BHAGYODAY COOPERATIVE BANK LTD. A

v.

RAVINDRA BALKRISHNA PATEL DECEASED THROUGH HIS LRS & ORS.

(Civil Appeal Nos. 8531-8532 of 2022) B

NOVEMBER 16, 2022

[K.M JOSEPH AND HRISHIKESH ROY, JJ.]

Gujarat Co-operative Societies Act, 1961 (GCoSA, 1961) – Ss. 103, 103 (a) - Code of Civil Procedure 1908 – Ss. 38, 39, Or. 21, r.46A, Or. 26, r.46 – Limitation Act S. 5 – The Appellant-Bank granted a financial facility to a firm (M/s. Vimal Traders, Partnership Firm) of three partners (Respondents and one Gautam Vishnuprasad Tripathi) – Amount was not repaid – Lavad Suit was filed in 1988 by the Appellant before the Board of Nominees u/ GCoSA 1961, which held to make payment with interest p.a. from the date of suit till realisation and cost of the suit to the Plaintiff (therein) – Matter was adjudicated in the form of an arbitration proceeding – Certificate contemplated u/s. 103(a) of the Act came to be issued on 17.09.1995 – Appellant filed execution application before Civil Court – During pendency of said application, Jangam Warrant was issued against Respondents (therein) for recovery – Appellant filed an application seeking withdrawal of the Execution Application with liberty to file the petition before the Court of competent jurisdiction on the ground that the respondent had shifted the place of residence – Withdrawal application was allowed on 02.02.2005 – On 19.01.2006, the Appellant-Bank filed an execution petition before the 4th Additional Senior Civil Judge – Appellant had obtained a decree against another partnership firm in which the Respondents were partners alongwith one 'H' – Deemed decree obtained against the said parties in previous Lavad Suit again under the Act, was put to execution – Mother of respondents, who stood as guarantor for the loan granted in the transaction which led to Lavad Suit – Her property was put to sale in the Court auction – After auction was held there was excess amount which belongs to mother and lying in deposit – Based on the developments in the other suit namely the holding of the Court auction in connection C D E F G H

A *with the enforcement of the liability of the mother as guarantor, an application was filed on 24.01.2007 by Appellant – The purport of the application appears to be to obtain satisfaction of the deemed decree with reference to the amount which was realized in the Court auction – Respondents filed objection, which was dismissed and held that the amount to be deposited and the interest and cost be come on the share of respondents herein – Respondent challenged the order – High Court held that (Impugned Order) - a) The execution application filed by Appellant is not maintainable as after the first application was dismissed on default the application before second execution court was not within period of limitation; b) execution petition filed to get it transferred to second court was done without an order u/s. 39 of CPC; c) without observing the mandatory requirement i.e., to affords an opportunity to the person aggrieved that is the garnishee to raise his objection to the attachment the Execution Court had allowed the prayer under Order 21 Rule 46A – On appeal, held: Mere dismissal of the first application on the ground of default may not result in the decree holder being precluded from filing a fresh execution petition provided it is within time – When the Authority passed the award under the Act, it was a Civil Court – It is not a Court within the meaning of Section 38 of CPC – For effective working of Section 39 of CPC, there must be a Court which has passed a decree - In the context of the CPC there is no such Court within the meaning of Section 38 in these cases instead, there was essentially arbitration proceedings and what is passed by the said authority is clothed only with the effect of a decree and it is enforceable as a decree – Certificate being granted it resulted in a deemed decree – Words 'decree as defined in clause (2) s. 2 of CPC' as used in s. 103 of the Act is to reinforce in the concept of a decree with greater clarity and by way of abundant caution – The mere presence of these words by itself cannot support the attempt at distinguishing the principle which is that in view of the fact that Sections 38 and 39 of the CPC are not as such applicable, the decree-holder may seek to execute the decree in any Court which otherwise has jurisdiction – In case of debt, share and other property covered u/ Order 26 Rule 46 procedures begins with an attachment, but in this case there is no attachment of debt in the form of money lying in the deposit, which is not a manner to pass order with Order 21 Rule 46 A – In the*

H

facts, therefore, the second execution petition is maintainable – The filing of the second execution petition was not illegal for the reason that there was no order under Section 39 of CPC – The filing of the application under Order 21 Rule 46A and the order passed as such by the Execution Court may be flawed.

Allowing the appeals, the Court

HELD: 1. Mere dismissal of the first application on the ground of default may not result in the decree holder being precluded from filing a fresh execution petition provided it is within time. [Para 21][17-F]

2. The plea of limitation though pressed before the Execution Court was not pursued by the Respondents before the High Court. No doubt, a pure question of law may be permitted to be raised in an appeal generated by the grant of special leave under Section 136 of the Constitution of India. Section 103 of the Act appears to contemplate that after the adjudication by the Authorities, which would include any appeal carried therefrom, the order passed, is to be certified by the Registrar or the Liquidator. This would give birth to what is by way of a deeming provision a decree of a Civil Court. In this case, an award was passed in the year 1988 and the certificate was issued in the year 1995. As to when the application was made by the Appellant seeking the certificate and what was the time taken by the Authority to issue a certificate are all matters shrouded in mystery. There is a case for the Appellant, no doubt, that the apprehension of the learned Counsel for the Respondents that if the creditor sleeps over the matter even for a period beyond time provided for executing a decree and makes an application with great delay then it would result in a completely inequitable situation may not rise as the facts speak otherwise. [Para 22][17-G-H; 18-A-D]

3. The Respondents may not be justified in seeking to distinguish the judgment of this Court Sundaram Finance Limited. It cannot be in the region of doubt that when the Authority passed the award under the Act, it was a Civil Court. It is not a Court within the meaning of Section 38 of Code of Civil Procedure. If there is no Court, which can be said to have passed the award in this case, then it is inconceivable as to how it could be maintained

in the same breath that it is indispensable to the maintaining of the execution proceedings in another Court that the Court which passed the decree must necessarily transfer the proceedings to the latter Court. For the effective working of Section 39 of Code of Civil Procedure, there must be a Court which has passed a decree. The words 'decree as defined in Clause (2) of Section 2 of Code of Civil Procedure' as used in Section 103 of the Act is to reinforce in the concept of a decree with greater clarity and by way of abundant caution. The mere presence of these words by itself cannot support the attempt at distinguishing the principle which has been laid down in the decision of Sundaram Finance Limited which is that in view of the fact that Sections 38 and 39 of the Code of Civil Procedure are not as such applicable, the decree holder may seek to execute the decree in any Court which otherwise has jurisdiction. This would mean that the finding by the High Court in this regard is flawed and is liable to be overturned. [Para 24][19-G-H; 20-A-E]

