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RAMESAM, J.

Doss(1) cannot be regarded as an authority for such a proposition, as is sometimes supposed. In this case there is a clear statement by the defendants' ancestors that Madiraju, Narayanappa, and Lingaraju were grandsons of brothers. At that time there was no motive for making an inaccurate statement and the pedigree was not in dispute.

Acting on Exhibit A-1, I accept the conclusion of the learned Subordinate Judge and dismiss this appeal with costs.

The memorandum of objections also fails and is dismissed with costs.

KUMARASWAMI SASTRI, J.—I entirely agree.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Wallace and Mr. Justice Jackson.

1927, February 25.

SRI RAJAH SATRUCHERLA SIVASKANDA RAJU BAHADUR GARU, APPELLANT,

v.

SRI SRI SRI RAMACHANDRA DEO MAHARAJULAM GARU, RAJA OF JEYPORE AND OTHERS, RESPONDENTS.*

Execution—Ss. 21, 37, 38, 150, Civil Procedure Code (V of 1908)—Preliminary mortgage decree—Transfer of territorial jurisdiction thereafter to another Court—Passing of final decree by the first Court without objection—Right of the first Court to order sale of mortgage properties.

After the passing of a preliminary mortgage decree, the Court that passed it ceased to have territorial jurisdiction over any of the mortgaged properties. After a final decree was passed by the same Court without any objection by the mortgagor, the mortgagee applied to that Court for sale.

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(1) (1881) I.L.R., 6 Calc., 626.

*L.P.A. No. 37 of 1927.

Held (1) that that Court had no power to order a sale of the properties, though it can receive an application for sale and transmit it to the Court having territorial jurisdiction and (2) that omission to object to the jurisdiction of that Court to pass the final decree estops the mortgagor only from disputing the validity of the final decree but does not estop him from objecting to the jurisdiction of that Court to order a sale.

APPEAL under clause (15) of the Letters Patent preferred against the order of the Hon'ble Mr. Justice CURGENVEN, dated 6th January 1927, and made in C.M.P. No. 3718 of 1916 in A.A. No. 363 of 1926, preferred to the High Court against the order of the Court of the Subordinate Judge of Vizagapatam in E.P. No. 25 of 1925 in O.S. No. 22 of 1913 on his file.

The facts are given in the judgment.

T. Rangachariar and *Y. Suryanarayana* for appellant.

A. Krishnaswami Ayyar and *P. Somasundaram* for respondents.

JUDGMENT.

WALLACE, J. WALLACE, J.—This Letters Patent Appeal is against the decision of CURGENVEN, J., in the matter of an order by him on C.M.P. No. 3718 of 1926, dated 6th January 1927, refusing to set aside a Court sale in execution of a mortgage decree against the appellants. The chief point raised is a question of the jurisdiction of the Sub-Court, Vizagapatam, to sell the property in execution as the property is not within its territorial jurisdiction. The learned Judge has not dealt with this point, but has merely dismissed the petition for stay.

It is not in dispute that between the date of the preliminary decree in the mortgage suit and the final decree the local area in which this property lies was taken away from the jurisdiction of the Sub-Court. The question for decision is whether in execution of the

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final decree the Court which passed the decree retains jurisdiction to sell the property which has passed out of its jurisdiction. This is a vexed question which has been the subject of a large number of decisions in this Court and in the Calcutta High Court. It is quite clear from the authorities in these rulings that there are two main principles of decision which are inherently irreconcilable. The first is that a Court which ordinarily has no power to sell property outside its local jurisdiction cannot gain that power merely because it has passed the decree against that property while it was within its jurisdiction; that is, there is no reason why a Court should have greater powers over property at a later stage of a suit than it had at the beginning; and the second principle is that when a Court has once got jurisdiction over property it cannot lose it. I incline to the former principle in view of the practical difficulties which will attend the acceptance of the latter. The latter view clearly to my mind implies that the Court which passed the decree never loses its jurisdiction to execute that decree and the learned vakil for the respondent goes so far as that. I shall consider the effect of that proposition from two points of view, first, whether the provisions of the Code bear it out, and second, as to the practical difficulties in working.

