
(1979) 04 CAL CK 0011
In the Calcutta High Court
Case No : S.A. No. 875 of.1963

Ichhab Mondal and Ors

APPELLANT

Vs

Lalmohan pain and Others

RESPONDENT

Date of Decision : 20-04-1979

Acts Referred:

Bengal Agricultural Debtors Act, 1936 — Section 13, 29, 29(5), 33, 34
Civil Procedure Code, 1908 (CPC) — Order 21 Rule 89, Order 21 Rule 90, 151, 47

Citation : 84 CWN 188

Hon'ble Judges : Chittatosh Mookerjee, J

Bench : Single Bench

Advocate : Gopal Chandra Mukherjee, for the Appellant; Nagendra Mohan Saha, for the Respondent

Judgement

Chittatosh Mookerjee, J.—This Second Appeal is at the instance of plaintiffs. Their suit for declaration of title, confirmation of possession and for permanent injunction was dismissed by the learned Munsif, 2nd Court, Krishnagar. The learned Subordinate Judge Nadia also dismissed the appeal confirming the findings of the learned Munsif. Thereafter, this second appeal was preferred. The predecessor-in-interest of the plaintiffs held a raiyati jama comprising 14,22 acres of land in Kharian No. 831 Mouza Dhananjoypur under Nakashipara Police Station under Jyo-tish Chandra Pal Choudhury and others at a annual rent of Rs. 19-7 annas". The said J.C. pal Choudhury obtained a decree for arrears of rent against the plaintiffs' predecessors-in-interest in Rent Suit No. 718 of 1937. Thereafter, the said "decree-holder put up the said decree into execution in Rent Execution Case No. 262 of 1940. While the said execution case was pending the present plaintiffs made an application to Dhananjoypur Debt Settlement Board for settlement of his debt under the provisions of Bengal Agricultural Debtor's Act 1936. The Debt Settlement Board had given notice thereof to the executing Court and the further proceedings in Rent Execution Case No. 262 of 1940 had remained stayed. On January 8, 1949, Debt Settlement Board made an award in favour of the plaintiffs, in the meantime, the Executing Court had issued notice

upon the judgment-debtors to show cause why the stay of the said execution case shall not be vacated and on February 18, 1950, the said stay was vacated. On October 10, 1950, the suit property was auction sold in Rent Execution Case No. 262 of 1940. The present plaintiffs had filed an application u/s 47 read with Order 21 Rule 90 of the CPC for setting aside, the said sale held on October 10" 1950. The learned Munsiff, 2nd Court at Krishnagar by his order, dated May 31, 1951 dismissed the said application on contest.

2. Thereafter, on September 10, 1955 the present plaintiffs instituted a title suit, inter alia, for a declaration on their title and for further declaration that the auction sale of the suit property in Rent Execution Case No. 262 of 1940 was illegal, fraudulent and void. They also prayed for confirmation of possession and for permanent injunction.

3. Both the trial court and the lower appellate court have held that the plaintiffs' Misc. Case u/s 47 of the CPC having been dismissed on May 31, 1951, the present suit was barred u/s 47 of the Code and the question involved was concluded by principles of res judicata. The trial court and also the lower appellate court did not determine the remaining issues in the suit. The principal question in this Second Appeal is whether the suit in question was maintainable in law. Section 33 of the Bengal Agricultural Debtor's Act, 1938 lays down that except as provided in the said Act--

No Civil or. Revenue Court shall entertain a suit. application or proceeding against the debtor in respect of :

(a) any debt included in application u/s 8 or in a statement under sub-section (1) of "Section 13, proceedings in connection with which are pending before a Board or an Appellate Officer or a District Judge or an Additional District Judge; or

(b) any debt for which any amount is payable under an award except in accordance with the provisions of sub-section (5) of Section 29".

The expression "application" in Section 33 of the Bengal Agricultural Debtors Act is wide enough to include execution proceedings. The aforesaid" execution proceedings had remained stayed u/s 34 of the said Act on receipt of a notice that the plaintiffs had applied for settlement of their debts. to Dhananjoypur Debt Settlement Board until the said stay order was purported to be vacated.

