FULL BENCH.

Before Walmsley, C. C. Ghose, Suhrawardy, B. B. Ghose and Duval JJ.

1925

June 15.

GORA CHAND HALDAR

v.

PRAFULLA KUMAR ROY.*

Jurisdiction—Executing Court, power of, to question validity of decree.

Where a 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, the executing Court is authorised to question the validity of a decree.

FULL BENCH REFERENCE.

THE facts material for the Reference are given in the Order of Reference, which ran as follows :—

SUHRAWARDY AND CUMING JJ. This appeal is directed against an order of the Subordinate Judge of Birbhum holding the decree sought to be executed by the appellant incapable of execution and dismissing his application for execution. In 1910, appellant obtained the mortgage decree, which he is now seeking to execute, in the Court of the Subordinate Judge of Birbhum in respect of properties, some of which were in the district of Birbhum and some in the Sonthal Parganas. In this execution case, the judgment-debtors have taken exception to the execution on the ground that when the decree was passed, some of the mortgaged properties situated in the Sonthal Parganas were under settlement, and so under section 2 of Act XXXVII of 1855, the Birbhum Court had no jurisdiction to pass the decree ; the decree having thus been passed without jurisdiction is void and incapable of execution. The Court below has found that one of the Sonthal Parganas properties, Mouza Mouloti, was under settlement when the decree was passed and held, under the provisions

* Full Bench Reference No 5 of 1924 in Appeal from Order No. 365 of 1922.

of the Act above referred to and on the authority of the decision of the Judicial Committee of the Privy Council in *Maha Prasad Singh* v. *Ramani Mohan Singh* (1), that the Birbhum Court had no jurisdiction to try the suit and pass the decree, which is accordingly void and incapable of execution. In this view, the learned Subordinate Judge has dismissed the execution case. The finding of fact recorded by the Court below has not been disputed before us by the appellant, but the order of the Court below has been assailed on two grounds :—(i) that the Court below as executing Court could not go behind the decree and test its validity but was bound to execute it even though it was passed without jurisdiction ; (ii) that the Court below is wrong in holding that the whole decree was bad and it should have executed so much of it as was valid in respect of the Birbhum properties.

The second contention may be shortly disposed of as untenable, in view of the decision of the Judicial Committee in *Maha Prasad Singh v. Ramani Mohan Singh* (1).

On the first point there is no unanimity of opinion, and we find it difficult to reconcile some of the decisions of this Court. In *Roop Narain Singh v. Ramayee Singh* (2) and *Narendra Bahadur Chand v. Gopal Sah* (3), the objection that the decree was void and incapable of execution was permitted to be raised and allowed in the execution of the decree. A contrary view was taken in *Biswa Nath Prosad Mahata v. Bhagwandin Pandey* (4) and in *Kalipada Sarkar v. Hari Mohan Dalal* (5), where it has been laid down that an execution Court cannot question the validity of the decree and refuse execution though the decree was a nullity and passed without jurisdiction. In *Kunja Mohan Chakravarty v. Manindra Chandra Roy Choudhuri* (6), Mookerjee J., who was a party to the decisions in *Biswa Nath Prosad Mahata v. Bhagwandin Pandey* (4) and *Kalipada Sarkar v. Hari Mohan Dalal* (5), enunciates the proposition of law that when a decree is void and a nullity, it is not only the duty of the Court which passed it to ignore it but of every Court to which it is presented. Though the case in which this observation was made did not arise in execution, it is wide enough to cover a case like the present and is in conflict with the view expressed by the same learned Judge in the two previous cases above cited. This question has been recently considered by a Full Bench of the Patna High Court in *Jungli Lall v. Laddu Ram Marwari* (7), where on a review of the conflicting authorities it has been

(1) (1914) I. L. R. 42 Calc. 116 ; L. R. 41 I. A. 197.
(2) (1878) 3 C. L. R. 192.
(3) (1912) 17 C. L. J. 634.
(4) (1911) 14 C. L. J. 648.
(5) (1916) I. L. R. 44 Calc. 627.
(6) (1922) 27 C. W. N. 542.
(7) (1919) 4 P. L. J. 240.

