
(1940) 01 PAT CK 0020
In the Patna High Court

Central Co-operative Bank Ltd.

APPELLANT

Vs

Dasrath Pandey

RESPONDENT

Date of Decision : 30-01-1940

Acts Referred:

Citation : AIR 1940 Patna 406

Hon'ble Judges : Rowland, J;Agarwala, J

Bench : Full Bench

Judgement

Agarwala, J.—This appeal by the defendant is from a decision of the Subordinate Judge of Patna confirming a decision of the Munsif of Barh. The appeal arises out of a suit for a declaration that an auction sale at which the defendant purchased the property of the plaintiff was a nullity and for confirmation of the plaintiff's possession over the property that was the subject-matter of the sale or in the alternative for recovery of possession of that property if it should be found that defendant was in possession.

The facts giving rise to the litigation were that the defendant Bank (the Barh Central Co-operative Bank, Ltd.) obtained an award on 17th August 1928 against the Maranchi Partabpur Co-operative Society. Under the Co-operative Societies Act this award had the force of a decree. The decree-holder, that is to say the Bank, applied for execution of the award in the Court of the Subordinate Judge of Patna. The particular manner in which the decree-holder sought to execute the award was by attachment and sale of the property of individual members of the Maranohi Partabpur Cooperative Society, Dasrath Pandey, the plaintiff (a member of the Society), objected to the execution, on amongst other grounds, that the Court had no jurisdiction to sell the property of individual members of the Society in execution of a decree against the Society, and also disputed the amount claimed, alleging that a sum of Rs. 474-8-0 had been claimed in excess of what was due.

2. After this objection had been raised, a petition was filed in the executing Court signed by Dasrath Pandey, one of the persons against whom it was proposed to

proceed in the execution, and the manager of the Barh Central Co-operative Bank Ltd., which was the decree-holder. This petition stated that the judgment-debtor had withdrawn" all objections to the execution and that the Bank had agreed to remit Rupees 474-8-0 and to allow the judgment-debtor a month's time for payment of the balance. The petition then went on:

There is no need of issuing a fresh sale proclamation and your petitioner, the judgment-debtor, will not object on the ground of any irregularity.

There was no payment by the judgment-debtor either in December or at any other time, with the result that the property was put up to sale and purchased by the decree-holder. This sale was confirmed in January 1930. On 26th June 1931, this Court, in another case, namely in Harihar Prasad v. Bansi Missir AIR (1981) Pat 321, decided that the property of individual members of a co-operative society was not liable to be sold in execution of a decree against the society.

3. In 1937 the present suit was instituted by Dasrath Pandey for the reliefs stated above. The Courts below have agreed in decreeing the plaintiff's suit, holding that the Subordinate Judge of Patna had no jurisdiction to sell the property of the plaintiff in execution of the decree against the Maranchi Partabpur Co-operative Society. The first question that arises in this appeal is whether the execution sale is a nullity by reason of the absence of jurisdiction in the Subordinate Judge of Patna to sell the plaintiff's property. The decision of the Court below, in my opinion, proceeds on "a confusion between the existence of jurisdiction and the exercise of jurisdiction. "Jurisdiction" as was pointed out by West J. in *Amritav Krishna v. Balkrishna Ganesh* (1887) 11 Bom 488 .

consists in taking cognizance of a case involving the determination of some jural relation, in ascertaining the essential points of it and in pronouncing upon it. An inquiry into whether the jurisdiction exists is not an exercise of jurisdiction over the case itself, but an investigation of another question altogether, that of whether the conditions of cognizance are satisfied.

4. A Court is necessarily always clothed with jurisdiction to decide whether the matter before it is within its competence or not. But the existence of jurisdiction must be distinguished in all cases from the exercise of it. When the Court has jurisdiction to deal with the matter before it the decision of all other questions in the cause is only an exercise of that jurisdiction; and as Lord Hobhouse observed in *Malkarjun v. Narhari* (1901) 28 Bom 387:

A Court has jurisdiction to decide wrong as well as right. If it decides wrong, the wronged party can only take the course prescribed by law for setting matters right; and if that course is not taken the decision, however wrong, cannot be disturbed.

It is clear that jurisdiction cannot be [conferred by consent or waiver:

When a Judge has no inherent jurisdiction over the subject-matter of the suit the parties cannot by their mutual consent, convert it into a proper judicial process;

but when in a cause which the Judge is competent to try, the parties, without objection join issue and go to trial upon the merits, the defendants cannot subsequently dispute his jurisdiction upon the ground that there were irregularities in the initial procedure, which, if objected to at the time, would have led to the dismissal of the suit: see *Ledgard v. Bull* (1887) 9 All 191 , per Lord Watson.

Ordinarily, if a party does not raise the [question of jurisdiction during the trial he should not be allowed to do so after the proceedings have been carried to conclusion provided the question of jurisdiction depends upon the decision of some fact or point of law: see *Girwar Narayan v. Kamla Prasad* AIR (1933) Pat 104.

