

(1978) 03 CAL CK 0061

In the Calcutta High Court

Case No : A.F.O.O. No. 371 of 1977 and Suit No. 3011 of 1969

Kalidas Pal

APPELLANT

Vs

Sripati M. Roychowdhury and Others

RESPONDENT

Date of Decision : 22-03-1978

Acts Referred:

Calcutta High Court (Original Side) Rules, 1914 — Rule 1(A)
Civil Procedure Code, 1908 (CPC) — Order 34 Rule 4, 96

Citation : AIR 1979 Cal 14

Hon'ble Judges : Bimal Chandra Basak, J;A.N. Sen, J

Bench : Division Bench

Judgement

Sen, J.—This is an appeal against the order of the trial Judge dated the 5th July, 1977 directing substitution and amendment of the decree.

2. The relevant facts may be briefly recorded.

One Satya Mohan Roychowdhury since deceased filed this suit on a mortgage for a decree under Order 34, Rule 4 in Form No. 9 of Appendix D to the First Schedule of the CPC or any other appropriate Form. There are two defendants in the suit. The defendant No. 1, Kalidas Pal is alleged to be the mortgagor and the second defendant, Kali Prasad Gupta is alleged to be the puisne mortgagee. The defendant No. 1, Kalidas Pal, the mortgagor, duly entered appearance in the suit and filed his written statement. The other defendant Kali Prasad Gupta, the puisne mortgagee has also entered appearance and filed his written statement.

3. An application was made in the said suit for the appointment of a Receiver over the mortgaged property and in the said application a conditional order was passed. By the said order a Receiver was appointed but he was directed not to take possession, if the mortgagor defendant went on paying a particular amount every month. It appears that the mortgagor defendant had been paying the amount more or less regularly. During the pendency of the suit the mortgagor defendant, Kalidas Pal was adjudicated insolvent by an order passed by the District Judge of Hooghly in Insolvency Case No. 4 of 1.974. Thereafter on the

application of the plaintiff Satya Mohan Roychowdhury since deceased an order was passed directing that Mr. M. M. Halder, District Judge of Hooghly as the Assignee of the mortgagor defendant to be added as a party to this suit and on the basis of the said order Mr. M. M. Halder was added as a party to this suit.

4. After Mr. M. M. Halder as the Assignee of the insolvent mortgagor defendant, was added as a party to this suit, the Solicitors for the plaintiff made an application on or about the 15th of June, 1976 for final judgment and decree in the suit under the provisions of Chap. 13A of the Rules of the Original Side of this Court. The said summons was taken out only against Mr. M. M. Halder, the District Judge of Hooghly who was added as a defendant as the Assignee of the mortgagor defendant. It appears that Mr. M. M. Halder did not contest the said application and on the said application the learned trial Judge passed a decree under Chap. 13A against Mr. M. M. Halder, the assignee, who was added as a defendant. It appears that by the said decree the learned trial Judge directed accounts to be taken in the manner indicated in the decree on the basis of the mortgage and referred the matter of taking accounts to the Registrar of this Court. The learned trial Judge further directed by the said decree the Registrar to make a report after he had taken accounts on the basis indicated in the decree. The learned trial Judge further directed and decreed that after the report of the Registrar had been confirmed, by efflux of time or otherwise with or without modification there would be a preliminary decree directing the defendant Kalidas Pal to pay the amount so found due in accordance with the provisions of the Code of Civil Procedure. By the said decree the learned Judge further directed and decreed that if the mortgagor defendant did not pay the said amount in terms of the preliminary decree the decree-holder would make an application for final decree.

5. It appears that the mortgagor defendant who was adjudged insolvent in Insolvency Case No. 4 of 1974 by the District Judge of Hooghly at Chinsurah was subsequently discharged by an order made on or about the 10th December, 1976. The result was that the mortgagor defendant was no longer an insolvent person, Satya Mohan Roychowdhury, the plaintiff in the suit and in whose favour the said decree in Chap. 13A against the District Judge of Hooghly as the assignee of the insolvent had been passed, died on the 24th March, 1977. The present application was thereafter made by his son Sripati Mohan Roychowdhury and in the said application Sripati Mohan Roychowdhury asked for the following reliefs:

(a) The death of the plaintiff Satya Mohan Roychowdhury be recorded;

