

2012 C L D 1663

[Lahore]

Before Muhammad Khalid Mehmood Khan and Muhammad Ameer Bhatti, JJ

Mian AFTAB A. SHEIKH and 2 others----Appellants

Versus

Messrs TRUST MODARBA through Trust Management Services (Pvt.) Ltd. and another----Respondents

First Appeal from Order No.268 of 2010, decided on 5th March, 2012.

(a) Modaraba Companies and Modaraba (Floatation and Control) Ordinance (XXXI of 1980)---

----Ss. 2(h), 25, 26 & 28(2)---Civil Procedure Code (V of 1908), S.47---West Pakistan Land Revenue Act (XVII of 1967), Ss.4(2)(14), 79, 80 & 81---Money decree, execution of---Objection petition under S.47, C.P.C. by judgment debtor that Modaraba Tribunal lacked jurisdiction to execute such decree as same was executable by Collector as arrears of land revenue---Validity---Land revenue being a kind of rent imposed by State and payable by landowner, which if remained unpaid would become arrears of land revenue---Procedure for recovery of land revenue was provided under Ss.79 to 81 of West Pakistan Land Revenue Act, 1967, but not for recovery of decretal amount---Impugned decretal amount was an outcome of dispute arisen out of a business agreement between two parties having no nexus with land---State was not party in such agreement, thus, decretal amount could not be termed as land revenue and judgment debtor could take refuge under Ss.79 to 81 of the Act---Word "as" used in S.28(2) of Modaraba Companies and Modaraba (Floatation and Control) Ordinance, 1980 and omission of word "Collector" therefrom would denote that decretal amount

would be recoverable by Tribunal as arrears of land revenue, but not by Collector--- Tribunal could exercise all powers available to Collector under S.80 of the West Pakistan Land Revenue Act, 1967---Tribunal being a civil court had option to execute its decree either under O.XXXVII, C.P.C. or by adopting procedure under West Pakistan Land Revenue Act, 1967--- Tribunal once having opted to execute its decree under C.P.C. could not adopt procedure under West Pakistan Land Revenue Act, 1967 and vice versa--- Objection petition was dismissed in circumstances.

Maj. Mehtab Khan v. The Rehabilitation Authority and another PLD 1973 SC 451; First Grindlays Modaraba v. Pakland Cement Ltd. and 2 others 2000 CLC 2017; Tanveer Hussain v. Divisional Superintendent; Pakistan Railways and 2 others PLD 2009 SC 249; Tahir Farooq v. Judge Family Court and others 2002 MLD 1758 and Enmay Zeb Publications (Pvt.) through Director General v. Sindh Labour Appellate Tribunal through Chairman and 2 others (2001 SCMR 565 ref.

(b) Civil Procedure Code (V of 1908)---

---Preamble, Ss. 1 & 4---Application of special statute to Civil Procedure Code, 1908, Scope---Where special statute provided for application of C.P.C. without debarring specifically any provision thereof, then C.P.C. as a whole would become applicable thereto.

Muhammad Shahzad Shaukat and Barkat Arif Chaudhry for Appellants.

Muhammad Aqil Malik for Respondents.

Date of hearing: 13th February, 2012.

JUDGMENT

MUHAMMAD KHALID MEHMOOD KHAN, J.---The respondent No.1 being Modaraba company incorporated under the Modaraba Companies and Modaraba (Floatation and Control) Ordinance, 1980 filed a suit against appellants for recovery of Rs.70,600,240 before Modaraba Tribunal established under Modaraba Companies and Modarabas (Floatation and Control) Ordinance, 1980 (hereinafter referred to as "Ordinance, 1980"); the suit was decreed

on 27-7-1999; the respondent No.1 filed application for execution of decree, the appellants filed application under section 47 Code of Civil Procedure, 1908, challenging the jurisdiction of Tribunal being the executing court; the learned Chairman Tribunal dismissed the application through impugned order on 29-4-2010.

2. Learned counsel for appellants submits that execution proceedings initiated by Tribunal is hit by section 28(2) of the Ordinance, 1980; the decree is executable as arrears of land revenue and as such the protection of sections 79, 80 and 81 of the Land Revenue Act, 1967 is available to appellants/ judgment debtors. Learned counsel submits that Tribunal has no authority to auction the property of the judgment debtors for recovery of decretal amount without the previous sanction of Board of Revenue under section 88 of the Land Revenue Act, 1967.

