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(1972) 04 GUJ CK 0003

In the Gujarat High Court

Case No : First Appeal No. 126 of 1967

Kevaldas Kalabhai — APPELLANT

Vs

Champaklal Chimanlal Sodagar and Others — RESPONDENT

Date of Decision : 05-04-1972

Acts Referred:
Bombay City Civil Court Act, 1948 — Section 12, 13, 14, 18
Civil Procedure Code, 1908 (CPC) — Order 21 Rule 22, 11, 48
Limitation Act, 1908 — Article 183

Citation : AIR 1973 Guj 19 : (1973) 14 GLR 136

Hon'ble Judges : T.U. Mehta, J

Bench : Single Bench

Advocate : Kusum M. Shah, for the Appellant; N.S. Parghi and B.R. Shah, for the Respondent

Judgement

1. This is Appeal arises out of the order passed by the 8th Judge of the City Civil Court, Ahmedabad, dismissing the execution Appln. who is the decree-holder. The execution in question is of a decree passed by the High Court of Bombay on its Original side for the sum of Rs. 19,770/- with interest and costs in civil suit NO. 674/- 47, which was for the amount of Rs. 13,210/- 8-0. The said decree is passed on 16th March 1951. The same was transferred by the High court of Bombay to City Civil court, Ahmedabad for execution and pursuant to that order of transfer the appellant-decree holder had filed this execution application in the city Civil Court, Ahmedabad on 28th April 1964. The total amount for the realisation of which the execution is filed comes to Rs. 30,270,90 nps. During the course of the execution the decree holder has taken into attachment the judgment -debtors immovable property situated at Kalupur in the city of Ahmedabad.

2. To this execution application judgment-debtors who are respondents in the s appeals have taken various objections. Their main contention is that the High court of Bombay had not jurisdiction to pass any decree against them on 16th March, 1951, in view of the facts that, on that date, the jurisdiction over the

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subject-matter of the suit was with the City Civil Court , Bombay Another contention which was raised by the respondent before the executing court was that even if it is believed that the High court of Bombay has jurisdiction to pass the decree sought to be executed, it had not jurisdiction to entertain any execution application in view of the specific provisions made in Section 12, read with Section 3 and 4 of Bombay City Civil Court Act, 1948, (Bombay Act XL of 1948) (hereinafter referred to as the Principal Act). The respondents-judgment-debtors also contended that the execution application filed by the decree-holder pursuant to the transfer of decree to the City Civil Court, Ahmedabad is also barred by time and that the High court of Bombay had not jurisdiction to transfer the decree to City Civil court, Ahmedabad for the purpose of execution.

3. All these contentions weighted favourably with the leaned Judge of the Executing Court with the result that he dismissed the execution application with to costs and raised the attachment over the properties of the respondents. This order was passed by the leaned Judge on 28th April, 1966 and it is against this order that the original decree-holder has preferred this appeal.

4. In this appeal Miss Shah who appeared on behalf of the appellant, contended that the High Court of Bombay had jurisdiction to pass the decree sought to be executed in view of the fact that when original civil Suit No. 1674/47 was filed in the said High Court, City Civil Courts, Bombay was no in existence. It came into existence during the pendency of that suit on 16th August 1948., but at that time the City Civil Court, Bombay, had jurisdiction to receive. try and dispose of only those suit and proceedings of civil nature which did not exceed Rupees 10,000/- in value. It was pointed out that since the suit which was filed by the decree holder was for the realisation of Rs. 13, 270/- it was not liable to the transferred to the City Civil Court, Bombay u/s 18 of the Principal Act. It was further pointed out that suit which was filed by the decree holder was for the realisation of Rs. 13,270/- it was not liable to be transferred to the city Civil Court , Bombay u/s 18 of the Principal Act. It was further pointed out that subsequently, during the pendency of the suit, the pecuniary jurisdiction of City Court, Bombay was raised to suits and proceedings of civil nature not exceeding Rs. 25,000/- in value but since this pecuniary jurisdiction was raised "prospectively" from 20th January, 1950 the date on which the notification which raised that pecuniary jurisdiction come into force, the proceedings of the present suit were not a liable to be transferred to the City Civil Court, Bombay and, therefore, even after the raising of the pecuniary jurisdiction of the City Civil Court, Bombay to the limit of Rs. 25, 000/- the High Court of Bombay to a did not cease to have jurisdiction over the matter. According to Miss Shah, therefore, when on 16th March, 1951, the High Court of Bombay passed the decree of Rs. 19,77/- in favour of the decree-holder it had full jurisdiction over the subject-matter of the suit.

5. Miss Shah also contended that the High Court of Bombay has also jurisdiction to entertain the execution application in spite of the provisions contained in

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Section 12 and 3 of the Principal Act, because, it being the court which passed the decree sought to be executed, it had never lost it jurisdiction to execute the same, in spite of the fact that the jurisdiction over the subject-matter of the suit was transferred to the City Civil Court. According to Miss Shah, therefore, the High Court of Bombay had not only jurisdiction to but had also jurisdiction to transfer the decree for execution to City Civil Court, Ahmedabad.