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held that an execution Court can only execute a valid decree and a void decree ought to be disregarded without any formal proceedings to set it aside. The same view has been taken in other High Courts: *Imdad Ali v. Jagan Lal* (1), *Háji Musá Háji Ahmed v. Purmánand Nursey* (2), *Subramania Aiyar v. Vaithinatha Aiyar* (3).

As it is a matter of general importance and the view taken by this Court in the cases of *Biswa Nath Prosad Mahata v. Bhagwandin Pandey* (4) and *Kalipada Sarkar v. Hari Mohan Dalal* (5) are not only in conflict with that accepted by the other High Courts but also with the decisions in other cases of this Court to which we have referred, we are of opinion that the present state of the authorities being embarrassing to the lower Courts, the law on the point should be settled by a Full Bench.

We accordingly submit the following question for the decision of the Full Bench:—

Where a decree having been passed by a Court having no jurisdiction to pass it is void and a nullity, is the execution Court competent to question its validity and refuse to execute it?

As the point has arisen in a second appeal, the whole case is submitted to the Full Bench for decision.

Babu Rupendra Kumar Mitter (with him *Babu Dharmadas Sett* for *Babu Pramatha Nath Bandopadhya*), for the appellant. There are two classes of cases reported in which the power of the Court executing a decree has been considered: (i) where the Court passing the decree had no jurisdiction over the subject matter and (ii) where the decree was a nullity by reason of it being passed against a dead man whose legal representatives raised the question as to the validity of the decree at the time of execution.

The cases *Nagendrabala Choudhurani* v. *Secretary of State for India in Council* (6) and *Biswa Nath Prosad Mahata* v. *Bhagwandin Pandey* (4) fall within the first class. It is held that the executing Court must take the decree as it stands and cannot go into the question of its validity. There is no conflict

(1) (1895) I. L. R. 17 All. 478.
(2) (1890) I. L. R. 15 Bom. 216.
(3) (1913) I. L. R. 38 Mad. 682.
(4) (1911) 14 C. L. J. 648.
(5) (1916) I. L. R. 44 Calc. 627.
(6) (1911) 14 C. L. J. 83.

on the point so far as the Calcutta High Court is concerned.

The cases falling within the second class do not lay down a uniform rule.

Kalipada Sarkar v. *Hari Mohan Dalal* (1) lays down that the executing Court in such a case cannot go into the question of the validity of the decree. *The Representatives of Girendranath Tagore* v. *Huronath Roy* (2), *Roop Narain Singh* v. *Ramayee Singh* (3), *Narendra Bahadur Chand* v. *Gopal Sah* (4) and *Jungli Lall* v. *Laddu Ram Marwari* (5) have laid down that the executing Court can disregard such a decree and refuse execution. The cases falling within the second class can be placed on a different principle. Under Order XXI, rule 22, C. P. C., a notice has to be served on the legal representative of a judgment-debtor who is dead and such a representative can show that his predecessor in interest was not a party to the suit in the real sense, being dead at the time of the decree. The case of *Girendranath Tagore* (2) puts it this way. The cases of *Narendra Bahadur* (4) and *Jungli Lall* (5) purported to be based on the broader ground that the executing Court, as all other Courts, can disregard what is a nullity. In both these cases reliance was placed either in the arguments or in the judgments in *Girendranath Tagore's* case (2) or *Roop Narain Singh's* case (3), which were decided under Act VIII of 1859. That Act indicated that in certain cases the executing Court could disregard a degree which appeared to be passed by a Court without jurisdiction. See section 268 of that Act. There is no corresponding section in the Code of 1908, which indicates that the Legislature has since then changed.

(1) (1916) I. L. R. 44 Calc. 627.
(2) (1868) 10 W. R. 455.
(3) (1878) 3 C. L. R. 192.
(4) (1912) 17 C. L. J. 634.
(5) (1919) 4 P. L. J. 240.