3. Learned counsel for respondents submits that an earlier application on the same ground was dismissed on 7-11-2009 by Tribunal and as such successive application is not maintainable. Further, the appeal against the decree was disposed of in terms of settlement agreement before the Hon'ble Supreme Court of Pakistan and as such objection against the jurisdiction of tribunal is no more available to appellants. Learned counsel submits that Tribunal is a civil court and has the powers to execute its decree. Learned counsel further submits that Tribunal is a banking company in terms of Section 2 of the Financial Institutions (Recovery of Finances) Ordinance, 2001. He relied on Maj. Mehtab Khan v. The Rehabilitation Authority and another (PLD 1973 SC 451), First Grindlays Modaraba v. Pakland Cement Ltd. and 2 others (2000 CLC 2017), Tanveer Hussain v. Divisional Superintendent, Pakistan Railways and 2 others (PLD 2009 SC 249), Tahir Farooq v. Judge Family Court and others (2002 MLD 1758) and Enmay Zeb Publications (Pvt.) through Director General v. Sindh Labour Appellate Tribunal through Chairman and 2 others (2001 SCMR 565).

4. Heard, record perused.

5. Under section 2(h) of Modaraba Companies and Modarabas (Floatation and Control) Ordinance, 1980, the Tribunal means a Tribunal constituted under section 24, the powers of Tribunal are defined in section 25, for better appreciation of two provisions of section 25 it is reproduced as under:--

"Section 25: Powers of a Tribunal.--- (1) A Tribunal shall---(a) in the exercise of its jurisdiction, have in respect of a claim filed by a holder of Modaraba Certificates against the Modaraba company or by a Modaraba company against any other party with whom it has entered into business transaction relating to Modaraba Fund, or in respect of an application by the Registrar for the winding up of a Modaraba company, all the powers vested in a Civil

Court under the Code of Civil Procedure, 1908 (Act V of 1908);

(b)

(c)

(2) All proceedings before a Tribunal shall be deemed to be judicial proceedings within the meaning of sections 193 and 228 of the Pakistan Penal Code (Act XLV of 1860), and the Tribunal shall be deemed to be a Court for the purposes of sections 480 and 482 of the Code of Criminal Procedure, 1898 (Act V of 1898).

(3) No Court other than the Tribunal shall have or exercise any jurisdiction with respect to any matter to which the jurisdiction of the Tribunal extends under this Ordinance.

6. Section 26 of the Ordinance, 1980 provides the procedure of Tribunal which reads as under:--

"26. Procedure of the Tribunal.---Matters before the Tribunal shall come up for regular hearing as expeditiously as possible and, except in extraordinary circumstances and on grounds to be recorded, the Tribunal shall hear the cases from day to day.

(2) In the exercise of its jurisdiction, the Tribunal shall, in all suits before it, including suits for recovery of money, follow the summary procedure provided for in Order XXXVII of the First Schedule to the Code of Civil Procedure, 1908 (Act V of 1908)."

7. Section 28 of the Ordinance, 1980 provides as under:--

"Section 28. Judgment and decree.---(1) A Tribunal shall, after the case has been heard, pronounce judgment as early as practicable and on such judgment a decree shall follow forthwith.

(2) The Tribunal shall, on the application of the decree-holder, forthwith order execution of the decree:

Provided that, if the decree is for money, the recovery in execution thereof shall be made as arrears of land revenue."

8. The perusal of section 25(a) of the Ordinance 1980 shows that Modaraba Tribunal constituted under Section 24 enjoys all powers of Civil Court under Code of Civil Procedure, 1908. The Tribunal while exercising civil jurisdiction has the powers to adjudicate upon the following claims/issues:--

- (a) If any Modaraba certificate holder filed a claim against Modaraba company;
- (b) Modaraba Company filed claim against any other party with reference to some business transaction relating to Modaraba fund;
- (c) If Registrar files any winding petition against Modaraba Company for winding up the company business.

9. The perusal of section 25(a) of the Ordinance, 1980 shows that Tribunal has the power to decide the three types of claims as a civil court and all powers vested in a civil court under the Code of Civil Procedure, 1908 are available to Tribunal. However, the jurisdiction of Tribunal is restricted only to the extent of above three disputes.

10. Under section 26(2) of the Ordinance, 1980, the Tribunal while hearing suits, including a suit of recovery of money, has to follow the summary procedure as provided under Order XXXVII, C.P.C., meaning thereby where the Tribunal is hearing a suit for recovery of money or any other suit, the Tribunal will follow the procedure of Order XXXVII, C.P.C. After hearing the suit under section 28(1) of the Ordinance, 1980, the Tribunal will pronounce judgment and decree and will initiate execution of decree on the application of decree holder, under subsection (2) of section 28 of the Ordinance, 1980, if the decree is for recovery of money, the recovery of decree shall be made as arrears of land revenue.

11. The argument of learned counsel for appellants is that as the decree is recoverable as arrears of land revenue and as such the protection of sections 79, 80 and 81 of the Ordinance, 1980 has to be followed.