6. On the question of limitation, it was contended by Miss Shah that the decree in question was passed by a chartered High Court and therefore, prior of limitation would be 12 years for the purpose of execution of the decree and that period should be computed as provided by Article 183 of the First Scheduled attached to the Limitation Act, 1908, which was in force at the relevant time.

7. M/s. B. R. Shah and P. M. Shah, who appeared on the behalf of the respondents by judgment -debtors, supported the view taken by the executing court by contending that the decree in the question is not executable as it is not passed by a court having jurisdiction in the matter and that, at any rate, the High Court of Bombay had not jurisdiction either to entertain and execution application or to transfer the decree for execution to any other court in view of the fact that at the relevant time it was only the City Civil Court, Bombay, which has such a jurisdiction. In support of this latter contention, reliance was placed on a decision given by the High Court of Bombay in Vishwanath Keshav Joshi Vs. B.M. Sukhadwalla, wherein it is held that the proceedings to execute ad decree passed by the Bombay High Court for a sum exceeding Rs. 2,000/- but no exceeding Rs. 10,000/-., filed after that the coming into force of the Bombay City Civil Court Act, 1948, lie in the Bombay City Civil Court, as and not in the Bombay High Court.

8. A further point, which was raised on behalf of the respondents was that the execution application which if filed by the appellant-decree-holder, in City Civil Court, Ahmedabad pursuant to the transfer of decree from the High Court of Bombay is barred the period of limitation in as much as it is filed on 28th April, 1964, i.e., 12 years after the decree sought to be executed was passed on 16th March, 1951.

9. After the arguments of the leaned advocate of the parties were heard, I noticed that the objections raised by the respondent-judgment-debtors to the maintainability of the execution application on the ground of the jurisdiction, were barred by principle of constructive res judicata, but since the point was not argued by the leaned advocate of the parties, both the parties were give a fresh opportunity to address the court on this point. They were accordingly heard even on the question of constructive res judicata.

10. In view of the above, I find that following points are involved in this appeal:

(1) Whether the execution application bearing No. 237/64 filed by the appellant-decree-holder in the city Civil Court, Ahmedabad , is barred by limitation?

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(2) Whether the contentions raised by the respondents-judgment-debtors against the maintainability of execution application on the ground of jurisdiction, are barred by the principle of constructive res judicata?

(3) Whether the High Court of Bombay had no jurisdiction to pass the decree, which is sought to be executed?

(4) If the point No. 2 is decided in the negative, whether the High Court of Bombay had any jurisdiction to transfer the decree passed by it, for execution to City Civil Court, Ahmedabad?

11. Before taking up these points for my consideration, If find that it would be necessary to state shortly some relevant facts, which would be helpful in deciding them.

12. As stated above, the appellant-decree-holder filed the original suit in the year 1947 for the recovery of Rs. 13,210/- in the High Court of Bombay on its Original side. The judgment-debtors who were defendants in that suit, did not appear either in person or by advocate and, therefore, upon therein the evidence offered by the plaintiff and perusing the exhibits the High Court eventually passed a decree of Rupees 19,770.00 with running interest at the rate of 4 % and costs of the suit on 16th March, 1951. This being a decree passed by a Chartered High Court, it was not required to be executed at the end of every three years because Article 182 of the Limitation Act of 1908 did not apply to such decrees. It was Article 183 which applies to the facts of the case. According to this Article , a period of limitation of 12 years is provided for the enforcement of decree passed by any court established by Royal Charter in exercise of its ordinary Original Civil jurisdiction. It is as admitted fact that before the present execution application was filed in City Civil Court, Ahmedabad, the decree hold represented na application was filed execution of this decree for the first time in the Bombay High Court on 13-10-61, when the said execution application was obviously within the period of limitation. On this execution application a notice under Order 21, R 22 C. P. C. was issued on 2nd September, 1963 against the respondents-judgment-debtors but the respondent-judgment-debtors did not paper in response to the notice with the result that the same was made absolute pursuant to the Judge''s Order dated 22nd November, 1963 and the decree-holder (appellant) was given opportunity to execute the decree against the respondents-judgment-debtors. In the record we find a certificate D/- 11-4-64 given by the Prothonotary and Senior Master of the Bombay High Court to this effect. That certificate shows that no satisfaction of the decree was obtained by the execution. The decree-holder thereafter appears to have moved the High Court of Bombay to transfer the decree of execution to City Civil Court, Ahmedabad as a result of which the said Prothonotary and Senior Master of the Bombay High Court is found to have made following endorsement under the decree on 24th April, 1964:--

" Certified copy of decree and certificate to be transmitted to the Registrar City

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Civil Court, Ahmedabad, for execution against the defendants. Execution here stayed. Costs Rs. 86/--"

Within 8 days thereafter i.e. on 28th April 1964 the decree-holder is found to have filed the present execution application in City Civil Court, Ahmedabad, where it is registered as Darkhast No. 237/64.