4. The defendants neither alleged nor proved that the award dated January 8, 1949 of the Debt Settlement Board in favour of the plaintiffs had become inexecutable before the Civil Court sold the suit property in auction sale on October 10, 1950. Thus, there was no evidence before the Court that the Certificate Officer u/s 29(5) had failed to recover the amounts payable under the aforesaid award, dated January 8, 1949 and had certified that the amount in question had become irrecoverable. Therefore, Section. 13 of the Bengal Agricultural Debtors Act was a clear bar to the execution of the decree obtained by J. C. Pal Chowdhury against the predecessors of the plaintiffs in Rent Suit No.

718 of 1937 and which was put to execution in Rent Execution No.262 of 1940.

5. In other words, the Civil Court had no jurisdiction to execute the decree in respect of any debt of the plaintiffs which was included in the award of the Debt Settlement Board dated January 8, 1949. In this case further complication has arisen by reason of dismissal of the plaintiff's application u/s 47 read with Order 21 Rule 90 of the CPC for setting aside the auction, sale dated October 10, 1950 in Rent Execution Case No. 262 of 19-10. Therefore, we have to consider whether or not the question of validity or otherwise of the said execution sale is concluded by the principles of res judicata and whether the instant suit was barred u/s 47 of the Code of Civil Procedure.

6. There is ample authority for the proposition that the refusal of the executing Court to execute a decree on the ground of absence of jurisdiction will not bar a separate suit by aggrieved party or will operate as res judicata (see Mahabir Singh Vs. Narain Tewari and Others ; A. Venkatesh hayya v. A: Virayya AIR 1958 A.P.1). Reference may also be made to the decision of Mookerjee and Cunnig, JJ. in Kalipada Sarkar v. Hari Mohan- Dalal, ILR 44 Cal 627. Their Lordships were inclined to hold that "the validity of a decree can-not be questioned in execution proceeding on the ground that as the lunatic plaintiff was not properly represented in the suit, no decree for cost could have been made against him. Proceeding to enforce a judgment is collateral to the judgment, and therefore no enquiry into its regularity or validity can be permitted in such a proceeding". Their Lordships held that such a decree against a person who was not properly represented is not to be impeached in execution, but should be reversed or annulled in some direct proceeding taken for that purpose, for example, an application for revision, by way of appeal, or by way of regular suit in a court of competent jurisdiction.

7. Mr. Gopal Chandra Mukherjee, learned Advocate, appearing on behalf of the appellants has also rightly placed reliance to the decision of the supreme court in Mathura Prasad Bajoo Jaiswal and Others Vs. Dossibai N.B. Jeejeebhoy, . Their Lordships inter alia held that a decision relating to jurisdiction of the court to try the earlier proceedings being a pure question of law unrelated to the rights of the parties to a previous suit is not res judicata in the subsequent suit. A question relating to the jurisdiction of a court cannot be deemed to have been finally determined by an erroneous interpretation of the statute the court holds that it has no jurisdiction, the question would not operate as res judicate. Similarly, by an erroneous decision if the court assumes jurisdiction which it does not possess under the statute, the question cannot operate as res judicata between the same parties, whether the cause of action in the subsequent (vide. paragraph 10)." In view of this authority which is binding upon me, I would hold that the present suit was not barred by principles of res judicata.

8. In the instant case, plaintiffs in their application under Order 21 rule 90 read with Section 47 of the CPC filed in title Execution Case No. 262 of 1940 had made two fold allegations. In the first place, they had alleged that the decree

under execution was included in an award given by the Debt Settlement Board so that the decree could not legally be executed by sale. Secondly they had alleged that the sale process was fraudulently suppressed by the decree-holder opposite party acting in collusion with the auction purchasers. But at the time of trial of the said Misc. Case the executing Court had recorded "the applicants have not produced any award by the Debt Settlement Board. The applicant no. 1 does not in his evidence even claim that the decree has been made the subject matter of such an award. There is nothing to be said about this aspect of the matter. The executing Court upon consideration of the evidence found that there was no fraud in publishing and conducting the sale. Thus, the executing Court did not adjudicate whether or not the said decretal debt was the subject matter of the proceeding under the Bengal Agricultural Debtors Act and in the absence of any material the said question was kept open. It is immaterial to consider if the said question of invalidity of the executing proceeding was raised, the executing Court would have decided the same.

