

(1939) 01 CAL CK 0023
In the Calcutta High Court

Sakti Nath Roy Choudhury

APPELLANT

Vs

Jessore United Bank Ltd. (Registered)

RESPONDENT

Date of Decision : 20-01-1939

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 22

Citation : AIR 1939 Cal 403

Hon'ble Judges : R.C. Mitter, J;Khundkar, J

Bench : Full Bench

Judgement

R.C. Mitter, J.—The respondent instituted in the Court of the Subordinate Judge at Jessore a suit against five persons, Sailaja Nath, Shekaraja Nath, Himadrija Naih Hemaja Nath and Adrija Nath Rai Chowdhury to enforce a mortgage bond. The preliminary decree was passed on 9th January 1933 when all the said five defendants were alive. Hemaja Nath however died on 23rd October 1933 before the final decree, leaving as his sole legal representative his minor son named Alope Nath. The fact of his death was not brought to the notice of the Court with the result that in the final decree his name appeared. The final decree therefore was not effective against Alope Nath, who had not been substituted in the suit in his father's place. The final decree directed the sale of four items of immovable property, three situated within the district of Jessore and one in the Khulna District. The final decree was put into execution in the Court of the Subordinate Judge, Jessore, on 4th March 1936. In the application for execution the decree-holder included all the four properties but prayed for the sale of the property situated in the Khulna District as the other three properties which were within the Jessore District had already been sold at the instance of a prior mortgagee.

2. As Sailaja Nath had died before the application for execution was put in but after the final decree and as Hemaja Nath was also dead at the time the decree, holder applied for substituting the names of the legal representatives of both Sailaja Nath and Hemaja Nath in their places. Sakti Nath and Somnath, an infant, were the legal representative of Sailaja Nath. As one of the legal

representatives of Sailaja Nath and the sole legal representative of Hemaja Nath were minors the decree-holder proposed Renu Bala, the mother of the former, and Shekaraja Nath, the uncle of the latter, as their guardians. The usual notices were directed to be served on the minors and on their proposed guardians. On receipt of the return of service the legal representatives of Sailaja Nath and Hemaja Nath were substituted on 4th April 1936 but as the proposed guardians did not appear and express their consent to the proposed appointment the Court appointed Mr. Satyendra Nath Sen, a pleader, as their guardian, and the latter was ordered to submit his report. Mr. Sen put himself in communication with the minors and their natural guardians but got no instructions from them. On 1st May 1936 he submitted his report in which he stated that he was not in a position to contest the execution case (I, 18). After the Court had received this report and had accepted it it issued notices under Order 21, Rule 22 of the Code on the other judgment-debtors, on 5th May 1936. No notice under this rule was issued, or served on Mr. Sen, the guardian of Som Nath and Aloke Nath. The judgment-debtors who were served did not appear in terms of this notice. The peon's return is Ex. C (II, 11 at 13).

3. On 26th May 1936 the Court issued notice for the settlement of the terms of the sale proclamation under Order 21, Rule 66. On 12th June 1936 the peon reported that he had served the notice on the judgment-debtors 2 and 3, Shekaraja Nath and Himadrija Nath, but could not serve it on the other judgment-debtors (Ex. D-II, 14). Shekaraja Nath appeared in pursuance of this notice and filed an objection to the valuation. His objection was registered on 20th June 1936 and the Court directed the decree-holder to take steps for the service of the notice under Order 21, Rule 66 on judgment-debtors 1 and 5, Sakti Nath and the widow of Adrija Nath, who was also dead. On 30th June 1936 notices were again issued on these two judgment-debtors and were served on them on 8th July 1936. The peon's return has not been included in the paper-book but it is on the record being sheet No. 46. The objection of Shekharaja Nath was heard and the Court fixed Rs. 20,000 as the value of the property. At that time the Collector had already taken possession of the estate u/s 99, Cess Act, Rs. 7156-8-0 being then the arrears of land revenue and Rupees 6922.13.3, the arrears of cess (App. pp. 2 and 3.) This value was inserted in the sale proclamation. In the sale proclamation as published in the locality the description of the property was as follows:

Touzi No. 132/2 of the Khulna collectorate, Dihi Bhadra, Pergunah Duran, police station Satkhira in the District of Khulna. Names of mouzas within the mehal (names given) 16 annas sadar revenue Rupees 6277-15-8 of which half, namely Rs. 3138-14-6, is payable for the estate.

