Agencia Commercial International Limited and Others

Vs

Custodian of The Branches of Banco Nacional Ultramarino

Civil Appeals Nos. 2475 to 2477 and 2579 of 1969

(Baharul Islam, O. Chinnappa Reddy, R. S. Pathak JJ)

30.07.1982

JUDGMENT

PATHAK, J. -

1. These appeals by certificate granted by the Additional Judicial Commissioner of Goa, Daman & Diu arise out of suits for the recovery of loans made to the appellants at various Branches of the Banco Nacional Ultramarino in Goa during Portuguese rule.

2. The territories of Goa, Daman & Diu constituted the Estado de India of the sovereign State of Portugal. The Banco Nacional Ultramarino (the National Overseas Bank) with its Head Office at Lisbon in Portugal, carried on banking business in Goa at different Branches, some of them being situate at Vasco Da Gama, Margao and Panjim. It was also a currency-issuing Bank and discharged the functions of a Government Treasury. It issued Portuguese currency notes in Goa, and in its banking capacity it received deposits and granted loans.

3. On December 20, 1961 the territories of Goa, Daman & Diu were liberated from Portuguese rule and integrated with India. On the eve of the transfer of power the Banco Naciaonal Ultramarino closed its Branches at Goa and removed a substantial portion of the valuable assets held there to its Head Office at Lisbon and to other places overseas.

4. To provide for the administration of the liberated territories the President of India promulgated the Goa, Daman & Diu (Administration) Ordinance, 1962, which on March 27, 1962 was replaced by the Goa, Daman & Diu (Administration) Act, 1962 enacted by Parliament, By virtue of sub-section (1) of Section 5 of the Act all laws in force immediately before "the appointed day" (December 20, 1961) in Goa, Daman & Diu were to continue to be in force therein until amended or repealed by a competent legislature or other competent authority.

5. The closure of the Branches of the Banco Nacional Ultramarino at Goa gave rise to considerable confusion. It was necessary to take measures for the exchange of over nine crore rupees worth of Portuguese currency notes for Indian currency, and likewise to provide for the repayment of moneys and the return of valuables deposited with the Branches. As the Banco Nacional Ultramarino had closed those Branches no one could operate on them. To relieve the common confusion and distress, the President of India promulgated, under Article 240 of the Constitution, the Goa, Daman & Diu (Banks Reconstruction) Regulation, 1962 (hereinafter referred to as 'the Regulation'). Section 3 declared that in view of the closure of the branches and the transfer of a substantial portion of their assets out of India on or about the "appointed day" and the difficulties experienced by depositors, the Branches would, as from that day, be reconsturcted in the interests of the general public in

accordance with the provisions of the Regulation. An examination of the provisions which follow shows that the Branches were integrated into a fully constituted Bank independent of the Banco Nacional Ultramarino, the purpose being to dispose of the business pending on December 20, 1961, with no fresh business being undertaken, and its functions being confined to the discharge of existing liabilities and the recovery of existing debts and other assets with a view to the ultimate winding up of the Bank. A Custodian was appointed by the Central Government to take charge of the Bank. The properties and assets as well as the obligations and liabilities of the Bank stood transferred to and vested in him, and he was empowered to realise any debts or other amounts due to the said Branches including any debts or other amounts due from the Head Office of the Banco Nacional Ultramarino.

6. On March 30, 1963, the Custodian filed a suit in the Court of the Civil Judge at Ilhas, Panaji against the Agencia Commercial Internacional, its managing partner, Jose Antonio Gouveia and his wife Geraldina Pereira Gouveia, alleging that the Branch of the Banco Nacional Ultramarino at Panaji had, pursuant to a request of the Agencia, opened a current account in its favour up to the limit of Escudos 300,000$00 for three months renewable at 4 per cent interest, 3 per cent fine, 1 1/4 per cent quarterly commission, penal interest at 6 per cent and court expenses, the loan account being secured by a promissory note with its maturity date in blank, executed by the Agencia and guaranteed by the managing partner and his wife. The limit was raised subsequently, and the excess was also guaranteed by a promissory note with its maturity date in blank and signed by the defendants. The plaintiff stated that the loan account showed a debit balance of Escudos 428,612$37, equivalent to Rs 71,435.40, in favour of the Panjim Branch of the Banco Nacional Ultramarino, the account being closed on December 20, 1961 and the balance thereof becoming payable. It was stated further that the promissory notes were not in the possession of the plaintiff and could be presumed to have been removed to Portugal. The plaintiff prayed for a joint and several decree against the defendants for Rs 71,435.40 with accrued interest, penal interest, commission, fine and court expenses.