4. In this case, there is no attachment of the debt in the form of the money lying in deposit. The order which is passed is expressly made Under Order 21 Rule 46A. Certainly, this is not the manner in which an order could have been passed within the meaning of Order 21 Rule 46A. There is a definite scheme as already noticed which is clear from the perusal of Order 21 Rule 46 and by the subsequent additions to the law by the amendment of the year 1976 which is contained in Order 21 Rule 46A to Order 21 Rule 46I. It would unerringly point to the provisions being mandatory. Therefore, the High Court appears to be right in its finding that the Execution Court should have first attached the debt under Order 21 Rule 46 before proceeding to pass the order under Order 21 Rule 46A of Code of Civil Procedure. [Para 28][24-G-H; 25-A]

5. The filing of the second execution petition was not illegal for the reason that there was no order under Section 39 of Code of Civil Procedure. The filing of the application Under Order 21 Rule 46A and the order passed as such by the Execution Court may be flawed. In the facts of this case, the more appropriate

order would have been one under Order 21 Rule 52 of Code of Civil Procedure. The amount is lying in deposit with the same Court in which the Appellant has moved the second application for execution. It is directed that the order passed by the Execution Court must be treated as an order by which the attachment has been made Under Order 21 Rule 52 of Code of Civil Procedure. By order dated 08.08.2022, this Court had permitted the Respondents to withdraw the amount lying in deposit in excess of Rs. 12 lakhs. It would thus be open to the Appellant to proceed against the said amount, to the extent of Rs. 12 lakhs. The order will be treated as an order of attachment. The Execution Court, will therefore proceed with the matter in accordance with law. However, the Respondents-Patel brothers had an opportunity to raise objections before the Execution Court and the right which is given Under Order 21 Rule 46C is for the benefit of the garnishee. It is nobody's case that the Respondents-Patel brothers are the garnishees. [Para 32][26-G-H; 27-A-D]

6. The Execution Court will however look into the complaint of the Respondents that the Appellant has not properly accounted with reference to the directions given by the Arbitrator regarding the adjustment to be done of the amount which would be due to the Respondents under an award obtained by them. It is left open to the Execution Court to undertake the said exercise and it is for the Execution Court to finally decide the exact amount which is to be made available to the Appellant. The impugned order is set aside. Appeals allowed. [Para 33][27-E-F]

Shivashankar Prasad Shah and Others Versus Baikunth Nath Singh and Others **1969 (1) SCC 718: [1969] 3 SCR 908;** *Sundaram Finance Limited versus Abdul Samad and Another (***2018) 3 SCC 622: [2018] 10 SCR 451;** *Nuthalapati Kotaiah vs. Executive Officer TTD Office at Guntu* **(1985) 3 AP LJ 103;** *The Madurai City Municipal Corporation, represented by its Commissioner, Madurai vs. N. Baskara Pandian & another* **1998 SCC Online Mad 75;** *Executive Engineer,*

A *T. C. Division, K.S.E. Boards, Palghat versus J. H. Sharma and another* **AIR 1988 Ker. 285 – referred to.**

Case Law Reference

B **[1969] 3 SCR 908**	**referred to**	**Para 14**
[2018] 10 SCR 451	**referred to**	**Para 16**

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 8531-8532 of 2022.

From the Judgment and Order dated 27.03.2018 of the High Court C of Gujarat at Ahmedabad in Letters Patent Appeal No.2647 of 2017 in Special Civil Application No.9619 of 2013.

Preetesh Kapur, Sr. Adv., Ms. Hemantika Wahi, Ms. Jesal Wahi, Kabir Hathi, Advs. for the Appellant.

D Aniruddha Deshmukh, Nikhil Goel, Advs. for the Respondents.

The Judgment of the Court was delivered by

K.M. JOSEPH, J.

Leave granted.

E 2. The woes of a decree holder begin after obtaining a decree. It is in execution that a decree holder is confronted with an unimaginably large number of obstacles. With the facts as unfolded in the course of the judgment, we are reinforced in our belief that there is substance in this complaint.

F 3. The appellant-Bank granted a financial facility to a firm (*M/s. Vimal Traders, Partnership Firm*). There were three partners, namely, *Ravindra Balkrushna Patel* and *Nikhil Balkrushna Patel* who are brothers and the third person was Shri *Gautam Vishnuprasad Tripathi*. Since the amount was not repaid, a Lavad Suit No.2265/1984 came to be filed by the appellant-bank before the Board of Nominees under The G *Gujarat Co-operative Societies Act, 1961 (*hereinafter referred to as 'the Act'*)*. The adjudicatory body passed an order on 23.09.1988. The operative portion of the order reads as follows: -

> "The defendants to make payment of Rs.2,61,314.34ps. with 20.5% interest p.a. from the date of suit till realisation H and cost of the suit to the plaintiff latest by 31.03.1989.

The garnish order passed below Exh.6 is made absolute and the plaintiff is at liberty to execute the award against the G.S.I.C. for the said amount of Rs.1,50,000/- taking due process of law after 31.03.1989. Lavad fee of Rs.510/- deposited by the plaintiff to be credited to the Government as fees.

Award accordingly

Given and pronounced in open Court on 23.09.1988."

4. We may notice at this juncture itself Section 103 of the Act. It reads as follows: -

"103. Money how recovered.- Every order passed by the Registrar or a person authorised by him under Section 93, or by the Registrar, his nominee or board of nominees under Section 100 or 101, every order passed in appeal under Section 102, every order passed by a Liquidator under Section 110, every order passed by the State Government in appeal against orders passed under Section 110 and every order passed in revision under Section 155, shall if not carried out,-

(a) on a certificate signed by the Registrar or a Liquidator, be deemed to be a decree of a Civil Court, as defined in clause (2) of Section 2 of the Code of Civil Procedure, 1908 and shall, be executed in the same manner as a decree of such Court, or

(b) be executed according to the provisions of the Land Revenue Code and the rules thereunder for the time being in force for the recovery of arrears of land revenue:

Provided that, any application for the recovery in such manner of any such sum shall be made to the Collector, and shall be accompanied by a certificate signed by the Registrar, or by any Assistant Registrar to whom the said power has been delegated by the Registrar. Such application shall be made within twelve years from the date fixed in the order and if no such date is fixed, from the date of the order."

