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*Before Sir Shah Muhammad Sulaiman, Chief Justice, Justice Sir Lal Gopal Mukerji, and Mr. Justice King*

CANTONMENT BOARD, MUTTRA (DECREE-HOLDER) *v.* KISHAN LAL (JUDGMENT-DEBTOR)* 1934 *February*, 20

*Jurisdiction—Execution court questioning whether decree was passed without jurisdiction—Defect of jurisdiction, various categories of—Question whether the suit was cognizable by civil or revenue court—Agra Tenancy Act (Local Act III of 1926), sections 230, 268, 269—Civil Procedure Code, section 47: order XXI, rule 7*—Res judicata.

A suit for the recovery of grazing dues, which was cognizable by the revenue court, was brought in the civil court. The defendant's objection that the court had no jurisdiction to try the suit was overruled and a decree was passed. An appeal lay to the District Judge, but the defendant did not appeal. The suit was such that if it had been brought in the revenue court an appeal would, in that case also, have lain to the District Judge. When the decree was put in execution the defendant again raised the objection that the decree was passed by a court without jurisdiction. The question was whether the execution court could entertain the objection.

*Held* that, without attempting to lay down any broad proposition which would be of universal application to all cases where the validity of the decree itself was called in question in the execution court, the question whether it is open to a defendant in a suit a civil court, which under the Agra Tenancy Act was cognizable by the revenue court alone and in which either no such objection was taken or if taken was disallowed, to raise the same point over again in the execution department should be answered in the negative.

*Second Appeal No. 1276 of 1931, from a decree of Bhagwan Das Bhargava, Additional Subordinate Judge of Muttra, dated the 5th of August, 1931, reversing a decree of Shri Nath, Munsif of Muttra, dated the 4th of May, 1931.

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It is not possible to lay down any sweeping statement which will cover all possible categories of want of jurisdiction. A defect of jurisdiction may have various grades, and different considerations might well apply to them.

Reading section 230 of the Agra Tenancy Act along with sections 268 and 269, it is clear that in the case of a suit cognizable by the revenue court in which the appeal would lie to the District Judge the jurisdiction of the civil court to entertain the suit is not absolutely taken away, and the civil court would have jurisdiction to entertain the suit if no objection as to jurisdiction is taken before it; and even if the objection is so taken but is erroneously overruled, the District Judge in appeal will nevertheless decide the suit on the merits if sufficient materials are on the record, and will not order the plaint to be returned for presentation to the revenue court. In such cases, therefore, the defect of jurisdiction is a matter of secondary importance and does not go to the very root of the case so as to oust the jurisdiction of the civil court completely.

The proper questions which are to be determined by the court executing the decree are those mentioned in section 47 of the Civil Procedure Code. There is no provision in the Code which entitles the execution court to inquire into the jurisdiction of the court which passed the decree. A comparison of section 225 of the Code of 1882 and of order XXI, rule 7 of the present Code shows that now even the court to which the execution is transferred has no longer any power left to require proof of the jurisdiction of the court which passed the decree. It is implied that the court which passed the decree should not itself, in the execution department, begin to inquire into the validity of the decree on the ground of jurisdiction.

The question of jurisdiction having been decided by the court passing the decree, the raising of the same question in the execution proceedings is barred by the principle of *res judicata*.

[*Per* SULAIMAN, C. J.: In the case of judgments of foreign courts, on the basis of whose judgment a suit is instituted or whose decree has been transmitted for execution, there is provision in sections 13 and 14 of the Code for an inquiry into the jurisdiction of the court which pronounced the judgment.]

There may be cases where the decree is incapable of execution; it may be void and a nullity, as where the decree was passed against a dead person, or there may be a statutory prohibition against the sale of certain property, e.g an occupancy holding, although the decree directs its sale. In such cases the executing court is merely staying its own hands and not in-

quiring into the jurisdiction of the court which passed the decree.

Mr. *Muhammad Ismail* (Government Advocate), for the appellant.

Dr. *N. P. Asthana* and Mr. *B. N. Sahai*, for the respondent.