4. In the advertisement published in the Calcutta Gazette the description is the same, but the names of the Mouzas are omitted and the revenue payable is stated to be Rs. 3138-14-6, it being not stated that the revenue payable for touzi No. 132/2 is half of the total revenue payable for the entire estate. According to

the peon's report the sale proclamation was proclaimed in 14 villages appertaining to the mehal in the course of three days, 1st September to 3rd September 1936, and the sale proclamation was affixed to a bamboo post planted on a public road in village Satkhira, the last village where it was proclaimed (Ex. B II, 15). At the sale which was held on 12th October 1936 there were four bidders besides the decree-holder and there was keen competition among the bidders as the bid sheet would show (I, 22). The decree-holder's bid was the highest and the property was knocked down to him for Rs. 20,000. On 17th November 1936 Sakti Nath alone filed an application for setting aside the sale. The Subordinate Judge has by his order dated 31st March 1937 refused his application and he has preferred this appeal against the same. His learned Advocate Mr. Eoy Choudhury urges the following points in support of the appeal :

- (1) That the decree is a void decree, as the final decree was passed against a dead man (Hemaja Nath) and the execution Court should have refused to execute it;
- (2) that the Court of the Subordinate Judge at Jessore had no jurisdiction to sell the property which was not within its territorial jurisdiction, but was within the territorial jurisdiction of the Khulna Court;
- (3) that there was fraud in publishing the sale, the sale proclamation having been suppressed;
- (4) that there were irregularities in publishing and conducting the sale, because (a) the notice of the substitution of the heirs of Sailaja Nath and Hemaja Nath had not been served on Som Nath, the minor son of Sailaja, (b) the notices under Order 21, Rule 22, and Order 21, Rule 66 were neither issued nor served on Mr. Sen, the guardian of the minors Som Nath and Alope Nath, (c) that notices under Order 21, Rule 66, had not been served on Sakti Nath and the widow and legal representative of Adrija Nath, (d) that the property was misdescribed in the sale proclamation and that the description given in the advertisement in the Calcutta Gazette did not tally with that given in the sale proclamation, and (5) that the value of the property was over a lac of rupees and that the inadequacy in the price was the result of fraud and material irregularities.

5. We will first deal with points 3 to 5. The learned Subordinate Judge has recorded a finding that the sale proclamation was duly published in the locality and that finding has been attacked before us. We find no substance in the said attack. The peon has not been examined but his report has been exhibited (Ex. E II, 15). The decree-holder has also examined the drum, mer, the identifier, Keshav Lal Dutta and 5 mokabila witnesses Barada Kanta Mandal, Hari Pada Ghosh, Samiraddi Mondal, Haras Sardar and Hem Chand. The evidence on behalf of the appellant consists of the oral evidence of persons who say that the sale proclamation was not published in their presence. There was no motive to suppress the sale proclamation. The property being Zemindary the sale had been advertised in the Calcutta Gazette. The witnesses examined on behalf of the appellant are either his tenants or are under his control. Under these circumstances we do not see any reason to differ from the estimate of the oral evidence formed by the trial Court. We accordingly hold that the sale proclamation was duly published.

6. There is no substance in ground 4(a). The whole argument is based on the fact that in the peon's return, Ex. B(II-9), the name of the minor Som Nath is not mentioned. Two notices were made over to the same peon, Abdul Rahman Dhali, one for service upon the minors, Som Nath and Alope Nath, and the other for service upon the natural guardians of the said minors and on Sakti Nath, the adult son of Sailaja. The peon went with the two notices to the judgment-debtors' house at 37 Cossipur Eoad and served both of them on the same date (23rd October 1936) and at the same time about (10 A. M.). He submitted two returns written on the back of the duplicates of the two notices. They have been marked Bxs. A and B. In the return Ex. A, which is the return of service on the minors, he mentions that he found both the minors present, (Som Nath and Alope Nath) and served the notice in their presence. In the return Ex. B, which is the return of service on Sakti Nath and the the natural guardians of the minors he omits to record the presence of Som Nath. That statement that Som Nath was also present was not relevant to this return Ex. B but was so only to the return Ex. A, where his presence at the time of service is specially noted. We hold that the notices of substitution were duly served on the minors and on their proposed guardians.

7. We do not see any substance also in ground No. 4(b). Notices under Order 21, Rule 22 were issued by the Court on 5th May 1936 and notices under Order 21, Rule 66 on 26th May 1936. It is admitted that these notices were issued only on judgment-debtors 1, 2, 3 and 5 and not on the guardian of judgment-debtor 1 (ka), the minor Som Nath, and of No. 4, the minor Alope Nath. But these notices were issued after Mr. Sen had been appointed their guardian and after he had filed his final report on 1st May 1936 (I, 18) in which he stated that he was not in a position to contest the execution case. This report was accepted by the Court on the same day. We do not see how under these circumstances omission to issue and serve notices under Order 21, Rule 22 and Rule 66 on Mr. Sen thereafter can be a material irregularity.

