, 1949, the Pakistan Government promulgated Pakistan (Administration of Evacuee Property) Ordinance, 1949 (Ordinance No. XV of 1949), whereby all property in Pakistan in which an evacuee had any right or interest vested in the Custodian of Evacuee Property with retrospective effect from March 1, 1947. The expression 'evacuee property' was defined by Section 2, sub-section (3) of the Ordinance to include any right or interest in joint Hindu family property. 'Cash deposits in Banks' were however excepted from the definition of the term 'property' by Section 2(5) of the Ordinance. The Ordinance was amended in 1951 by the Pakistan (Administration of Evacuee Property) Amendment Act, 1951 (Act No. VI of 1951), whereby Section 2(5) of the Ordinance was amended so as to bring cash deposits in Banks within the definition of the term 'property'. By a notification, dated February 19, 1952, the Pakistan Government exempted from the operation of the provisions of the said Ordinance 'cash deposits made at Banks by persons other than companies or associations or bodies of individuals whether incorporated or not'.

2. On May 9, 1959, Shri Ghamandi Ram (now deceased) as manager and Karta of the joint Hindu family firm filed an application under Section 13 of the Displaced Persons (Debts Adjustments) Act, 1951 (Act No. 70 of 1951), before the Tribunal constituted under the said Act at Delhi claiming Rs. 3,165/11/- including Rs. 2,341/11/- on account of the said principal and interest at 6% per annum on the ground that the said amount had not become evacuee property and the liability of the Imperial Bank of India had not therefore ceased. During the pendency of the proceedings before the Tribunal the appellant Bank was constituted under the provisions of the State Bank of India Act, 1955 (Act No. 23 of 1955), and succeeded to the entire rights and liabilities of the Imperial Bank of India. The appellant was accordingly substituted in the said proceedings for the Imperial Bank of India. By its

order, dated November 1, 1956, the Tribunal dismissed the application of the respondent on the ground that in terms of the law enforced in Pakistan the deposit in the Bank in the account of the firm had become an evacuee property and would be deemed to have vested in the Custodian with effect from March 1, 1947 and by virtue of the said vesting the liability of the Bank had ceased. The Tribunal further held that the only property in the pledged goods, which belonged to the firm, was the equity of redemption and that had vested in the Custodian being a 'property' within the meaning of the said Ordinance. The respondent took the matter in revision before the Punjab High Court being Civil Revision No. 104-D of 1958. The application was allowed by Mr. Justice D. K. Mahajan by his judgment, dated 12th September, 1963, on the ground that the amount claimed by the respondent was cash deposit made by an individual in terms of the notification, dated February 19, 1952 and was thus beyond the purview of the provisions of the Ordinance. The learned Judge accordingly set aside the order of the Tribunal and granted a decree in favour of the respondent for the amount claimed. This appeal is brought by special leave from the judgment of the Punjab High Court, dated 12th September, 1963, in Civil Revision No. 104-D of 1958.

3. Section 2, sub-section (3) of the Pakistan (Administration of Evacuee Property) Ordinance, 1949 (Ordinance No. 15 of 1949), defines the term 'evacuee property' as meaning any property in which an evacuee has any right or interest, or which is held by or for him in trust, and includes :

> "(a) any right or interest in joint Hindu family property which would accrue to the evacuee upon the partition of the same, or
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> (b) property obtained from an evacuee after the twenty-eight day of February, 1947, until confirmed by the Custodian,
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> but does not include -
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> (i) any movable property in the immediate physical possession of any evacuee, or
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> (ii) any property belonging to a joint stock company the head office of which was situated before the fifteenth day of August, 1947, in any place in the territories now comprising India, and continues to be so situated after the said date."

Section 2, sub-section (5) defines the term 'property' as follows :

> "'property' means property of any kind, and includes any right or interest in such property and any debt or actionable claim, but does not include a mere right to sue or a cash deposit in a bank."
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> Section 2(5) of the Ordinance was amended by Pakistan (Administration of Evacuee Property) Amendment Act, 1951 (Act No. VI of 1951), in the following manner :
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> "2(b) in clause (5) the words 'or a cash deposit in Bank' shall be omitted".
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> Section 6 of the Ordinance states :
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> "6(1) All evacuee property shall vest and shall be deemed always to have vested in the Custodian with effect from the first day of March, 1947."

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The notification of February 19, 1952, issued by the Pakistan Government in exercise of the powers conferred by Section 45 of the Ordinance is in the following terms :

"In exercise of the powers conferred by Section 45 of the Pakistan (Administration of Evacuee Property) Ordinance XV of 1949, the Central Government in suppression of its Ministry's Notification F. 22(1) 51-P, dated the 9th May, 1951, is pleased to exempt from the operation of the provisions of the said Ordinance cash deposits made at Banks by persons other than companies or associations or bodies of individuals whether incorporated or not."