(b) If necessary, the Register of this suit be amended by substituting in the cause title thereof the name, address and description of the petitioner Sripati Mohan Roychowdhury, the sole executor named in the last will and testament of the plaintiff Satya Mohan Roychowdhury since deceased in place of the plaintiff Satya Mohan Roy Chowdhury since deceased and also by deleting the name of the defendant No. 3;

(c) The petitioner be given leave and liberty to continue and/or carry on further proceedings in connection with suit and/or implementation of the decree passed on 14th July 1976;

(d) The decree passed in the suit on 14th July 1976 be varied and/or amended in the manner indicated in red ink Annexure "A" hereto:

(e) That the costs of and incidental to this application to be taxed by the Taxing Officer of this Hon"ble Court be costs in the proceedings subsequent to the said decree made herein;

6. On the said application the learned trial Judge passed an order on the 5th July, 1977, By his order the learned trial Judge directed the applicant and Sm. Sashibala Roychowdhury to be brought on record in place of Satya Mohan Roychowdhury as his heirs and legal representatives and he further directed and ordered that the decree under Chap. 13A which had been passed be varied and/or amended as prayed for in the said application, The effect of the said amendment was to make the said decree binding on Kalidas Pal, the mortgagor. The learned Judge also gave liberty to the substituted heirs and legal representatives to continue and carry on further proceeding in connection with the suit and/or implementation of the said decree. In short the effect of the said order is that the heirs and legal representatives of Satya Mohan Roy Chowdhury, the original plaintiff (since deceased), were brought on record in the said proceedings and the decree obtained by the said Satya Mohan Roychowdhury against the District Judge, Hooghly as assignee of Kalidas Pal, the mortgagor defendant, became binding on the said mortgagor defendant Kalidas Pal and the substituted parties became entitled to carry on further proceedings in the suit or in implementation of the decree.

7. Against this order of the learned trial Judge Kalidas Pal has preferred this appeal.

8. A preliminary objection was raised on behalf of the respondent on whose application the order under appeal has been passed that this appeal is not maintainable, as the order under appeal is not an appealable order. It has been argued on behalf of the said respondent that the order is only an order effecting substitution and amendment of the decree and the learned trial Judge who has passed the order was perfectly competent to pass the same. It has been argued that this Court had jurisdiction to pass any decree in the suit. It has been argued that as this Court has pecuniary and territorial jurisdiction and jurisdiction over the subject-matter of the suit and has passed the decree in the suit over which this Court, undoubtedly has jurisdiction, the decree passed by this Court cannot be said to be a decree without jurisdiction and can never be said to be a nullity. It has been contended that the application under Chapter 13A was perfectly competent and a decree had been properly passed by the learned trial Judge on the said application. It has further been contended that even if it can be said that the provisions of Chap. 13A of the Rules of the Original Side of this Court did not

have any application and the learned trial Judge was not right in passing a decree in the suit under the provisions of the said Rules in the said application under Chapter 13A, the decree passed by the learned trial Judge cannot, in any event, be said to be a decree without jurisdiction, as the learned trial Judge had undoubtedly jurisdiction over the subject-matter of the suit and this Court has both territorial and pecuniary jurisdiction to try the suit. It has been argued that at the most in such a case it may be said that the said decree passed by the learned trial Judge is an erroneous decree but it can never be said that the said decree is without jurisdiction. In support of this contention, reference has been made to the following decisions: (1) Hriday Nath Roy v. Ram Chandra Barna Sarma ILR Cal 138 : (AIR 1921 Cal 34) (FB), (2) Seth Hiralal Patni Vs. Sri Kali Nath, ; (3) Ittavira Mathai Vs. Varkey Varkey and Another, ; (4) Vasudev Dhanjibhai Modi Vs. Rajabhai Abdul Rehman and Others, .

9. It has been next contended that the order directing amendment of the decree is entirely a formal order. The decree under Chap. 13A has been passed against the District Judge of Hooghly as the assignee of the mortgagor defendant who was then insolvent and the District Judge represented the estate of the mortgagor. After the said order adjudging the mortgagor defendant as insolvent, there has been a subsequent order discharging him and the mortgagor has ceased to be an insolvent any longer and the formal amendment in the decree has become necessary to make the said decree effective and to enable the decree-holder to take further appropriate steps in the matter. It is, therefore, submitted that the order under appeal allowing substitution and directing amendment of the decree is not an appealable order.