13. It is from these facts that the pointsigh HiHHkdkflkazlsdki iijeieieiiididididididihigh court at dispute between the parties in this appeal, are required to be determined. The first question is whether the present Darkhast which was filed on 28th April, 1964, is bared by limitation or not. As stated above, the decree in question is found to have been passed by the High Court of Bombay, which is one of the Court established by Royal Charter, in exercise of it ordinary Original civil jurisdiction. It is obvious, therefore, that the period of limitation for the execution of this decree would be 12 years. It is an admitted position that provisions contained in Section 48 of CPC which provide for the time limit of 12 years for execution of a decree do not apply to the facts of this case for the simple reason that the matter is governed by Article 183 which applies to the decrees passed by Courts established by Royal Charter Now according to Article 183 of the Limitation Act, 1908, the period of 12 years would being to run when a present right to enforce the decree in question accrues to the person capable of releasing the right. But this provision is further controlled by a proviso, which is in the following terms:--

"Provided that when the judgment, decree of order has been revived, or some part of the principal money secured there by, or some interest on such money has been paid, or some acknowledgment of the right thereto has been given in writing singed by the person liable to pay such principal or interest, or his agent, to the person entitled thereto are his agent, the twelve years shall be computed from the date of such revivor, payment of acknowledgment or the latest of such revivor payment or acknowledgments as the case may be".

If this proviso governs the facts of the case, then the period of 12 years would run not from the date of the decree, when the right is accrued, but form the date of the revivor or payment of acknowledgment, if any In my view, the above stated facts of the case show very satisfactorily that a "revivor" as contemplated by the above quoted proviso attached to Article 183 of the Limitation Act, 1908 has taken place in this case in the execution proceedings filed by the decree-holder in the High Court of Bombay prior to the institution of the present execution proceedings. As pointed out by a Division Bench case of Patna High Court in Harnarain Vs. Dayabhai Hira Chand, , the term "revivor" used in Article 183 of the Limitation Act refers to the Common Law practice, under which, if a writ of execution was not issued within a year and a day, if was necessary to revive the decree by the process known as "scire facias", i.e. to say by calling on the judgment-debtor to show cause why the decree-holder should not have execution against him. The doctrine has its origin in the presumption of the satisfaction, which was held to arise when execution had not been applied for

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within a year and a day after the date of the judgment. The rules now found embodies in Order 21, Rule 22 of the C. P. Code, 1908 under which, when an application is made more than one year after the date of the decree, notice is required to be issued to the person against whom the execution is prayed, notice is required to be issued to the person against whom the execution is prayed, requiring him to show cause why the decree should not be executed against him. In order to constitute a "revivor" of a decree there must be, expressly or by implication, a determination by a court, that the decree is still capable of execution and that the decree is decree-holder is entitled to enforce it. As held by the High Court of Allahabad in Ram Krishna Murarji Vs. Ratan Chand and Another, , the essence of doctrine of revive of that notice should be issued to be judgment-debtor and after giving him an opportunity of being heard, the court should record a finding explicitly or impliedly, that the decree of order in question is executability. The same view is taken by a Division Bench of Bombay High Court in Kirtilal Jivabhai Vs. Chunilal Manilal, . In Gopalarayadu v, Gopal Krishnayya AIR 1945 Mad 325, the Madras High Court has held that "revivor" is as order in execution against a particular person consequent upon a notice and that indication by the executing court that the decree was still alive and capable of being executed was naught to revive the decree and give a fresh starting point of limitation. In the execution application, which was filed by the decree-holder in this case in the High Court of Bombay, a rule was issued was subsequently made absolute by the court and the decree-holder was given liberty to execute the decree. Under these circumstances, the final determination made by the court about the excitability of the decree in that execution application amounted to "revivor" and if that be so, the period of limitation of 12 years contemplated by Article 183 of the Act should be computed from 11 the April, 1964, the date on which the said determination was made. Under the circumstances, the present execution application is obviously filed within the period of limitation and, therefore so far as the first point is concerned,. the respondents cannot succeed.

14. The second point involved in this matter is regarding constructive res judicata and relates to the contentions raised on behalf of the judgment-debtors ad regards the maintainability of the execution of the decree. As already stated above, the contention is that after the jurisdiction of city Civil Court Bombay was raised in January 1950 to hearer the suits and proceeding not exceeding Rs. 25,000/- in value, the High Court of Bombay ceased to have any jurisdiction to entertain application for executing the decrees for Rs. 25.000/- and below even though validly passed by it, because such application could be filed only in City Civil Court, Bombay. It was pointed out that since in this case the decree was for Rs. 19,770/- the High Court Bombay had not jurisdiction to entertain this execution application or to entertain any proceedings even for transfer of the decree to any other Court of execution. For this proposition a strong reliance was paced on the decision of Bombay High Court in Vishwanath Keshav Joshi Vs. B.M. Sukhadwalla,).