Section 7 of the Ordinance states :

> "7. (1) Every person who is, or has at any time after the twenty-eight day of February, 1947, been in possession, supervision or management of any evacuee property, shall be deemed to hold or to have held, as the case may be, such property on behalf of the Custodian.
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> (2) Every person who is in possession, supervision or management of any evacuee property or property which he knows or has reason to believe is evacuee property shall, as soon as may be but not later than sixty days from the commencement of this Ordinance, intimate to the Custodian in writing his willingness to surrender such property to the Custodian or to any person authorised by the Custodian in this behalf upon receipt of a notice from the Custodian that the property is evacuee property, and shall surrender the same if called upon by the Custodian or any person authorised as aforesaid.
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> (3) The provisions of sub-section (2) shall not apply to any person who is in possession, supervision or management of any evacuee property be virtue of an allotment made by a Rehabilitation Authority."

Section 7 of the Ordinance was amended in 1951 in the following terms -

> "5. In sub-section (2) of Section 7 of the Ordinance, for the words "sixty days from the commencement of this Ordinance" the words "such date as may be notified by the Central Government in the Official Gazette" shall be substituted, and the words 'upon receipt of a notice for the Custodian that the property is evacuee property' shall be omitted."

Section 11 of the Ordinance states :

> "11. (1) Any amount due to any evacuee, or payable in respect of any evacuee property, shall be paid to the Custodian by the person liable to pay the same.
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> (2) Any person who makes a payment under sub-section (1) shall be discharged from further liability to pay to the extent of the payment made.
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> (3) Without prejudice to any penalty to which he may be liable under Section 29, any person who makes or has made any payment otherwise than in accordance with sub-section (1) or any law for the time being in force requiring payment of any such amount as is mentioned in sub-section (1) to be made to the Custodian shall not be discharged from his obligation to pay the amount due, and the right of the Custodian

to enforce such obligation against such person shall remain unaffected."

4. The first question involved in this appeal is whether upon a correct interpretation of the notification of the Pakistan Government, dated February 19, 1952, the Joint Hindu family firm 'Ghamandi Ram Gurbax Rai' was 'a body of individuals' within the meaning of the notification and whether the amount in dispute had accordingly become vested in the Custodian of Evacuee Property, Pakistan, with effect from March 1, 1947, by virtue of the provisions of the Ordinance thereby divesting the said joint Hindu family firm of its interest therein.

5. According to the Mitakshara school of Hindu Law all the property of a Hindu joint family is held in collective ownership by all the coparceners in a quasi-corporate capacity. The textual authority of the Mitakshara lays down in express terms that the joint family property is held in trust for the joint family members then living and thereafter to be born (see Mitakshara, Ch. I, 1-27). The incidents of co-parcenership under the Mitakshara law are : first, the lineal male descendants of a person up to the third generation, acquire on birth ownership in the ancestral properties of such person; secondly, that such descendants can at any time work out their rights by asking for partition; thirdly, that till partition each member has got ownership extending over the entire property, conjointly with the rest; fourthly, that as a result of such co-ownership the possession and enjoyment of the properties is common; fifthly, that no alienation of the property is possible unless it be for necessity, without the concurrence of the coparceners, and sixthly, that the interest of a deceased member lapses on his death to the survivors. A coparcenary under the Mitakshara School is a creature of law and cannot arise by act of parties except in so far that on adoption the adopted son becomes a co-parcenor with his adoptive father as regards the ancestral properties of the latter. In Sundaranam Maistri v. Harasimbhulu Maistri and Another. (ILR 25 Mad. 149 at 154).

Mr. Justice Bhashyam Ayyangar stated the legal position thus :

> "The Mitakshara doctrine of joint family property is founded upon the existence of an undivided family, as a corporate body (Gan Savant Bal Savant v. Narayan Bhond Savant) (ILR 7 Bom 467) and Mayne's 'Hindu Law and Usage', 6th edition, Paragraph 270) and the possession of property by such corporate body. The first requisite therefore is the family unit; and the possession by it of property is the second requisite. For the present purpose, female members of the family may be left out of consideration and the conception of a Hindu family is a common male ancestor with his lineal descendants in the male line, and so long as that family is in its normal condition, viz., the undivided state - it forms a corporate body. Such corporate body, with its heritage, is purely a creature of law and cannot be created by act of parties, save in so far that, by adoption, a stranger may be affiliated as a member of that corporate family."

6. Adverting to the nature of the property owned by such a family the learned Judge proceeded to state :

"As regards the property of such family, the 'unobstructed heritage' devolving on such family, with its accretions, is owned by the family, as a corporate body, and one or more branches of that family, each forming a corporate body within a larger corporate body, may possess separate 'unobstructed heritage' which, with its accretions, may be exclusively owned by such branch as a corporate body."

7. Having regard to the juristic nature of the Hindu joint family, according to the doctrine of

Mitakshara, we are of the opinion that the Hindu joint family firm of Ghamandi Ram Gurbax Rai cannot be treated as an 'individual' within the meaning of the notification of the Pakistan Government, dated 19th February, 1952, but the said firm must be treated as 'a body of individuals whether incorporated or not' within the meaning of that notification.