7. The suit was resisted by the defendants, principally on the ground that the Banco Nacional Ultramarino was a Public Limited Company with its Head Office at Lisbon, that the Branch at Punjim did not possess a separate juridical personality from the Company and could not be said to posses assets or libility of its own, that transactions by the Panjim Branch were made under the direct superintendence of the Head Office and credit was granted directly by the Head Office, and that the credit in question was incorporated in promissory notes lying with the Banco Nacional Ultramarino which had already informed its debtors that it would take action on the bills directly or by transfering them to a third party. It was also pleaded that the debtors could be compelled to pay the credit incorporated in a promissory note only when the creditor returned the promissory note for payment, so that future duplication of payment would be avoided. The defendents asserted that Escudos 25,794$45, equivalent to Rs 4,234.09, had been entered to their credit in the Bank account and that they were entitled to a set-off. The plaintiff filed a replication to the written statement of the defendants, and the defendants followed with a rejoinder. Civil suits were also filed by the Custodian against other defendants in respect of similar transactions, and a substantially similar defence was set up in all of them. The suits were instituted in the Court of the Civil Judge, Senior Division at Margo. Some of the suits filed at Margo were tried by Shri E.S. Silva, Comarca Judge, while the other by Shri Justino Coelho, Comarca Judge. The preliminary objections to the maintainability of the suits found favour with Shri Silva, and he dismissed the suits before him altogether. Sheo Coelho, however, found it necessary to try the suits instituted in his court on their merits, and he decreed them against the original debtor as well as the guarantor and surety. The lone suit decided by Shri Ataide Lobo, the Comarca Judge, Ilhas at Panaji was decreed against the

principal debtor but dismissed against the guarantors.

8. Ten appeals were filed before the Addittional Judicial Commissioner. The Additional Judicial Commmissioner dismissed the appeals against the judgment of Shri Ataide Lobo. Allowing the appeals against the judgments of Shri E.S. Silva, he decreed the suits and granted the reliefs claimed by the Custodian. The appeals against the judgment of Shri Justino Coelho were dismissed except that the appeal filed by Amalia Gomes Figueiredo, one of the guarantors, was allowed and the suit dismisssed as against her.

9. The Additional Judicial Commissioner held that the Regulation effected a reconstruction of the Branches in Goa, Daman & Diu of the Banco Nacional Ultramarino, that the rights and obligations of the Branches referred to in the Regulation must be understood to mean the rights acquired and the obligations undertaken by the Banco Nacional Ultramarino through those Branches and therefore the Custodian was entitled to maintain the suits and sue for the realisation of debts arising out of transactions entered into through those Branches. The additional Judicial Commissioner also held that as the execution of the negotiable instruments had been admitted in the written statements and it was commonly agreed that they were not within the reach of the Custodian, having been removed by the officers of the Banco Nacional Ultramarino to Libson or elsewhere on December 20, 1961, there was nothing to preclude the Custodian claiming relief without producing those negotiable instruments. He also repelled the contetion that the bills of exchange and the promissory notes could on endorsement by the Banco Nacional Ultramarino in favour of others result in the defendants having to make payment a second time. He recorded an oral undertaking furnished by the Custodian that in the event of a decree in such suits the Custodian would render compensation to the defendant to the extent that the Custodian had made realisation pursuant to the decrees under appeal. Having regard to Article 53 of the Uniform Law on Bills of Exchange and Promissory Notes, the Additional Judicial Commissioner held that the holder had lost his right of recovery against all except the acceptor in respect of whom, observed the Judicial Commissioner, the suits were within time in view of Article 70 of the Uniform Law.