15. I am for the opinion that his content is not available to the judgment debtors

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as it is barred by the principle of the constructive res judicata. I have already stated above that before this execution application was filed on the transfer of the decree of Cite Civil Court, Ahmedabad, the decree-holder had preferred an execution application on 13-10-61 in the High court of the Bombay. Notice under Order 21, rule 22, CPC was also issued in that application and the same was made absolute on 22nd November 1963, as the judgment-debtors did not appear to take objection to the execution. It is thus evident that in these execution proceeding before the Bombay High Court, the judgment-debtors failed to raise any contention that the High Court of Bombay had no jurisdiction to execute the decree. The question is whether they can be permitted to agitate this question in this subsequent execution filed in City civil Court, Ahmedabad.

16. Answer to this question is provided by authoritative pronouncements of Supreme Court in Mohanlal Goenka Vs. Benoy Krishna Mukherjee and Others, and of this Court in Ganchi Laxmichand Ambaram Vs. Tulsidas Madhavdas, .

17. It is now settled legal position even since the decision of the Judicial committee in 1883 in Ram Kirpan v. Rap Kuari (1883) 11 Ind App 37 that Section 11. Civil Procedure Code, which deals with the principle of res judicata, is not exhaustive and hence this principal can be applied even to execution proceedings. However, on the question relating to the application of the constructive res judicata contained in Explanation IV of Section 11, CPC some High Court have taken a view that this principal cannot be extended to execution proceeding and that an order made in execution proceeding should not have the force of res judicata unless the point raised in subsequent proceeding was "actually" raised an decided in previous proceedings. Patna case of Prithi v. Jamshed, AIR 1922, Pat 289, Calcutta case of Gourmoni v. Jughat Chandra ILR 1890 Cal 57 and Madras case of Somsundaram v. Chokkalingum ILR Mad 780 : (AIR 1917 Mad 185) and Subramania v. Raheswara ILR Mad 1016 : (AIR 1918 Mad 1167) are the instance on the point. In Mannu Lal Vs. Hanuman Singh, . Allahabad High court held that the principle of constrictive res judicata would apply only if the previous execution application has been "fructuous".

18. All the decisions have lost their efficacy in view of the above referred decisions of Supreme Court in Mohanlal Goenka Vs. Benoy Krishna Mukherjee and Others, and of this Court in Ganchi Laxmichand Ambaram Vs. Tulsidas Madhavdas, . A full Bench of Madras High Court has rejecting the above view in Venkatranga v. Chinna Seethamma AIR 1941 Mad 440 (FB). this and other decision rejecting the above view need not be discussed here in view of the exhaustive treatment of the subject made by this Court in Ganchi Laxmichand''s case AIR 1963 Guj (supra). In this last named case Bhagwari, J. (as the then was) has considered the Scheme of Order 21, rules 22 and 23 along with the provisions contained in Section 47 and 2(2), C. P. C. and has concluded that where a judgment debtors does not appear in answer to the notice under O. 21, R. 22 CPC to show cause why by the decree should not be executed against him,. Order 21, R. 23 provides that the Code shall order the decree to be executed.

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Such an order, being a determination of a question within Section 47 amounts to a decree within the meaning of Section 2(2), CPC and therefore, if such a decree become final, the judgment-debtors cannot be permitted to contended any subsequent stage of execution proceeding that the order was not rightly made. It is further held in this case that if the order under Order 21, Rule 23 can operate as res judicata in regard to the contentions urged at the hearing of the notice under Order 21, rule 22, that order must equally operate as constructive res judicata in regard to the contentions which might and ought to have been urged against the execution of the decree in opposition which might and ought to have been urged against the execution of the decree in opposition to the notice under Order 21, rule 22. Equally must be order under Order 21, Rule 23 operate as constructive res judicata if the person again whom the decree is sought to be execute does not appear in answer to the notice under Order 21, rule 22 and the order directing the decree to be executed is, there, made by the court. This decision is thus a complete answer to the question whether the Principe of constructive res judicata can be applied to those execution application wherein, at a prior stage, the court had no occasion to give ''actual'' decision on the disputes subsequently raised, or where the prior execution has not "fructified'' . In Mohanlal Goenka Vs. Benoy Krishna Mukherjee and Others, even the Supreme Court has taken the same view.