We proceed to consider the next question arising in this appeal viz., whether the liability of the appellant to the respondent in India would be deemed to be extinguished in view of the operation of the Pakistan Evacuee Property Ordinance and in view of our finding that the amount in dispute had become vested in the Custodian of Evacuee Property, Pakistan, with effect from March 1, 1947, by virtue of the provisions of the Ordinance. It is not disputed that the appellant had got garnishable assets in Pakistan out of which the Pakistan Government could realise the amount by attachment of the property of the appellant. The question is : what is the rule of Private International Law in such a case of involuntary assignment of debts ? The question has arisen in English Courts with regard to the legislation passed during or after a war by which the contractual rights of the enemies vested in the public authorities such as custodians or administrators of enemy property. It was held in English Courts that in such a case the question whether a given contractual right, e.g. a debt, is transferred under such legislation and whether therefore payment to a custodian or administrator has the effect of discharging the debtor, depends on the situs of that right and not so much on the proper law of the contract from which the right arises. (See Dicey Conflict of Laws, 8th Ed., p. 780). For example in Arab Bank Ltd. v. Barclays Bank (Dominion, Colonial and Overseas) (1954 AC 495), the appellant Bank had a credit balance on the current account with the respondent bank's branch in Jerusalem. The British Mandate over Palestine expired at midnight on May 14, 1948, and thereupon the Provisional Council of State and the Provisional Government of the State of Israel were constituted. War broke out between Israel and the Arab States, which rendered the further performance of the contract of current account impossible. From the date of the termination of the Mandate the appellant Bank's premises were situate in Arab-controlled territory and the respondent Bank's premises were situate in Israel territory. By legislation the State of Israel vested in an official called the 'Custodian of the Property of Absentees', the property in the State of Israel belonging to a class of persons and corporations which included the Arab Bank. The respondents paid the appellants' credit balances, amounting to some pound 583000 to the custodian. In 1950 the appellants sued the respondents for this sum. It was held that the right to be paid the credit balance survived the outbreak of war, remaining in existence subject to the suspension of the appellant bank's right to recover it. Being locally situate in Israel, it became subject to the legislation of that state and vested in the custodian, and was not recoverable by the appellant bank from the respondent bank. The key to the problem lies in distinguishing between (1) questions of assignability, which are governed by the proper law of the debt, and (2) questions of attachment or garnishment (involuntary assignment) governed by the lex situs of the debt. If, for example, an involuntary assignment occurs after a voluntary assignment has already been made, the lex situs determines whether the rights of the voluntary assignee have been postponed or defeated. If the voluntary assignment occurs first, the lex situs determines what rights, if any, the voluntary assignee has acquired. A question of priorities arose in the case of Re Queensland Mercantile and Agency Co., ((1891) 1 Ch 536) the facts of which were as follows :

"The Union Bank of Australia held debentures issued by the Queensland Company charging the shares in that company that were not fully paid up. The Bank was domiciled in England and the company in Queensland. After the capital had been called up, nut before it was paid by the shareholders, who thus became debtors of the company, the Company domiciled in Scotland, began an action for negligence in Scotland against the Queensland Company, and immediately issued the Scottish process of arrestment against numerous shareholders who were domiciled in Scotland. The

effect of this process according to Scottish law was to prevent the shareholders, pending a decision in the action of negligence, from paying the calls to the company."

The question that fell to be decided was whether the Union Bank, as debenture-holders, were entitled to be paid first out of the unpaid shares, according to the law of England and of Queensland; or whether the Company in accordance with the law of Scotland, had a prior right over the shares to the extent of the damages that they might be awarded in the action of negligence.

A question of priorities between two assignees was thus raised. The Union Bank contended that the question fell to be decided by the law of Queensland, since the Queensland Company was a creditor in respect of the unpaid shares and any assignment by it must be tested by the law of its domicile. North, J., however, applied Scottish Law. His reasoning was that since the debtors were resident in Scotland and therefore the unpaid calls which formed the subject-matter of the assignments were situated in that country, the assignments must rank in the order prescribed by Scottish Law. He assimilated choses in action to tangible movables, asserting that an assignment of the latter class of property was governed by the lex situs. In our opinion the same legal position prevails in India and therefore the liability of the appellant in this case to the respondent in India must be deemed to have been extinguished.

For these reasons we hold that this appeal should be allowed, the judgment of the Punjab High Court, dated 12th September, 1963, in Civil Revision No. 104-D of 1958 should be set aside and the judgment of the Tribunal under the Displaced Persons (Debt Adjustment) Act in case No. 74/11/13 of 1956/1952 should be restored dismissing the claim of the respondent. There will be no order with regard to costs in the High Court. But as directed by this Court on 30th October, 1964, while granting Special leave, appellant will pay the cost of the respondents in this Court.

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