

(1957) 04 BOM CK 0005
In the Bombay High Court
Case No : Appeal No. 856 of 1955

Bai Shakri

APPELLANT

Vs

Bapusinghji Takhatsinhji

RESPONDENT

Date of Decision : 03-04-1957

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 7, 11, 38, 47, 86

Citation : AIR 1958 Bom 30 : (1957) 59 BOMLR 655 : (1957) ILR (Bom) 786

Hon'ble Judges : Desai, J

Bench : Single Bench

Advocate : A.B. Patwa, for the Appellant; S.M. Shah and M.K. Shah, for the Respondent

Judgement

1. This Second Appeal raises some interesting questions of law and one of them is whether a decree passed in a suit against a Ruling Chief without obtaining the previous consent of the Central Government u/s 36 of the CPC can operate as res judicata in the subsequent execution proceedings. The other question, really another facet of the same contention, is whether the Court to which a decree is transferred for execution has, under Order 21, Rule 7 of the Code, the power to question the jurisdiction of the Court which passed the decree. The matter has been ably argued before me by Mr. Patwa, who appears for the appellant.

2. The appellant obtained a decree on a promissory note in a suit filed by him against the respondent in the Court of the Civil Judge at Himatnagar. A written statement was filed by the respondent, the Chief of Vasna State, and in substance one of the contentions raised by him was that he was a Ruling Chief when the decree was passed and was, in the absence of a certificate u/s 86 of the Code, not liable to be sued in the Municipal Courts of this country. He did not, however, appear at the hearing of the suit and the decree was passed ex parte. A darkhast filed by the decree-holder on 29th July 1953 was dismissed because one of the contentions raised on behalf of the judgment-debtor was that in any case the decree could not be executed against him in the absence of such

certificate On 21st April 1954 the decree-holder, after obtaining a certificate to execute the decree, filed the darkhast out of which arises this second appeal.

3. Before the executing Court to which the decree had been transferred, a contention was raised on behalf of the judgment-debtor that the decree against him was a nullity because before filing the suit no certificate as required by Section 86 of the CPC had been obtained by the plaintiff. That contention prevailed and the darkhast was dismissed. An appeal preferred against that order was also dismissed by the lower appellate Court and the decree-holder has now come to this Court in second appeal.

4. Three contentions are pressed before me by learned counsel for the appellant. The first contention is that the decision of the Court at Himatnagar to the effect that it had jurisdiction to entertain and try the suit operated as res judicata in these execution proceedings. The Court at Himatnagar had taken the view that the defendant was not a ruler. It is urged that the Court at Himatnagar having decided the question of jurisdiction that decision-of the Court operates as res judicata and therefore bars the contention now raised by the judgment-debtor. It is also urged that every Court is competent to decide whether it has jurisdiction or not to entertain and try any cause or matter coming before it. But these considerations cannot, in my opinion, override the primary consideration relating to the basic competence of that Court when the question is subsequently raised in another matter or before the Court which is called upon to execute that decree and the plea of res judicata is raised.

5. A judgment delivered by a Court not competent to deliver it, because there is no inherence of jurisdiction in it, cannot operate as res judicata and if the Court which passed the decree was not competent at all to do so, there can be little scope for the doctrine of res judicata to operate. Where there is inherent want of jurisdiction in a Court, a decree passed by it is a nullity and if the decree is a nullity, no issue decided by the Court which passed the decree can operate as res judicata in any subsequent suit or proceedings; and a decree which is a nullity is incapable of execution. Now the defendant judgment-debtor was a person whose name was mentioned in the list of Ruling Chiefs in the White Paper published by the Central Government and the arguments before me had to proceed on the footing that a certificate was necessary before he could be sued in the Court at Himatnagar. Sections 9 and 86 of the CPC have in this context to be read together and cluing so it must follow that a Court has no inherent jurisdiction to entertain and try a suit against a person to whom Section 86 applies but can only do so if the requisite consent of the Central Government is obtained before the institution of the suit. The provisions contained in Section 86, it is well-established, are imperative and in my judgment a decree passed by a Court without the requisite certificate would be by a Court which has no jurisdiction at all to entertain the suit. It would be a case of total absence of competence and the decree would be a nullity.