19. Shri Shah, arguing on behalf of the respondents-judgment-debtors, however, contended that this Court should refuse to apply the principle of constrictive res judicata to the present case on the ground that there was total lack of inherent jurisdiction in the High Court of Bombay to entertain and to proceed with the proviso execution and therefore, to transfer the decree for exception to any other court. I find that even this contention of Shri shah should be rejected in view of the decision given by the Supreme Court in the above referred case of Mohanlal Goenka Vs. Benoy Krishna Mukherjee and Others, . This very argument has been considered and rejected by the Supreme Court in that case. At this stage it would be necessary to stage shortly a few facts of that case. The decree sought to be executed in that case was passed by the High Court of Calcutta on its original side on 12-6-1931. The High Court transferred the said decree for execution to Asansol Court where decree-holder application for execution was dismissed for default on 11-3-1932. Thereupon the Asansol Court seen to the High Court what in form purported to be certificate u/s 41, Civil Procedure Code. The said Court however, did not return the certified copy of the decree and other documents transferred to it by the High Court. ON 24-11-1932 the decree-holder filed another petition for execution of the decreeing Asansol Court. during the course of this second execution, some properties of the judgment-debtor was put to sale to public auction and were purchased by the decree-holder. The sale was subsequently set aside. The properties were gain soled in public auction and again it was set aside. There was third sale which was confirmed. Thereafter the judgment-debtors raised a contention by filing an application u/s 47 and 151, CPC that certificate sent by Asansol Court in 1932 at the end of the first

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execution application was in substance a certificate u/s 41, CPC and, therefore, after sending that certificate, the Asansol Court cased to have jurisdiction to entertain second execution application as there was not fresh transmission of the decree of the High Court to that Courts. Such as objection was not raised by the Judgment debtors at any stage of the second petition for execution.

20. It is obvious from the facts that the question which was involved in that case was one of the inherent jurisdiction of the Asansol court to entertained and proceeding further whit the second execution application. The Supreme Court held that where neither at the time when the execution application was made and a notice served on the judgment-debtor not at a subsequent stage, the judgment debtor raised any objection on the ground that executing Court had not jurisdiction to execution the decree, the failure to raise such an objection which goes to the root of the matter precludes him from raising the plea of jurisdiction on the principle of constrictive res judicata. The Supreme Court has further observed in that case that even an erroneous decision on a question of law operates asses judicata between the parties because correctness or otherwise of a judicial decision has not bearing on the question whether or not it operates as res judicata. It should be noted that in that case the High Court of Calcutta had refused to apply the principle of constructive res judicata on the ground that there was lack of inherent jurisdiction in the executing court to proceed with execution but this view of the High Court was rejected by the Supreme Court as is clearly from the judgment recorded by Ghaulam Hasa, J. This decision of the Supreme Court is followed by different High Courts and its ratio of applied even in cases where a question of court''s jurisdiction to entertain execution application was involved. Patna case of Dhirendra Nath Chandra and Others Vs. Satish Chandra Gorain and Others, , full Bench decision of Orissa High Court in Jagannath Ramanuj Raj Deb Vs. Sri Lakshmi Narayan Tripathy and Others, , Mysore case of Stappa v. Hirachand, AIR 1961 Mys 54 and Kerala case of Raman Vs. Ambujakshi Amma, are the instances on the point. Some of these High Court have made observation suggesting that cases of total lack of inherent jurisdiction in the executing court would not invite the application of the principle of the constructive res judicata, but such observation do not get any support form the judgment recorded by Ghulam Hasan, J., in the above referred Supreme Court case of Mohanlal Goenka Vs. Benoy Krishna Mukherjee and Others, . I find that even if an exception is made of the case wherein execution Court which death with the matter at a prior stage was totally lacking in inherent jurisdiction to entertain the petition for execution that does not help the judgment-debtors in this case because the discussion which follows shows that the High Court of Bombay which has passed the decree sought to be executed, was not lacking in a n "inherent" justification to entertain the application to execute the decree in spite of the change in the pecuniary jurisdiction of the City civil Court Bombay.

21. At this stage it would be necessary to stage shortly the court of events which held to the raising of the pecuniary jurisdiction of City Civil Court Bombay in the

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mouth of January, 1950 and the relevant provisions of the Principal Act.

22. This suit was field in the High Court of Bombay in 1947 when the Principal Act was not even enacted. It is an admitted position that the Principal Act came into force from 16th August, 1948. According to Section 3 thereof, notwithstanding anything contained in any law City Civil Court, Bombay "shall have jurisdiction to receive, try and dispose of all suit and other proceedings of the civil nature not exceeding ten thousand rupees in value". The present suit admittedly exceeded Rs. 10,000/- in value, and therefore, when the Principal Act came in to force City Civil Court at Bombay did not acquire any jurisdiction to try and dispose it of. The suit, therefore, remained within the jurisdiction of the High Court. Thereafter, while this suit was still pending in the High Court,. the Government of Bombay issued a notification, known as "Jurisdiction Notification", 20th January, 1950. By this notification the jurisdiction of City Civil Court, Bombay was raised to the pecuniary limit to Rs. 25,000/-. This notification is in the following words:

"Bombay Castle, 20th January, 1950. Bombay City Civil Court Act, 1948, No. 2346/5. In exercise of the powers conferred by Section 4 of the Bombay City Civil Court Act, 1948 (Bom. XL of 1948), the Government of Bombay is pleased to invest, with effect from and on the date of this notification, the City Court with jurisdiction to receive, try and dispose of all suits and other proceedings of a Civil nature not exceeding twenty five thousand rupees in value, and arising within the Greater Bombay subject, however, to the exception specified in Section 3 of the said Act.

