

(1973) 01 CAL CK 0021

In the Calcutta High Court

Case No : Liquidated claim Suit No. 1345 of 1956

I.K. Merchants Ltd.

APPELLANT

Vs

Indra Prakash Karnani

RESPONDENT

Date of Decision : 10-01-1973

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 34, 47, 51

Citation : AIR 1973 Cal 306 : (1973) 2 ILR (Cal) 650

Hon'ble Judges : S.K. Hazra, J

Bench : Single Bench

Advocate : Gouri Mitter, General and J.N. Das, for the Appellant; Somnath Chatterjee, P.K. Day and S. Addy, for the Respondent

Judgement

S.K. Hazra, J.—This is an application by the plaintiff decree-holder for execution of the balance amount of the decree dated July 2, 1958, to be realised by arrest and detention in civil prison of the defendant judgment-debtor Indra Prakash Karnani.

2. This application was made on December 9, 1971 and a notice was issued by this court under Order 21, Rule 22 (i) (a) and Rule 31 (i) of the Code of Civil Procedure. The judgment-debtor Indra Prakash Karnani has appeared pursuant to the said notice and is opposing this application. Parameswar Santhalia, a Director of the plaintiff company has affirmed an affidavit on December 6, 1971 which is used in support of the application of the plaintiff decree-holder. On January 24, 1972 the judgment-debtor has also affirmed an affidavit denying and disputing the claim for execution of the decree as aforesaid.

3. The facts relating to this application are shortly as follows:--

On July 19, 1956, the plaintiff company instituted a suit against the defendant Indra Prakash Karnani as the maker of two Promissory Notes for Rs. 20,000/- and Rupees 57,000/- dated January 27, 1954 and February 10, 1954 respectively, aggregating to the principal amount of Rs. 77,000/- and interest on

the said sums amounting to Rupees 7,875/13 calculated upto the date of the filing of the suit. The plaintiff claimed in the suit: (a) Decree for Rs. 84,875/13/-, (b) further interest and (c) costs.

4. On July 2, 1958, A.N. Ray, J. (as he then was) passed a decree in favour of the plaintiff company against the defendant for a sum of Rs. 92,238.15 paise with interest thereon at the rate of 6 per cent per annum from the date of the decree until realisation and costs.

5. After the decree dated July 2, 1958, there were several proceedings between the parties.

6. The judgment-debtor preferred an appeal from the decree. On April 20, 1959 the Court of Appeal passed an order staying execution of the decree upon the defendant furnishing security to the satisfaction of the Registrar of the decretal amount. On May 7, 1959 order was passed for attachment and sale of the right, title and interest of the judgment-debtor in premises No. 12/1B, Marsden Street, Calcutta in execution of the said decree. Thereafter on May 21, 1959 on the application of the judgment-debtor G. K. Mitter, J. (as he then was) passed an order, inter alia, that upon the defendant furnishing security for the amount mentioned in the order of the Appeal Court to the satisfaction of the Registrar, Original Side, the order for attachment and sale would be stayed. Thereafter security was furnished by the judgment-debtor. A reference was held before the Registrar-in-Insolvency. The defendant offered his right, title and interest in the undivided one-third share in the said premises No. 12/1B, Marsden Street, Calcutta, as security and proposed three other persons as his securities for the full value of the decretal amount under the said decree dated July 2, 1958. Two of the three persons who were and are the owners of an undivided one-third share each in the said premises No. 12/1B, Marsden Street, Calcutta, and the other was and is the sole and absolute owner of premises No. 250, Upper Chitpore Road (now known as Rabindra Sarani), Calcutta offered their respective properties as securities for the decree-holder. The Registrar-in-Insolvency accepted the said offer as sufficient for the full value of the decretal amount under the decree dated July 2, 1958 which at that time amounted to Rs. 98,223/1/6 pies which is equivalent to Rs. 98,223.09 p. Security was furnished on May 27, 1969 for this amount of Rs. 98,223.09 p. being the amount of the decree then due. Three persons who stood sureties executed security bond for this sum.