10. Shri V.M. Tarkunde appearing for the appellants in Civil Appeal No. 2476 of 1969 contends that the loans were granted by the Head Office of the Banco Nacional Ultramarino, and not by the Branches at Goa, and that as the properties and assets, rights and claims of the Branches alone vested in the Custodian under the Regulation, the Custodian was not entitled to sue for recovery of the loans granted by the Head Office. Shri Tarkunde relies on the distinction made by the Regulation between the Head Office and the Branches of the Bank and says that they have been regarded as separate entities. Shri Tarkunde further says that even if the suits are held maintainable, the Additional Judicial Commissioner erred in not proceeding further to determine whether the appellants were entitled to credit for the adjustments claimed by them in the loan accounts.

11. Shri Naunit Lal, appearing for the appellants in Civil Appeals Nos. 2475, 2477 and 2579 of 1979, adopts the submissions of Shri Tarkunde.

12. Shri F.S. Nariman, appearing for the appellants in Civil Appeals Nos. 2464 to 2468 of 1969, also disputes the maintainability of the suits. He has strenuously urged that no dichotomy can be envisaged between the Head of the Banco Nacional Ultramarino and its Branches in Goa, and it is only the Banco Nacional Ultramarino at its Head Office at Lisbon which can sue for recovery of the debts. Alternatively he contends that even if the Head Office and the Branches can be regarded in law as separate entities some, if not all, of the loans had been extended directly by the Head Office and in respect of them, he says, the Regulation cannot be applied. He also urges that even if all the

transactions are held covered by the Regulation, the suits cannot be decreed as there is no statutory discharge of the appellants' liability to the Banco Nacional Ultramarino in respect of the debts. The indemnity offered by the Custodian, he urges, is of no value in law. Another reason why the suits cannot be decreed, says Shri Nariman, is because the promissory notes have not been produced.

13. There has been considerable dispute on the point whether the transactions were entered into by the Branches of the Banco Nacional Ultramarino or could be attributed to the Head Office at Lisbon. It seems to us clear from the material on the record that the appellants entered into the loan agreements with the Banco Nacional Ultramarino, and the Head Office of the Bank at Lisbon authorised the relevant Branch at Goa to give effect to the agreement. The evidence is clear that the agreements were signed on behalf of the Bank by the Manager of the relevant branch and the loan accounts were opened by the Branches in their books, that payments were made by the Branches to the appellants, that deposits by way of repayment were made by the appellants in these accounts maintained by the Branches, and the appellants pledged or hypothecated their goods in favour of the Branches; in short while the Head Office authorised the Branch to execute the agreements the transactions were regarded for all purposes as transactions pertaining to the respective Branches, to be actually controlled and worked out by them. The suits, it may be noted, were filed on the basis of the balance recorded in the accounts books of the relative Branch.

14. Now it is indisputable as a general proposition that a body corporate and its branches are not distinct and separate entities from each other, that the branches constitute mere components through which the corporate entity expresses itself and that all transactions entered into ostensibly with the branches are in legal reality transactions with the corporate body, and it is with the corporate body that a person must deal directly. But it is also now generally agreed that in the case of a Bank which operates through its Branches, the Branches are regarded for many purposes as separate and distinct entities from the Head Office and from each other. This Court observed in Delhi Cloth and General Mills Co., Ltd. v. Harnam Singh ((1955) 2 SCR 402, 422 : AIR 1955 SC 590 : 1955 SCJ 645) :

In banking transactions the following rules are now settled : (1) the obligation of a bank of pay the cheques of a customer rests primarily on the branch at which he keeps his account and the bank can rightly refuse to cash a cheque at any other branch : Rex v. Lovitt (1912 AC 212, 219 : 105 LT 650 (PC)), State Aided Bank of Travancore v. Dhrit Ram (69 IA, 1, 8, 9 : AIR 1942 PC 6 : 198 IC 753) and New York Life Insurance Co. v. Public Trustee ((1924 2 Ch 101, 110, 117 : 131 LT 438 (CA)); (2) a customer must make a demand for payment at the branch where his current account is kept before he has a cause of action against the bank : Joachimson v. Swiss Bank Corporation ((1921) 3 KB 110 : 125 LT 338 (CA)) quoted with approval by Lord Reid in Arab Bank Ltd. v. Barclays Bank (1954 AC 495, 531 : (1954) 2 All ER 226 (HL)). The rule is the same whether the account is a current account or whether it is a case of deposit. The last two cases refer to a current account : the Privy Council case (69 IA, 1, 8, 9 : AIR 1942 PC 6 : 198 IC 753) was a case of deposit. Either way, there must be a demand by the customer at the branch where the current account is kept, or where the deposit is made and kept, before the bank need pay, and for these reasons the English courts hold that the situs of the debts is at the place where the current account is kept and where the demand must be made.