9. The decision of Edgley, J. in *Sheikh Tamizali v. Md. Nasarali Bhuiya* reported in 72 C.L.J. 66 at page 71 does not apply. Edgley, J. in the said case rejected the contention on behalf of the decree holder that once a rent sale had been held thus the debt must be regarded as satisfied and "the matter would no longer fall within the scope of the Bengal Agricultural Debtors Act and the rent sale held by the Civil Court could not be set aside u/s 47 of the Code of Civil Procedure.". His Lordship had observed that "the question as to the validity of an execution sale is clearly a matter which arises between the parties, to the suit and relates to the execution of the decree, and, therefore, falls within the purview of Section 47 of The Code of Civil Procedure. His Lordship further held ""if it is established that a debt in respect of which execution proceeding had been taken was included in an application to the Debt Settlement Board, the Court would have no option but to set aside the sale, even if it had received no notice u/s 34 of the Bengal Agricultural Debtors Act. Edgley J. (as he then was) in the said case, however, did not consider a case in which the executing Court in the absence of sufficient materials had declined to pronounce whether or not the decretal debts under execution were included in award made under the Bengal Agricultural Debtors Act. In the present case the executing Court did not decide the point and the same was still open. In this connection, reference may also be made to a decision of the Supreme Court in *Ramchandra Arya v. Man Singh* reported in AIR 1968 SC 054. Their Lordships in that case held that when a decree is a nullity and the sale held in execution of that decree is void ab initio the question of any party having resorted to the provisions of Order 21 Rule 89 and Rule 90 of the CPC to have the sale set aside does not arise. When a decree being nullity, has to be treated as non est, and, consequently the sale, when held, was void ab initio. Any claim based on a void sale can be resisted without having that sale set aside".

10. In the instant case, if the decretal debt which was under execution was subject-matter of an award under Bengal Agricultural Debtors Act, the auction

sale must be held to be a nullity which did not require to be set aside. The view finds support from a decision of Derbyshire CJ. (as he then was and Mukherjea J. (as he then was) in *Fatema Khatoon v. Manindra*, 44 CWN 1125 . Their Lordships held that "execution sale after receipt of an information u/s 35 would be invalid. Lodge J. in *Dwijendra Kumar Roy and Others Vs. Ram Ranjan Hati and Others* , similarly held that in execution sale under a decree partly governed by sub-section (1) and partly by sub-section (ii) of Section 35 of the Bengal Agricultural Debtors Act held in contravention of that Section was a nullity, the auction purchaser is entitled to refund of his money u/s 151 of the Code of Civil Procedure". Lodge J. (as he then was) had observed that "if the sale was a nullity, there was no necessity of order to set it aside."

11. When the execution sale is a nullity, the executing Court itself may in its inherent powers pass an appropriate order or an aggrieved party in a collateral or independent proceeding may establish the sale to be a nullity and obtain appropriate reliefs.

12. For all these reasons, I conclude that the trial court and the lower appellate court erred in law in holding that the instant suit was barred u/s 47 of the CPC and the question was concluded by principles of constructive res judicata. Therefore, the judgments and decrees of both the Courts should be set aside. The trial court should now proceed to determine the merits of the case. The trial court will also examine whether the debt under execution was subject-matter of the award by the Debt Settlement Board. The trial court will also decide other claims and contention of the parties. I, accordingly, allow this appeal. set aside the judgment and decrees of the Lower appellate court and of the trial court and remand the case to the trial court for fresh decision of the remaining Issues in accordance with law and in the light of the observations contained in this judgment. The trial court will decide on the evidence already on record and on further evidence already on record and on further evidence, if any, adduced by the parties.

In the circumstances of the case. there will be no order as to costs.