7. The appeal filed by the defendant judgment-debtor was dismissed on December 18, 1961. There was an application for leave to appeal to the Supreme Court. But the same was dismissed by the Court of Appeal on May 7, 1962. The defendant judgment-debtor thereafter made an application claiming relief under the Bengal Money-Lenders' Act. But the said application was dismissed by A. N. Ray, J. (as he then was), by an order dated December 19, 1962. An appeal was filed against the order dated December 19, 1962 but the same was dismissed on June 25, 1964. An application for leave to appeal to the Supreme Court against

the said order dated June 25, 1964 was dismissed on May 21, 1965. On November 26, 1968 an application was made by the decree-holder for sale of the attached property but the said application was dismissed by Sabyasachi Mukharji, J., on the ground, inter alia, that the said attachment has been vacated upon security being furnished by the judgment-debtor. On February 2, 1971, there was an order for assignment of the security bond in favour of the decree-holder and on March 5, 1971, the said security was assigned in favour of the decree-holder, and on April 6, 1971, the plaintiff filed a suit upon the security bond against the judgment-debtor and the three other persons who stood sureties. In this suit the plaintiff is claiming a decree for Rs 98.223.09 p. and for usual preliminary mortgage decree in respect of the said properties. This suit is now pending.

8. After filing the said suit, the plaintiff decree-holder has now made this application for execution of the balance amount of the decree for Rs. 79.551.37 p. and the mode in which execution of the decree is sought is by arrest and detention of the judgment-debtor.

9. In paragraphs 19 and 20 of the affidavit, Parameshwar Lal Santhalia stated:

"19. In terms of the said decree dated 2nd July, 1958 the plaintiff decree-holder is now entitled to receive from the defendant a sum of Rs. 1,77,774.25 p. particulars whereof are as follows:

Particulars

(a) Principal amount of the decree Rs. 98,238.94

(b)

Interest on judgment in terms of the said decree calculated from 2nd July 1958 upto 15th November 1971

Rs. 85,535.31

Rs. 1,77,774.25

20. Out of the said total amount of Rs. 1,77,774.25 p. now due under the said decree, only the sum of Rs. 98,223.09 is secured by the said security bond which is the subject-matter of the said Suit No. 135 of 1971. The balance sum of Rs. 79,551.37 p. is not secured in any manner and the decree-holder is entitled to execute the said decree for realisation of the said balance sum."

10. In the affidavit in support of the claim of the decree-holder it is stated as follows:

The defendant judgment-debtor has at all material times been and still is a wealthy man and he has been and still is carrying on various business enterprises. He is a Director of at least seven companies each of which is a flourishing concern. He holds substantial shares in the share capital of the said companies as also numerous other companies. He calls himself and is commonly

known as "Seth Indra Prakash Karnani" and professes to belong to a wealthy community of businessmen. At all material times he has been realising rents from immovable properties belonging to him including his share in the said property being premises No. 12/1B, Marsden Street, Calcutta. The defendant judgment-debtor has and always has had since the date of the decree sufficient means to pay balance of the decree, or in any event a substantial part thereof; but the defendant has been and is dishonestly refusing and neglecting to make any payment towards the decretal dues. In the premises, this court should make an order for execution of the said decree for the said balance sum, by arresting the judgment-debtor and detaining him in prison.

11. The judgment-debtor has shown cause against this application and raised several points as hereunder:

The decree is without jurisdiction, nullity and contrary to the provision of Section 34 of the Code of Civil Procedure. It is denied that the judgment-debtor is a wealthy man or holds substantial shares in flourishing companies or that he calls himself "Seth Indra Prakash Karnani". It is denied that at present he is realising any rent from any immovable property or from premises No. 12/1B, Marsden Street, Calcutta, or that he has sufficient means to pay the alleged balance of the said decree or substantial part thereof or that he has been or is dishonestly refusing or neglecting to make payment towards the alleged decretal dues. He states that he holds qualification shares only of the aggregate value of Rs. 4,000/- approximately in about eight companies and all his said shares are pledged with the bankers of the companies. He has not drawn any remuneration from any of the said companies as a Director due to their poor financial conditions. The rents, issues and profits of premises No. 12/1A, Marsden Street, Calcutta which is a Hindu joint family property have been and still are attached by the Income Tax authorities. The judgment-debtor is a member of Hindu joint family but he has not received any rents from the said property for a considerable time. At present the Income Tax liabilities of the said Hindu joint family Which includes the judgment-debtor amount to Rs. 37 lakhs approximately and the same are outstanding for want of funds. He says that he has not at present the ability to pay the alleged decretal dues of the applicant It is further sated that the plaintiff decree-holder has no subsisting legal right to execute the decree. In any event, the decree cannot be executed piecemeal for the alleged balance sum of Rs. 79,551.27 p. only.