By order of the Government of Bombay,

V. T. Dehejia, J.

Secretary to the Government".

Validity of this notification was then challenged in Original Civil Jurisdiction Suit No. 240 of 1950 (Narottamdas Jethabhai Vs. Aloysious Pinto Phillips, , before the High Court of Bombay. the High Court held it to be invalid and of no effect. As a result to this decision of the High Court, all the suits having valuation of more than Rs. 10,000/- continued to be filed in the High Court, and the High court also continued to try such suits. In the meanwhile, State of Bombay preferred an appeal to the Supreme Court. On 20th December, 1950, Supreme Court held that the said notification was intra vires as legal. (State of Bombay Vs. Narothamdas Jethabai and Another, . In view of this decision of the supreme Court it was found necessary to validate the suits and proceeding instituted tries and disposed of by the High Court during the interval between the date of the above referred "Jurisdiction Notification and the decision of the Supreme Court. In the result, Bombay Act XV of 1951 called "Bombay Special suits and proceedings validating Act 1951" (hereinafter referred to as Validating Act) was passed on 24 the April, 1951. In the meanwhile the decree in the present suit was already passed by the High Court on 16th March, 1951. Section 3 of the

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Validating Act validated the decree passed by the High Court only in the those suit which were instituted after the date of "jurisdiction notification (viz., 20th January, 1950)". The present suit was not instituted after the date to Jurisdiction Notification and hence the said section did not apply to it. For the same reason even section 4 there of which applied to pending and dismissed suit did not apply to it. The result was that the record of this suit remained with the High Court.

23. From these facts the first question which would arise to be considered is whether the High Court of Bombay had not jurisdiction to pass the decree sought to be executed? If the answer to the question is that the High Court had such a jurisdiction, then the next question would be whether it had no "inherent" jurisdiction to execute the decree passed by it.

24. Reverting to the provisions of the Principal Act we find that Section 112 thereof puts bar to the jurisdiction of the High Court to try suits and proceedings cognizable by city court. But this section is controlled by a proviso which is in the following terms:

"Provisions the High Court may, for any special reason, and at any stage removed for trail by itself any suit or proceeding from the city Court".

This proviso, and Section 13 and 14 of the Principle Act show that though Section 12 barred the jurisdiction of the High court to try suits and proceedings cognizable by City Court it did not lose its inherent jurisdiction to try cases cognizable by city Court in certain specified circumstances, These Section 13 and 14 and in the following terms:--

"13. If in any suit instituted in the High Court the Judge who tries it is of the opinion that it ought to have been instituted in the City Court and in such suit--

(a) if the plaintiff does not obtain a decree, the defendant shall be entitled to his costs as between attorney and client; or

(b) if the plaintiff obtains a decree for any matter of an amount of value less than the maximum amount of the pecuniary jurisdiction of the city Court, on costs shall be allowed to the plaintiff".

"14. When any suit or proceeding is removed or trial to the High court from the city Court u/s 12--

(a) it shall be heard and disposed of by the High Court in the exercise of its original civil Jurisdiction and the said court shall have all the powers and jurisdiction in respect thereof as if it had been originally instituted in such court;

(b) court fee on the scale for the time being in force in the High Court as a court of original civil jurisdiction shall be payable in that court in the respect of the suit or proceeding therein:

Provided that in that levy of such fee which, according to the practice of the court, is credited to the State Government, credit shall be given by for the

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institution fee already paid in the city Court".

Proceeding further with the provisions of the Principal Act, we find that Section 18 provides for the transfer of suits pending in High Court, in the following terms:

"18. (1) All suit and proceedings cognizable by the City Court and pending in the High court, in which issues have not been settled or evidence had not been recorded on or before the date of coming into force of this Act, shall be transferred to the City Court all shall be heard and disposed of by the City Court and the City Court shall have all the powers and jurisdiction thereof as if the had been originally instituted in that court.

(2) In any suit or proceedings so transfer institution fee shall be paid, credit being give to any court fee levied in the High Court, and costs incurred in the High Court till the date of the transfer all be assessed by the City Court in such manner as the State Government may, after consultation with the High Court, determine by rules".