As to the first point, if the Court which passes the decree never loses its jurisdiction to execute it, then the contingency provided for in section 37 (*b*), Civil Procedure Code, of the Court of first instance losing its jurisdiction to execute a decree could not have been contemplated at all. The phrase "Court of first instance" there is obviously used in the sense of the Court which originally passed the decree—compare the use of the same phrase in clause (*a*)—and was probably used to avoid employing in the definition of the phrase

"Court which passed the decree" the very phrase which was being defined and also perhaps to exclude by using that phrase a Court of intermediate appeal. The respondents' vakil argues that section 37 (*b*) is only ancillary to (*a*) and is brought into operation only when there has been an appeal and a decision by the appellate Court. I cannot accept that contention which would amount to saying that the Code has made no provision for the case of the execution of a decree which has not been appealed against, when the Court which originally passed the decree has ceased to exist. The learned vakil refers us to section 150 to explain this lacuna. But apart from the improbability of the legislature relegating to a different part of the Code one aspect of the problem which was before them when section 37 was drawn up, section 150 in terms only applies to cases of transfer from a Court and not to cases of a Court ceasing to exist. I am of opinion therefore that the Code does not authorize the idea that a Court which originally passed a decree never loses its jurisdiction to execute it. Pressed to its logical conclusion, this argument would mean that the Court to which territorial jurisdiction has been transferred has no jurisdiction to execute, because the contingency which gives it jurisdiction to execute, namely, the ceasing of jurisdiction in the Court which originally passed the decree, will never occur. It has never been yet held so far as I know, that the Court to which territorial jurisdiction has been transferred does not have jurisdiction to execute the decree. A ruling which might be cited to the contrary, viz., *Kali Pado Mukerjee* v. *Dino Nath Mukerjee*(1) has been explained in *Jahar* v. *Kamini Debi*(2) to be not a real case of transfer of territorial jurisdiction. In most of the reported rulings under this clause (37) (*b*), it has

(1) (1898) I.L.R., 25 Calc., 315. (2) (1901) I.L.R., 28 Calc., 238.

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been taken almost for granted that the usual case to which the phrase "has ceased to have jurisdiction to execute it" applies is the case where between the date of decree and the date of execution application territorial jurisdiction over the property has passed from the Court of original trial to another Court.

The practical difficulties of holding the proposition are that by force of section 37 itself and section 38, two Courts at least would have concurrent powers to execute the same decree, and simultaneous executions, simultaneous sales, simultaneous enquiries into claim petitions, and so on, under the same decree would be going on in different Courts. The difficulties of that procedure far outweigh any hardship in asking the decree-holder to go for execution and Court sale to a Court which has territorial jurisdiction over the property even when it was not the Court which originally passed the decree.

The proposition generally laid down in the reported authorities is that a Court has no power to sell property outside its territorial jurisdiction. Territorial jurisdiction is a condition precedent to the Court selling the property. See *Prem Chand Dey* v. *Mokhoda Debi*(1), *Subbiah Naicker* v. *Ramanathan Chettiar*(2), *Venkatasami Naik* v. *Sivana Mudali*(3), *Veerappa Chetty* v. *Ramasami Chetty*(4), *Guruswami Naicker* v. *Mahommadhu Rowther*(5), *Viswanadhan Chetty* v. *Murugappa Chetty*(6), and *Maharajah of Jeypore* v. *Rajah Lakshminarasimha Garu*(7) and the same conception underlies the Full Bench decision in *Seeni Nadan* v. *Muthusamy Pillai*(8). See also the Full Bench decision in *Prem Chand Dey* v. *Mokhoda Debi*(1) and *Begg, Dunlop & Co.* v. *Jagannath*

(1) (1890) I.L.R., 17 Calc., 699 (F.B.) at 703.
(2) (1914) I.L.R., 37 Mad., 462 at 472.
(3) (1919) I.L.R., 42 Mad., 461.
(4) (1920) I.L.R., 43 Mad., 135.
(5) (1923) I.L.R., 46 Mad., 83.
(6) (1917) 33 M.L.J., 750.
(7) (1923) 18 L.W., 747.
(8) (1919) I.L.R., 42 Mad., 821 (F.B.).