10. It has been contended on behalf of the appellant that the order under appeal is without jurisdiction and is a nullity. The contention is that the order in question touches the question of jurisdiction of the Court and has also the effect of passing decree against the appellant without any jurisdiction and as such the order is clearly appealable. It is argued on behalf of the appellant that Chap. 13A of the Rules of this Court has no application to a mortgage suit and as Chap. 13A has no application to the suit, the Court had no jurisdiction or power to entertain an application under Chapter 13A in the instant case and to pass any decree in the said application. In support of this contention reliance has been placed, on the decision of the Division Bench of this Court in the case of Radha Kissen Goenka v. Thakursidas Khemka reported in 30 C WN 223 : (AIR 1936 Cal 713).

11. On the merits it has been contended on behalf of the appellant that a written statement had been filed on behalf of the appellant and the appellant is contesting the suit. Under such circumstances, there cannot be any decree against the appellant without proper adjudication of his defence. It is further submitted that as Chap. 13A has no application in the case of a mortgage suit, there cannot be any decree against the appellant in an application under Chapter 13A and the learned trial Judge by passing the order of amendment of the decree has now in effect passed a decree against the appellant without

adjudication of his defence on merits.

12. On behalf of the respondent applicant, the son of the original mortgagee plaintiff, it has been submitted that Chap. 13-A can be invoked even in a mortgage suit. In this connection our attention has been drawn to the relevant provisions of Chap. 13-A. Relying on the provisions contained in Rule 1-A of the said Chapter it has been submitted that the provisions of Chap, 13-A will apply in respect of a debt or a liquidated demand. Our attention has been drawn to Rule 5 of Chap. 7 which provides that the mortgage suit may be marked as a liquidated claim. It has further been submitted that the mortgagor has in fact no defence to the suit, and as the District Judge, who as assignee of the mortgagor was representing his estate, did not contest the said proceeding, the learned trial Judge very properly passed the said decree. It has been further argued that the said decree which as a mortgage decree is really in the nature of a decree against the property and is clearly binding on the mortgagor in whom the property has now again vested after his discharge from insolvency.

13. It is well-settled that if the court has initial jurisdiction to pass any order, any order passed by the Court which has jurisdiction to pass the order cannot be considered to be a nullity. The order passed by the Court may be an erroneous or a wrong order. The Court has jurisdiction to pass an order which may be a right order or which may be a wrong order. Correctness or incorrectness of the order pronounced will not make the order without jurisdiction and will not render the order a nullity. It is equally well-settled that if the Court does not have any jurisdiction to deal with a particular matter or to pass a particular order, any such order passed without jurisdiction will be a nullity. An appeal will undoubtedly lie against an order which has been passed without jurisdiction.

14. The effect of the order passed by the learned trial Judge in the instant case is to pass a decree against the appellant, although his defence in the suit still remains to be adjudicated. As the order of the learned trial Judge has the effect of passing a decree against the appellant, the order in the instant case will be appealable.

15. The relevant provisions of Chapter 13A may be set out hereunder :

"1. The provisions of this Chapter shall not be applicable save to suits.

(A) in which the plaintiff seeks to recover a debt or liquidated demand in money payable by the defendant with or without interest arising-

(i) on a contract express or implied; or

(ii) on an enactment where the sum sought to be recovered is a fixed sum of money or in the nature of a debt other than a penalty; or

(iii) on a guarantee where the claim against the principal is in respect of a debt or a liquidated demand only; or

(iv) on a trust; or

(B) for the recovery of Immovable property with or without a claim for rent or mesne profits by a landlord against a tenant whose term has expired or has been duly determined by notice to quit or has become liable to forfeiture for non-payment of rent against persons claiming under such tenant.

3. Where the defendant in any suit which is within the terms of Rule 1 has entered appearance the plaintiff may, as regards any claim which is within the terms of Rule 1, on affidavit made by himself or by any other person who can swear positively to the facts verifying the cause of action and the amount claimed, if any, and stating that in his behalf there is no defence to the claim, apply to the Judge for final judgment for the amount claimed together with interest, if any, or for the recovery of the land (with or without rent or mesne profits) as the case may be and costs :

Provided that as against any defendant who has filed a written statement such application shall not be permissible unless the summons is taken out as in Rule 4 mentioned within ten days after receipt of notice of the entering of appearance under Chap. VIII, Rule 18."

