

## APPELLATE CIVIL.

*Before Chatterjea and Panton JJ.*

AMINUDDIN MULLICK

v.

ATARMANI DASÍ.\*

*Execution of Decree—Jurisdiction—Civil Procedure Code (Act V of 1908) s. 150—Decree by Subordinate Judge for nearly Rs. 2,000—Application for execution of decree before Munsif invested with power up to Rs. 2,000—Maintainability.*

In a mortgage suit for over Rs. 1,000 after a preliminary decree was obtained in the Court of the 2nd Munsif, who was empowered to try suits up to Rs. 2,000, the Munsif was transferred and the final decree in the case was passed by the Subordinate Judge. Application for the execution of the decree was then made before a successor of the Munsif, similarly empowered :—

*Held*, that under the provisions of s. 150 of the Civil Procedure Code, the Munsif had jurisdiction to entertain the application.

SECOND APPEAL by Aminuddin Mullick, the judgment-debtor.

The above appeal arose out of proceedings in execution of a mortgage decree. The respondents had instituted a mortgage suit in the Court of the 2nd Munsif, Howrah, who had jurisdiction to try suits up to the value of Rs. 2,000, and a preliminary decree nearly to the extent of that amount was passed, the Munsif was afterwards transferred and as his successor was not vested with power to try suits up to Rs. 2,000 the final decree in the case was made by the Subordinate Judge of Howrah, the decree-holders

\* Appeal from order, No. 99 of 1919, against the order of H. M. Veitch, Additional District Judge of Howrah, dated Jan. 13th, 1919, affirming the order of Kumud Nath Ray, Munsif at Howrah, dated July 29th, 1918.

then applied for the execution of the decree before the 2nd Munsif, who had in the meantime been empowered to try suits up to Rs. 2,000, the decree was executed by that Court and some of the properties of the judgment-debtor were sold; the judgment-debtor then applied under Order XXI, rule 90 and s. 47, Civil Procedure Code, to set aside the sale, no evidence on the merits was adduced in support of the application and the only question for consideration was: "Whether the Munsif, 2nd Court, had jurisdiction to execute the decree." both the Courts below having answered the question in the affirmative, the judgment-debtor appealed to this Court.

*Babu Narendra Nath Chowdhury*, for the appellant. The decree was not transferred to the learned Munsif for execution and he had no jurisdiction to deal with it; the Court of the Subordinate Judge which had passed the decree had neither ceased to exist nor ceased to exercise jurisdiction to execute the decree and the application for execution should have been made to that Court: *Kali Pado Mukerjee v. Dino Nath Mukerjee* (1), *Bachu Koer v. Golab Chand* (2).

*Babu Mammatha Nath Ganguli*, for the respondents. The learned Munsif being vested with power to try suits up to Rs. 2,000 has jurisdiction to execute the decree, the proper test is whether the suit wherein the decree was passed could have been instituted in the Munsif's Court at the time of the application for execution: s. 37, Civil Procedure Code. *Udit Narayan Chowdhuri v. Mathura Prasad* (3), *Seeni Naden v. Muthusamy Pellai* (4) referred to.

*Babu Narendra Nath Chowdhury*, in reply.

*Cur. adv. vult.*

(1) (1897) I. L. R. 25 Cal. 315.

(3) (1908) I. L. R. 35 Cal. 974.

(2) (1899) I. L. R. 27 Cal. 272.

(4) (1919) I. L. R. 42 Mad. 821.

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CHATTERJEA AND PANTON JJ. This appeal arises out of proceedings in execution of a mortgage decree.

The preliminary decree upon the mortgage was obtained in the Court of the 2nd Munsif of Howrah who had power to try suits up to the value of Rs. 2,000, the decree being nearly for that sum. Subsequently, the Munsif having been transferred and his successor not having been vested with powers to try suits up to Rs. 2,000, the final decree in the case was made by the Subordinate Judge of Howrah. The plaintiff decree-holder, however, applied for execution of decree before the 2nd Munsif, who had, in the meantime, been empowered to try suits up to Rs. 2,000. The decree was executed in that Court with the result that certain properties of the judgment-debtor were sold and a portion of the decree was realised by the proceeds of the sale.