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It is established that an executing Court is a Court of limited powers. There is a course of decisions that it cannot go behind the decree and that an objection under section 244 of the Code of 1882 must assume the validity of the decree: *Hassan Ali* v. *Gauzi Ali Mir* (1), *Grish Chunder Lahiri* v. *Shoshi Shikhareswar Roy* (2), *Khetrapal Singh Roy* v. *Shyama Prosad Barman* (3), *Thakur Madan Mohan Nath* v. *Bhikhar Sahu* (4), *Rama Prosad Roy Chowdhury* v. *Anukul Chandra Roy Chowdhury* (5), *Maharaj Kumar Bindeswari Charan Singh* v. *Thakur Lakpat Nath Singh* (6), *Kalipada Sarkar* v. *Hari Mohan Dalal* (7). The rule so formulated is based on sound principles of justice, equity and good conscience. If a decree is attacked directly either by way of appeal or review, as being passed without jurisdiction and the decree should be vacated, the plaintiff can either take back the plaint and file it in the proper Court claiming the benefit of section 14 of the Limitation Act, or, in a case like the present, make the necessary amendment in the plaint: *Setrucharlu Ramabhadra Raju Bahadur v. Maharaja of Jeypore* (8).

Babu Baranashibashi Mookerjee for *Babu Brajalal Chakravarti* (with him *Babu Panchanan Ghosal*), for the respondent. Assuming that the decree was passed without jurisdiction, was void and a nullity, I contend that the executing Court, as any Court, can treat the decree as a nullity.

(1) (1903) I. L. R. 31 Calc. 179, 181.
(2) (1900) I. L. R. 27 Calc. 951; L. R. 27 I. A. 110.
(3) (1904) I. L. R. 32 Calc. 265.
(4) (1912) 16 C. L. J. 517, 519.
(5) (1914) 20 C. L. J. 512, 514.
(6) (1910) 15 C. W. N. 725, 728.
(7) (1916) I. L. R. 44 Calc. 627.
(8) (1919) I. L. R. 42 Mad. 813; L. R. 46 I. A. 151.

There is a good deal of ambiguity in the use of the expression " want of jurisdiction ".

Where there is an apparent nullity, the executing Court can certainly question the lack of inherent jurisdiction and refuse to proceed. Where, however, facts are to be investigated, the matter is different. So also where it is only an irregular or illegal exercise of jurisdiction: *Hriday Nath Roy* v. *Ram Chandra Barna Sarma* (1).

In *Nagendrabala Choudhurani's* case (2), relied on by my friend, the validity was questioned on the ground of irregular or erroneous exercise of jurisdiction and not on the absolute want of inherent jurisdiction. The observation of Mookerjee J. must be limited to the facts of the case. The facts of the case of *Biswa Nath Prosad Mahata* (3) do not appear in the report. We do not know on what ground exactly the decree was challenged. The records are in the Patna High Court. Seeing, however, that Mookerjee J. followed *Nagendrabala's* case (2), we can well assume that the ground was similar.

In *Purna Chandra Chatterjee* v. *Dinabandhu Mukerjee* (4), the legality was questioned indirectly. Notice under section 10 of the Public Demands Recovery Act had not been served. The Full Bench held the sale to be a nullity.

A judgment of a Court which has no jurisdiction is null and void: *Golab Sao* v. *Chowdhury Madho Lal* (5), per Mookerjee J.

See also *Kunja Mohan Chakravarty* v. *Manindra Chandra Roy Choudhuri* (6), *Jyoti Prakas Chattoraj*

(1) (1920) I. L. R. 48 Calc. 138, 147-9.
(2) (1911) 14 C. L. J. 83.
(3) (1911) 14 C. L. J. 648.
(4) (1907) I. L. R. 34 Calc. 811, 819.
(5) (1905) 9 C. W. N. 955, 959.
(6) (1922) 27 C. W. N. 542.

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v. *Bagala Kanta Chowdhury* (1) and *Jadu Nath Manna* v. *Prankrishna Das* (2), in all of which Mookerjee J. was one of the Judges.