SULAIMAN, C. J.:—This is an execution second appeal arising out of a suit brought by the Cantonment Board through the Secretary of State for India in Council against the defendant, Kishan Lal, for recovery of certain grazing dues, which had been agreed by the defendant to be paid in instalments to the Board under a lease dated the 6th of July, 1928. The suit was brought in the court of the Munsif of Muttra, and an objection was taken in the written statement that the suit was not cognizable by the civil court. The learned Munsif held that the Tenancy Act of 1926 did not apply to the Cantonment areas under the new Act. No doubt under section 1 of the old Tenancy Act of 1901 the Cantonment areas, not being administered by the Lieutenant-Governor of the North-Western Provinces, were excluded; but the language of section 1 of the Agra Tenancy Act of 1926 was altered and the Act was made applicable to the whole of the province of Agra, except certain areas mentioned in the schedule, which does not include a Cantonment area. It has, therefore, to be conceded by the Government Advocate that the Munsif was wrong in holding that he had jurisdiction to entertain the suit; nonetheless he decided the point in favour of the plaintiff and decreed the claim for money. No appeal was preferred from that judgment to the District Judge; nor, of course, there was any further remedy sought from the High Court. It may also be mentioned that the suit was for recovery of an amount in excess of Rs.500 and being one for recovery of grazing dues could not be treated as a suit of small cause court nature.

The Cantonment Board applied for execution of the decree in the Munsif's court, and their first application

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for execution having been dismissed, a second application for execution was filed, to which objections were raised that the civil court had no jurisdiction to entertain the suit at all. The first court held that the execution court could not go behind the decree as the matter had been decided in the suit itself and that it must take the decree as it stands and execute it. On appeal, however, the lower appellate court has, on the strength of certain authorities, come to the conclusion that it is open to the execution court to go behind the decree and ascertain whether the Munsif had jurisdiction to entertain the suit, and, if it came to the conclusion that he had not, to dismiss the application for execution. The lower appellate court accordingly has re-examined the plaint and held that the suit was not cognizable by the Munsif. It has accordingly dismissed the application for execution. The Cantonment Board have come up in second appeal, and a learned Judge of this Court referred this case to a Division Bench, which has referred it to a larger Bench.

It must be conceded on behalf of the Board that the suit was not cognizable by the civil court at all. As it related to pasturage and not to an agricultural holding, even section 273 of the Tenancy Act would not have been applicable and the civil court could not have sent a mere issue to the revenue court for trial but would have been compelled to return the plaint for presentation to the proper court. This is clear from the definitions of "land" and "holding" given in section 3. It must, therefore, be assumed that the suit was not cognizable by the Munsif at all and, if he had decided the matter rightly, he had no option but to return the plaint.

The question, however, that arises before us is whether this point can now be raised in the execution department. On the face of it there is a certain anomaly in the view accepted by the lower appellate court. It would not have been a fatal objection if the matter had

gone up in appeal to the District Judge from the court of the Munsif, for, if the learned Judge found that there were sufficient materials necessary for the determination of the suit, he would have under section 269 of the Tenancy Act disposed of the suit, even though it had been instituted in the wrong court. But now the defendant without having appealed has been allowed by the lower appellate court to take the objection that the decree is futile and infructuous.

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In this particular case it is not necessary to decide the much larger question whether an execution court is competent to inquire into the jurisdiction of the court which passed the decree. There are certain difficulties if the court is not allowed to examine such a question, and there would certainly be serious anomalies if it is allowed to do so in all cases. Section 11 of the Civil Procedure Code would not in terms apply, but the principle underlying that section has been held to be applicable to the execution proceedings. Still there is a serious difficulty that if the civil court was not competent to entertain the suit, it is difficult to see how its decision would be binding on the defendant. *Prima facie* a court, which has no jurisdiction to entertain a claim, cannot by seizing the case usurp jurisdiction and then by deciding that it has jurisdiction make its decision binding on the defendant. On the other hand, if an execution court is allowed to challenge the validity of the decree, then it must have the same power even if that decree has ben affirmed on appeal by the lower appellate court and has even been confirmed by the High Court. As regards appeals under the Tenancy Act to which section 268 or 269 might apply, it may be said that the decree which is binding on the parties is the appellate court decree and not the decree of the first court. But that explanation would be of no avail as regards cases where the first court has proceeded without any jurisdiction, and there are no provisions similar to those contained in the sections noted above.