25. Now, the first important point to be noted is that none of these provisions applied to the present suit on 16th August, 1948 when the Principal Act was brought into force for the simple reason that its pecuniary valuation was more than Rs. 10.000/-. Therefore, on 16th August 1948, City Court Bombay had no jurisdiction to try it. The "Jurisdiction Notification" which raised the pecuniary jurisdiction of the City Court came into force on 20th January, 1950. This notification is already quoted above. A bare perusal of thus notification shows that the jurisdiction of the City Court was raised to Rs. 25,000/- "with effect from and no the date of notification" i.e. with effect form and on 20th February, 1950. The notification is, therefore, prospective and not retrospective in its operation. It does not provided for the transfer of pending suits, and it is an admitted position that there is no other order evidencing transfer of business contemplated by Section 150, Civil Procedure Code. The leaned Judge of the Lower Court seems to be of the opinion that with the raising of pecuniary jurisdiction of the City Court on 20th January, 1950, the provisions of the Principle Act contained in Section 3, 12, and 18 authoritically applied even to the proceedings pending in High Court. Such a view is not justified in view of the facts that the operation of the" Jurisdiction Notification" is merely prospective and that there are no directions regarding the transfer of pending proceedings. It need not be emphasised that Section 18 of the Principal Act applied to the proceedings which were pending in High Court and which were cognizable by City Court on the date on the which the Principal Act came into force. The present suit was not covered by Section 18 on the date of the application of the Principal Act and therefore a special provision for its transfer was necessary after the issuance of "Jurisdiction Notification" on 20th January 1950 in order to invest the City Court with jurisdiction to try it. Since this was not done, the High Court continued to have jurisdiction to try and to dispose it of. In this view of the matter, the leaned Judge of the lower court was in error in holding that the High Court o f Bombay had not jurisdiction to pass the decree which is sought to be

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executed.

26. This brings me to the next question, namely whether the High Court of Bombay had no "inherent" jurisdiction to executed the decree passed by it. Vishwanath Keshav Joshi Vs. B.M. Sukhadwalla, the Bombay High Court for a sum exceeding Rs. 2,000/- but not exceeding Rs. 10,000/- filed after the coming to force of the Bombay City Civil Court Act, lie in Bombay City Civil Court and not in the Bombay High Court. Facts of that case show that the decree in that suit was passed on April 2, 1948, i.e. before the principal Act was bought into force on 16th August 1948. However, execution application was made by the decree-holder on September 22, 1948, i.e. after the Principal Act came into force. The court first considered whether the execution proceedings are the "proceedings" cognizable by the City Court in view of that fact that the suit had already ended and resulted in a decree. The Court came to the conclusion that execution proceedings were such proceedings. The Court thereafter proceeding to consider the provisions of Section 37, CPC and interpreted the meaning of the expression "court which passed a decree" occurring in that section and relying upon the Calcutta decision in Masrab Khan Vs. Debnath Mali alias Abhu Mali and Others, held that city Court Bombay, was deemed to be the "Court which passed the decree" which was sought to be executed and therefore, that was sought to be executed and therefore that was "substituted" for the High Court according to the terms of Section 37(b) of Civil Procedure Code. In view of this, the Court concluded that it did not retain jurisdiction to execute the decrees exceeding Rs. 2,000/- and not exceeding Rs. 10,000/- sitting as a Single Judge I feel myself bound by this decision of the Bombay High Court as it is a decision prior to the establishment of this Court. I, therefore, do not proposed to enter into a debate on the question whether in case where pecuniary or territory jurisdiction of the Court which has passed a decree is subsequently changed the said court loses its jurisdiction to execute the said decree. In view of the application of the Principle of constructive res judicata, and in view of some observation of some of the High Court in cases referred to above going to show that cases of total lack of inherent jurisdiction may from an exception to the application of constructive as judicata to execution proceedings, the limited question which arises for my determination is whether the above referred decision of Bombay High Court comes in my way in holding that the High court of Bombay had never lost its "inherent" jurisdiction to execute the decree passed by it. I find that the case was not examined by that High Court from this angle. In fact, it was not necessary for that court to consider this point. Therefore, all that the High Court has held in that case is that in cases where a decree is for the amount between Rs. 2,000/- and Rs. 10,000/- the application to execute that decree should be filed in city Court, Bombay after the Principal Act came in to force. It says nothing about the inherent lack of High Court''s jurisdiction. In may opinion, therefore, the question whether there was lack of "inherent" jurisdiction in the High Court is res integra. If we again peruse the provision of the Principal Act we find that there is enough evidence contained therein to show that the High Court

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never lacked in its "inherent " jurisdiction to try suits and proceedings cognizable by City Court. Had it been so lacking in its inherent jurisdiction, the provisions contained in the abovequoted proviso to Section 12 as well as in Section 13 and 14 would never have been there. Even Section 18 stipulates that the case and proceedings wherein issues had been settled or evidence had been recorded, were not to be transferred to city Court. In other words, they were to be disposed of by the High Court. If the High Court was lacking in "inherent" jurisdiction to try the suit and proceedings cognizable by City Court, in no eventuality it would have been invested with any jurisdiction to try such suits and proceeding. This means that though in ordinary course the High Court ceased to have jurisdiction to try suits and proceedings cognizable by City Court its "inherent" jurisdiction to try and dispose of such suits and proceedings was never lost. In this view of the mater, the respondents judgment-debtors ought in to have raised the question of jurisdiction in facts have raised the question of jurisdiction in the first execution proceedings taken out by the decree-holder in the High Court of Bombay and if they failed in doing so, their subsequent challenge on that score would be barred by constructive res judicata.

