

(1955) 01 CAL CK 0032
In the Calcutta High Court
Case No : A.F.A.O. No. 14 of 1953

Sadananda Saha and Others

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 14-01-1955

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 47, 9
Independence (Legal Proceedings) Order, 1947 — Article 4(3)

Citation : AIR 1956 Cal 317 : 60 CWN 99 : (1956) 2 ILR (Cal) 763

Hon'ble Judges : S.R. Das Gupta, J; Mallick, J

Bench : Division Bench

Advocate : Manindranath Ghose and Anil Kumar Sen, for the Appellant;
Bhabeshnarayan Bose, for the Respondent

Final Decision : Dismissed

Judgement

S.R. Das Gupta, J.—This is an appeal against an order passed u/s 47, Civil P. C. The decree-holders are the appellants before us. By the said order it was held that the decree which was passed was without jurisdiction.

2. The facts leading up to this appeal are as follows: Originally a suit was brought in the court of the Munsif at Chandpur by the appellants on the allegation that out of 51 bundles of tobacco booked from Shampur station on the A. B. Railway to Chandpur station on the same Railway only 14 bundles were delivered. The claim was made against the then Governor-General in Council of India. The said suit was filed before August 1947, before the date on which partition of India took place.

While the said suit was pending the partition of India was effected and thereafter a decree was obtained from the said court by the appellant on 18-5-1948. By the said decree the defendant was given three months' time to pay all the decretal dues. The payment of the decretal amount not having been made a notice u/s 80, Civil P. C. was served on the Union of India and thereafter a suit being Money Suit No. 10 of 1949 was brought in the court of the Sixth Subordinate Judge,

Alipore.

The said suit was filed on 3-5-1949 and an ex) parte decree was passed in the said suit on 22-8-1949. I should have mentioned that the decree in question was obtained on the judgment which had been delivered by the First Court of the Munsif at Chandpur in the previous suit. Thereafter an execution proceeding was started for the realisation of the said decretal amount.

An objection u/s 47, Civil P. C. was filed by the Union of India in the said execution proceedings. The application u/s 47 of the Code was dismissed by the Subordinate Judge, 1st Court, Alipore. There was an appeal against the said order and the lower Appellate Court held that the court which passed the decree in Money Suit No. 10 of 1949 had no jurisdiction to pass the same and therefore the execution proceedings cannot proceed and he allowed the application made u/s 47, Civil P. C. It is against that order that the present appeal has been preferred.

3. The learned Advocate for the appellants contended before us that the view taken by the learned Additional District Judge was entirely wrong. In order to determine whether or not the view taken by the lower court is correct it would be necessary to refer to certain provisions of the Indian Independence (Legal Proceedings) Order, 1947 and of the Indian Independence (Rights, Property and Liabilities) Order, 1947. The relevant article of the Indian Independence (Legal Proceedings) Order, 1947 is Article 4 which runs as follows:

"4. Notwithstanding the creation of certain, new Provinces and the transfer of certain territories from the Province of Assam to the Province of East Bengal by the Indian Independence Act, 1947,--

(1) all proceedings pending immediately before the appointed day in any civil or criminal court (other than a High Court) in the Province of Bengal, the Punjab or Assam shall be continued in that court as if the said Act had not been passed, and that court shall continue to have for the purposes of the said proceedings all the jurisdiction and powers which it had immediately before the appointed day;

(2) any appeal or application for revision in respect of any proceedings so pending in any such, court shall lie in the court which would have appellate, or as the case may be revisional jurisdiction over that if the proceeding were instituted in that court after the appointed day; and

(3) effect shall be given within the territories of either of the two Dominions to any judgment, decree, order or sentence of any such court in the said proceedings, as if it had been passed by a court of competent jurisdiction within that Dominion".

The material provisions of the Indian independence (Rights, Property and Liabilities) Order, 1947 are contained in Articles 8 and 12 of the said, order. They are as follows:

"8 (1) Any contract made on behalf of the Governor-General in Council before the appointed day, shall, as from that day.