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A Full Bench of the Calcutta High Court has apparently gone to the utmost length in favour of the respondent. In *Gora Chand Haldar* v. *Prafulla Kumar Roy* (1) five learned Judges of that court considered it a tedious task to examine the numerous decisions, many of which were conflicting, and thought that such an examination would not lead to any useful result. Without giving any elaborate reasons, they stated their view that where the decree presented for execution was made by a court which apparently had no 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. With great respect, I would say that the proposition has been stated in too wide terms and that it is not possible to lay down any sweeping statement which will cover all possible categories of want of jurisdiction. A defect of jurisdiction may have various grades and different considerations might well apply to them.

For instance, as regards the want of jurisdiction of a foreign court, on the basis of whose judgment a suit is instituted or whose decree has been transmitted for execution, there is provision in sections 13 and 14 of the Civil Procedure Code for an inquiry into the jurisdiction of the court which pronounced the judgment.

Similarly it may be possible to hold, although it is not necessary to decide in this case, that in a separate suit the want of jurisdiction of a court which has pronounced a judgment can be inquired into. Obviously section 11 would not be a bar, because that would only apply to a case where the first court was really competent to try the second suit. It is also clear that under section 44 of the Evidence Act a party would be entitled to show that the previous judgment, which is produced by the opposite party, is no bar to his claim, inasmuch as it was passed by a court which had no jurisdiction.

(1) (1925) I.L.R., 53 Cal., 166.

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It is not necessary to consider whether in an independent suit the question of want of territorial jurisdiction can be raised. Section 21 of the Civil Procedure Code does not in terms create a bar, but the principle has been applied by a Bench of the Madras High Court. A different opinion has, however, been expressed by another Bench of this Court, and it has been laid down that section 21 would not cure the defect for all purposes.

Again there may be a want of jurisdiction due to the fact that exclusive jurisdiction has been conferred on a different set of courts by statute and a civil court is debarred from hearing suits of that nature. The question how far such a difficulty would be fatal and can be examined in the execution department would depend on the provisions of the statute under which such jurisdiction is taken away.

Without, therefore, attempting to lay down any broad proposition which would be of universal application, I would attempt to examine the narrow question whether it is open to a defendant in a suit, which under the Agra Tenancy Act was cognizable by the revenue court alone and in which no such objection was taken or if taken was disallowed, to raise the same point over again in the execution department.

Section 230 of the Tenancy Act no doubt confers an exclusive jurisdiction on the revenue courts in certain classes of cases specified in the fourth schedule. The cognizance of cases of that nature by the civil courts is, therefore, completely barred. But, as in these provinces both civil and revenue courts exist together and cases on the border line may cause an apparent conflict of jurisdiction, the Tenancy Act itself has made ample provision to obviate difficulties created by such conflict. Section 268 lays down that when, in a suit instituted in a civil or revenue court, an appeal lies to the District Judge or High Court, an objection that the suit was instituted in the wrong court shall not be entertained by the appellate court unless such objection was taken

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in the court of first instance. This section, therefore, must be read along with section 230. The jurisdiction of the civil court is not absolutely taken away; but the civil court would have jurisdiction to entertain the suit if no objection as to jurisdiction is taken before it, that is to say, the omission to raise an objection would be a waiver of the plea of jurisdiction, which would be quite sufficient to clothe the civil court with jurisdiction to hear and dispose of the suit.

Again, under section 269 even if a suit has been instituted in the wrong court, if all the materials necessary for the determination of the suit are on the record, it is the duty of the appellate court, namely, the District Judge, to dispose of the appeal as if the suit had been instituted in the right court. That section also provides that where there are no sufficient materials and the appellate court remands the case or frames fresh issues, it may direct its order either to the court in which the suit was instituted or to such court as it may declare to be competent to try the same.

These provisions make it clear that so far as suits which may be filed in a civil or revenue court and in which the appeals would always lie to the District Judge or the High Court are concerned, the defect of jurisdiction is a matter of secondary importance and does not go to the very root of the case so as to oust the jurisdiction of the civil courts completely. It is not such a fundamental defect as would be absolutely incapable of being cured in any event. The legislature has contemplated that if no objection is raised, or even if objection is raised but there are sufficient materials for the disposal of the case, the plea of want of jurisdiction should not be listened to.