12. A point of considerable importance has been raised, namely, whether the decree dated July 2, 1958 is a nullity or in other words, whether the decree, so far as it provided interest on interest is without jurisdiction and nullity and if so, whether the Executing Court can determine this question in an application for execution.

13. Mr. Gouri Mitter, the learned Advocate-General with Mr. J. N. Roy appearing for the petitioner argued that the decree passed by A. N. Ray, J., may be a wrong decree so far as it provided that interest should be paid on the entire decretal

amount which consisted of principal and interest, but the decree is not a nullity or without jurisdiction. He further argued that the suit was rightly and properly instituted. The Court had power and authority to hear and determine the suit and the Court has determined it and passed a decree. Therefore, the decree is not a nullity.

14. In support of his contention the learned Advocate-General relied on the Full Bench decision (*Hriday Nath Roy v. Ram Chandra Barna Sarma*, in ILR 48 Cal 138 = (AIR 1921 Cal 34 (FB), Mookerjee, A.C.J., observed at p. 146 of the report.

"An examination of the cases in the books discloses numerous attempts to define the term "jurisdiction" which has been stated to be "the power to hear and determine issues of law and fact"; the authority by which the judicial officers take cognizance of and decide causes"; "the authority to hear and decide a legal controversy"; the power to hear and determine the subject-matter in controversy between parties to a suit and to adjudicate or exercise any judicial power over them"; "the power to hear, determine and pronounce judgment on the issues before the Court"; the power or authority which is conferred upon a Court by the Legislature to hear and determine causes between parties and to carry the judgment into effect"; the power to enquire into the facts, to apply the law, to pronounce the judgment and to carry it into execution". Then at page 147 the learned Judge said:

"Thus, the jurisdiction may have to be considered with reference to place, value, and nature of the subject-matter. The power of a Tribunal may be exercised within defined territorial limits. Its cognizance may be restricted to subject-matters of prescribed value. It may be competent to deal with controversies of a specified character, for instance, testamentary or matrimonial causes, acquisition of lands for public purposes, record of rights as between landlords and tenants. This classification into territorial jurisdiction, pecuniary jurisdiction and jurisdiction of the subject-matter is obviously of a fundamental character." At page 148 the learned Judge said:

"A judgment pronounced by a Court without jurisdiction is void, subject to the well known reservation that when the jurisdiction of a Court is challenged, the Court is competent to determine the question of jurisdiction, though the result of the enquiry may be that it has no jurisdiction to deal with the matter brought before it.

Since jurisdiction is the power to hear and determine, it does not depend either upon the regularity of the exercise of that power or upon the correctness of the decision pronounced, for the power to decide necessarily carries with it the power to decide wrongly as well as rightly."

15. It was argued by the learned Advocate-General that once the Court has Jurisdiction to determine a matter, it has jurisdiction to decide it wrongly as well as rightly. 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.

16. The Full Bench decision in *Hriday Nath v. Ram Chandra*, AIR 1921 Cal 34 has been referred to and relied on in the recent decision of the Supreme Court in *Official Trustee, West Bengal and Others Vs. Sachindra Nath Chatterjee and Another*, .

17. Mr. Somnath Chatterjee, the learned counsel appearing for the judgment-debtor invited my attention to a recent decision of the Supreme Court in *Bahadur Singh and Another Vs. Muni Subrat Dass and Another*, . In this case, a question arose whether a decree directing the tenants to deliver possession of the premises to the landlord is a nullity on the ground that it was passed in contravention of Delhi and Ajmer Rent Control Act, 1952 and whether this portion of the decree is enforceable either by the landlord or by his son. This question arose in an application u/s 47 of the Civil Procedure Code, where the tenant submitted that u/s 13 of the Delhi and Ajmer Rent Control Act, 1952, the Court was prohibited from passing a decree or order for possession in favour of a landlord against a tenant except in a suit or proceeding instituted by the landlord against the tenant for recovery of possession on one of the grounds stated therein, and unless the Court was satisfied that a ground for eviction existed. Bachawat, J. delivered the judgment and held that a decree passed in contravention of Section 13(1) is a nullity. The learned Judge observed at page 436:

"On plain reading of Section 13, the Court was forbidden to pass a decree. The decree is a nullity and cannot be enforced in execution".