12. The land revenue is defined under subsections (2), (14) of section 4 of Land Revenue Act, 1967 which are read as under:--

"(2) "Arrears of land revenue" means land-revenue which remains unpaid after the date on which it becomes payable;

(14) "Land-revenue" means land-revenue assessed or assessable under this Act, or under any other law for the time being in force relating to land-revenue, and includes any rates imposed on account of increase in the value of land due to irrigation.

13. The perusal of section 4(2) of Land Revenue Act, 1967 will show that land-revenue is that which is recoverable from the land under the Land Revenue Act and any other law for the time being but it relates only with the land. The land revenue is a kind of rent levied by the State. If the land revenue is not paid as per its imposition order, then it will become arrears. Admittedly amount of decree is an outcome of business transaction between two independent parties who entered into an agreement for carrying certain business and State is not involved in the transaction.

14. The Land Revenue Act, 1967 provides the procedure under sections 79, 80 and 81 of the recovery of land-revenue only and not the recovery of decree.

15. The argument of learned counsel for appellants is thus of no avail for the simple reason that decree passed by the Tribunal is a conclusive determination of rights between the parties and it is an outcome of a dispute arisen out of an agreement between two independent parties having no relationship with the land. The State is also not party in the transaction and as such the decree passed by the Tribunal could not be termed as land-revenue and the judgment debtor could not take refuge under sections 79, 80 and 81 of Land Revenue Act, 1967.

16. The proviso of section 28(2) of the Ordinance, 1980 provides that decree for recovery of money will be recoverable as arrears of land revenue, the word used "as" denotes that decree of Tribunal for recovery of money is recoverable as arrears of land revenue, this

shows that status of decree passed by Tribunal is an arrear of land revenue but not the land revenue. Under section 2(4), (14) the land revenue is the rent of agricultural land imposed by the State and if the land revenue is not paid according to law prescribed for its payment, it will become arrears of land revenue, land revenue and arrears of land revenue are two distinct things, if the person liable to pay land revenue failed to pay according to its prescribed law it will become arrears but if paid it will remain land-revenue and the defaulter of land revenue claim refuge under sections 79, 80 and 81 of Act, 1967.

17. The recovery of arrears of land revenue is regulated under section 80 of the Land Revenue Act 1967, and where the question of ascertainment of land revenue is in dispute, section 79 of Land Revenue Act will come into action.

18. The impugned decree in the present case is against the appellant is an outcome of business transaction between the parties which shows that decree in dispute is not a land revenue, the Ordinance, 1980 only provides that decree may be executed as arrears of land revenue, meaning thereby the tribunal can execute the decree like arrears of land revenue, the Tribunal can take all actions as are available to Collector under section 80 of the Land Revenue Act, 1967, the word "as" clarify that decree will not be executed by the Collector but the Tribunal can execute the decree as arrears of land revenue, if the intention of legislator was that decree will be executed through revenue hierarchy, the legislator may simply say that decree of Tribunal will be executed by the Collector, the word Collector is missing in section 28(2) of the Ordinance 1980, this will show that it is the Tribunal alone who has to execute its decree.

19. Under section 25(1) of the Ordinance, 1980, the Tribunal is a civil court under Code of Civil Procedure, 1908, C.P.C. provides complete mechanism for execution of decree, hence the Tribunal has the option either to execute its decree as arrears of land revenue or under Code of Civil Procedure, 1908, however if the Tribunal opts to execute the decree under Code of Civil Procedure, 1908 then decree has to be executed under the provision of Code of Civil Procedure, 1908 and not the provision of Land Revenue Act 1967; likewise if the Tribunal chooses to execute the decree as arrears of Land Revenue under the Act of 1967, then decree will be executable under the Land Revenue Act 1967.

20. The argument of learned counsel that Tribunal has no powers to execute its own decree is thus without any force.

21. It is settled law, where the special statute provides the application of Code of Civil Procedure, 1908, the C.P.C. will be applicable as a whole unless any provision is specially debarred by the statute itself.

22. The Tribunal Ordinance 1980 provides that Tribunal is a civil court under the Code of Civil Procedure, 1908 and for suits including the suit for recovery of money the Tribunal will adopt the procedure provided under Order XXXVII, C.P.C., meaning thereby the Tribunal is debarred from applying ordinary procedure for deciding the suit provided in Code of Civil Procedure, 1908. There is no provision available in Ordinance, 1980, debarring the Tribunal not to execute its decree, hence the logical conclusion of the issue is that Tribunal has the power to execute its own decree either under the provision of Code of Civil Procedure, 1908 or by adopting the procedure of Land Revenue Act, 1967.

23. The upshot of the above said discussion is that appeal fails and is dismissed.

SAK/A-51/L

Appeal dismissed.