The position then is this that if the defendant had chosen to appeal to the District Judge, the District Judge would never have ordered the plaint to be returned for presentation to the revenue court, but would have most probably disposed of the case himself, because

there were apparently all the necessary materials on the record. But even if he found that all the necessary materials were not on the record, he might have remanded the case and would have remanded it possibly to the very Munsif who had disposed of it originally. The defendant not having appealed has deprived himself of an opportunity which he might possibly have had of getting this case sent to the revenue court.

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Examining the functions of an execution court as laid down in the Code of Civil Procedure, it would seem that the proper questions which have to be determined by the court executing the decree are mentioned in section 47 of the Civil Procedure Code, and they are matters between the parties or their representatives relating to the execution, discharge or satisfaction of the decree. Neither in the old Codes nor in the present Code has there ever been any specification entitling the execution court to inquire into the jurisdiction of the civil court which passed the decree. Indeed, under section 225 of the Act of 1882 a court to which a decree was sent for execution was expressly empowered to require proof "of the jurisdiction of the court which passed it". Those words have been deleted from the corresponding rule, order XXI, rule 7 of the present Code. The obvious inference is that now even the court to which the execution is transferred has no longer any power left to require proof of the jurisdiction of the court which passed the decree but must execute it as it finds it. As the decree is not required to be produced, section 44 of the Evidence Act would hardly be of help in the execution department. One may, therefore, infer that this implies that the court which passed the decree should not itself begin to inquire into the validity of the decree on the ground of want of jurisdiction.

But it is not possible to lay down broadly that an execution court can in no circumstances go behind the decree and must of a necessity shut its eyes to circumstances under which the decree came to be passed.

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In the case of defendants who were dead at the time of the decree, their Lordships of the Privy Council in the cases of *Radha Prasad Singh* v. *Lal Sahab Rai* (1) and *Brij Indar Singh* v. *Kanshi Ram* (2) have laid down that the decree is a nullity as against them and cannot be executed against their heirs. In such cases it is the duty of the execution court to inquire into the question whether the defendants, against whom the decree purports to have been passed, were in fact alive or dead on the date of the decree and, if satisfied on evidence that they were dead, to hold that the decree was incapable of execution. But this is not really a case of want of jurisdiction in the court which passed the decree, but a case where the decree is void and a nullity and is incapable of execution against the heirs of the person who was not represented before the court.

Similarly it has been held by a Full Bench of this Court in the case of *Katwari* v. *Sita Ram Tiwari* (3) that where a tenant had made a mortgage of his occupancy holding and a suit was brought on the basis of the mortgage deed and a decree for sale obtained from the civil court, the execution court could nevertheless refuse to sell the occupancy holding, as it was not saleable under section 20 of the Agra Tenancy Act. The learned Judges expressed the view that "No doubt it was not open to the judgment-debtor to contest the validity of the decree which was passed against him; but it was open to him to say to the court that, as the law contains a mandatory provision which precludes a court executing a decree from selling an occupancy holding, the court was bound to carry out the provisions of the law and not to act in violation of those provisions." It was thought that it was altogether immaterial whether the decree ordered sale or whether it was a simple money decree. What the decree-holder was seeking was to sell an occupancy holding in execution of his decree, which

(1) (1890) I.L.R., 13 All., 53. (2) (1917) I.L.R., 45 Cal., 94.
(3) (1921) I.L.R., 43 All., 547.

sale was prohibited by the express provisions of section 20. It, therefore, seems that the *ratio decidendi* of that Full Bench case was that where there is some statutory enactment which prohibits the sale of some property, then it is the duty of the executing court to refuse to sell it, even though a decree has been passed by another court. When an execution court refuses to execute it, it is not really holding that the decree was passed without jurisdiction, or is not really setting aside the decree, but is merely staying its hands from proceeding further, because it is itself prohibited by law from selling the property.