This decision of the Supreme Court was followed by a more recent decision in *Kaushalya Devi and Others Vs. Shri K.L. Bansal*, . In this case a decree was passed by a Court in ejectment suit in terms of compromise, without satisfying itself if the grounds for eviction existed. The defendant against whom the decree was passed presented an application u/s 47 of the CPC challenging the validity of the decree alleging that the same has been passed in contravention of Section 13(1) of the Delhi and Ajmer Rent Control Act, 1952 and hence the decree was a nullity. The Supreme Court in this case followed the judgment in *Bahadur Singh's* case and held that the decree in so far as it directs delivery of possession of the premises to the landlord is a nullity and cannot be executed.

18. Mr. Somnath Chatterjee also relied on *Official Trustee, West Bengal and Others Vs. Sachindra Nath Chatterjee and Another*, . Mr. Chatterjee invited my attention to page 828 of the judgment where Hegde, J. said:

"From the above discussion it is clear that before a Court can be held to have jurisdiction to decide a particular matter it must not only have jurisdiction to try the suit brought but must also have the authority to pass the orders sought for. It is not sufficient that it has some jurisdiction in relation to the subject-matter of the suit. Its jurisdiction must include the power to hear and decide the questions at issue, the authority to hear and decide the particular controversy that has

arisen between the parties."

At p. 829 of the judgment of the Supreme Court, the learned Judge said :

"The jurisdiction conferred on the Court u/s 34 (of the Trust Act) is a limited jurisdiction. Under that provision, the Court has not been conferred with overall jurisdiction in matters arising under a Trust deed. The statute has prescribed what the Court can do, and inferentially what it cannot do. From the fact that the Court has been conferred power to grant only certain reliefs it follows as a matter of law that the Court has been prohibited from granting any other relief."

19. Mr. Chatterjee also, in this connection, relied on AIR 1933 61 (Privy Council) . In this case there was an application for execution of a decree. The Subordinate Judge passed an order dismissing the application on the preliminary ground that the decree was a nullity, as the Court which passed it had no jurisdiction, and it could not, therefore, be executed. The respondent appealed to the High Court at Calcutta. The learned Judges of the High Court agreed with the Subordinate Judge in holding that the decree was a nullity, but held that the application might be treated as one for execution of the award, and directed that it should be entertained as such.

20. Sir Dinshah Mulla delivered the Judgment of their Lordships of the Privy Council and said at p. 75:

"The Act does not contain any provision for making a decree on an award such as is contained in Schedule II, Article 21, of the Civil Procedure Code. Such a decree, if made, is one without jurisdiction, and therefore a nullity. Their Lordships agreed with the view taken by the Courts in India that the decree was passed without jurisdiction, and was, therefore, incapable of execution as such".

21. Mr. Chatterjee submitted that the initial lack of jurisdiction is not the final test in order to determine whether a decree or order is void or invalid. There are cases where the Court had initial jurisdiction, but exercise of it resulted in not merely wrong order but invalid and void order and it has been held that if the Court had no power to make a particular type of order, the Court has no jurisdiction to make such an order and, therefore, it is a nullity.

22. Mr. Chatterjee also relied on the English decision in (1966) 2 All ER 981 (Pachey Property Corporation Ltd. v. Robinson). Winn. L. J. in this case agreed with the view of Benning, J. that the judgment in default of appearance for recovery of possession was nullity because u/s 3 of the Act of 1933, the Court had no power to give judgment for possession unless it considered it reasonable to do so. There was non-compliance of a statute as there was no determination of the question as to whether it was reasonable to give judgment for possession, as such the judgment was held to be a nullity.

23. Mr. Chatterjee also relied on my own decision reported in Sisir Kumar Chandra and Another Vs. Sm. Monorama Chandra and Others, . In this matter, there was an application for stay of execution of a consent decree passed in a

testamentary suit. The application was made in a subsequent suit filed in this Court for declaration that the consent decree in the testamentary suit is a nullity and not binding on the petitioners and the same should be set aside and cancelled. The consent decree in the testamentary suit which was challenged in the subsequent suit was a composite decree in which a Court of Probate granted probate by consent and also by consent passed a decree on the terms of settlement filed in the Probate Court.