(a) if the contract is for purposes which as from that day are exclusively purposes of the Dominion of Pakistan, be deemed to have been made on behalf of the Dominion of Pakistan instead of the Governor-General in Council; and

(b) in any other case, be deemed to have been made on behalf of the Dominion of India instead of the Governor-General in Council".

4. The rest of the provisions of the said Article are not material for our present purpose.

"12 (1) Where immediately before the appointed day the Governor-General in Council is a party to any legal proceedings with respect to any property, rights or liabilities transferred by this Order, the Dominion which succeeds to the property, rights or liabilities in accordance with the provisions of this Order shall be deemed to be substituted for the Governor-General in Council as a party to those proceedings and the proceedings may continue accordingly".

We are not concerned with the rest of the provisions of the said Article.

5. The first question which arises for our decision is against whom this decree of the Chandpur court was passed. The decree apparently was passed against the Governor-General in Council of India but at the time said decree was passed the partition of India had been effected. So the question is against whom was the said decree, passed, or in other words, which of the Dominions shall be deemed to have been substituted for the Governor-General in Council as a party in the said suit?

The answer to that question would again depend on whether or not the liability in respect of the contract on which the plaintiffs filed the said suit was a liability of the Dominion of Pakistan or of the Dominion of India, that is to say, the view we take as to the effect of Article 8 (1) (a) and (b), Indian Independence (Rights, Property and Liabilities) Order, 1947. It is not disputed before us that the contract with the then Governor-General in Council was for the carriage of 51 bundles of tobacco booked from Shampur Station to Chandpur station. Both these stations are now within the Dominion of Pakistan.

That being so, would the contract in question be a contract for the purposes of the Dominion of Pakistan or for the purposes of the Dominion of India? This very question arising out of similar set of circumstances came up for consideration before Roxburgh J. in the case of-- Union of India (UOI) Vs. Loke Nath Saha, and His Lordship held that Article 8 (1) (a), Indian Independence (Rights, Property and Liabilities.) Order, 1947 did not cover such a contract and the liability on the said contract must be a liability as provided in the residual provisions of Article 8 (1); (b), namely the liability of the Dominion of India,

The reason for this view taken by His Lordship was that it could, not be said that

the contract for carriage of goods in March, 1947, before the Dominion of Pakistan was ever thought of, could be held as from the "appointed day" to be one that is for the purposes which from that day are exclusively the purposes of the Dominion of Pakistan. In a subsequent case reported in -- Krishna Ranjan Basu Ray Vs. Union of India (UOI) and Others, , Das Gupta J. sitting with Debabrata Mookerjee J. took a contrary view.

Their Lordships did not accept the reasoning given in the case decided by Roxburgh J. and held that the purpose of the contract was the carriage of the goods and where the destination was some point in Pakistan it would seem reasonable to hold that the purpose was the purpose of the Dominion of Pakistan. The view taken by Das Gupta and Debabrata Mookerjee JJ. was also the view taken in a decision of the East Punjab High Court in the case of -- Chaman Lal Loona and Co. Vs. Dominion of India, New Delhi, .

6. The question, therefore, is which of these decisions should be accepted as correct. Had it been necessary for us to go into the question for the purpose of disposing of this appeal we would have certainly done so, but in our opinion, this appeal can be disposed of on a much shorter ground and it would not be necessary for us to go into this question at all.

7. The position is that if it is taken to be a decree passed against the Dominion of India, then under the provisions of Article 4, Indian Independence (Legal Proceedings) Order, 1947 no decree on such a decree could be passed. If again, the decree in question be taken to be a decree passed against the Dominion of Pakistan then also in view of the said provisions no fresh decree could be obtained by the appellants.

Article 4, Indian Independence (Legal Proceedings) Order 1947 lays down in the clearest possible terms that notwithstanding the creation of the new provinces all proceedings pending immediately before the appointed day in any civil or criminal Court in the Province of Bengal, Punjab or Assam shall be continued in that court as if the said Act had not been passed.