A 5. On the application apparently made by the appellant-Bank, the certificate contemplated under Section 103 (a) of the Act came to be issued on 17.09.1995. In view of the provisions of Section 103 of the Act, since the order passed under Section 103 of the Act in this case is to be executed in the same manner as a decree of a Civil Court as defined in clause (2) of Section 2 of the Code of Civil Procedure, 1908 B (For short 'CPC'), the appellant initially filed Execution Application No.777/1995 before the City Civil Court, Ahmedabad. It would appear that the notice was not served in the Execution Application No.777/1995 and the appellant according to it tried to serve the notice but it failed. Thereupon, the Execution Court passed the following order on C 22.10.1997, which reads as under:-

> "When matter called out, neither *darkhastdar* nor his L.A. is present. From the record, it appears that the darkhastdar has not taken any effective steps since long. However, in the interest of justice, darkhastdar is granted, time till D 27.11.1997. If no effective step is taken till than the darkhastdar- petition will stand automatically dismissed on 27.11.1997."

6. Still further, the appellant on 27.11.1997 gave a new address and filed an application. It is the further case of the appellant that the E Court was not working and there was a strike and the case stood posted to 10.12.1997. During the pendency of the Execution Application No.777 of 1995, a Jangam Warrant was issued against the respondents for recovery of Rs.8,74,033.49/- by order dated 15.07.1998. On 02.02.2005, the appellant-Bank filed an application seeking withdrawal of the Execution Application with liberty to file the petition before the Court of F competent jurisdiction. This was occasioned according to the appellant-Bank by shifting of the residence of the respondents. According to the appellant-Bank, the said application was allowed and the Execution Application was permitted to be withdrawn by order dated 02.02.2005. On 19.01.2006, the appellant filed an execution petition before the 4th G Additional Senior Civil Judge (Ahmedabad Rural).

7. At this juncture, we must notice another aspect. It would appear that the appellant-Bank had obtained a decree against M/S. *Virat Paper Processors* (a partnership firm) in which again *Ravindra Balkrushan Patel and Nikhil Balkrushna Patel (hereinafter for brevity 'Patel* H *brothers')* were partners along with *Hemant Balkrushna Patel* (not a

party herein). It must be noticed that all the three were brothers though the firm was a different firm. The deemed decree obtained against the said parties in Lavad Suit No.576/1988 again under the Act, was put to execution. It is here we must note another person whose role will become clear i.e., *Savitaben Balkrushna Patel (Deceased)*-the mother of the Patel brothers, who stood as guarantor for the loan granted in the transaction which led to Lavad Suit No.576/1998. Her property was finally put to sale in the Court auction. A sum of Rs.39,25,000/- was fetched and it was lying in deposit. The mother of the Patel brothers expired on 18.06.2005.

8. Resuming the narrative with reference to the developments in the suit with which we are concerned, after filing of the execution petition as it were by the appellant in the new Execution Court apparently based on the developments in the other suit namely the holding of the Court auction in connection with the enforcement of the liability of the mother as guarantor, an application came to be filed on 24.01.2007. The purport of the application appears to be to obtain satisfaction of the deemed decree with reference to the amount which was realized in the Court auction. We may only notice the prayer as we find from Annexure-P7 of the SLP paper book, which is as follows: -

> "A. In connection with the Special Darkhast no. 80/99, the property of the opponents was sold by initiating legal procedure and amount thereof to the tune of Rs. 39,25,000/- rupees thirty Nine lacs twenty five thousand only is deposited before the Court in Special Darkhast no. 80/99 and after deducting the outstanding amount in special Darkhast no. 80/99 with interest and cost, remaining amount is likely to be credited and that amount is to be given to the opponents no. 2 and 3 thus, your honour may be pleased to pass order of garnishi and direct the registrar/Nazir of the Court of learned Civil Judge (S.D.) Saheb to deposited the remaining credited amount in the said execution.
>
> B. Your honour may be pleased to pass such other and further relief as may be deemed fit.

A

> C. Your honour may be pleased to pass order to send one copy of the order of this Garnishi application to keep it in Special Darkhast no. 80/99 pending before the Court of Shri BB Pathak sahib, Civil Judge S.D. Ahmedabad Rural."

B 9. The Patel brothers who are judgment debtors in the instant case filed their objections. After considering their objections, the Execution Court passed the following order.

> "Objection application Ex. 28 filed by the opponents no. 2 and 3 is hereby dismissed.
>
> C
>
> Under the provisions of order 21 Rule 46A of the CPC, the Registrar and Nazir of the Court of Principal Senior Civil Judge Saheb, Ahmedabad (rural) is hereby ordered to deposit the actual remaining amount in this Darkhast after making payment of the Darkhast, interest and cost come
>
> D
>
> on the share of opponent *Ravindra Balkrishna Patel* and *Nikhil Balkrishna Patel* out of the credited amount in Special Darkhast No.80-99.
>
> This order has been declared today on this 10.04.2013 in the open Court."
>
> E

It is this order which came to be challenged before the High Court by the Patel brothers. The High Court by the impugned order has set aside the order passed by the Execution Court. It is being aggrieved thereby that the appellant-Bank is before us.

F 10. We heard Mr. Preetesh Kapur, learned senior counsel for the appellant and also Mr. Aniruddha Deshmukh, learned counsel appearing on behalf of the Patel brothers, including the partnership firm.

THE FINDINGS IN THE IMPUGNED ORDER

G 11. The High Court finds that the earlier execution petition filed in the first Execution Court, namely, Execution Application No.777/1995, having been dismissed, the application which is filed subsequently in the year 2006 before the Second Execution Court, if we may describe it as such was not maintainable. It is found that the first application having been dismissed for default, the proper course would have been to approach

H the said Court within the period of limitation. It is found that the said

order dismissing the execution application should have been set aside within a period of 30 days since Section 5 of the *The Limitation Act, 1963* is not available in execution proceedings, the subsequent execution petition is barred.