24. The principle of law is well settled that a Court of Probate cannot grant probate by consent. A Probate Court cannot also pass a decree on terms of settlement. I followed the principles of law laid down by the Supreme Court in *Official Trustee, West Bengal and Others Vs. Sachindra Nath Chatterjee and Another*, that "before a court can be held to have jurisdiction to decide a particular matter it must not only have jurisdiction to try the suit brought but must also have the authority to pass the orders sought for. It is not sufficient that it has some jurisdiction in relation to the subject-matter of the suit. Its jurisdiction must include the power to hear and decide the question of issues, the authority to hear and decide the particular controversy that has arisen between the parties."

25. It seems to me that initial lack of jurisdiction is not the only test to determine whether a judgment or order is invalid or nullity. There may be cases where lack of jurisdiction may arise at a subsequent stage. If the court which passes a decree or order which it has no authority or competency or power to pass, it may also be a decree or order which is passed without jurisdiction and nullity although initially the court had power or authority to entertain and try the suit or the matter.

26. Now what I find in the instant case? To appreciate the point involved in the instant case, Section 34 of the CPC has to be considered before the Section was amended in 1956. Section 34 of the CPC before its amendment in the 1956 was as follows:

"34 (1). Where and in so far as a decree is for the payment of money, the Court may, in the decree, order interest at such rate as the Court deems reasonable to be paid on the principal sum adjudged, from the date of the suit to the date of the decree, in addition to any interest adjudged on such principal sum for any period prior to the institution of the suit, with further interest at such rate as the Court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the Court thinks fit."

27. By the CPC Amendment Act, 1956 (Act 66 of 1956), Section 34 of the CPC was amended as follows:

"In Sub-section (1), for the words "with further interest at such rate as the Court deems reasonable on the aggregate sum so adjudged", the words "with further interest at such rate not exceeding six per cent per annum as the Court deems reasonable on such principal sum" shall be substituted;....."

28. After the amendment in 1956 therefore, Section 34 of the Code reads thus:

"Interest.--(1) Where and in so far as a decree is for the payment of money, the Court may, in the decree, order interest at such rate as the Court deems reasonable to be paid on the principal sum adjudged, from the date of the suit to the date of the decree, in addition to any interest adjudged on such principal sum for any period prior to the institution of the suit, with further interest at such rate not exceeding six per cent per annum as the Court deems reasonable on such principal sum, from the date of the decree to the date of payment, or to such earlier date as the Court thinks fit."

29. Therefore, before the Amendment Act of 1956, the Court had power to award interest on principal and other sum on the decree. But after the amendment, Court had power to award interest on the decree on the principal amount only and not on the aggregate sum.

30. The question therefore is whether after the amendment of Section 34 of the CPC in 1966 the Court has jurisdiction to award interest on any sum exceeding the principal amount for which the decree was passed.

31. In the instant case the decree was passed not only on the principal amount of the decree but also interest was awarded on the aggregate sum for which the decree was passed, namely, interest on decree was awarded in respect of the amount of interest up to the date of the decree. Thus decree provided interest on interest.

32. It is sometimes very difficult and nice question of law whether a court lacks jurisdiction to pass a decree or order. If the Court is not entitled to enter upon an enquiry into the question then of course the court had no jurisdiction. But there are cases where although the Court had jurisdiction to enter upon an enquiry it has done something or failed to do something in course of an enquiry which is of such a nature that its decision is a nullity. The Court may have made a decision which it had no power to make; or the court may have made a decision in contravention of law which prohibited the court to pass the order or decree. It may have passed its decision on some matter which under the provisions setting it up it had no right to take into account. If such question is raised for determination before a court and if any party takes a point that a particular decree or order or any part of the decree or order is without jurisdiction or nullity, the court has to determine the question. Even the executing court has to do it; because if an order is a nullity or without jurisdiction the executing court may refuse to exercise it.

33. Section 34 of the CPC has given only a limited jurisdiction to grant interest on the principal amount of the decree. It follows inferentially reading Section 34, as it stood before the amendment and as it stands now after the amendment, that the court has been prohibited from granting interest on the aggregate amount of the decree. Therefore, it seems to me, that the principles laid down in *Official Trustee, West Bengal and Others Vs. Sachindra Nath Chatterjee and*

Another, and in Bahadur Sing's case (1969) 2 SCR 432 and in Kaushalya Devi and Others Vs. Shri K.L. Bansal, would be equally applicable in this case.

