

(1937) 04 CAL CK 0006

In the Calcutta High Court

Case No : Appeal from Appellate Order No. 363 of 1936

Biswanath Lahiri

APPELLANT

Vs

The Chatra-Serampur Co-Operative Credit Society, Ltd.

RESPONDENT

Date of Decision : 26-04-1937

Acts Referred:

Citation : (1937) 04 CAL CK 0006

Final Decision : Dismissed

Judgement

Mukherjee, J.—This appeal is on behalf of one of the judgment-debtors and is directed against an order passed in execution proceedings under sec. 47 of the Code of Civil Procedure. It appears that the decree-holder obtained a decree in the year 1927 against six Defendants for a sum of Rs. 667 and odd annas. The decree was executed several times and certain amount was realised. The present execution case has been started in June, 1935, and the decree-holder wants to realise the balance of the decretal dues amounting to Rs. 507 and annas odd. The present Appellant is the legal representative of judgment-debtor No. 2, and he has preferred an objection under sec. 47 of the Code on the ground that the decree which was sought to be executed was a nullity being passed by a Court which had no jurisdiction to pass it. For the purpose of making out his objection the judgment-debtor wanted to produce certain papers before the executing Court, but as the papers were not produced in time his application for adjournment was dismissed. The trial Court rejected his petition of objection on the ground of laches on his part, and also because the objection which he put forward was according to the learned Munsif not tenable in law. Against that an appeal was taken to the lower Appellate Court.

2. The lower Appellate Court in its judgment expresses an opinion that if the judgment-debtor had any right in law to come forward and say that the decree was void for want of jurisdiction, he would have remanded the case and given him an opportunity of producing the papers he wanted to produce. But as in the opinion of the learned Judge, it was not possible for the judgment-debtor to take

up that position, he dismissed the appeal and upheld the decision of the trial Court. It is against this order that the present second appeal has been preferred.

3. The first point that the learned Advocate for the Appellant has raised, is that the lower Appellate Court has taken an entirely wrong view of the law and that on the principle which was enunciated by a Full Bench of this Court in *Gorachand Halder v. Profulla Kumar Roy* I. L. R. 53 Cal 1661 s. c. 29 C. W. N. 948 (F. B.) (1925). he was entitled to say that the decree sought to be executed was void for want of jurisdiction.

4. On the other hand, it has been argued on behalf of the Respondent that no such objection was taken in any of the previous execution proceedings, and consequently it is not open to the objector to raise it for the first time, in the present execution proceedings. I think that both the two points have substance, and that as there had not been a proper hearing of the case, on either of the two points the case should be remanded to the trial Court in order that this question might be properly investigated.

5. Now, on the first point which is raised on behalf of the Appellant, the Full Bench decision referred to above makes it perfectly clear that the executing Court is entitled to refuse to execute a decree on the ground that it was made without jurisdiction. What is necessary, in order to enable the judgment-debtor to raise this objection is that the decree must have been made by a Court, which apparently had no jurisdiction whether pecuniary or territorial, or in respect of the judgment-debtor's person. The learned District Judge is of opinion that if the want of jurisdiction is not apparent on the face of the decree, and it is necessary to prove any other fact for the purpose of establishing it, the case does not come within the purview of the Full Bench decision mentioned above. In my opinion this would be to put a too narrow interpretation upon the language which was used by the Full Bench of this Court. In the Full Bench case itself the absence of jurisdiction of the Birbhum Court to pass the decree was not apparent on the face of it, but had to be proved by adducing evidence to show that at the time when the decree was passed, one of the mortgaged properties which was situated in Santhal Parganas was under settlement. The executing Court found this fact upon a consideration of the evidence that was adduced by the judgment-debtor and this finding being affirmed in appeal, was not and could not be questioned in second appeal before this Court,

6. In *Hari Bandhu Pal v. Hari Mohan Saha* 34 C. W. N. 36 (1929), this Court remitted the case for consideration by the lower Court for the purpose of deciding as to whether the Defendant against whom a decree was passed, was really alive, or dead at the time when the decree was made.

7. In *Amalabala Dasi v. Sat at Kumari Dasi* 54 C. L. J. 593 (1931). Sir Manmatha Nath Mukerji interpreted the word "apparently" in the Full Bench case as meaning " what would appear on the face of the decree and the papers relevant for the purpose of understanding it." In that case the decree-holder as Plaintiff

instituted a suit on the original side of this Court for recovery or a sum of money alleged to be due on a mortgage bond. In the plaint it was distinctly stated that the money had been advanced in Calcutta, and that the Defendant had agreed to repay the money with interest in Calcutta. This statement was not challenged by the Defendant in that suit and the Court passed a decree which was afterwards sought to be challenged on the ground that these averments were false and there being no promise to repay the money in Calcutta, the Original Side of this Court had no jurisdiction to entertain the suit.

8. The position, therefore, is that if a Court assumes jurisdiction upon certain averments made in the pleading, Which unless they are challenged, or shown to be inaccurate, would give the Court jurisdiction to try the suit, the Defendant against whom the decree was passed would not be entitled to contradict that statement and say that the averments were false and hence the assumption of jurisdiction by the Court was illegal.

9. In the present case all that the judgment-debtor wanted to show was that he was a member of the co-operative credit society, and as such the Civil Court had no jurisdiction to entertain the suit between him and the co-operative credit society. If all the Defendants were members of the co-operative credit society then it is not disputed that under sec. 43 (1) of the Co-operative Societies Act read with r. 22, the said suit would not be cognisable by a Civil Court. I think that an opportunity should have been given by the Courts below to enable the Appellant to prove these facts. As he himself was guilty of some laches in this direction, the order could be made only on his paying the costs to the other side.

10. I accordingly direct that the matter should go back before the trial Court, provided the Appellant pays the Respondent, the costs of the executing Court and of the lower Appellate Court within a month from this date, on payment of the costs the matter will be heard by the executing Court. The executing Court will first of all consider the question as to whether the present Appellant or his predecessor was a party to any of the previous execution cases, and notices of the applications for execution were served upon him or his predecessor. If the Court finds that he or his predecessor was a party to any of the previous proceedings, and he had notice of the same, the question as to whether the decree was a nullity or not would not at all arise for consideration in this case. The execution order which was passed in his presence in the previous execution cases would be conclusive and operate as res judicata in the subsequent execution cases. If the Court is of opinion that he was not a party in the earlier cases, then the other question will be decided, and the Appellant will be at liberty to adduce evidence only for the purpose of showing that he or his predecessor, as well as the other Defendants, were members of the Co-operative Credit Society, which ousted the jurisdiction of the Civil Court to pass a decree against them.

11. The result, therefore, is that the orders of both the Courts below are set aside and the matter remitted for consideration by the trial Court in the light of

the observations that have been made above. In default of payment of aforesaid costs this appeal will stand dismissed. There will be no order for costs in this appeal. Future costs will abide the result.