12. Next, it is found that in view of Section 38 of CPC a decree could be executed either by the Court which passed it or the Court to which the decree was transferred. Section 39 of the CPC provides for the exclusive mechanism by which the decree could be ordered to be transferred. In the facts of this case, it was found there was no approach made by the appellant-Bank to the Court in which the execution petition was originally filed to get it transferred to the second Court in which without an order under Section 39, the appellant-Bank filed the second application in the year 2006. Therefore, the very petition filed before the Execution Court on the second occasion was not maintainable.

13. Further, the Court elaborated on the flaw involved in the application maintained under Order 21 Rule 46A of CPC and, more importantly, the actual order that was passed thereunder. The reasoning of the High Court is as follows: - Before an order is passed under Order 21 Rule 46A of the CPC, there must be an attachment of the debt. There was no attachment of the debt within the meaning of Order 21 Rule 46 of CPC. It is found that Order 21 Rule 46 of CPC insisting on an order of attachment as is clear from a perusal of Order 21 Rule 46A of CPC serves a salutary purpose. It affords an opportunity to the person aggrieved that is the garnishee to raise his objection to the attachment. Valuable rights are vouchsafed to the garnishee and the right is to be enforced through the mechanism of Order 21 Rule 46C. Order 21 Rule 58 provides for objection to attachment. A person aggrieved by an order under Order 21 Rule 58 of CPC has further rights in the form of the appeals as provided in law. In this case, it was found that without observing the mandatory requirement of attachment it is that the Execution Court had allowed the prayer under Order 21 Rule 46A. It must be noticed that though the argument relating to the execution petition being barred by limitation was pursued vigorously before the Execution Court, it was not pressed before the High Court by the respondents.

CONTENTIONS OF THE PARTIES

14. Mr. Preetesh Kapur, learned senior counsel for the appellant would with reference to the facts as we have noticed make the following submissions. He would point out that the mere fact that the earlier

execution petition was dismissed would not stand in the way of the processing and considering of the second execution petition. The execution petition was dismissed only if at all on account of default. In fact, it was withdrawn with liberty. But even if it is dismissed on default, in view of the law laid down by judgment of this Court in *1969 (1) SCC 718*, *Shivashankar Prasad Shah and Others Versus Baikunth Nath Singh and Others,* the second petition was maintainable. It was held as follows in the said decision: -

> "6. The courts in India have generally taken the view that an execution petition which has been dismissed for the default of the decree-holder though by the time that petition came to be dismissed, the judgment-debtor had resisted the execution on one or more grounds, does not bar the further execution of the decree in pursuance of fresh execution petitions filed in accordance with law-see *Lakshmibai Anant Kondkar v. Rayji Bhikaji Kondkar*, (XXXI, BLR 400). Even the dismissal for default of objections raised under Section 47, Civil Procedure Code does not operate as *res judicata* when the same objections are raised again in the course of the execution-see *Bahir Das Pal and Another v. Girish Chandra Pal, AIR 1923 Cal 287; Bhagwati Prasad Sah v. Radha Kishun Sah and Others, AIR 1950 Pat 354; Jethmal and Others v. Mst. Sakina, AIR 1961 Raj 59; Bishwannath Kundu v. Smt. Subala Dassi, AIR 1962 Cal 272*. We do not think that the decision in *Ramnarain v. Basudeo, ILR XXV Pat 595* on which the learned counsel for the appellant placed great deal of reliance is correctly decided. Hence we agree with the High Court that the plea of *res judicata* advanced by the appellant is unsustainable."

15. The dismissal of the earlier execution petition on the ground of default will not bar the filing of a fresh execution as long as the second petition is filed within the period of limitation. In this case, limitation would begin to run only on obtaining the certificate contemplated under Section 103 of the Act. The certificate was obtained in the year 1995. Therefore, the second execution petition filed in the year 2006 was well

within the period of 12 years and therefore the execution petition is not barred. As far as the findings of the High Court that Sections 38 and 39 of the CPC governed the facts of the case, it is contended that the Court has erred in not bearing in mind the following a vital feature present in this case. This is not a case where a decree has been passed by a Civil Court. What has happened is in terms of the Act on a claim by the appellant-Bank which is a creditor the matter was adjudicated in the form of an arbitration proceeding. At the end of the adjudication, the plaintiff being successful, an award was passed. After the award is passed, a certificate has to be applied for. The certificate is granted under Section 103 of the Act. The certificate granted under Section 103 of the Act only results in the order passed becoming executable as a decree. He further points out that even after the certificate is passed it is not as if the order was a decree as such. All that the law provides is that it is enforceable as a decree. He would submit that similar provisions are contained in the *Arbitration and Conciliation Act, 1996.*

16. He drew our attention in this regard to the judgment of this Court reported in *Sundaram Finance Limited versus Abdul Samad and Another,* (2018) 3 SCC 622. Therein this Court was considering the question which was similar to the question which arises in the facts of this case, namely, whether the filing of the execution petition is governed by the regime provided under Sections 38 and 39 of the CPC. We notice the following, *inter alia,* discussion: -

> "14. We would now like to refer to the provisions of the said Act, more specifically Section 36(1), which deals with the enforcement of the award:
>
> > "36. *Enforcement*. — (1) Where the time for making an application to set aside the arbitral award under Section 34 has expired, then, subject to the provisions of sub-section (2), such award shall be enforced in accordance with the provisions of the Code of Civil Procedure, 1908 (5 to 1908), in the same manner as if it were a decree of the court."
>
> The aforesaid provision would show that an award is to be enforced in accordance with the provisions of the said Code in the same manner as if it were a decree. It is,

A thus, the enforcement mechanism, which is akin to the enforcement of a decree but the award itself is not a decree of the civil court as no decree whatsoever is passed by the civil court. It is the Arbitral Tribunal, which renders an award and the tribunal does not have the power of execution of a decree. For the purposes of execution of a decree the award is to be enforced in the same manner as if it was a decree under the said Code.

20. We are, thus, unhesitatingly of the view that the enforcement of an award through its execution can be filed anywhere in the country where such decree can be executed and there is no requirement for obtaining a transfer of the decree from the court, which would have jurisdiction over the arbitral proceedings."