8. Regarding ground No. 4(c) Mr. Roy Choudhury must have urged it under a misapprehension. The return of the first notice issued under Order 21, Rule 66 has only been printed. That notice was issued on 26th May 1936 to be served on judgment-debtors 1, 2, 3 and 5. The peon's return dated 12th June 1936 on this is that he had served Nos. 2 and 3 only but could not serve Nos. 1 and 5 (Ex. D and Ex. D-I 11-14, 26-27). Mr. Roy Chowdhury must have been under the wrong impression that no fresh notice under Order 21, Rule 66 was issued or served on judgment-debtors 1 and 5. Order No. 13 dated 30th June 1936 shows that a fresh notice was issued for service on judgment-debtors 1 and 5 and order No. 14 dated 22nd July 1936 shows that the notice so issued was served. The peon's return of this service has not been printed. It is on the record, being sheet No. 46. Nor is ground No. 4(d) of any substance. Two points are urged: The first is that it ought to have been stated in the sale proclamation that hissy No. 2 of touzi No. 132 was being put up to sale and not touzi No. 132/2. There is no material difference between the two descriptions and even if the difference was

material Order 21, Rule 90, Sub-rule 3 would prevent the appellant from raising the point as the notice for settling the terms of the sale proclamation had been served on him. The second point is that the advertisement in the Calcutta Gazette did not tally with the sale proclamation. In both, the estate has been described correctly and all important particulars have been given. The only difference is that in the sale proclamation the names of the mouzas which appertain to the estate were given but in the Gazette these names had been omitted. There is nothing in this.

9. The fifth point urged relates to the value of the property. Shekaraja Nath appeared at the stage of settlement of the terms of the sale proclamation. At his instance the Court after an enquiry raised the valuation from Rs. 10,000 to Rs. 20,000 and the decree-holder has purchased for Rs. 20,000. At that stage, Shekaraja Nath, who had a common interest with the other judgment-debtors admitted that the net annual income was Rs. 2500. The Court accepted the statement and fixed the value at ten years' purchase after taking into consideration the charges on the property. Admittedly Rs. 7156.8-0 was then due on account of revenue. The arrears of cesses were Rupees 6922-13-3, for which the Collector had taken and was in possession then. It is now said that the net annual income is Rs. 6000. To support that case there is only oral evidence of the flimsiest character. Neither the partition papers nor the collection papers nor the hastabud which the appellant could have produced in support of his case have been produced. At the sale the decree-holder was not the only bidder. The bid sheet shows that there were four other bidders and there was keen contest (I, 22). On these materials we hold that the appellant has not been able to establish that he or the other judgment-debtors has sustained substantial injury, much less that the alleged inadequacy of the price was due to any material irregularity. The sale will accordingly have to be confirmed, unless the appellant is able to establish that it was a void sale. Grounds Nos. 1 and 2 have been urged by him with a view to establish that position, which grounds we now proceed to consider.

10. There cannot be any doubt that the final decree was a void decree as against Aloke Nath, the legal representative of Hemaja Nath, on the ground that Hemaja Nath was then dead. The first question is whether the entire decree was void, and the second question is, can the executing Court refuse to execute it on the ground that one only of the several mortgagors was dead at the time of the passing of the final decree. In our judgment the first question must be answered in the negative, and in that view the second question does not arise. Normally a mortgage suit must be instituted against all persons who have an interest in the equity of redemption. But if in a mortgage suit the equity of redemption is not entirely unrepresented but only some of the owners of the equity of redemption are left out without any negligence or fault on the part of the mortgagee, that is to say, he having no knowledge of the rights of the persons so left out, and a decree is passed on his mortgage such a decree is not a void decree. It is only the right of redemption of the persons so left out which is not affected or cut off by the final decree. Such a mortgagee is entitled to recover his whole dues from

the shares which those persons, who were parties to the suit, had in the hypothecated properties. The decree for the entire amount due to him is valid but that decree can be enforced by sale of the interest only of the persons made defendants in the mortgage suit and the interest of the persons left out cannot be sold. This is a fundamental principle and if support from judicial decisions is necessary the case in *Rajani Kanta Ghosh and Others Vs. Sourendra Nath Mitter and Others*, is a direct authority. In the case before us the mortgagee did not know of the death of Hemaja Nath, before he obtained his final decree. If he had known of it in time he would have substituted his heirs before the final decree without any difficulty, for the final decree was passed within 90 days of his death. We accordingly hold that the final decree passed was a valid decree against Sailaja Nath, Shekaraja Nath, Hemadrija Nath and Adrija Nath and the whole of the amount decreed can in law be recovered from the shares they had in the mortgaged property. None of these persons or their legal representatives can impeach the sale on the ground that the decree was not binding on the legal representative of Hemaja Nath. The interest of Alope Nath, the legal representative of Hemaja Nath, prima facie has not been affected by the sale. He has not come forward to object to the sale, and his rights to the property can only be adjudicated upon when he comes up before Court through proper proceedings. Although the second question does not arise in this view of the matter it is doubtful whether *Gora Chand Halder and Another Vs. Prafulla Kumar Roy and Others*, would have enabled the appellant to raise the question in execution proceedings, seeing that the power of the executing Court to refuse execution on the ground that the decree was a void one was in that case confined within strict limits.