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There may accordingly be cases where the decree is incapable of execution, or is void and a nullity, in such a way as to make it impossible for the executing court to execute it; or there may be cases where there are certain statutory provisions which prevent the executing court from proceeding to sell certain property, for instance, where the sale of certain lands is prohibited and not necessarily their attachment and order for sale. In such cases it may be possible for the court in one sense to go behind the decree and not execute it; but in reality the court is merely staying its own hands and not inquiring into the jurisdiction of the court which passed the decree.

But to hold that an executing court must always inquire into the question of the jurisdiction of the court which passed the decree would be to re-open matters which might have been the subject of the controversy in the original suit and which might well have been decided on a consideration of the oral and documentary evidence. Such questions may be mixed questions of law and fact, for example, as to the place where the cause of action arose, the place where the contract was broken, the sub-division in which the property in dispute was situated, the nature and character of land as to whether it is saleable or not and the validity of certain transfers. All such questions are properly speaking

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questions which arise for consideration in the suit itself and which have to be determined on an examination of the evidence on the record. It would be too much to lay down that the executing court can go behind these findings and re-open the question and determine afresh that the civil court decided this question wrongly and, therefore, improperly usurped jurisdiction.

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The opinions in the other High Courts are rather conflicting, and it is possible to cite cases in support of either view from every High Court. So far as this High Court is concerned, the learned counsel for the respondent has to admit that apart from certain observations made in a few cases, there is no case with the exception of one, in which an execution court has been allowed as such to go into the question of the want of jurisdiction of the court passing the decree. In one case an objection of the judgment-debtor was allowed to be converted into a plaint and the proceeding in the execution treated as a suit and the matter then allowed to be re-agitated: vide *Daulat Singh* v. *Maharaj Raja Ramji* (1), where a decree had been passed against a minor without a proper appointment of his guardian *ad litem* on the footing that he was a major, and the minor was allowed to convert his objection in the execution department into a plaint and have the question re-investigated. The cases of a dead person and the sale of an occupancy holding, in which the matter has been allowed to be examined in the execution department, have already been cited. There is, however, the latest case of the *Cantonment Board, Agra* v. *Kanhaiya Lal* (2), in which a decree passed by a civil court against the Cantonment Board declaring that a certain clause in the lease obtained from the Cantonment authority was binding on the Board and granting an injunction, although the matter could only have been considered by the District Magistrate, was held to be *ultra vires*, and execution of it was refused. The learned Judges expressed

(1) (1926) I.L.R., 48 All., 362. (2) [1933] A.L.J., 162.

this view on a broad view of certain general principles without referring to any authority. It is not clear whether the conflicting authorities on this point were placed before the Bench. It seems to me that it would be very inconvenient and is contrary to the spirit of the provisions in section 47 of the Code to allow execution courts to go into such matters.

I would, therefore, hold that the appeal should be allowed and the application for execution proceeded with.

*Sulaiman, C.J.*

MUKERJI, J.:—I entirely agree that this appeal should be allowed and the execution of the decree applied for should be proceeded with.

The facts of the case have already been stated by the learned CHIEF JUSTICE and I need not restate them. I shall only briefly mention the reasons which actuate me in deciding that the appeal should be allowed.

It is too late in the day to contend that an execution court can go behind the decree. It is, however, urged that there are certain cases in which an execution court is allowed to go behind the decree, and one of such cases must be where the court passing the decree had no jurisdiction to make it.

By way of example it is said that where a decree is made against a defendant or one of the defendants who was dead at the time of the pronouncement of the judgment, it is open to the heirs of the deceased to represent to the executing court that so far as they are concerned the decree is not executable. The heirs are certainly allowed to raise an objection that they cannot be held liable under the decree. But, in my opinion, this is not "going behind the decree". If, for example, a Magistrate, after a proper trial of say a charge of theft, sentences the prisoner to three months' imprisonment, and when the judgment is to be pronounced it is found that the prisoner is dead, the judgment cannot be executed, not because the judgment is wrong or that the Magistrate had no jurisdiction to hear the case of theft,