5. These being the general principles relating to the question of jurisdiction it is now necessary to apply these principles to the facts of the present case. The facts are that the Subordinate Judge of Patna had jurisdiction to entertain the application for execution of the award obtained by the Barb Central Co-operative Bank Ltd. The manner in which the holder of the award-sought the assistance of the Court was by sale of a property that did not belong to the judgment, debtor society but by the. sale of property belonging to the individual members of that society. The power of the-Court to render the decree-holder the assistance which he sought depended upon, the question whether the property of the individual members of the society was liable to be sold in execution of a decree against the society. That question of law-was decided in favour of the decree-holder. It was subsequently held in 11 Pat 174,1 already referred to, that the view of law taken by the executing Court was not correct. That wrong decision of the executing Court was not however challenged by Dasrath Pandey in the execution proceedings. In my view he cannot now treat the result of the execution proceedings as a nullity.

6. The next question is with respect to the compromise petition filed in the execution proceeding. It was contended by the learned advocate for the plaintiff respondent that the written statement of the-defendant in the present suit did not refer to this petition. That appears to be so but the petition itself was proved in the suit on behalf of the defendant and both the Courts have dealt with its legal effect. The question therefore was agitated by the parties and decided in their presence. The effect of such a compromise, that is to say, of a compromise by which a party gives up for consideration a right which it subsequently transpires that he had, has been the subject-matter of many decisions in the Courts. The leading case on the subject is *Stapilton v. Stapilton* 1 W & TLC 234. It was there held that:

An agreement entered into upon a supposition of a right, or of a doubtful right, though it after-wards comes out that the right was on the other side, shall be binding, and the right shall not prevail against the agreement of the parties; for the" right must always be on one side or the other and therefore the compromise of a doubtful right is a sufficient foundation of an agreement.

This case followed the earlier decision in *Cann v. Cann* 1 P W 723 where it was held

that where two parties are contending in this Court, and one releases his pretensions to the other there can be no colour to set this release aside, because the man that made it had a right; for by the same reason there can be no such thing as compromising a suit, nor room for any accommodation; every release supposes the party making it to have a right; but this can be no reason for its being set aside, for then every release might be avoided.

The law was expressed as clearly as it is possible to state by Bowen L.J. in *Miles v. New Zealand Alford Estate Co.* (1886) 82 Ch D 266 :

It seems to me that if an intending litigant bona fide forbears a right to litigate a question of law or fact which it is not vexatious or frivolous to litigate, he does give up something of value. It is a mistake to suppose it is not an advantage, which a suitor is capable of appreciating, to be able to litigate his claim even if he turns out to be wrong. It seems to me it is equally a mistake to suppose that it is not sometimes a disadvantage to a man to have to defend an action even if in the end he succeeds in his defence; and I think therefore that the reality of the claim which is given up must be measured, not by the state of law as it is ultimately discovered to be, but by the state of the knowledge of the person who at the time has to judge and make the concession. Otherwise, you would have to try the whole cause to know if the man had a right to compromise it and with regard to questions of law it is obvious you could never safely compromise a question of law at all.

7. So far as the liability of individual members of a co-operative society to have their property sold in execution of decrees against the society is concerned it was, until the decision of the Full Bench already referred to, generally thought that the property of individual members was liable and it is in that state of things that the parties to the execution proceedings had to decide for themselves whether they would risk a decision of the Courts on the question of law that was raised or would forgo the benefit of that decision and decide the matter themselves in a manner which suited their interest best. It will be remembered also that the decree-holder not only gave up his right to a judicial decision of the question of law involved but, in addition, remitted to the judgment-debtor a sum of Rs. 474-8-0 and gave him time for payment of the balance. In 2 IA 2199 the facts were that the appellant had obtained a decree for land with mesne profits up to the date of the suit.

8. In execution proceedings he applied for subsequent mesne profits with interest thereon as well as for interest on the amount already decreed. As regards the subsequent mesne profits, the defendant (pending his appeal) had executed certain security bonds to the Court in which he had undertaken to account in respect thereof in the suit. It was held that the obligation made the accounting in respect thereof "a question relating to the execution of the decree"

and that, in any case, the defendant was estopped from saying that the mesne profits were not payable under the decree. The reason given was that

if the respondent (that is to say the defendant) had contracted an obligation to account in this suit for the subsequent mesne profits claimed, he cannot escape from it, because when he contracted-it the course and practice of the Courts proceeded upon a construction of a statute which has since been pronounced to be erroneous.

9. In my opinion, the plaintiff's claim in the present suit fails with the result that this appeal by the defendant must be allow-ed and the decree of the Court below vacated. The defendant, appellant is entitled to his costs throughout.

Rowland, J.

10. I agree.