11. The only question that now remains for consideration is whether the Subordinate Judge of Jessore could sell the property which was within the territorial limits of the Subordinate Judge of Khulna. The decree under execution was a decree for sale in enforcement of a mortgage which comprised properties situated both in the districts of Jessore and Khulna. The Subordinate Judge of Jessore had territorial jurisdiction to entertain the suit and to pass the mortgage decree, as some of the properties mortgaged were situated within his jurisdiction.

12. The learned Advocate for the appellant contends that the fundamental proposition is that a Court has only power to sell property within its territorial jurisdiction and if the property is beyond its territorial jurisdiction, it can only be sold by the decree being transferred to the Court within territorial limits of which it lies. For supporting this proposition, he contends that the word "may" in Section 39, Civil P.C. means must. He puts forward his argument in this way. The words "on the application of the decree-holder" imply that the Court which passed the decree is not to act suo motu. The word "may" must have the same meaning in reference to all the Clauses (a) to (c) of Sub-section (1), and as regards cases falling within Clauses (a) and (b) as it is obligatory on the Court which passed the decree to transfer the decree on the application of the decree-holder on the ground that it cannot issue execution process outside its territorial

jurisdiction, the word "may" in reference to eases falling within these two clauses means must. He says that the same meaning must be given to the word "may" in reference to Clause (c), the first part of which contemplates a decree for sale passed in a mortgage suit. It seems to us that the learned advocate for the appellant is right when he contends that Clause (b) deals with a simple money decree and the first part of Clause (c) with a final decree for sale in a mortgage suit. The first question for consideration is whether the word "may" in Section 39 means "must". To decide this we will have to examine the catena of sections beginning from Section 37, but at this stage we may observe that Clause (d) of Sub-section 1, Section 39 militates against the view contended for by the appellant. Certainly the word "may" implies in connexion with Clause (d) that the Court has a discretion and has not to act under compulsion.

13. Section 38 provides that a decree may be executed either by the Court which passed the decree or by the Court to which it is sent for execution. The meaning is plain. Two classes of Courts shall have jurisdiction to execute, namely (1) the Court which passed the decree and (2) the Court to which it is transferred for execution. Read with the rules of procedure relating to transfer of decrees it means that in the matter of execution the jurisdiction of the first class of Courts is primary but that of the second class is derivative; the foundation of jurisdiction of the latter being an act, namely the act of transfer, of the first class of Courts. This idea is also brought out by the terms of Section 42, for the powers of the transferee Courts are to be measured by those of the Court which had passed the decree. Section 37 which in its natural sequence ought to have come after Section 38 defines the phrase "Court which passed the decree". The definition has an expanding effect. In addition to the Court which had actually passed the decree sought to be executed certain other Courts are brought within the expression. The Section gives jurisdiction to execute to Courts which would not otherwise have had jurisdiction, being Courts which would not have come within the two classes mentioned in Section 38. The two clauses of Section 37, proceed upon different principles. Clause (a) proceeds upon a principle of convenience - on the view that the machinery of the Court of first instance is more suitable than of the Appellate Court, and also on the principle that a party aggrieved by an order passed at the execution stage may have an appeal to same tribunal or hierarchy of tribunals by which an appeal from the decree in the suit itself would have been tried. The first part of Clause (b) proceeds upon a principle of necessity. Civil Courts of justice which exist to give relief in cases of infringement of civil rights would otherwise have been stultified. The second part of Clause (b) gives" concurrent jurisdiction to two Courts, the Court which had actually passed the decree-shorn at the time of execution of a part of its jurisdiction (may be pecuniary or territorial), and the Court which at that time had acquired a new jurisdiction namely that of the former. In this case a Court which had no territorial or pecuniary jurisdiction over the subject-matter at the time of execution case can entertain and carry on execution, and it shows that there are exceptions to the proposition that the Court which passed the decree cannot take

in execution properties outside its territorial jurisdiction.