It was explained further that if the bank wrongly refused to pay when a demand was made at the proper place and time, then it could be sued at its head office as well as at its branch office, but the reason was that "the action is then, not on the debt, but on the breach of the contract to pay at the place specified in the agreement", and reference was made to Warrington, L.J. at page 116 and Atkin, L.J. at page 121 of New York Life Insurance Co. v. Public Trustee ((1924 2 Ch 101, 110, 117

: 131 LT 438 (CA)). That is the position in regard to banking law and practice, and it is apparently in that light that the Regulation has been framed.

15. The Regulation was intended to achieve what emergency legislation was designed to secure in a somewhat different context by somewhat comparable methods. In England, during the First World War the Trading with the Enemy Amendment Act, 1916 provided for the winding up of the business carried on in England by companies incorporated in Germany. That Act was considered by the court in In re W. Hagelberg Aktien-Gesellschaft (1916 Ch D 503 : 115 LT 444) and it was observed that although the branches and agency of a business could not be regarded as distinct from the principal business of the owner, nonetheless, if a statute was enacted to create that effect, effect had to be given to the statute for the purposes incorporated therein. During the Second World War the courts in England were called upon to consider the Defence (Trading with the Enemy) Regulation, 1940 under which a winding-up order could be made in respect of the business of any enemy bank carried on at its London offices. In re The Banca Commerciale Italiana ((1943) 1 All ER 480 (Ch D)) the court observed that having regard to the language of the statute and previous cases on the point "a winding-up order made under the regulation must be held to create for the purpose of winding up a new entity, namely, the business ordered to be wound up, and this entity is considered as one which can possess assets and have liabilities of its own". Corresponding legislation in India during the Chinese invasion and the Indo-Pakistan Wars was incorporated in the Defence of India Rules framed from time to time. In all these cases there is a departure from the general rule that the branches and agencies of a business are no more than the components through which the entire enterprise is carried on, and that they cannot be considered as distinct or separate from the Head Office. The departure was necessitated by an emergent or abnormal situation, and incorporated and regulated by specific legislation enacted for the purpose of coping with the problems arising out of such a situation. It is only right then that the true scope of what is intended by the legislation should be determined by close reference to the express terms of the legislation.

16. It is abundantly plain from the object and purpose of the Regulation and the provisions which seek to realise them that all transactions effected by or through the branches of the Banco Nacional Ultramarino were intended to be brought within the compass of the Regulation. As observed earlier, although the loan agreements may have been entered into with the Banco Nacional Ultramarino, the Branches were authorised by the Head Office to give effect to those agreements, and accordingly the branch concerned embarked upon the execution of the agreements and the working out of the transactions. The entire business involved in those transactions and dealings was effected by the branch concerned, and it was only when occasion strictly so required that the branch made reference to the Head Office for authority to amend or enlarge the scope of the operation. The transaction and the business nonetheless remained throughout those of the branch, and this is fully affirmed by the existence and operation of the loan accounts in the books of the branch, by the pledge or hypothecation of goods in almost all cases in favour of the branch and by the overall nature and character of the transaction as an ordinary banking transaction falling within the normal business of a branch.

17. It will be noticed that Section 5 of the Regulation expressly speaks of "properties and assets, all rights, powers, claims, demands, interests, authorities and privileges and all obligations and liabilities" of the branches and of "all contracts, deeds, bonds, agreements.." to which the branches are a party or which are in their favour. It proceeds clearly on the basis that the branches must be regarded as entering into and carrying out transactions identifiable as theirs. These are transactions distinct from those exclusively carried on by the Head Office of the Banco Nacional Ultramarino, with which transactions in their essence the branches had nothing to do. It will also be noticed that

by sub-section (2) of Section 7 the Regulation envisages financial transactions between the branches and the Head Office. The entire purpose of the Regulation is to reconstruct by operation of statute the closed branches of the Banco Nacional Ultramarino and to constitute them into a Bank and to work out existing transactions and square up all pending business with a view to ultimately winding up the affairs of the branches. Section 14 of the Regulation provides :