34. In my view, this is a case where the CPC by implication, prohibited the court from passing interest on the decree on the aggregate sum and, therefore, the part of the decree which provided the interest in excess of the principal amount is without jurisdiction. If the Code prescribes what the Court can do, inferentially it prescribes what it cannot do.

35. Now, the point is whether as executing court, I can go into this question.

36. In the Full Bench decision in Gora Chand Haldar and Another Vs. Prafulla Kumar Roy and Others, it was held as follows:

"Where a decree presented for execution was made by a Court which apparently had no jurisdiction, whether pecuniary or territorial or in respect of the judgment-debtor's person, to make the decree, the executing Court is entitled to refuse to execute it on the ground that it was made without jurisdiction. With these narrow limits, the executing Court is authorised to question the validity of a decree."

37. Walmsley, 3. delivered the judgment in the Full Bench case reported in ILR 53 Cal 166 = (AIR 1925 Cal 907) (FB) and held at p. 173 :

"I think it may be said that the correct view, and the view for which there is a strong current of authority, is that where the decree presented for execution was made by a Court which apparently had no jurisdiction, whether pecuniary or territorial or in respect of the judgment-debtor's person, to make the decree, the executing Court is entitled to refuse to execute it on the ground that it was made without jurisdiction. Within these narrow limits I think that the executing Court is authorised to question the validity of a decree."

33. In this connection the dictum of the Supreme Court in Kiran Singh and Others Vs. Chaman Paswan and Others, may also be noted, which is as follows:

"It is a fundamental principle that a decree passed by a Court without jurisdiction is a nullity and that its invalidity could be set up whenever and wherever it is sought to be enforced or relied upon, even at the stage of execution and even in collateral proceedings. A defect of jurisdiction, whether it is pecuniary or territorial, or whether it is in respect of the subject-matter of the action, strikes at the very authority of the Court to pass any decree, and such a defect cannot be cured even by consent of parties."

39. The decision of the Full Bench of the Calcutta High Court in Gora Chand Haldar and Another Vs. Prafulla Kumar Roy and Others, lays down clearly that the Executing Court is authorised to question the validity of the decree within the three limits mentioned in the said case. Supreme Court in Kiran Singh and Others Vs. Chaman Paswan and Others, also enumerates the three limits which appear in Gora Chand's case.

40. Subsequent decisions of the Supreme Court relied upon by Mr. Chatterjee

shows that the Supreme Court has refused to execute a decree or order passed in contravention of a particular statute although initially the Court had jurisdiction to entertain the suit or proceeding.

41. A Judge of first instance is placed in a position of some difficulty when he is confronted, as I am in this case, with the decision of Full Bench as well as the decisions of Supreme Court which it seems impossible to reconcile.

42. If the three narrow limits mentioned in *Gora Chand Haldar and Another Vs. Prafulla Kumar Roy and Others*, are the only three limits when the executing court can go into the question whether the decree presented for execution is or is not without jurisdiction, then the argument advanced by the learned Advocate-General has to be accepted, namely that as executing Court, I cannot refuse to execute the decree on ground that it was made without jurisdiction because apparently it cannot be said that in the instant case, the court which passed the decree had no jurisdiction whether pecuniary or territorial or in respect of judgment-debtor's person, to make the decree. Again, subsequent decisions of the Supreme Court relied upon by Mr. Chatterjee show that the Supreme Court has refused to execute a decree where a decree or order has been passed in contravention of a particular statute although initially the court had jurisdiction.

43. Although it seems to me that the decision of the Full Bench of the Calcutta High Court in *Gora Chand Haldar and Another Vs. Prafulla Kumar Roy and Others*, has now to be read in the line of reasoning of the decision of the Supreme Court in *Bahadur Singh and Another Vs. Muni Subrat Dass and Another*, and the other decision of the Supreme Court in *Kaushalya Devi and Others Vs. Shri K.L. Bansal*, and although it seems to me that these three narrow limits laid down in *Gora Chand's* case are not the only cases where the executing court can question the validity of the decree, there may be other cases where there is apparent lack of jurisdiction in passing the decree and even in such cases the executing court may refuse to execute the decree, but, I should, as a court of first instance, and as executing court, prefer to follow the decision of the *Gora Chand's* case and the dictum of the Supreme Court laid down in *Kiran Singh and Others Vs. Chaman Paswan and Others*, leaving a superior Tribunal to decide this point finally. In this respect I am respectfully following the observation of Roxburgh, J. in *In re. House Property and Investment Co. Ltd.* (1954) 1 Ch 576 at p. 601.