17. He would therefore submit that once second application was not barred by limitation, a fresh execution petition could be filed in the Court which would have jurisdiction. The jurisdiction of the second Court would have to be determined with reference to the element of the residence of the judgment debtors within the jurisdiction of that Court or the existence of property as the case may be within the limits of the Courts jurisdiction. As far as the finding that Order 21 Rule 46 of CPC was observed in its breach before the Court passed the Order 21 Rule 46A of CPC, he would submit that the garnishee in the case is not the mother of the Patel brothers. In fact, the mother as noticed had passed away in the year 2005 and the application itself was filed only in the year 2007. The case of the appellant is that after the auction was held in execution of the decree in the other suit filed by the appellant after satisfying the decree debt in the said case, there was an excess sum. It belonged to the mother and it was lying in deposit and as the mother passed away, therefore, it became payable by the Court's Nazir to the judgment debtors in the said case two of whom are the judgment debtors being the Patel brothers involved in this case also. Therefore, the argument is that it is the Court Nazir who is the garnishee as he was under an obligation or debt to make payment of the said amount to the judgment debtors which included Patel brothers involved in this case. He would further submit that with reference to the wide powers available to the Execution Court under Section 51 of CPC that at any rate it would be

highly unjust to deny the decree holder the fruits of its decree and to proscribe the Court from getting at assets of the judgment debtors which were lying in a deposit in the same Court. In other words, the proceeds of the Court auction after satisfying the decree debt of the appellant in the other case and payable to the judgment debtors after death of the guarantor (mother) was lying in deposit of the second Execution Court. On the strength of the powers available under Section 51 as also inherent power under Section 151 of CPC, the Court must be ceded the power to make available the said amount for appropriation by the decree holder.

18. *Per-contra,* learned counsel for the respondents, Mr. Aniruddha Deshmukh stoutly opposes the contentions. He would point that as far as the interpretation placed under Sections 38 and 39 of CPC by the High Court is concerned it is unexceptionable. When confronted with the judgment of this Court, in *Sundaram Finance Limited* (supra) relied upon by the learned counsel for the appellant, he would make an attempt at distinguishing the said judgment. This attempt is bolstered with reference to the words 'decree as defined in clause (2) of Section 2 of CPC' as found in Section 103 of the Act. He would submit that this distinguishable text of the Act with which this Court is concerned may render the principle laid down by the judgment of this Court not applicable. He would further point out that the High Court was entirely right in its interpretation of Order 21 Rule 46 and Order 21 Rule 46A. He supported his contention in this regard to three judgments of the High Courts which are as follows: - *Nuthalapati Kotaiah vs. Executive Officer TTD Office at Guntur, (1985) 3 AP LJ 103, The Madurai City Municipal Corporation, represented by its Commissioner, Madurai vs. N. Baskara Pandian & another, 1998 SCC Online Mad 75 and Executive Engineer, T. C. Division, K.S.E. Boards, Palghat versus J. H. Sharma and another, AIR 1988 Ker. 285*. He would submit that Order 21 Rule 46 read with Order 21 Rule 46A of CPC and the provisions which succeed these provisions enact a scheme which is intended to safeguard the interest of the garnishee. Any deviation from the mandatory regime will reach grave injustice to the garnishee as found by the High Court and also echoed in the judgments relied upon by him. He would further point out that Order 21 Rule 52 of CPC provides for the procedure to be followed in a case like the present. Order 21 Rule 52 of CPC, reads as follows: -

A ORDER 21 RULE 52:-

52. Attachment of property in custody of Court or public officer.—Where the property to be attached is in the custody of any Court or public officer, the attachment shall be made by a notice to such Court or officer, requesting that such property, and any interest or dividend B becoming payable thereon, may be held subject to the further orders of the Court from which the notice is issued:

Provided that, where such property is in the custody of a Court, any question of title or priority arising between the decree-holder and any other person, not being the judgment-debtor, claiming to be interested C in such property by virtue of any assignment, attachment or otherwise, shall be determined by such Court.

19. He would submit that since the appellant is not pursuing a case based on the mother (deceased) being a garnishee and if the further case based on the Court Officer being a garnishee falls to the ground, D the only express provision which must be understood as giving effect to the residuary clause found in both Section 51 of CPC and Order 21 Rule 11 must be followed. Section 51 of the CPC, *inter alia,* provides as follows: -

51. Powers of Court to enforce execution.—Subject to such E conditions and limitations as may be prescribed, the Court may, on the application of the decree-holder, order execution of the decree—

(*a*) by delivery of any property specifically decreed;

(*b*) by attachment and sale or by the sale without attachment of any property;

F

(*c*)by arrest and detention in prison [for such period not exceeding the period specified in Section 58, where arrest and detention is permissible under that section];

(*d*) by appointing a receiver; or

G

(*e*) in such other manner as the nature of the relief granted may require:

20. In similar vein, we find that when an execution petition is filed, the applicant is obliged to specify the nature of the relief which he seeks. H Not unnaturally there is replication of the words 'such other manner as

may be needed'. He would still further point out that Order 21 Rule 46A of CPC was not available to the appellant for another formidable reason. Order 21 Rule 46 expressly is inapplicable in regard to movable property not in the possession of the judgment debtor where the property is deposited in or in the custody of the Court. Therefore, it is contended that if money fetched in a Court auction can be described as property and it is deposited in the Court then in view of the express provision of Order 21 Rule 46, it is not applicable. The scheme of Order 21 Rule 46 followed by Order 21 Rule 46A may not be available and this may have to be dealt with under Order 21 Rule 52. He would finally conclude by contending that on the facts there is another obstacle for the appellant to realise the fruits of the decree. It is submitted that a perusal of the award by the authority under the Act would reveal that the judgment debtors have obtained an award against a third party. It was ordered in the award that the appellant would be entitled to execute the said award in realizing the amount which was awarded in favour of the appellant in this case. This has not been accounted for. It is pointed out that the said process would necessarily have to be undertaken even if this Court is inclined to grant any relief to the appellant.

FINDINGS

21. The first question we have to consider is whether the dismissal of the execution petition filed by the appellant apparently on the ground of default or withdrawal of the first execution petition will result in a bar for the filing or the prosecuting of the Second execution petition. In this regard, in fact, we must notice that the learned counsel for the respondent does not seek to raise any objection as such to the contentions of the appellant that the second execution application would be maintainable provided it is within the period of limitation. We also find merit in the contentions of the appellant that the mere dismissal of the first application on the ground of default may not result in the decree holder being precluded from filing a fresh execution petition provided it is within time.