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but because there is nothing on which the judgment can operate. The party, against whom the decree is made or sentence is passed, cannot be found to be in existence, and it is on that account that the sentence or decree cannot be executed. In my opinion, it is not a case of want of jurisdiction at all, nor is it a case of going behind the decree or judgment. Again another instance has been given where, according to the contentions of the learned counsel for the respondent, a Full Bench decision of this Court has practically held that the executing court could go behind the decree. That is the case of *Katwari* v. *Sita Ram Tiwari* (1). In that case the learned Judge who delivered the judgment of the Court took care to point out that in deciding the case he was *not* going behind the decree, but was only holding that the executing court was to carry out a mandatory provision which precluded a court executing a decree from selling an occupancy holding. With all respect, I have some doubt in my mind as to the correctness of this decision, but it is not really necessary to doubt the correctness. Even if it be a correct decision, the learned Judge who delivered the judgment and the two learned Judges who agreed with that judgment expressly held that an executing court could not go behind the decree. The reason for non-execution of the decree in its terms was not existent within the decree or was not existent in the want of jurisdiction on the part of the court passing the decree, but resided in a rule of law which stood apart from the decree.

As has been pointed out by the learned CHIEF JUSTICE, a reading of section 47 of the Civil Procedure Code and a comparison of section 225 of the Civil Procedure Code of 1882 with the corresponding provision in the Code of 1908, namely, order XXI, rule 7, make it abundantly clear that the executing court is not entitled to question the correctness of the decree passed. The matters which are allowed to be agitated before the executing court are

(1) (1921) I.L.R., 43 All., 547.

laid down in section 47, and, as I read them, they do not include a question whether the court which passed the decree was properly seised of the case or not. Again, section 225 of the Civil Procedure Code of 1882 provided that where a decree had been transferred for execution to another court, it might require proof of the jurisdiction of the court passing the decree. That provision has been deleted from the present Code. This indicates that the legislature was of opinion that to allow the court to which a decree had been transferred for execution to question the validity of the decree would be wrong.

*Mukerji, J.*

The decided cases in different courts are conflicting, and it is not necessary to examine them. The only case in this Court, which is directly in point, is the case of the *Cantonment Board, Agra* v. *Kanhaiya Lal* (1). It does not appear that the question, whether the executing court could go behind the decree and question the jurisdiction of the court which passed the decree, was discussed before the learned Judges. The very difficult question that arose before us, and which has occupied two days of this Bench, was disposed of in a few lines. This indicates that it was assumed that the executing court could declare that the decree under execution was passed without jurisdiction and was *ultra vires* of the court. In the circumstances, that judgment cannot be binding on the Full Bench.

In this particular case there are many circumstances which go to show that it was not open to the respondent before us to question the validity of the decree in the execution department. The point had already been raised and decided in the very suit. The execution proceedings are only a part of the suit and nothing more. The decree is there and the decree has to be carried into effect. If an order passed in execution of a decree be binding between the parties during the subsequent proceedings in the same execution—see *Ram Kirpal* v. *Rup Kuari* (2)—it should follow, in my opinion, that

(1) [1933] A.L.J., 162. (2) (1883) I.L.R., 6 All., 269.

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a decision made in the original suit itself should be binding so far at least as the parties are concerned and in that suit and in the execution department of that suit.

*Mukerji, J.*

Whether the respondent can question the validity of the decree passed, on the ground of want of jurisdiction in the learned Munsif who passed it, by means of any suit is a point which is not before us. It is possible that it is open to him to institute a suit and to have it declared that the decree passed was passed by a court without jurisdiction, and he may seek some other proper and suitable relief. I leave that point, therefore, undecided.

There are other aspects of the case which have been touched by the learned CHIEF JUSTICE, and I need not go over them again. It seems to me clear that the provisions like section 21 of the Civil Procedure Code, section 11 of the Suits Valuation Act, sections 268 and 269 of the Agra Tenancy Act, indicate that the legislature has been doing its best to minimise the chances of raising a question of jurisdiction and thereby setting trials at naught. The plea of the respondent creates this anomalous position: If he had appealed against the decree of the Munsif directing him to pay the rent, sections 268 and 269 of the Agra Tenancy Act would have come into play and, unless he was able to show that on the merits he should succeed, he could never have succeeded. Yet he urges that he is in a better position by raising the point in the execution department than he would have been if he had raised the point in appeal. This, in my opinion, is a position which should not be allowed to be taken up by the respondent.

For these reasons I agree that the appeal should be allowed.

KING, J.:—I agree and have nothing to add.