The Central Government shall, on the expiry of twelve years, and may, at any time before such expiry, direct that the books of account and affairs of the branches of the Banco Nacional Ultramarino in Goa, Daman and Diu shall be inspected by the Reserve Bank or by such other agency as the Central Government may determine and that a report on the basis of such inspection shall be made and the Central Government may, after considering the said report, direct the winding-up of the affairs of the said branches on such terms and conditions to be specified by that Government which shall, as far as practicable, be in consonance with the provisions relating to winding-up of a banking company under the Banking Companies Act, 1949.

18. To accept the contentions advanced by the appellants would be to negative the very object and purpose of the Regulation and to nullify its provisions. Such a construction of the Regulation is not open to the Court, for it could never be supposed that in enacting the Regulation the President intended an exercise in futility. It is well settled that the construction put by a court on the provision of a statute should accord with the object and purpose of the statute, and in that behalf the rule in Heydon case ((1584) 3 Co Rep 7a : 76 ER 637) relied on by this Court in R.M.D. Chamarbaugwalla v. Union of India (1957 SCR 930 : AIR 1957 SC 628 : 1957 SCJ 593) is attracted. What was the law before the statute was passed, what was the mischief or defect for which the law had not provided, what remedy had the legislation appointed and what was the reason of the remedy ? That substantially was also the test laid down in Virajlal Manilal & Co. v. State of M.P. ((1970) 1 SCR 400, 410 : (1969) 2 SCC 248 : AIR 1970 SC 129). It was observed in Kanai Lal Sur v. Paramnidhi Sadhukhan (1958 SCR 360, 367 : AIR 1957 SC 907 : 1958 SCJ 99) :

> ...When the material words are capable of two constructions, one of which is likely to defeat or impair the policy of the Act whilst the other construction is likely to assist the achievement of the said policy, then the courts would prefer to adopt the latter construction...

19. We are of opinion that the transactions under consideration in these appeals fall within the scope of the Regulation and the Custodian is fully entitled to sue for the recovery of the debts covered by the loan agreements. The contention of the appellants to the contrary is rejected.

20. We now turn to the remaining points raised in these appeals. It has been urged that the statutes (sic suits) cannot be decreed because the Promissory Notes and the Bills of Exchange have not been produced by the Custodian before the trial court. Now, it is not disputed that the documents have been removed from Goa to Portugal or to other places overseas and are no longer in the possession of the branches. The debts were sought to be proved on the basis of the accounts maintained in the books of account of the relevant branches. This was permissible by virtue of sub-section (1) of Section 8 of the Regulation which provides :

> 8. (1) If for the prosecution of any suit, appeal or other legal proceeding by the Custodian in any court it is necessary to produce any document or other particulars and the said document or particulars are proved to the satisfaction of the Court to have been removed to Portugal or to any of the territories under Portuguese control,

> it shall be lawful for the Court, in disposing of the suit, appeal or other legal proceeding to base its decree or decision on the books of account of the branches of the Banco Nacional Ultramarino in Goa, Daman and Diu and on the evidence which can be otherwise produced.

Having regard to the circumtances, it is within the competence of the court to base its decree on the books of account of the branches in Goa and on other evidence which can be produced. It was not necessary for the Custodian, indeed it was not possible, to produce the Promissory Notes and Bills of Exchange. Our attention has been invited to a passage on Byles on Bills of Exchange (22nd Edn., p. 389, para 70) which declares that "in any action or proceeding upon a bill, the court or judge may order that the loss of the instrument shall not be set up or provided an indemnity be given to the satisfaction of the court or judge against the claims of any other person upon the instrument in question". The provisions of Rule 16 of Order VII of the Code of Civil Procedure and Section 81 of the Negotiable Instruments Act, 1881 were also referred to. It is true that those provisions require the plaintiff to furnish an indemnity before a suit can decreed if the negotiable instrument on which the suit founded is proved to have been lost or cannot be produced. It seems to us that resort to those provisions cannot be justified inasmuch as the case fall to be determined under the Regulation and the Portuguese law which continued in force in Goa. Even in respect of the Portuguese law, that is to say, provisions in the Portuguese Commercial Code and the Portuguese Uniform Law, to which our attention has been specifically drawn, we are of opinion that it stands suspended by reason of the express provisions contained in sub-section (1) of Section 8 of the Regulation. No indemnity can be reasonably required of the Custodian when it has been proved to the satisfaction of the court that the document has been removed to Portugal or to any of the territories under Portuguese control. The sub-section plainly makes no provision for indemnifying the debtors against any further claims made against them. Such a measure was not considered necessary, because the Regulation vested the entire right in the Custodian to recover the debt and no further right was left in anyone else. The debts were regarded as properties and assets of the branches, and all rights in respect of them stood transferred to and vested in the Custodian by virtue of sub-section(1) of Section 5. Having regard to the provisions of the Regulation and the object with which it was enacted it is not possible to conceive that it would be open to the Head Office of the Banco Nacional Ultramarino to sue the debtors for recovery of those debts.