22. This brings us to the aspect of limitation. The plea of limitation though pressed before the Execution Court was not pursued by the respondents before the High Court. No doubt, a pure question of law may be permitted to be raised in an appeal generated by the grant of special leave under Section 136 of the Constitution of India. We may only observe that what Section 103 of the Act contemplates is grant of certificate signed by the Registrar or the Liquidator. This is to be preceded

A by the requirement of words 'shall if not carried out'. In other words, what Section 103 of the Act appears to contemplate is that after the adjudication by the Authorities which would include any appeal carried therefrom, the order passed, *inter alia*, is to be certified by the Registrar or the Liquidator. This would give birth to what is by way of a deeming provision a decree of a Civil Court. In this case, we may only notice that an award was passed in the year 1988 and the certificate was issued in the year 1995. As to when the application was made by the appellant seeking the certificate and what was the time taken by the Authority to issue a certificate are all matters shrouded in mystery. There is a case for the appellant, no doubt, that the apprehension of the learned counsel for the respondents that if the creditor sleeps over the matter even for a period beyond time provided for executing a decree and makes an application with great delay then it would result in a completely inequitable situation may not rise as the facts speak otherwise. We do not intend to however in this case go to this question in greater detail, particularly in view of the fact that it was not pursued.

23. The next question which arises is the effect of the interplay of Sections 38 and 39 of CPC. They are as follows: -

> 38. Court by which decree may be executed.—A decree may be executed either by the Court which passed it, or by the Court to which it is sent for execution.
>
> 39. Transfer of decree.—(1) The Court which passed a decree may, on the application of the decree-holder, send it for execution to another Court [of competent jurisdiction], —
>
> (*a*) if the person against whom the decree is passed actually and voluntarily resides or carries on business, or personally works for gain, within the local limits of the jurisdiction of such other Court, or
>
> (*b*) if such person has no property within the local limits of the jurisdiction of the Court which passed the decree sufficient to satisfy such decree and has property within the local limits of the jurisdiction of such other Court, or

(*c*) if the decree directs the sale or delivery of immovable property situate outside the local limits of the jurisdiction of the Court which passed it, or

(*d*) if the Court which passed the decree considers for any other reason, which it shall record in writing, that the decree should be executed by such other Court.

(2) The Court which passed a decree may of its own motion send it for execution to any subordinate court of competent jurisdiction.

[(3) For the purposes of this section, a Court shall be deemed to be a court of competent jurisdiction if, at the time of making the application for the transfer of decree to it, such Court would have jurisdiction to try the suit in which such decree was passed.]

[(4) Nothing in this section shall be deemed to authorise the Court which passed a decree to execute such decree against any person or property outside the local limits of its jurisdiction.]

It is clear that under the scheme of the CPC, if a decree is passed by a Civil Court, then either the Court which passed the decree can execute it or the Court to which the decree is transferred can execute the decree. Section 39 of the CPC speaks of the powers of the transferor court. It also provides for the decree holder applying to the Court which passed the decree. The question, however, is whether this regime is applicable in the facts of this case. We have noticed the judgment of this Court rendered no doubt in the context of the *Arbitration and Conciliation Act, 1996*. The only point which is raised before us to distinguish the said judgment by the learned counsel for the respondents is that in view of the use of words 'decree as defined in clause (2) of Section 2 of CPC', in Section 103 of the Act, the principle may not be available.

24. We are of the view that the respondents may not be justified in seeking to distinguish the judgment of this Court *Sundaram Finance Limited* (supra). It cannot be in the region of doubt that when the Authority passed the award under the Act, it was a Civil Court. It is not a Court within the meaning of Section 38 of CPC. If there is no Court, which can be said to have passed the award in this case, then it is inconceivable

A as to how it could be maintained in the same breath that it is indispensable to the maintaining of the execution proceedings in another Court that the Court which passed the decree must necessarily transfer the proceedings to the latter Court. For the effective working of Section 39 of CPC, in other words, there must be a Court which has passed a decree. In the context of the CPC, we are of the view that there is no such Court within the meaning of Section 38 in these cases. Instead, we have what is essentially arbitration proceedings and what is passed by the said authority is clothed only with the effect of a decree and it is enforceable as a decree. No doubt on the certificate being granted it resulted in a deemed decree. In such circumstances, we are of the view that there is no merit in the contention of the respondents. The attempt to distinguish the judgment based on the presence of the words 'decree as defined in clause (2) of Section 2 of CPC' is equally misplaced. This is for the reason that we would think that the words 'decree as defined in clause (2) of Section 2 of CPC' as used in Section 103 of the Act is to reinforce in the concept of a decree with greater clarity and by way of abundant caution. The mere presence of these words by itself cannot support the attempt at distinguishing the principle which has been laid down in the decision of *Sundaram Finance Limited* (supra) which is that in view of the fact that Sections 38 and 39 of the CPC are not as such applicable, the decree holder may seek to execute the decree in any Court which otherwise has jurisdiction. This would mean that the finding by the High Court in this regard is flawed and is liable to be overturned.

25. This brings us to the last of the substantive contentions which have been debated before this Court. Undoubtedly, Order 21 Rule 46A of CPC is part of the scheme of the provisions relating to executions and it must be understood with reference to the reliefs which can be claimed by the decree holder as provided in both Section 51 and Order 21 Rule 11 of CPC. We have already noticed Section 51 and we have also noticed Order 21 Rule 11. The lawgiver has elaborated the manner in which each of these sub heads under which a decree holder may execute a decree. For instance, the aspect of attachment of various kinds of properties are found to be separately dealt with in Order 21 of CPC, and the procedure to be followed has been detailed thereunder. Order 21 Rule 46 apparently deals with attachment of debt, share and other property but an important distinguishing feature is that the debt, share and other property must not be in the possession of the judgment debtor to attract

Order 21 Rule 46. The exception is in regard to 'such other property' which though not in the possession of the judgment debtor, is property deposited or is in the custody of any Court. In other words, in regard to such property Order 21 Rule 46 and therefore Order 21 Rule 46A will not apply. Order 21 Rule 46A of CPC was in fact, inserted by Act 104 of 1976 with effect from 01.02.1997. So are the rest of the provisions which include Order 21 Rule 46B to Order 21 Rule 46I of CPC. The scheme would appear to be as follows. In the case of debt, share and other property which is covered by Order 21 Rule 46 the procedure begins with an attachment. It is to be made by a written order. The order prohibits the creditor recovering the debt and the debtor from making payment until further orders of the Court. The copy of the order so prohibiting the parties is to be affixed on a conspicuous part of the Court house and another copy is to be sent to the debtor. The debtor of the judgment debtor is prohibited from making the payment. He may pay the amount of debt into the Court and such payment will be a discharge for him as if he has made the payment to his immediate creditor.

