

(1941) 03 CAL CK 0022
In the Calcutta High Court

Meghraj Golab Chand, Firm

APPELLANT

Vs

Chandra Kamal Bhuiyan

RESPONDENT

Date of Decision : 31-03-1941

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 37(b)

Citation : AIR 1941 Cal 493

Hon'ble Judges : Henderson, J

Bench : Division Bench

Judgement

Henderson, J.—This appeal is by the decree-holder. His difficulties are due to the fact that he did not appeal against a wrong order made by the Subordinate Judge of Jorhat. The decree was made by the Subordinate Judge of Dibrugarh, on 7th March 1934. North Lakhimpore (the area within which the cause of action arose) was transferred to Sibsagar with effect from 1st August 1934. Starting with an application by the decree-holder on 11th February 1937, there were altogether four execution cases disposed of by the Subordinate Judge at Jorhat which is the headquarters of the Sibsagar District. The last was dismissed on 31st March 1939, on the ground that the Court had no jurisdiction to deal with the matter. The present execution case was filed in the Court of the Subordinate Judge at Dibrugarh, where the decree was originally made. An objection was filed by the judgment-debtor on the ground that the application was barred by limitation. This objection was overruled by the Deputy Commissioner, but has been allowed in appeal by the Subordinate Judge.

2. It is not necessary to discuss the merits of the case. Mr. Sen very fairly conceded that the application is not barred by limitation. The question depends upon whether the Court at Jorhat had jurisdiction to execute the decree. The case clearly comes within the provisions of Section 37 (b), Civil P.C. As a result, the applications in the Court of Jorhat were properly filed in a Court of competent jurisdiction. They, therefore, cannot be treated as mere nullities and are sufficient to save limitation. Mr. Sen, however, supported the conclusion of the

Subordinate Judge that the appellant is precluded from raising the question on the general principles of res judicata. On this point Mr. Mukherji's first contention was that res judicata can only apply to the case in which the decision was made (the fourth case) and subsequent cases. It will not affect the previous cases. On that view the present application would be within time as it was filed within 3 years of the dismissal of the third case. On that matter the position is as follows : This very objection as to jurisdiction was taken by the judgment-debtor in the second case. The decree was transfer red to Nowgong where it appears that the judgment-debtor was stationed at the time. The execution case was eventually dismissed. The objection was not pressed to a decision and was not raised in the third case. When the objection was put forward again in the fourth case, the appellant ought to have raised a plea of res judicata. He should have contended that the judgment-debtor was prevented from raising the question either on the principles of constructive res judicata or on the ground that the failure of the judgment-debtor to prosecute his objection in the second case was tantamount to its dismissal. When this plea was not raised, then on the general principles of res judicata the last decision will prevail and all the cases will be affected by it.

3. In the second place, Mr. Mukherji relied on the general principle that the decision of a question of law which does not decide anything regarding the rights of the parties is not res judicata. Various cases were cited in support of this general proposition. Of course, Mr. Sen had no difficulty in distinguishing some of them from the present case. But they do illustrate other applications of the same principle. The particular point in the present case is whether the decision of the Court that it has no jurisdiction to deal with the case is res judicata or not. A right decision on this point could not have any such effect. It would be nothing more than an expression of opinion by the presiding officer of a Court which had no jurisdiction to deal with the matter. The necessary foundation for raising a plea of res judicata would accordingly be absent. In his reply Mr. Mazumdar contended that the opposite proposition must be equally true. When the Court itself is denying jurisdiction, the decision cannot have any such effect. I am not prepared to accept this contention. Ex hypothesi, a Court having jurisdiction has wrongly decided a point raised by the parties and a wrong decision by a competent Court can be made the basis of a plea of res judicata. It is therefore necessary to examine the matter further. The general question arose for consideration by a Full Bench of this Court in the case in Tarini Charan Bhattacharjee and Others Vs. Kedar Nath Halder, . The question was framed in extremely wide terms, i. e., whether an erroneous decision on a pure question of law operates as res judicata in a subsequent suit where the same question is raised. The judgment was delivered by Rankin C. J. He was not prepared to answer the question, framed as it was in such wide terms. He did, however, make some observations with regard to the law of res judicata and on the present question he said this:

Questions of law are of all kinds and cannot be dealt with as though they were all

the same. Questions of procedure, questions affecting jurisdiction, questions of limitation, may all be questions of law. In such questions the rights of parties are not the only matter for consideration. The Court and the public have an interest. When a plea of *res judicata* is raised with reference to such matters, it is at least a question whether special considerations do not apply.