"Another preliminary question is, what is the duty of a Judge when he is confronted with a series of decisions which are difficult to reconcile? In my judgment, if there is a decision which cannot be distinguished from the case before him, even if it is a decision of a Judge of the first instance, a fortiori, of course, if it is a decision of the) Court of Appeal or of the House of Lords, he ought to apply it expressing may be his doubts whether it is still good law, but leaving a superior tribunal to overrule it."

44. The next question which arises is : if a part of the money decree passed by a

court is without jurisdiction whether that "part of the money decree is severable op whether the decree itself requires modification? A question naturally arises which part of the decree is a nullity and which part is not so. This would inevitably result into a question of calculation if the decree-holder admits that certain part of the decree is without jurisdiction and should not be executed.

45. I think I need not go into this question further in this application. In the instant case, the decree has been executed. The judgment-debtor has given security for the principal and interest on the decree up to a particular date, namely, up to May 27, 1959. Therefore, in my view, as executing court I cannot, in this application made by the decree-holder, sever part of the decree as executable and another part as not executable as the judgment-debtor wants me to do, but leave the parties to take such steps as they may be advised.

46. Assuming the contention of Mr. Advocate-General is accepted namely, that in the instant case there was merely an error of law in the decree which can be corrected by other proceeding but till the same is corrected the decree is not without jurisdiction and as executing court I must execute the decree, then the further question will arise: whether in the facts and circumstances of the case, I shall in execution of the decree for the balance amount of the decree-holder's claim pass an order for arrest and detention of the judgment-debtor.

47. The answer to this question will depend upon the question whether the court is satisfied u/s 51 of the Code of Civil Procedure, that balance of the decree should be executed by arrest and detention of the judgment-debtor in prison. Section 51, Sub-section (c) of the CPC provides as follows:

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

(a)

(b)

(c) by arrest and detention in prison

(d)

(e)

Provided that where the decree is for the payment of money, execution by detention in prison shall not be ordered unless, after giving the judgment-debtor an opportunity of showing cause why he should not be committed to prison, the court, for reasons recorded in writing, is satisfied-

(a)

(b) that the judgment-debtor has, or has had since the date of the decree, the means to pay the amount of the decree or some substantial part thereof and refuses or neglects or has refused or neglected to pay the same.

(c)

Explanation:-- In the calculation of the means of the judgment-debtor for the purposes of Clause (b) there shall be left out of account any property which, by or under any law or custom having the force of law for the time being in force is exempt from attachment in execution of the decree."

48. Under Sub-Clause (b) of the proviso to Section 51, the Court must be satisfied that the judgment-debtor has, or has had since the date of the decree, means to pay the amount of the decree or some substantial part thereof and refused or neglected or has refused or neglected to pay.

49. The decree-holder has to satisfy the Court that proviso to Section 51 applies under the facts of a particular case.

50. In *Jogendra Missir Vs. Ramnandan Singh*, the law on this point is stated thus:

"The proviso to Section 51 enjoins on the court itself not to order arrest and detention of the judgment-debtor in prison unless the court, for reasons recorded in writing, is satisfied that the materials on the record of the case come within any of the Clauses of the proviso. In other words it is a mandate to the court by the Legislature as a matter of public policy with a view to implement its object by protecting debtors who cannot pay their debts for reasons beyond their control. Irrespective of the fact whether the judgment-debtor appears or not, the court has to satisfy itself, before issuing any warrant of arrest against the judgment-debtor, whether the materials on the record bring the case within any of the clauses of the proviso to Section 51. The judgment-debtor cannot waive the privilege conferred on him by that section." At page 221 of the judgment it is said:

"it is apparent that waiver of the privilege conferred by the proviso to Section 51 of the Code does infringe the public policy, because by inserting this privilege for the judgment-debtor in Section 51 of the Act of 1908, the Legislature was guided by public policy, namely, that a debtor should not be put in the prison, when he is unable to pay his debt for reasons beyond his control."

51. In *T. Kunhiraman Vs. Pootheri Illath Madhavan Nair*, , the Court held:

"The mandatory provisions of Section 51 must be complied with before arrest is ordered".