14. We will now examine the terms of Section 39. The word "may" used in reference to Courts ordinarily implies a discretion in the Court. The words "on the application of the decree-holder" signify that such discretion is to be invoked by a party, in this case the decree-holder. He has to pray for it. Discretion implies a power of refusal, not an arbitrary power, but a fettered," power, one to be exercised judicially and liable in the case of misuse to be reviewed by a higher judicial authority. Do then Clauses (a) and (b) of Sub-section (1) militate against this ordinary significance of the word "may". Reading these two clauses carefully; we think they do not. Let us take the case of a decree-holder who has obtained a simple money decree of a small amount against a man of position and means who has money sufficient to liquidate the decree" in deposit to his credit in the very Court which had passed this decree but who is as resident outside the territorial limits of the Court which had passed the decree. To the Court which had passed the decree an application is made by the decree-holder" for transfer of the decree to the Court which had jurisdiction over his person with the avowed purpose of putting him under-arrest. u/s 51 that is one of the recognized modes of execution, but Courts are also required to see that its processes are not abused. The Court which had, passed the decree can in such a case in our judgment refuse to transfer the decree, and if it does it would be doing the right thing. Clause (b) is more significant and lends support to the view we are taking. The words used there are "has not property. within the local limits of the jurisdiction of the Court which passed the decree sufficient to satisfy etc." This implies that if there are sufficient properties within its jurisdiction to satisfy the decree the Court which had passed decree may, in its discretion, refuse to transfer the decree to another jurisdiction on the ground that the decree-holder should proceed against the properties within its jurisdiction in the first instance. We accordingly hold that source of the general principle that a Court has no power to take into execution property beyond its territorial limits lies not in Section 39 of the Code but has for its basis a different principle a principle of universal, or as it has been called by Atkinson J., a principle of international jurisprudence in a passage in *Bank of Bengal v. Sarat Kumar Mittra* A.I.R.(1918) Pat. 126, which passage has been quoted with approval by Suhraavardy J. in *Hari Das Basu Vs. National Insurance Company, Ltd.*, . That principle is founded on the principle that a Court cannot ordinarily issue its processes beyond its territorial limits.

15. We have examined the provisions of the Code in some detail and have based our view on them because the effect of Section 39 has been stated differently at different times by this Court {see for instance the observations in *Ambika Ranjan Mujumdar Vs. Manikganj Loan Office, Ltd.*, where the word "may" has been construed to mean must in reference to a case coming under Clause (b) of Section 39 and also the cases following.) In the case where the mode of execution prayed for is by appointment of a receiver, there cannot be any doubt that the Court which had passed the decree can appoint a receiver though the

properties over which the receiver is appointed are partly or wholly outside its territorial limits. Where sale of immovable property in execution of a simple money decree is asked for in the Court which had passed the decree, such Court cannot proceed to sell, if the property is outside its territorial jurisdiction, for the first effective step in the course of execution, namely the step to be taken for attachment, cannot be taken by it. In the case of a mortgage execution no attachment is necessary. The first matter of importance for bringing the property to sale in such a case is the settlement of the terms of the sale proclamation for which no process in the sense in which we use it (that is excluding notices for appearance of the judgment-debtor or summons on witnesses) has to issue and up to the sale no other process has to be issued, the sale proclamation being in law only regarded as an advertisement intended to protect the judgment-debtor's interest at the impending forced sale. It is only after the sale has been confirmed that a process has to issue from the Court holding such a sale namely the writ of possession. It is on these broad principles we hold that there is no bar to a Court which had passed a decree for sale in a mortgage suit from selling any portion of the mortgaged property or any independent item situated outside its territorial jurisdiction, it having had jurisdiction to entertain the suit and to pass the decree by reason of part of the mortgaged property or some other items of mortgaged property being within its territorial limits.

16. We will now proceed to examine the reported cases relating to the sale of mortgaged properties outside jurisdiction by the Court which had passed the final decree for sale. The first reported decision of importance is the case in *Maseyk v. Steel & Co.* (1887) 14 Cal. 661. There the Subordinate Judge of Rajshahye passed a decree for sale on the basis of a mortgage which comprised immovable properties situated within Rajshahye and also within another district, Naya Dumka. Both these properties were sold by the Rajshahye Court. The question was raised as to the jurisdiction of that Court to sell the property in Naya Dumka. Patheram C.J. first pointed out the distinction between a simple money decree and a decree for sale. He said that in the former case an officer of the Court has to attach the property and has to proceed to sell and to give possession of it in his capacity of officer of Court, which corresponds with that of the Sheriff of Calcutta and in doing that his powers would be limited by the territorial jurisdiction of the Court of which he is an officer. He then said that Section 19 of the Code of 1882 (which corresponds to Section 17 of the present Code) gave the Rajshahye Court power to order the sale of the mortgaged properties. By the mortgage the mortgagor contracted with the mortgagee for sale of the hypothecated properties for the satisfaction of the dues of the latter in case of non-payment and the learned Chief Justice said that a decree for sale passed in a mortgage suit is in effect though not in form a decree for specific performance. The Court in its decree directs the mode and appoints the person who is to carry out the sale. On this principle he distinguished a sale in execution of a decree for sale from a sale in execution of a simple money decree and held that the Rajshahye Court had jurisdiction to sell the Naya Dumka property. Ghosh J.

referred to Section 223, Sub-section 1, Clause (c) of the Code (Section 39 (1)(c) of the present Code) and said that that Section only meant that the decree may be transferred to another Court when it may be necessary for the Court which had passed the decree to direct that proceedings be sent to another Court within the jurisdiction of which the property may be situated. The language employed by him implies, as he himself explained in a later case, *Gopi Mohan v. Doybaki Nandan* (1892) 19 Cal. 13, that the word "may" in that Section implies a discretion and that in the case of a decree for sale the transfer to another Court should be made on grounds of convenience or for protecting the interest of the judgment-debtor but that clause does not oust the jurisdiction of the Court which had passed the decree for sale to sell where the property to be sold is outside its territorial jurisdiction. He based his judgment on the principle that a Court which had authority to pass a decree for sale must be taken to have authority to sell the property covered by the decree and for this proposition he referred to the statutory form of a decree for sale.