The judgment-debtor then applied to have the sale set aside under the provisions of Order XXI, rule 90. So far as the application was based on Order XXI, rule 90, no evidence was adduced by the judgment-debtor in support of his application. The only question which was considered by the Courts below was whether the Munsif, 2nd Court, had jurisdiction to execute the decree and the question has been answered in the affirmative by both the Courts below: the judgment-debtor has appealed to this Court.

The Additional District Judge has relied on the provisions of sections 37 and 38 of the Civil Procedure Code. Section 38 says that "the decree may be executed either by the Court which passed it or by the Court to which it is sent for execution." The Munsif's Court was not the Court which passed the decree, nor was the decree sent to that Court for execution. Section 37 lays down that the expression "Court which passed a decree," or words to that effect shall,

in relation to the execution of decrees unless there is anything repugnant in the subject or context, be deemed to include.—(a) where the decree to be executed has been passed in the exercise of appellate jurisdiction, the Court of first instance and

(b) Where the Court of first instance has ceased to exist or to have jurisdiction to execute it, the Court which, if the suit wherein the decree was passed was instituted at the time of making the application for the execution of that decree, would have jurisdiction to try the suit.

Now, the Court of the Subordinate Judge which passed the decree had not ceased to exist, nor ceased to have jurisdiction to execute it because section 38 expressly provides that a decree may be executed by the Court which passed it. We think, however, that the Munsif's Court had power to execute the decree under section 150 of the Civil Procedure Code. That section runs thus: "save as otherwise provided, where the business of any Court is transferred to any other Court, the Court to which the business is so transferred, shall have the same powers and shall perform the same duties as those respectively conferred and imposed by or under this Code upon the Court from which the business was so transferred."

As soon as the 2nd Munsif's Court was vested with the powers to try suits up to Rs. 2,000 in value, the business in the Subordinate Judge's Court, so far as it related to suits up to the value of Rs. 2,000, must be taken to have been transferred to the Munsif's Court, and that Court would have the same powers and would perform the same duties as those respectively conferred and imposed by the Code upon the Court of the Subordinate Judge, from which the business was so transferred. There are, no doubt, the words "save as otherwise provided," but we do not think that

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those words exclude execution cases from the purview of the section. We are, therefore, of opinion that the Munsif's Court had jurisdiction to execute the decree.

The appeal is accordingly dismissed with costs.

A. S. M. A.

*Appeal dismissed.*

## APPEAL FROM ORIGINAL CIVIL.

*Before Mookerjee, Acting C. J., and Fletcher J.*

KHATIZAN

*v.*

SONAIRAM DAULATRAM.\*

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 April 23.

*Appeal—Transfer—Order for transfer of a suit—"Judgment"—Letters Patent (1865) cls. 13 and 15.*

An order for transfer of a suit to the High Court, under clause 13 of the Letters Patent, is not appealable.

*Ismail Soleman Bhamji v. Mahomed Khan* (1), *The Justices of the Peace for Calcutta v. The Oriental Gas Company* (2) referred to.

*Hadjee Ismail Hadjee Hubbeeb v. Hadjee Mahomed Hadjee Joosub* (3) distinguished.

APPEAL from an order of Greaves J.

Sonairam Daulatram, the defendant No. 1, had, under a decree in a Small Cause Court suit, attached certain properties belonging to Abdul Gaffur, the defendant No. 2, in which the plaintiff claimed a half share. The plaintiffs, appellants, had filed a suit in the High Court for a declaration that they are entitled to a half share in the properties and specific performance

\* Appeal from Original Civil No. 40 of 1920, in suit No. 34 of 1920.

(1) (1891) I. L. R. 18 Cal. 296.      (2) (1872) 8 B. L. R. 433.

(3) (1874) 13 B. L. R. 91.