52. The same principle is applied in *Ch. Harpal Singh and Others Vs. Lala Hira Lal*, . The head note of this case is as follows:

"Before the Court can issue a warrant of arrest or a notice to the judgment-debtor under Rule 37, Order 21, it has to see that the judgment-debtor is liable to arrest in pursuance of the application for execution. This means that the nature of the decree should be such that it can be executed by the arrest of the judgment-debtor and that such circumstances exist that an order of arrest can be made against the judgment-debtor, in case the Court was satisfied of those

circumstances. Such circumstances are what are mentioned in Clauses (a) to (c) to proviso to Section 51. The existence of such a circumstance becomes one of the conditions to govern the liability of the judgment-debtor to arrest.

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Mere non-payment to the decree-holder when the judgment-debtor came into possession of means subsequent to the date of the decree would not always be sufficient for coming to the conclusion that the judgment-debtor refused or neglected to pay the decree-holder. Refusal would imply that a request was made to the judgment-debtor at the time when he had the means to pay and yet the judgment-debtor did not pay and declined to make any payment. There must be something on the record to support that any such request was made when the judgment-debtor had that money with him and that the judgment-debtor refused to pay the decree-holder. Negligence to pay also would connote that when the judgment-debtor could have paid he just omitted to pay due to his negligence or carelessness. If the judgment-debtor had other claims to satisfy or other more urgent necessities to meet and spent the money on such purposes, it could not be said that he neglected to pay the decree-holder. In the absence of evidence having a bearing on these considerations the Court would not feel satisfied that the judgment-debtor had refused or neglected to pay the decree-holder's amount within the meaning of Clause (b) to the proviso to Section 51."

53. Thus the law is clear on this point that the onus is very heavy on the decree-holder who must satisfy the Court that proviso to Section 51 is attracted before a judgment-debtor should be sent to prison. The question is, whether the decree-holder in this case has been able to satisfy on the affidavit which has been affirmed before me that the judgment-debtor has, or has had since the date of the decree, the means to pay the amount or some substantial part and refused or neglected or has refused or neglected to pay the same.

54. In my view the decree-holder has not been able to satisfy me that proviso (b) to Section 51 of the CPC can be made applicable in this case. In my view, there are not sufficient materials upon which I can record in writing that the judgment-debtor has since the date of the decree the means to pay the amount of the decree or some substantial portion thereof and refuses or neglects to pay the same. The statement made in paragraph 21 of the affidavit of Parameshwar Santhalia is denied and disputed by the judgment-debtor. No particulars of assets or properties of the judgment-debtor has been stated in the affidavit in support of the tabular statement to show that the judgment-debtor has, or has had since the date of the decree means to pay the amount and he refused or neglected to pay the same. There is no demand made for payment of the balance amount of the decree by the decree-holder. It is true that the judgment-debtor is a member of a Mitakshara joint family which has joint family properties, but the judgment-debtor stated that there are large Income Tax liabilities. I cannot act on mere inference or make any presumption against the judgment-debtor. Under the facts of this case, I cannot also record that there was deliberate negligence or refusal

to pay by the judgment-debtor.

55. The last point raised before me is that this is a case of piecemeal execution and the Court will not on this ground entertain this application. The case cited before me on this point is Panaji Girdharlal Vs. Ratanchand Hajarimal Marwadi, by Mr. Pradip Das, who followed Mr. Somnath Chatterjee and made submissions on behalf of the judgment-debtor. The head note of the case in Panaji Girdharlal Vs. Ratanchand Hajarimal Marwadi, is as follows:

"It is not permissible to levy execution of a money decree in different stages or piecemeal. The rule is that a party having a right to execute a decree for money presently payable must enforce the whole decree at the same time and if a person having a right to recover a certain sum under a decree asks the Court to enforce that decree for a less sum, he must be taken to waive his right to levy execution for the balance.

A judgment-creditor detained a decree for principal and interest up to date of payment and costs and applied for execution and executed it in respect of the principal and costs omitting interest. Subsequently he put in a fresh application for interest only.

Held: that the effect of the earlier application for portion of the amount due at the date thereof was to prevent the judgment-creditor from making subsequent application for the balance."

56. In my view this case is not applicable in view of the facts of the present case where the execution is not really a piecemeal execution, but execution arising subsequently because of accumulation of the interest before the decree was satisfied fully.

57. However, in view of the matter which I have already discussed, there will be no order on this application.

58. Each party will pay and bear his or its own costs.