See also *Naunhoo Singh* v. *Tofan Singh* (3), *Roop Narain Singh* v. *Ramayee Singh* (4), *Narendra Bahadur Chand* v. *Gopal Sah* (5), *Arjun Dass* v. *Gunendra Nath Basu Mallick* (6), *Jungli Lall* v *Laddu Ram Marwari* (7) and the judgment of the Judicial Committee in *Ramlal Hargopal* v. *Kishan-chand* (8).

Babu Rupendra Kumar Mitter in reply. In this case, it is conceded that there is nothing wrong on the face of the decree.

[B. B. GHOSE J. The Division Court will decide that.]

Mookerjee J. enunciates the broad proposition in the cases of *Nagendrabala Choudhurani* (9) and *Biswa Nath Prosad Mahata* (10).

In *Golab Sao* v. *Chowdhury Madho Lal* (11), relied on by my friend, the decree was not challenged at all.

The other cases relied on by my friend need not trouble you, as the question was not raised in execution.

Cur. adv. vult.

WALMSLEY J. This Reference is made in a first appeal from an order. The necessary facts are given in the Order of Reference, and need not be repeated.

(1) (1922) 36 C. L. J. 124, 128-9.
(2) (1917) I. L. R. 45 Calc. 769.
(3) (1870) 14 W. R. 228.
(4) (1878) 3 C. L. R. 192.
(5) (1912) 17 C. L. J. 634.
(6) (1914) 18 C. W. N. 1266.
(7) (1919) 4 P. L. J. 240.
(8) (1923) I. L. R. 51 Calc. 361; L. R. 51 I. A. 72.
(9) (1911) 14 C. L. J. 83.
(10) (1911) 14 C. L. J. 648.
(11) (1905) 9 C. W. N. 956.

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WALMSLEY J.

The question propounded is in these words: "Where a decree, having been passed by a Court having no jurisdiction to pass it, is void, and a nullity, is the execution Court competent to question its validity and refuse to execute it?"

The learned Judges who made the Reference are satisfied that the decree under consideration was made by a Court that had no jurisdiction to make it, and that in consequence it is void and a nullity. It is not open to us, therefore, to consider any of the questions involved in that finding. We have to start by accepting the proposition that the Court that made the decree had no jurisdiction to make it, and by that expression is meant that the Court had not such territorial jurisdiction as would authorize it to make the decree, and not that having jurisdiction it exercised it erroneously. This distinction is of great importance, for, with all respect, I venture to think that the apparent conflict in reported cases is largely due to failure to keep this distinction clearly in view. It would be tedious to examine the numerous decisions in detail, and it would not lead to any useful result. I think it may be said that the correct view, and the view for which there is a strong current of authority, is that 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 authorized to question the validity of a decree.

As the question arises in a first appeal, we must return the case for final adjudication by the Bench which referred it, with the statement that

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our answer to the question propounded is in the affirmative.

C. C. GHOSE J. I agree.

SUHRAWARDY J. I agree.

B. B. GHOSE J. I agree.

DUVAL J. I agree.

S. M.

CRIMINAL REVISION.

Before Suhrawardy and Panton JJ.

1925

July 10.

E. J. JUDAH

v.

EMPEROR.*

Theft—Removal by owner, from possession of bailee, article given him for repairs—Dishonest intention—Repairs partly done, but not completed within stipulated or reasonable time—Lien of bailee till payment for part of work done—Penal Code (Act XLV of 1860) ss. 24, 378 and Illust. (j)—Contract Act (IX of 1872) s. 170.

Where an electric kettle was given to a repairer for repairs, and he did not complete the work within the stipulated period, or even within a reasonable time thereafter, and the owner forcibly removed the article from the repairer's shop, without payment of the sum demanded by the latter for work already done to it: *Held*, that the owner was not guilty of theft, as his intention was not to cause wrongful loss to the repairer, or wrongful gain to himself, within s. 24 of the Penal Code, but to recover his property after the lapse of a reasonable time.

*Criminal Revision No. 353 of 1925, against the order of T. Roxburgh, Chief Presidency Magistrate, Calcutta, dated April 27, 1925.