Sub-clause (3) lays down that effect shall be given within the territories of either of the two Dominions to any judgment decree, order or sentence of any such court in the said proceedings, as if it had been passed by a court of competent jurisdiction within that Dominion. Reading the said two sub-clauses of the said Article it seems to be clear that proceedings which were pending on the appointed day in any court in the Province of Pakistan will have to be continued in the same court and any order or decree passed in the said proceedings shall be given effect to in the other Dominion as if it had been passed by a court of competent jurisdiction within the said Dominion.

In other words, the decree or order in question so passed must be treated to be a decree or order of the other Dominion in which it is sought to be enforced. That being the position this decree, if it is a decree passed against the Dominion of Pakistan, must also be given effect to in the Dominion of India as if it had been

passed by a Court of competent jurisdiction within the Dominion of India.

If on the other hand, it be a decree passed against the Dominion of India then there is no question that it is to be enforced within the Dominion of India as a decree passed by a court of competent jurisdiction of this Dominion. So in either case, the decree in question can. be enforced in the Dominion of India as a decree passed, by a Court of competent jurisdiction within that Dominion. In that view of the matter it becomes in our opinion, unnecessary to decide the question mentioned above.

8. The next Question which arises, on the view we have taken so far, is whether or not the second decree which had been obtained by the appellants on the strength of the decree passed by the court of the Munsif at Chandpur was a decree passed without jurisdiction. As I have already indicated, the second decree was passed on the strength of the decree which was obtained from the court of the Munsif at Chandpur.

If it is a decree, which either it is in fact or is to be treated as such, passed by a competent court of the Dominion of India, then in our opinion no second decree can be obtained on the strength of the said decree and the decree which, had been obtained is a nullity. Section 9, Civil P. C. in our opinion makes this position quits clear. That section provides that the courts shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred.

In this case cognizance of such a suit is in our opinion barred by the provisions of Sub-clause (3), of Article 4, Indian Independence (Legal Proceedings) Order, 1947. That sub-section in effect says that the decree shall be given effect to as if it were a decree passed by a court of competent, jurisdiction of the Dominion in which it is sought to be enforced, in other words, the said sub-clause by implication prohibits the institution of a fresh suit on the decree which had been obtained in the proceedings mentioned in the said Article.

Mr. Ghose appearing on behalf of the appellants contended before us that if the result of the said sub-clause is that the decree which is obtained in the proceedings mentioned in the said Order will have to be enforced in the manner in which a decree in fact obtained in a court within the jurisdiction of the Dominion of India has to be given effect to, execution proceedings have to be taken in order to give effect to the said decree. Then the only bar to the institution of a fresh suit on the said decree would be the bar imposed by Section 47, Civil P. C.

But Mr. Ghose's contention is that Section 47, Civil P. C., although a bar to the institution of a suit, would not make a decree passed in contravention thereof a nullity. In support of the said proposition Mr. Ghose cited some cases before list with which I shall presently deal.

But I should mention at this stage that none of these cases cited by Mr. Ghose

supports the contention which he raised before us namely that a decree passed in contravention of the provisions of Section 47, Civil P. C. is not a decree passed without jurisdiction, or a nullity.

On principle I see no reason why a decree passed in a suit filed in contravention of the provisions of Section 47, Civil P. C. would not be a decree passed without jurisdiction and a nullity. Section 9, Civil P. C. clearly states that the courts have "jurisdiction" to try suits excepting those suits cognizance of which has been either expressly or impliedly barred.

In our opinion cognizance of a suit which falls within the purview of Section 47, Civil P. C. has been expressly barred by the said section. Section 47 says that all questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and "not by a separate suit".

Thus, the said section in clear terms prohibits the institution of a suit in respect of questions arising between the parties to the suit in which a decree was passed or their representatives relating to the execution, discharge or satisfaction, of the decree. I am for the moment conceding that the question which was raised in the subsequent suit was a question relating to the execution, discharge or satisfaction of the decree.

Even if that be the position, I see no reason why Section 9, Civil P. C. would not cover a case which comes within Section 47, Civil P. C. I have up till now proceeded on the "basis that the matters agitated in the second suit are matters which are covered by Section 47, Civil P. C. and on that the effect of Sub-clause (3) of Article 4, Indian Independence (Legal Proceedings) Order, 1947, is that the holder of a decree referred to in the said Article will have to follow the ordinary methods of execution.