Marwari(1). Some inroad on that general proposition has no doubt been made by rulings which have held that, where the Court is executing a mortgage decree for sale, and the property under mortgage is partly within and partly without its territorial jurisdiction, the Court has power to sell all the property. That has been allowed on the footing that the execution of a mortgage decree for sale is analogous to a decree for specific performance—see *Abdul Hadi* v. *Kabultunnissa*(2). So far however that proposition has not been laid down in any ruling by this Court, and no ruling has gone so far as to lay down that when the property in the mortgage decree lies wholly outside the territorial jurisdiction of the Court, the Court can sell the property in execution of the mortgage decree for sale, and I am not, as at present advised, prepared to make this further inroad on the general principle. Section 37 however does not forbid the view laid down in the Full Bench case in *Seeni Nadan* v. *Muthusamy Pillai*(3) that, though the Court which originally passed the decree has no jurisdiction to execute it because of the transfer of territorial jurisdiction, it has power to entertain an execution application and transmit it to the Court having territorial jurisdiction to execute it. On this point, respondents' vakil contends, first, that, if that is what the Full Bench decides, the decision was otiose, because no one doubts that the Court which passed the decree has power to transmit it for execution to the Court having jurisdiction to execute, and second, that the Full Bench case really implies that the Court which originally passed the decree has not lost its power to execute it; that is, if it has power to transmit, it must also have the power to execute. As to the first

(1) (1912) I.L.R., 39 Calc., 104. (2) (1924) 80 I.C., 901.
(3) (1919) I.L.R., 42 Mad., 821 (F.B.).

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contention, the decision was necessary because a decision in *Subbiah Naicker* v. *Ramanathan Chettiar*(1), had laid down that, if the Court which originally passed the decree had lost territorial jurisdiction, it could not entertain and transmit an execution application. As to the second contention, while the judgment of the late Chief Justice may be taken to go so far as the learned vakil wants, those of the other two Judges quite clearly do not, and it is noteworthy that, *Subbiah Naicker* v. *Ramanathan Chettiar*(1), was not overruled by the Full Bench. *Subbiah Naicker* v. *Ramanathan Chettiar*(1), therefore, remains good law, except in so far as it has been modified by the Full Bench ruling. That is, the net result is that when the territorial jurisdiction of the Court which passed the decree is taken away between the stage of the decree and execution, it has power to entertain an execution application for transmission to the Court having territorial jurisdiction but has no power to sell the property. It is to the convenience of decree-holders, and there is nothing in the Code to prohibit it, that they should be able to apply in execution to the Court where they obtained their decree, and should not have to hunt about to find out whether or not the territorial jurisdiction has been in the interval taken away from that Court. The latter Court will know best whether or not it has territorial jurisdiction and, if it has not, will transfer the decree for execution to the Court having such jurisdiction. The Full Bench view has been taken by a Bench of this Court in *Manavikraman* v. *Anantha-narayana Ayyar*(2), and this is also the *ratio decidendi* of *Jahar* v. *Kamini Debi*(3); see also *Udit Narain Chaudhuri* v. *Mathura Prasad*(4). I therefore in this case follow

(1) (1914) I.L.R., 37 Mad., 462.
(2) (1924) 46 M.L.J., 250.
(3) (1901) I.L.R., 28 Calc., 238.
(4) (1908) I.L.R., 35 Calc., 974.

the Full Bench view as I understand it to be and as I have set it out above.

The next point urged by the respondent relates to the application of section 21, Civil Procedure Code. That the principle of section 21 applies also to execution proceedings has been laid down in several rulings of this Court—see *Manavikraman* v. *Ananthanarayana Ayyar*(1), *Ramani* v. *Narayanaswami Ayyar*(2), and *Chokkalinga Pillai* v. *Velayuda Mudaliar*(3). The argument here is that, as the transfer of territorial jurisdiction was between the passing of the preliminary decree and the passing of the final decree and as the appellant made no objection to the passing of the final decree, he has waived his right to object to the jurisdiction. Such a contention might be upheld if it was a matter of law that the Court which originally passed the decree always has the right to execute it. But I have held that that is not the law. Waiver of a right to object to jurisdiction before the passing of the final decree will not therefore imply a waiver of the right to object in execution proceedings to a sale of the property. The appellant is no doubt barred from pleading in execution proceedings that the final decree was passed without jurisdiction—see *Zamindar of Ettiyapuram* v. *Chidambaram Chetty*(4), but in my view he is not barred from pleading that the Court has no right to sell in execution property which is not within its territorial jurisdiction. The view of one of the learned Judges in *Rajagopala Pandaratthiar* v. *Thirupathia Pillai*(5) has been pressed upon our attention. Now in that case the transfer of territorial jurisdiction was made while the execution proceeding was pending, and the objection regarding this jurisdiction

(1) (1924) 46 M.L.J., 250. (2) (1924) 47 M.L.J., 192.
(3) (1924) 47 M.L.J., 448. (4) (1920) I.L.R., 43 Mad., 675 (F.B.).
(5) (1926) I.L.R., 49 Mad., 746.