6. It is next argued that both the lower Courts were in the position of executing

Courts and it is not competent to a Court executing a decree to go behind the decree. Reliance is placed by learned counsel on the statement of the law deducible from decided cases given in Sir Dinshaw Mulla's Code at p. 167. It is there stated:--

"A Court executing a decree cannot go behind the decree. It must take the decree as it stands.....It has no power to entertain any objection as to the validity of the decree..or that the Court which passed it had no jurisdiction to pass it."

Now an examination of the cases cited in the foot-note to this summary of the law would show that the reference there made to absence of jurisdiction is not to that inherent want of jurisdiction in a Court which renders its pronouncement a nullity. Later on under the same heading of Powers of Executing Court, reference is made by the learned author to the decision of the Privy Council in AIR 1933 61 (Privy Council) , and that decision gives approval to the view that if the Court which passed a decree had no inherent jurisdiction, the decree is incapable of execution. A distinction has to be drawn between the two positions, namely where there is a decree which is incapable of execution on the ground that it is a nullity because the Court which passed it had no inherent jurisdiction and the case where all that can be said is that the Court passing the decree had irregularly assumed jurisdiction. In the latter case it would not be competent to the executing Court to question the existence of jurisdiction in the Court which passed the decree. Therefore, if this distinction is borne in mind, there is a complete answer to the present argument of the appellant.

7. It is lastly urged by Mr. Patwa that the decree was passed by the Court at Himatnagar and it was transferred to the Court at Dehgam and the powers of the transferee Court are circumscribed by the language of Order 21, Rule 7 of the Civil Procedure Code. It is argued that before the amendment of the analogous provision in the earlier Code there was some conflict of opinion on the question whether a transferee Court had the power to refuse execution of the decree if it found that the decree was passed without jurisdiction. The earlier provision permitted the transferee Court inter alia to require proof that the Court which passed the decree had jurisdiction, if there was any special reason for requiring such proof. The words "or of the jurisdiction of the Court" which appeared in the old Section 225 of the previous Code were deleted and the effect of such, omission, says Mr. Patwa, is that the Court to which a decree is transferred for execution has now no power to question the jurisdiction of the Court which passed the decree under execution.

8. Now it is true, as has so often been observed, that to permit an executing Court to inquire into the question of the jurisdiction of the trial Court, is tantamount to giving the executing Court powers of appeal or of superintendence over the trial Court which in certain cases may well mean the exercise of such power over a superior Court by an inferior Court. It is futile to examine the numerous decisions on the point and I am bound to follow the decisions of this

Court which lay down that the Court to which a decree has been transferred for execution under Order 21, Rule 7 of the Code cannot go behind the decree and question the jurisdiction of the Court which passed it. But those decisions do not touch the present point of absence of inherent jurisdiction of the Court and as I have already pointed out there is support to be derived from the pronouncement of the Privy Council for the view that if a Court which passed a decree had no inherent jurisdiction, the decree is incapable of execution. It must, therefore, follow that if the Court which passed a decree had no inherent jurisdiction, the decree is incapable of execution even by the transferee Court notwithstanding the language of Order 21, Rule 7. Here also the distinction between a decree which is incapable of execution on the ground that it is a nullity and a decree which is assailed on the ground that the Court which passed it had no jurisdiction because it acted irregularly, in assuming jurisdiction, has to be borne in mind. For all these reasons the present contention must be negatived.

9. Unfortunately for the decree-holder the appeal fails and will be dismissed. The fair order for costs seems to me that the appellant and the respondent should bear their own costs of this appeal.

10. Appeal dismissed.