21. Shri Nariman contends that an express provision was necessary in the Regulation to effect a complete discharge of the debtors from further liability as was the case in Section 11(2) of the Pakistan Ordinance considered in Delhi Cloth and General Mills Co. Ltd. v. Harnam Singh ((1955) 2 SCR 402, 422 : AIR 1955 SC 590 : 1955 SCJ 645). We think it is not necessary that there should be such a specific provision. It is sufficient if the same conclusion can be drawn from a proper construction of the general provisions of the Regulation and the object with which it has been enacted. We may point out that although reference was made by this Court in Delhi Cloth and General Co. Ltd. v. Harnam Singh ((1955) 2 SCR 402, 422 : AIR 1955 SC 590 : 1955 SCJ 645) to Section 11(2) of the Pakistan Ordinance, it was also observed on SCR page 425 that alternatively :

> ...Such payment would operate as a good discharge even under the English rules : see Fouad Bishara Jabbour v. Custodian of Absentee's Property of State of Israel ((1954) 1 All ER 145 (QBD)) at page 154 where a number of English authorities are cited, including a decision of the Privy Council in Odwin v. Forbes (1817 Buck 57 (PC)). That was also the result of the decisions in the following English cases, which are similar to this, though the basis of the decisions was the situs of the debt and the multiple residence of corporations : Fouad Bishara Jabbour v. Custodian of

Absentee's Property of State of Israel (1817 Buck 57 (CP)), Re Banque Marchands De Moscou ((1954) 2 All ER 746 (Ch D)) and Arab Bank Ltd. v. Barclays Bank (1954 AC 495, 529 : (1954) 2 All ER 226 (HL)).

22. The learned Additional Judicial Commissioner has reached the same conclusion, but in doing so he has relied on certain provisions of the Portuguese Uniform Law. We have not found it possible to examine the validity of his reasons because a complete statement of the Portuguese Uniform Law is not before us, and therefore we can find no justification for disturbing the basis on which he has come to his finding.

23. The learned Additional Judicial Commissioner has also adverted to an undertaking offered by the Custodian to indemnify the debtors against any action by anyone else for recovery of the debts, but on the view that we have taken we need not examine the validity or sufficiency of that undertaking.

24. We are satisfied that the discharge of the debts under the Regulation amounts to their complete discharge and it is not open to anyone else to sue for their recovery. No indemnity is required to be furnished by the Custodian on the ground that the relevant documents cannot be produced.

25. It is faintly urged that the suits filed by the Custodian were premature. This point was not raised before the courts below and we cannot allow it to be raised at this stage.

26. Their is one point, however, which, in our opinion, requires consideration by the trial court. In some of the suits it has been pleaded by the appellants that they were entitled to a set-off by reason of certain credits in their favour. The learned Additional Judicial Commissioner has held that the trial court was justified in declining to enter into those claims. We think that in this regard that courts below have erred. It was necessary to do complete justice between the parties having regard to the peculiar circumstances of these cases, and we are of opinion that so far as those claims are concerned the trial court should now examine them on their merits.

27. In the result, the appeals are dismissed subject to the direction that the trial court will take up the suits again solely for the purpose of examining the validity of the claims to set-off made by the appellants in those suits. We make no orders as to cost of these appeals.

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