27. What remains not to the considered is recent decision of Supreme Court on which reliance was placed by Shri Shah, for the proposition that what the question is purely of law and it relates to the jurisdiction of the court, or a decision of court sanctioning something what is illegal, the party affect by the decision will not be precluded from challenging the validity of that order under the rule of res judicata, because, rule of res judicata being a rule for procedure cannot supersede the law of the land,. Such a decision is given by the Supreme Court in Mathura Prasad Bajoo Jaiswal and Others Vs. Dossibai N.B. Jeejeebhoy, . After considering the ratio of this decision, I find that it does not help the respondents-judgment-debtors. In is first necessary to state a few facts which would explain this ratio. The respondent of that appeal before the Supreme Court had granted a lease of a price of land in village Pahadi taluka Borivli to the appellant Mathura Prasad, for constructing building for residential or business purposes. After the appellant constructed buildings on the said land, he submitted by application in the Court of civil Judge, (J. D) Borivli, that the standard rent of the land be determined u/s 11 of Bombay rent Act, 1947. this application was rejected by the leaned Civil Judge on the ground that the provisions of Bombay Rent Act did not apply to the open land let for the purpose of constructing building for residence etc. The order was confirmed by the High Court. But in a subsequent decision the same High Court changed its view. The appellant-tenant, hereafter filed a fresh petition for a order determining standard rent. This fresh petition was rejected by the court holding that the question had become res judicata by the decision in the proviso proceedings. this view was confirmed by the High Court with the result that the matter was taken to the Supreme Court by the tenant. It was found that the view taken by the High Court in previous proceeding was overruled even by the Supreme Court in Mrs. Dossibai N.B. Jeejeebhoy Vs. Khemchand Gorumal and Others, . The question

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which arose before the Supreme Court of reconsideration was whether in view of its decision in Mrs. Dossibai N.B. Jeejeebhoy Vs. Khemchand Gorumal and Others, , the determination of the dispute between the parties in the previous proceedings amounted to res judicata. the Supreme Court resolved this question by observing decision and not the reasons given for the said decision, and a pure question of law unrelated to facts which give rise to right, cannot be deemed to be a matter in issue. It was further observed that a decision on an issue of law ill be res judicata in a subsequent proceeding between the same parties, if the cause of action of the subsequent proceeding be the same as in previous proceeding, but not when the cause of action of the is different, not when the law has since the earlier decision been alerted by a competent authority, nor when the decision relates to the jurisdiction of the court to try the earlier proceeding , nor when the earlier decision declare valid transaction which a is prohibited by law. The observation making reference to jurisdiction of the Court to try earlier proceeding should be under stood in the background of the facts of the at case. These facts show that the interpretation which was accepted by the Civil Judge. Borivli and the High Court in previous proceeding between the parties was rejected by the Supreme Court in Mrs. Dossibai N.B. Jeejeebhoy Vs. Khemchand Gorumal and Others, . The interpretation put by the Supreme Court on a provision of law is the law of the land and the is interpretation is effective from the date of the enactment itself. Therefrom, it is that interpretation which determines that jurisdiction of course court and which also supplies a fresh cause of action to the party concerned. Under the circumstance, the previous decision of the High Court in that case could not have operated as res judicata. This, option appears to have been summarised by the Supreme Court in the following words:

"But where the decision is no question of law i.e. the interpretation of a statute, it will be res judicata in a subsequent proceeding between the same parties where the cause of action is the same, for the expression "the matter in issue" in Section 11, CPC means the right litigated between the arties, i.e. the facts on which the right is claimed or denied and the law applicable to the determination of that issue. where, however the question one purely of law and it relates to the jurisdiction of the court or a decision of the court sanctioning something which is illegal, by resort to the rule of res judicata a party affected by the decision will not be precluded from challenging the validity of that order under the rule of res judicata, for a rule of procedure cannot supersede the law of the land".

28. The facts of the case under my consideration are entirely different. In this case, as shown above, it is not possible to say that High Court of Bombay was totally lacking in inherent jurisdiction to execute the decree passed by it, and in response to the notice issued by the High court under Order 21, Rule 22, the respondents did not appears to raise any objection regarding the jurisdiction of the High Court to execute the decree under the provisions of the principal Act. In my view, therefore, this is a case which would be governed by the principle of constructive res judicata.

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29. Point No. 3 is already covered by the above a discussion which shows that the High Court of Bombay had jurisdiction to pass the decree in question. In view of the my answer to Point NO., 2, the consideration of Point No. 4 is the not called for.

30. In the result this appeal succeeds and is, therefore, allowed with costs throughout. The decision appealed against is set aside and the court lower Court is directed to proceed further with the execution of the decree transferred to it by the High Court of Bombay. Attachment of judgment-debtors'' properties granted pending this appeal is conditioned till the executing court things it proper to later or modify the order relating to the same.

31. Appeal allowed.

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