26. Order 21 Rule 46A of CPC, then deals with the notice to be given to the garnishee. A garnishee is obviously a person who owes a debt to the judgment debtor. It can be illustrated by an example i.e. 'A' owes a debt to 'B', 'B' in turns owes a debt to 'C', 'C' can obtain an order of garnishee against 'A'. 'A' would then be prohibited from making the payment to 'B'. 'B' would stand prohibited from receiving the debt from 'A'.

27. It is clear from Order 21 Rule 46A that in the case of debt which must be understood as a debt spoken of in Order 21 Rule 46 of CPC subject to what we will say immediately hereinafter, it is insisted upon by the lawgiver that the debt must have been attached under Order 21 Rule 46. There is a further qualification as regards debt. Order 21 Rule 46A excepts, debt secured by a mortgage or a charge. Once these conditions are fulfilled, then upon an application being made by the 'attaching creditor' a notice may be issued to the garnishee who in the example we have given, is 'A' calling upon him either to pay the debt or so much of it as would be sufficient to satisfy the decree and the cost of execution or show cause as to why he should not do so. Under Order 21 Rule 46B, if the garnishee does not pay the amount forthwith or he does not appear in the case of a show cause, the Court is empowered to order the garnishee to comply with the terms of the notice. The Court is

empowered to proceed as if there is a decree against the garnishee. Order 21 Rule 46C reads as follows: -

> 46-C. Trial of disputed questions.—Where the garnishee disputes liability, the Court may order that any issue or question necessary for the determination of liability shall be tried as if it were an issue in a suit, and upon the determination of such issue shall make such order or orders as it deems fit:
>
> Provided that if the debt in respect of which the application under Rule 46-A is made is in respect of a sum of money beyond the pecuniary jurisdiction of the Court, the Court shall send the execution case to the Court of the District Judge to which the said Court is subordinate, and thereupon the Court of the District Judge or any other competent Court to which it may be transferred by the District Judge shall deal with it in the same manner as if the case had been originally instituted in that Court.

Therefore, it is clear that the lawgiver has contemplated to confer invaluable rights on the garnishee in the form of empowering him to challenge the attachment which is necessarily involved in the order of garnishee under Order 21 Rule 46A of CPC. If the attachment is made under Order 21 Rule 46 of CPC, it would be open to him to question it under Order 21 Rule 58. If it is followed by an order under Order 21 Rule 46A, it is open to him to dispute his liability under Order 21 Rule 46C. In this regard, we may notice the judgment of High Court of Kerala, in *Executive Engineer, T. C. Division, K.S.E. Board, Palghat versus J. H. Sharma and another* reported *in AIR 1988 Ker 285*, rendered by a Division Bench and speaking through U. L. Bhat, J. The High Court, *inter alia,* held as follows: -

> "5. Attachment of debt in execution of a decree is dealt with in R. 46 of O. XXI. Attachment is to be made by written order prohibiting the creditor from recovering the debt and the debtor from making payment thereof until further orders of the court. Sub-r. (3) of R. 46 states that the debtor so prohibited may pay the amount of debt into Court. This is only an enabling provision. There is nothing in R. 46 which

compels the debtor to pay the amount of debt into court.

6A. It has to be noticed that R. 46 does not contain any provision enabling the garnishee to raise any objection though it gives opportunity to the garnishee to subject himself to the order by making payment into Court. The next step is provided by R. 46A. He has to be given notice either to pay the amount into court or to show cause why he should not do so. According to R. 46B, where he fails to pay the amount in Court and also fails to appear and show cause in answer to the notice, the court may order him to comply with the terms of the notice and on such order execution may issue as though such order were a decree against him. This is the consequence of his failure to respond in terms of the notice under R. 46B. Where he appears and disputes his liability R. 46C requires that the court should decide the question as if it were an issue in a suit and upon the determination of such issue the court should pass such order as it deems fit. The Court may uphold the contention raised by the garnishee or reject his contention and pass appropriate orders. Such an order is appealable under R. 46H. Thus the scheme of the rules contemplates a specific opportunity being given to the garnishee to show cause why he should not pay the amount into Court. If he raises an objection the court has a duty to consider the objection and pass appropriate orders. The rules do not require him to raise an objection suo motu before receiving a show cause notice under R. 46A. The fact that he did not suo motu file an objection when the attachment was effected before judgment does not take away his right under the above rules to raise an objection.

Equally, we may notice the judgment of the High Court of Andhra Pradesh reported in *(1985) 3 AP LJ 103, Nuthalapati Kotaiah vs. Executive Officer TTD Office at Guntur,* wherein the High Court held as follows: -

A

> 6. For the service of notice or summons, Order 5 C.P.C. provides an elaborate procedure providing adequate safeguards in effecting notice on the defendant or the respondent, as the case may be. Order 21 Rule 46-A gives power to the Court to issue notice to the garnishee but couched the language as 'may'. When a statute create a duty, one of the first questions for judicial consideration, is what is the sanction for its breach or the mode for compelling the performance of the duty. This question usually resolves itself into an enquiry whether the provision is mandatory or directory viz., whether absolute or, discretionary. If it is directory, the Court cannot interfere to compel performance or the act does not entail with invalidity. But if the act is mandatory, disobedience entails legal consequences which may take the shape of a public or private remedy obtainable in accordance with law. It is, however, a well recognised canon of construction that where power is given to a Court or a public officer for the purpose of being used for the benefit of persons to be affected upon the performance of which they are entitled to call for its exercise, the power ought to be exercised to effectuate the purpose for which it was given. Though the word 'may' appears to be an enabling word, when the object of the power is to affect a legal right, it must be construed to be mandatory and has its substitute as 'shall'.

B

C

D

E

The learned single Judge of the Madras High Court in *The Madurai City Municipal Corporation, represented by its Commissioner, Madurai Vs. N. Baskara Panian & Another, 1998 SCC Online Mad 75*, no doubt, while dealing with the question whether a fresh attachment is required under Order 21 Rule 46 of CPC when there is an attachment before judgment took the view that the earlier attachment would suffice.