But, in my opinion Sub-clause (3) of Article 4 has a wider effect than what is contended for by Mr. Ghose. It seems to us that Sub-clause (3) of Article 4 independently of Section 47, Civil P. C. bars, the institution of a fresh suit in respect of judgments, decrees or orders passed in proceedings which had been pending before a particular court on the "appointed day" as referred to in the said Article.

The whole scheme of the said Order is that the proceedings which are pending before a particular court on the "appointed day" have to be continued in that court and if any decree or order is passed by that Court, that decree or order must be final or binding on both the Dominions: in other words, the object of the said Article is clearly to prevent multiplicity of suits in different Dominions over the same matter which has been the subject-matter of proceedings pending in any particular Dominion on the "appointed day".

We are of opinion that independently of the provisions of Section 47, Civil P. C.

Sub-clause (3) of Article 4, Indian Independence (Legal Proceedings) Order, 1947, is a bar to the institution of a suit in respect of all matters which had already been the subject-matter of a decree passed in a suit pending on the "appointed day". That being so, Section 9, Civil P. C. is attracted to the said provisions and if a court entertains such a suit filed on the basis of such a decree or order the court would be, acting without jurisdiction.

9. I shall now deal with the cases cited by Mr. Ghose. In the case of -- "Hariravji Chiplunkar v. Shapurji Hormasji" 10 Bom 461 (PC) (D) relied on by Mr. Ghose the facts were as follows: a mortgage decree for redemption had originally been passed against two mortgagors. One of the mortgagors had paid up his dues and redeemed the mortgage. Thereafter the second mortgagor filed a fresh suit for redemption on the view that the decree in question was really a fresh mortgage.

The learned Subordinate Judge negatived that contention and held that the suit was barred in view of the provisions of Section 11 of Act 23 of 1861 (present Section 47, Civil P. C.) and dismissed the suit. Against the said decision there was an appeal to the High Court and the High Court took the same view. The matter was taken to the Privy Council and the Privy Council also dismissed the appeal. I do not see how this case helps Mr. Ghose in his contention.

Their Lordships did not at all consider the question of jurisdiction. All that their Lordships held was that Section 11 of Act 23 of 1861 was a bar to the institution of the suit. The question as to whether or not if any decree had been passed in contravention of the said section the same would have been a nullity having been passed without jurisdiction did not arise for their Lordships' consideration.

The other case on which reliance was placed by Mr. Ghose in his argument before us was the case of -- Gora Chand Haldar and Another Vs. Prafulla Kumar Roy and Others, . Mr. Ghose relied upon this case in support of his contention, namely, that even if the decree, in this case had been passed without jurisdiction, it is not such an absence of jurisdiction as can be challenged by the executing court: in other words, Mr. Ghose's contention was that the executing court can question the jurisdiction of the court which passed the decree only in limited cases, that is to say, cases where there is want of jurisdiction either territorial, pecuniary or personal.

It is in support of the said proposition that he cited the said case of Gora Chand Haldar and Another Vs. Prafulla Kumar Roy and Others, ". Mr. Ghose relied upon the observations of Walmsley J. made in the said case which are as follows:

"Where the decree presented for execution was made by a court which apparently had not 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".

In my opinion the observations on which Mr. Ghose relied in support of his contention must be read with reference to the facts of the case. It does not seem to us that Walmsley J. wanted to lay down an absolutely hard and fast rule namely that it is within those three cases and no other that the court executing the decree can question the jurisdiction of the court which passed the said decree.

The emphasis as it appears to us was more on the distinction between the absolute lack of jurisdiction and exercise of jurisdiction erroneously. We do not think that on the authority of this case we can accept Mr. Ghose's present contention.

10. In our opinion, therefore, the view taken by the learned Additional District Judge was correct. The court which passed the second decree on the basis of the decree which had already been obtained from the Munsif's court at Chandpur acted without jurisdiction. It is not a mere irregularity as contended by Mr. Ghose before us.

11. In the result, therefore, this appeal must be dismissed and we make an order accordingly. There will be no order as to costs.

Mallick, J.

12. I agree.