It will appear from the provisions contained in Rule 1 that specific provisions have been made regarding any suit concerning Immovable property, when the provisions of Chap. 13A can be attracted. Under Rule 3 the right is given to the plaintiff to make an application for final judgment only in a suit to which the provisions of Chap. 13A are applicable. Chapter 13A provides for the passing of a final decree in a summary manner in any suit to which the said Chapter applies. In a mortgage suit there have to be two decrees, a preliminary decree followed by a final decree. A final judgment resulting in a final decree cannot be passed in a mortgage suit under Chap. 13A of the Rules and Chap. 13A can have no application to a mortgage suit. The plaintiff in a mortgage suit does not have any right to make any application for final judgment or decree under the provisions of Chapter 13-A in a mortgage suit. Unless the provisions of Chap. 13-A apply the Court does not acquire any jurisdiction or power to entertain the application and to pass any decree and any decree which the Court may pass will clearly be without jurisdiction. Merely because Rule 5 of Chap. 7 provides that a mortgage suit may be marked as a liquidated claim for the purpose of classification of suits, it does not follow that it becomes a suit to which the provisions of Chap. 13-A are applicable.

16. The view that we have taken is also supported by the decision of the Division Bench in the case of Radha Kissen Goenka v. Thakursidas Khemka 30 CWN 228 : (AIR 192G Cal 713), Rankin J. who spoke for the Bench observed :

"It seems to me that the order of the learned Judge (a part of which as regards the sale of these properties is entirely without jurisdiction under Chapter XIII A) should be altogether set aside and that the proper order to make is that the plaintiff on this application should have judgment for Rs. 13,000 but that this judgment is not to be executed pending the final determination of the other

matters in the suit."

ILR 48 Cal 138 : (AIR 1921 Cal 34) Mookerjee, A.C.J. delivering the judgment of the Full Bench observed: "The authority to decide a case at all and not the decision rendered therein is what makes up jurisdiction." In the instant case, as the provisions of Chap. 13A had no application to the suit in question, the application for final judgment under the said provision was incompetent and the Court had no authority to entertain the said application. The other decisions of the Supreme Court lay down well-established principles. They are, however, not of any material assistance in considering the question involved in the present appeal.

18. In any event, as the effect of the order of the learned trial Judge is to pass a decree against the mortgagor defendant, the said order is clearly appealable.

19. The appellant has filed his written statement in the suit. His defence awaits adjudication in the suit. The learned trial Judge was not right in directing an amendment of the decree which made the decree binding on him without any adjudication of his defence.

20. As the decree passed under the provisions of Chap. 13A in the instant case is without jurisdiction and in any event cannot be made binding on the mortgagor defendant without adjudication of his defence which is to be adjudicated in the suit, the order of the learned trial Judge directing amendment of the decree cannot be upheld. The decree under Chap. 13A is also a nullity being without jurisdiction and in any event the said decree in the facts and circumstances of this case cannot be enforced.

21. For reasons stated above, we hold that the appeal is competent and the appeal must succeed. We set aside the order of the learned trial Judge directing amendment of the decree. We also make it clear that the decree passed by the learned trial Judge under Chap. 13A is of no effect and is not binding on the mortgagor defendant. The order of the learned trial Judge directing substitution is, however, upheld. The said heirs of the deceased plaintiff in terms of the order of the learned trial Judge will be substituted as plaintiffs in the suit and they will proceed to make necessary amendment in the cause title and also in the body of the plaint and the suit against the mortgagor and the other defendant will proceed to trial according to law. The hearing of the suit should be expedited and we direct that the suit should appear at the top of the appropriate prospective list a fortnight hence. The necessary amendment in the cause title and in the body of the plaint will be effected within a fortnight from date and the parties will be at liberty to apply before the appropriate Court for early hearing of the suit. The amendment will be effected on a signed copy of the minutes. Each party will pay and bear its own costs of the appeal.

Bimal Chandra Basak, J.

I agree.