F

28. In this case, there is no attachment of the debt in the form of the money lying in deposit. The order which is passed is expressly made under Order 21 Rule 46A. Certainly, this is not the manner in which an order could have been passed within the meaning of Order 21 Rule 46A. There is a definite scheme as already noticed which is clear from the perusal of Order 21 Rule 46 and by the subsequent additions to the law by the amendment of the year 1976 which is contained in Order 21

G

H

Rule 46A to Order 21 Rule 46I. It would unerringly point to the provisions being mandatory. Therefore, the High Court appears to be right in its finding that the Execution Court should have first attached the debt under Order 21 Rule 46 before proceeding to pass the order under Order 21 Rule 46A of CPC.

29. In this case, we must further bear in mind that the guarantor (the mother of the Patel Brothers) is not the garnishee even according to the appellant. In fact, we are unable to think of as to how the mother of the Patel brothers could be said to owe any money to her sons. At least nothing has been pressed before us to indicate how the mother could be the garnishee.

30. The contention, however, raised by the appellant is that it is not the mother and in fact the appellant was also aware that the mother was not alive as of the date of the making of the application and therefore there could not have been any order against the mother. The argument is that after the auction, the amount in excess of the judgment debt in the other suit come in, to the account of the Court and the Officer of the Court therefore became the debtor or it is the Officer would be the garnishee. We have our reservations about accepting this line of argument. Order 21 Rule 46 contemplates, *inter alia,* a debt. It is difficult to put the Nazir in the position of a debtor. We cannot understand the relationship between the Nazir in the facts of this case and judgment debtors in the other case is one of debtor and creditor respectively. Therefore, we would think that the very application as such may have been flawed.

31. However, in the facts of this case there remains another aspect. It would appear that the amount for which the property of the guarantor (mother of the Patel brothers) was sold was Rs.39,25,000/-. There is order dated 03.02.2007 passed by the Execution Court. The said order directed the distribution of the amount fetched in the Court auction in the following manner:- Rs.18,56, 750/- was to be paid to the appellant on account of the deemed decree in Lavad Suit No.576/1988 and Rs. 6,89,416/- each was to be paid to the two Patel brothers in the present case. Further Rs.6,89,416/- was also to be paid to another brother of the Patel brothers who was a partner in the firm which was the defendant in the other suit. The position therefore, which we have before us is the amount representing the share of the excess amount lies in the Court deposit i.e. the aggregate of Rs.6,89,416/- due to *Nikhil Balkrushna Patel and Rs.*6,89,416/- *to Ravindra Balkrushna Patel.* We are not

A certain as to what has happened to the amount of *Rs.6,89,416/-* which is earmarked as share *of Hemant Balkrushna Patel. Hemant Balkrushna Patel* is not a party to the present litigation.

32. Even proceeding on the basis of the flaw which existed in the application filed under Order 21 Rule 46A and furthermore the procedure
B followed by the Court first in not attaching the fund under Order 21 Rule 46, the question would arise as to whether the complaint with which we began in the judgment namely the woes of the decree holder must receive some redress. The award is passed as we notice in the year 1988 nearly 34 years ago. The amount in deposit upon the death of the mother of the Patel brothers would naturally belong to her legal heirs. We posed
C the question to the learned counsel for the respondents as to whether apart from the three Patel brothers whether there is any other legal heir. The learned counsel for the respondents would submit that there is no other legal heir available. We asked the learned counsel for the respondents whether he has a case that the mother has left behind a
D Will. It is pointed out to us that there is no Will left behind by the mother. This will bring the case to Section 15 of the Hindu Succession Act, 1956, which deals with succession to a Hindu female who died intestate. The Patel brothers would indeed be the Class-I heirs being the sons. We must notice in this regard that there is no case for the respondents that the order dated 03.02.2007, which is passed with them on the party
E array has been called in question by the Patel brothers. We, therefore, take it to be a case where the amount was lying in deposit and it was by the subsequent order dated 03.02.2007 to be appropriated to the two Patel brothers involved in this case before us and to the other brother. At this juncture, we may notice Order 21 Rule 52 again. It is in fact relied
F upon by none other than the learned counsel for the respondents. We would think that in the facts of this case, it would be appropriate and proper to proceed on the basis that the procedure under Order 21 Rule 52 ought to have been followed. In the facts, we would, therefore, feel that it is appropriate and just to hold as follows: - The second execution petition is maintainable. The filing of the second execution petition was
G not illegal for the reason that there was no order under Section 39 of CPC. The filing of the application under Order 21 Rule 46A and the order passed as such by the Execution Court may be flawed.

In the facts of this case, the more appropriate order would have been one under Order 21 Rule 52 of CPC. The amount is lying in
H

deposit with the same Court in which the appellant has moved the second application for execution. We therefore, direct that the order passed by the Execution Court must be treated as an order by which the attachment has been made under Order 21 Rule 52 of CPC. By order dated 08.08.2022, this Court had permitted the respondents to withdraw the amount lying in deposit in excess of Rs.12 lakhs. It would thus be open to the appellant to proceed against the said amount, to the extent of Rs.12 lakhs. The order will be treated as an order of attachment. We must bear in mind also the fact that this Court was persuaded to pass an order under which the amount lying in deposit in excess of Rs.12 lakhs was allowed to be withdrawn by the respondents. No doubt, this is on the basis that even accepting the liability of respondents the amount lying in excess of Rs. 12 Lakhs should be made available to the respondents. The Execution Court, namely, 4th Additional Senior Civil Judge (Ahmedabad Rural) will therefore proceed with the matter in accordance with law. However, we make it clear that the respondents-Patel brothers had an opportunity to raise objections before the Execution Court and the right which is given under Order 21 Rule 46C is for the benefit of the garnishee. It is nobody's case that the respondents-Patel brothers are the garnishees.

33. The Execution Court will however look into the complaint of the respondents that the appellant has not properly accounted with reference to the directions given by the Arbitrator regarding the adjustment to be done of the amount which would be due to the respondents under an award obtained by them. We leave it open to the Execution Court to undertake the said exercise and it is for the Execution Court to finally decide the exact amount which is to be made available to the appellant.

The appeals are allowed in the above fashion and the impugned order will stand set aside.

Parties will bear their respective costs.

Pending application(s), if any, stand disposed of.

Ankit Gyan and Anurag Bhaskar
(Assisted by : Bodhi Ramteke, LCRA)

Appeals allowed.