17. The next case is *Kartic Nath Pandey v. Tilukdhari Lal*. (1868) 15 Cal. 667. There the whole of the mortgaged property was within the local limits of the Court of the Subordinate Judge of Bhagalpur which had passed the decree for sale. At the time of execution however, the property was outside the limits of that Court and was placed within the local limits of the Court of the Subordinate Judge of Monghyr, a Court created after the decree. The Subordinate Judge of Bhagalpur was asked by the decree-holder to sell the property but the judgment-debtor objected that he had no jurisdiction and urged that the application for execution could only be entertained by the Monghyr Court on a transfer of the decree. This objection was overruled by this Court. The contention of the judgment-debtor was mainly based on Clause (c), Sub-section 1 of Section 223 of the Code of 1882 (Section 39 (1)(c) of the present Code). Norris and Beverley J.J. held that that clause did not curtail the jurisdiction of the Court which had passed the decree but had extended its jurisdiction by allowing it to transfer the decree for execution to another Court. It gave to that Court "a discretion either to execute its own decree or on the application of the decree-holder to send it to another Court for execution." Referring to Clauses (a) and (b) the learned Judges said that those clauses meant that, where the Court which had passed the decree finds it inconvenient to execute the decree itself, it will have the power to transfer it for execution by another Court on the application of the decree-holder. In holding that the Bhagalpur Court had jurisdiction to sell the property they followed the principle laid down by Ghosh J. in *Maseyk v. Steel & Co.* (1887) 14 Cal. 661 that a Court which had passed the decree for sale had jurisdiction to sell. In *Sreenath Chakravarti and Others Vs. Priyanath Bandopadhyaya and Others*, Mukherji J. observed at p. 836 that the case in *Kartic Nath Pandey v. Tilukdhari Lal*. (1868) 15 Cal. 667 and other cases proceeding on the same lines with it must be regarded as having been overruled by the Full Bench in *Prem Chand Dey v. Mokhada Devi* (1890) 17 Cal. 699 (F.B.). We will hereafter examine the case which was before Mukherji and Mitter JJ. the decision of the Full Bench in *Prem*

Chand Dey v. Mokhada Devi (1890) 17 Cal. 699 (F.B.) and the correctness of the said dictum.

18. To continue our review of the series of cases which concerned the question of the jurisdiction of the Court which had passed the decree for sale to sell property outside jurisdiction, leaving out for the present the Full Bench case in Prem Chand Dey v. Mokhada Devi (1890) 17 Cal. 699 (F.B.), the next case of importance is Gopi Mohan v. Doybaki Nandan (1892) 19 Cal. 13. There also the validity of a sale of property by the Court which had passed a decree for sale was upheld although the property sold was outside its territorial jurisdiction. Ghosh J. proceeded upon the same principle on which he had proceeded in deciding Maseyh's case Maseyk v. Steel & Co. (1887) 14 Cal. 661. This judgment is of importance because in it the learned Judge removed some ambiguities in his judgment in the former case on the scope of Section 223(1), Clause (c).

19. Case in Gopi Mohan v. Doybaki Nandan (1892) 19 Cal. 13 was followed in Tincouri Debya v. Shib Chandra Pal (1894) 21 Cal. 639 where however an attempt was made to explain the Full Bench decision in Prem Chand Dey v. Mokhada Devi (1890) 17 Cal. 699 (F.B.) on a hypothesis which seems to us to be doubtful, in view of the provisions made in para. 2, Section 649 of the Code of 1882 which corresponds to Section 37(b) second part of the present Code. The next case is Jagarnath v. Dip Rani (1895) 22 Cal. 871. Although there was no want of jurisdiction to sell in the third Subordinate Judge of Muzafferpore who had passed the decree for sale, on the ground, as stated in the judgment, that each Subordinate Judge has jurisdiction over the whole district, and the sale could have "been upheld on that ground alone, the learned Judges reaffirmed the principle formulated in Gopi Mohan v. Doybaki Nandan (1892) 19 Cal. 13 and Tincouri Debya v. Shib Chandra Pal (1894) 21 Cal. 639. In this case also the Full Bench decision in Prem Chand Dey v. Mokhada Devi (1890) 17 Cal. 699 (F.B.) was distinguished and we think on right lines. The line of cases of this Court beginning from Maseyk v. Steel & Co. (1887) 14 Cal. 661 was approved by the Full Bench of the Madras High Court in Ramiar v. Muthokrishna Ayyar A.I.R. (1932) Mad. 418 where the earlier Full Bench in Seeni Nadan v. Muthusami Pillai AIR (1920) Mad. 427 was explained. The Patna and Lahore High Courts have also taken the same view, Abdul Hadi v. Mt. kabultunnissa A.I.R.(1925) Pat. 139; Girdhari Lal v. Pars Ram A.I.R.(1933) Lah. 687. The Patna case is on all fours with the case before us because the only property sold by the Court which had passed the mortgage decree at the questioned execution was outside its jurisdiction, the other property which gave to that Court jurisdiction to try the mortgage suit having been sold at an earlier execution.