4. This case was considered in a subsequent decision by a Division Bench of the High Court at Patna in the case in *District Board, Darbhanga and Another Vs. Suraj Narain Sinha*, . It was here held that a previous decision that a civil Court had no jurisdiction to deal with the plaint is not *res judicata*. A similar view was taken by a learned Judge of the High Court at Allahabad in the case in *Jwala Debi Vs. Amir Singh* . Mr. Sen criticised the reasons which the learned Judge gave for his decision, but whatever the reasons, the decision is another example of the principle being given effect to. Mr. Mukherji further relied upon the old decision of the Privy Council in the case in *Delhi and London Bank Ltd. v. Melmoth A. D. Orchard* (77) 4 IA 127. The relevant passage in the judgment is this:

It was contended that the rule of *res judicata* applied, and that the application made on 4th May 1871, was barred by the order of the Deputy Commissioner of the 10th day of December 1869, from which no appeal was preferred. But their Lordships are of opinion that the order of the 10th day of December 1869, was not an adjudication within the rule of *res judicata*.

5. This decision has been discussed in connexion with attempts made to use it in support of other and wider propositions. Thus, in the case in *Manjunath Badrabhat v. Venkatesh Govind Shanbhog* (81) 6 Bom 54, it was held that this decision is no authority for the proposition that the decision on a point of limitation is not *res judicata*. Then again, in the case in *Khosal Chandra Roy Chowdhury v. Ukiladdi* 14 CWN 114 it was held that it is no authority for the proposition that a decision at one stage of an execution case can be again called in question at a later stage of the proceedings. I have not, however, been able to find any decision to the effect that it is no authority for the proposition that the determination of the question of jurisdiction is not *res judicata*. On this point, Mr. Sen argued that the reason underlying their Lordships' decision was that the matter was not really decided at all. He suggested that the order of the Deputy Commissioner sending the petition to the record room was a strong indication that the case was kept pending on the file. I need only say that records of disposed of cases and not of pending cases are consigned to the record room. Furthermore, the words used "was not an adjudication within the rule of *res judicata*" imply that the matter was decided but that the decision did not have a certain effect. If the case was still pending, the question would simply not have arisen for decision and it would have been unnecessary to say anything. Now, by his order dated 10th December 1869, the Deputy Commissioner decided that his Court had no jurisdiction to deal with the question. When Sir Barnes Peacock said that such a decision was not an adjudication within the rule of *res judicata*, the implication is that the principles of *res judicata* do not apply to decisions about

the jurisdiction of the Court. In my judgment, that case is directly in point.

6. On the other hand, Mr. Sen only cited one decision that of in the case in *Chinappa Reddi v. Srinivasa Rao Garu* ('35) 22 AIR 1935 Mad 835. The ground given for that decision really was that the rule of *res judicata* must apply unless it can be said that the former decision was a nullity. That is certainly in favour of the respondent in this case; but in my judgment the weight of the authorities is all the other way. The second question raised in the appeal was whether the appellant has brought himself within Section 14, Limitation Act. Mr. Sen pointed out that this raises the question whether the section applies to execution cases at all. He, however, does not desire to press that point of view and I will assume that it does so apply. It was, therefore, necessary for the appellant to show that he had been prosecuting his execution cases with due diligence and in good faith in the Court at Jorhat. There is nothing to suggest that he had any other motive than to realise his dues. Of course, now that it has transpired that the decision of the Subordinate Judge was a wrong decision, no question of bad faith can really arise. The appellant was diligently prosecuting his execution in the right Court. Bad faith could only be imputed to him on the suggestion that he knew that the judgment-debtor would raise a belated objection, that he anticipated a wrong decision and that for some improper reason he had already determined not to appeal. Any such conclusion would be absurd and there can be no question that he was acting in good faith.

7. It appears that the learned Subordinate Judge was influenced by some other matters which really throw no light on the question of diligence or good faith. Thus, the forbearance shown by the decree-holder to the judgment-debtor in waiting to take coercive measures until execution of the decree was nearly barred has been requisitioned against him to suggest that he was not diligent. Then again, the learned Subordinate Judge seems to have thought that the application of the decree-holder for transfer of the decree to Nowgong was a clever dodge to evade a decision on the question of jurisdiction. I need hardly say that the transfer of the decree to Nowgong would not make it impossible for a decision to be given on this point. The fact is that, so far from the decree-holder avoiding a decision, the judgment-debtor did not press his objection to a decision. These matters can throw no light on the bona fides of the decree-holder and he is entitled to deduct the time occupied in; these execution cases. This, however, is not sufficient to save limitation. He would also have to deduct the time taken in obtaining copies. There are no materials upon the record to show what that time was. This is, therefore, a matter of evidence. As in my opinion, the appeal succeeds upon the other point, I do not propose to call upon the parties to adduce such evidence. The appeal is accordingly allowed. The order of the lower appellate Court is set aside and that of the Deputy Commissioner restored with costs in all Courts. I assess the hearing fee of this appeal at three gold mohurs.