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was not taken in these proceedings at the earliest opportunity. Hence section 21 was applied and it was held that the judgment-debtor could not take such objection at a later stage. This is the ground on which MADHAVAN NAIR, J., disposed of the case. But VENKATASUBBA RAO, J., while giving that ground also as one of the grounds for dismissal of the appeal, in itself a sufficient ground for doing so, went into other grounds, namely, that the rule about territorial jurisdiction does not apply to the execution of mortgage decrees, and he relied on certain Calcutta cases, without however considering the Full Bench case in *Prem Chand Dey* v. *Mokhoda Debi*(1), which is also a case of a mortgage decree. So that the observation of the learned Judge that the decisions of the Calcutta High Court on this point have been uniform does not appear to be just. The cases in *Maseyk* v. *Steel & Co.*(2), *Gopi Mohan Roy* v. *Doybaki Nundun Sen*(3), and *Tincouri Debya* v. *Shib Chandra Pal Chowdhury*(4), on which he relies, are cases in which part of the mortgaged property still remained under the jurisdiction of the Court which originally passed the decree, and *Kartick Nath Pandey* v. *Tiluk Dhari Lall*(5), on which he also relies, was practically overruled by the Full Bench in *Prem Chand Dey* v. *Mokhoda Debi*(1). I am not therefore prepared to follow the learned Judge in holding that in all cases of mortgage decrees, not merely cases in which part of the property is still within the jurisdiction of the Court but also cases in which the property is wholly outside its jurisdiction, the Court which originally passed the decree retains jurisdiction to sell in execution. I am of opinion that *Subbiah Naicker* v. *Ramanathan Chettiar*(6),

(1) (1890) I.L.R., 17 Calc., 699 (F.B.).
(2) (1887) I.L.R., 14 Calc., 661.
(3) (1892) I.L.R., 19 Calc., 13.
(4) (1894) I.L.R., 21 Calc., 639.
(5) (1888) I.L.R., 15 Calc., 667.
(6) (1914) I.L.R., 37 Mad., 462.

so far as it lays down the opposite of this proposition, has not been overruled by the Full Bench case in *Seeni Nadan* v. *Muthuswamy Pillai*(1). I hold therefore that the lower Court has no jurisdiction to sell the property in execution, and that the sale cannot therefore go on.

I would set aside the order of the learned Judge and direct that the sale be stayed. The appellant will get his costs in this appeal and C.M.A. (one vakil's fee).

The C.M.A. No. 363 of 1926 is also allowed, and the order for sale is cancelled. The E.P. No. 25 of 1925 of the Sub-Court will be regarded as an application to transmit for execution to the Court having jurisdiction to sell and will be dealt with by that Court as such. No order necessary on C.M.P. No. 300 of 1927.

JACKSON, J.—I agree and have nothing to add.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Odgers and Mr. Justice Curgenven.

SRINIVASA AYYANGAR (PLAINTIFF AND FIRST RESPONDENT), APPELLANT,

1927, March 3.

v.

THE OFFICIAL ASSIGNEE, MADRAS, AND 2 OTHERS (DEFENDANTS, 1, 3 AND 4 PETITIONERS AND RESPONDENTS, 2 AND 3), RESPONDENTS.*

O. XLIII, r. (1) *(w)—O. XLVII, r. 7—Sec.* 115, *Civil Procedure Code—Appeal—Order granting review on ground of new evidence—Order not stating that the new evidence was important—Appealability of—Revision of.*

Although Order XLIII, rule (1) (*w*) of Civil Procedure Code allows an appeal against an order under rule 4 of Order XLVII granting an application for review, yet, the Order XLIII,

(1) (1919) I.L.R., 42 Mad., 821.

* Civil Miscellaneous Appeal No. 41 of 1927.