20. We will now consider whether Mukherji J. was right when he said in Sreenath Chakravarti and Others Vs. Priyanath Bandopadhyaya and Others, that Kartic Nath Pandey v. Tilukdhari Lal. (1868) 15 Cal. 667 and cases proceeding on the same lines, meaning thereby Maseyk v. Steel & Co. (1887) 14 Cal. 661 and the cases of this Court which we have reviewed above, have been overruled by the Full

Bench in *Prem Chand Dey v. Mokhada Devi* (1890) 17 Cal. 699 (F.B.). The facts of that case were that a rent decree was obtained on 6th July 1923 in the third Court of the Munsif at Bhanga. This decree was being executed as a money decree against some land which was within the local limits of the first Court of the Munsif at Bhanga. The question was a question of limitation, namely whether an application for execution presented to the first Court of the Munsif at Bhanga on 27th August 1928 on a transfer of the decree was barred by time. This question depended upon the further question whether an application for execution presented in the Gopalganj Court (which Court by reason of Cransfer of jurisdiction was to be regarded as the Court which had passed the decree) on 5th July 1925 (1926?) in which the decree-holder wanted to proceed against the self same immovable property situated within the local limits of the First Court of the Munsif at Bhanga, could be entertained by that Court. The Article which governed the case was, according to the learned Judges, Article 6 of Schedule 3, Ben. Ten. Act. If that application could be entertained by that Court the further contention of the decree-holder was that the application for execution filed on 27th August 1928 in the first Munsif's Court at Bhanga was to be treated as a continuation of the application filed in the Gopalganj Court on 6th July 1925 (1926?). It was held that the Gopalganj Court could receive the application for execution, though it could not make an order for sale, attach the property in execution and carry out its order for sale passed at the execution stage. Those things must be done by the first Court of the Munsif at Bhanga and for that purpose the Gopalganj Court would have to transfer the decree to that Court. It was also held that the last application made to the first Court of the Munsif at Bhanga on 27th August 1928 was to be treated as continuation of the application for execution made on 6th July 1925 (1926?) to the Gopalganj Court, and as this last mentioned application was within three years of the decree, the execution proceedings were not barred by limitation under Article 6 of Schedule 3, Ben. Ten. Act.

21. It is necessary to observe, firstly, that the decree under execution was not a decree for sale. It was a rent decree which was sought to be executed not under the procedure of Chap. 14, Ben. Ten. Act, but as a money decree. An order for sale was necessary from the executing Court and that order had to be carried into effect by attachment and sale. The order of attachment had to be made and writ of attachment had to be issued and executed. The observations of Mukherji J. therefore that Kartic Nath Pandey's case *Kartic Nath Pandey v. Tilukdhari Lal*. (1868) 15 Cal. 667 and all eases in that line had been overruled by the Full Bench in *Prem Chand Dey v. Mokhada Devi* (1890) 17 Cal. 699 (F.B.) was an obiter. There is no such observation in the judgment of Mitter J. who had also referred to *Prem Chand Dey v. Mokhada Devi* (1890) 17 Cal. 699 (F.B.). Mitter J. referred to *Prem Chand Dey v. Mokhada Devi* (1890) 17 Cal. 699 (F.B.) for the general proposition that a Court which passed the decree had no jurisdiction to order the sale of property outside its jurisdiction in execution. Stated in that form the proposition is quite correct. Mitter J. pointed out that the Gopalganj Court

could receive the application for execution but it could not attach or sell the property in question. It is also pertinent to observe that in the same page of the report in which Mukherji J. made the said observation he referred to *Begg Dunlop Co. v. Jagannath* (1912) 39 Cal. 104 and *Ambika Ranjan Mujumdar Vs. Manikganj Loan Office, Ltd.*, . In the former case the vital difference between a money decree and a mortgage decree in the matter of selling property outside jurisdiction by the Court which had passed the decree is maintained and the line of cases beginning with *Maseyk's* case i.e. *Maseyk v. Steel & Co.* (1887) 14 Cal. 661, *Kartic Nath Pandey v. Tilukdhari Lal.* (1868) 15 Cal. 667, *Gopi Mohan v. Doybaki Nandan* (1892) 19 Cal. 13, *Tincouri Debye v. Shib Chandra Pal* (1894) 21 Cal. 639 and other cases are expressly approved: *Begg Dunlop Co. v. Jagannath* (1912) 39 Cal. 104 . In *Ambika Ranjan Mujumdar Vs. Manikganj Loan Office, Ltd.*, the same distinction is noticed and no dissension is expressed to that line of cases. A critical examination in *Prem Chand Dey v. Mokhada Devi* (1890) 17 Cal. 699 (F.B.) would show that the line of cases beginning from *Maseyk's* case *Maseyk v. Steel & Co.* (1887) 14 Cal. 661 have not been touched. The facts of the case before the Full Bench were these:

22. A suit on a mortgage was instituted in the Court of the Munsif at Bishenpore and a decree for sale was passed by that Court by consent. Before the institution of the suit the said Court had lost jurisdiction over the property included in the mortgage by a transfer of jurisdiction by a notification of the local Government. The Sudder Munsif's Court at Bankura was at that time and at all material times the Court which had territorial jurisdiction. The consent decree for sale was enforced in execution by the Munsif of Bishenpur who sold the mortgaged property. On objection by the judgment-debtor, this sale was set aside by both the Courts below on the ground of lack of jurisdiction. When the appeal against these orders of the Courts below was heard by a Division Bench of this Court the latter referred two points for the consideration of the Full Bench. These points were: (1) Whether the judgment debtor was entitled in the course of execution proceedings to attack the decree itself as being void. This point the Division Bench was inclined to answer in the negative. (2) Whether the Munsif at Bishenpur could sell a property which was outside its territorial jurisdiction. The Division Bench was not disposed to agree with *Kartic Nath Pandey's* case *Kartic Nath Pandey v. Tilukdhari Lal.* (1868) 15 Cal. 667 and referred that case for the consideration of the Full Bench. Four Judges of the Full Bench firstly laid down the proposition that Courts of this country have no power to entertain a suit relating to immovable property or to an interest in immovable property outside its territorial jurisdiction. They accordingly held that the Bishenpore Court had SO jurisdiction to entertain the mortgage suit and to pass a decree for sale. The second proposition which they laid down was that execution of a decree is only a continuation of the suit and on the principle involved in this proposition they made the observation that

there appeared no legitimate reason why a Court in a later stage of a suit should have greater powers than it possessed at its institution.

23. The third proposition which they laid-down - a general proposition - was that territorial jurisdiction was a condition precedent to a Court executing a decree. In the last paragraph of their judgment, the ratio decidendi of the decision is stated. The decision was rested entirely on what we have called above the second proposition and the principle following therefrom, namely that as the Court had no territorial jurisdiction at the time when it passed the decree for sale, the sale in execution of the void decree for sale was also void. No reference was made to Kartic Nath Pandey v. Tilukdhari Lal. (1868) 15 Cal. 667 though that case was expressly mentioned in the order of reference, because we think that case did not require reconsideration by the Full Bench on the line of reasoning it took, for in Kartic Nath Pandey v. Tilukdhari Lal. (1868) 15 Cal. 667 the decree for sale had been passed by a Court which had power to pass such a decree. In Maseyk v. Steel & Co. (1887) 14 Cal. 661 Ghosh J., formulated the principle that a Court which passed a decree for sale had also the power to carry it out. Kartic Nath Pandey v. Tilukdhari Lal. (1868) 15 Cal. 667 was also rested on a corollary from this principle. In Gopi Mohan v. Doybaki Nandan (1892) 19 Cal. 13 which came up just a year after the Full Bench, Ghosh J. who was also a member of the Full Bench upheld a mortgage sale of property outside jurisdiction by the Court which had passed the decree for sale, that Court having jurisdiction to pass such a decree. He rested his decision on the second proposition laid down by the Full Bench in Prem Chand Dey v. Mokhada Devi (1890) 17 Cal. 699 (F.B.) that execution proceedings are only continuations of the suit. The Full Bench in our judgment accordingly did not touch those cases, where the decree for sale had been passed by a Court, which had jurisdiction to entertain the suit and to pass a decree for sale, and had been executed by such a Court by selling property outside its territorial jurisdiction. In Jagarnath v. Dip Rani (1895) 22 Cal. 871 the Full Bench was cited and distinguished on these lines by Prinsep and Ghosh JJ., the last mentioned Judge, as we have already stated, was also a member of the Full Bench who had delivered a separate but concurring judgment. We respect, fully dissent from the obiter dictum of Mukherji J. made in Sreenath Chakravarti and Others Vs. Priyanath Bandopadhyaya and Others, and hold that the law laid down in Kartic Nath Pandey v. Tilukdhari Lal. (1868) 15 Cal. 667 and in the same line of cases is still good law in this Court. We accordingly overrule also the second ground urged by the appellant and dismiss the appeal with costs to auction-purchaser respondent. Hearing fee 5 gold mohurs.

Khundkar, J.

24. I agree.