FULL BENCH

Before Mr. Justice C. M. King, Chief Judge, Mr. Justice Bisheshwar Nath Srivastava and Mr. Justice Ziaul Hasan 1935 *March*, 13

SHEO BEHARI LAL (DECREE-HOLDER-APPELLANT) *v.* MAKRAND SINGH AND OTHERS (JUDGMENT-DEBTORS-RESPONDENTS)*

Civil Procedure Code (Act V of 1908), section 21 and Order XXXIV, rule 5—Mortgage—Final decree for sale passed in terms of compromise between mortgagee plaintiff and subsequent mortgagees—Mortgagors not served and proceedings ex parte *against them—Final decree, if a nullity—Executing court, when can refuse to execute a decree as nullity —Suits Valuation Act (VII of 1887), section 11.*

A decretal court may be lacking in jurisdiction, territorial, pecuniary, personal or inherent to pass the decree. It is only when the lack of jurisdiction is such as to make the decree *coram non judice,* a mere nothing or what is not a decree at all in the eye of law, that it can be treated as a mere nullity and disregarded by the execution Court. A defect in the territorial or pecuniary jurisdiction such as can be cured by section 21 of the Code of Civil Procedure or section 11 of the Suits Valuation Act, does not make the decree *ab initio* void and a nullity, so as to justify the execution Court going behind it. In cases of lack of personal or inherent jurisdiction, e.g. in a case in which a decree is passed against a dead person, the decree is not a decree at all in the eye of the law, and can be disregarded as a nullity by any court before which it is presented. *Rabindranath Chakravarti* v. *Jnanendramohan Bhaduri* (1), *Jnanendra Mohan Bhaduri* v. *Rabindra Nath Chakravarti* (2), *Ram Narain* v. *Suraj Narain* (3), *Amrita Sundari Devi* v. *Serajuddin Ahmad* (4), and *Mahadeo Pande* v. *Somnath Pande* (5), referred to.

Where in a suit on a mortgage a final decree was passed by a Court of competent jurisdiction in terms of a compromise entered into between the plaintiff mortgagee and some puisne mortgagees according to which the mortgaged properties were to be sold in a particular order and the proceedings were *ex parte* against the mortgagors, who were not served with notice but the Court was wrongly informed that they were served

*Execution of Decree Appeal No. 54 of 1933, against the order of Babu Bhagwat Prasad, Subordinate Judge of Mohanlalganj, Lucknow, dated the 9th of August, 1933.

(1) (1930) I.L.R., 58 Cal., 1018. (2) (1932) L.R., 60 I.A., 71.
(3) (1933) I.L.R., 9 Luck., 485. (4) (1914) 19 C.W.N., 565.
(5) (1926) I.L.R., 48 All., 828.

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but were absent, there is no want of jurisdiction and the decree is not a nullity against the mortgagors so as to justify the execution Court in refusing to execute it.

The case was originally heard by a Bench consisting of the Hon'ble Chief Judge and Mr. Justice Ziaul Hasan, who referred certain questions of law involved in it to the Full Bench for decision. The referring order of the Bench is as follows:

KING, C. J. and ZIAUL HASAN, J.—As the questions raised in these appeals are of great importance and involve the interpretation of the Full Bench case of this Court in *Ram Narain* v. *Suraj Narain* (1), we refer the following questions of law to a Full Bench:

(1) Whether an execution Court can refuse to execute a decree only on the ground that the Court had no jurisdiction to pass it or whether it can refuse on the ground of the nullity of the decree for any other reason?

(2) Whether the final decree passed by the Court on the 22nd of February, 1930, in the present case is a nullity as against the respondents 1 to 3?

(3) If the answer to question no. 2 is in the affirmative, can the decree-holder proceed against the property of Jagannath, respondent no. 5?

Messrs. *Mohammad Ayub* and *Daya Shankar*, for the appellant.

Messrs. *Hyder Husain* and *Makund Behari Lal*, for the respondents.

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SRIVASTAVA, J.:—The facts of the case which has given rise to this reference are that on the 25th of May, 1904, Makrand Singh, Bharat Singh and Thakur Din Singh, respondents Nos. 1 to 3, executed a mortgage-deed in favour of the appellant Sheo Behari Lal. On the 15th of June, 1915, Bharat Singh alone executed a deed of further charge in favour of the mortgagee. Sheo Behari Lal brought a suit for sale on the basis of the aforesaid mortgage and the deed of further charge and impleaded therein also Shiam Behari Vaish and Jagannath, respondents Nos. 4 and 5 and one Chandika as subsequent mortgagees. On the 18th of December, 1926, the parties entered into a compromise and a preliminary decree for

(1) (1933) I.L.R., 9 Luck., 435: 11 O.W.N., 169.

sale was passed in terms of it. On the 14th of December, 1929, Sheo Behari Lal made an application for a final decree for sale against the six defendants. All the defendants were served with notice of this application but Bharat Singh alone appeared, and as no objection was raised by him, a final decree for sale was passed on the 11th of January, 1930. On the 8th of February, 1930, Shiam Behari made an application to have the final decree set aside on the ground that he had not been served with notice of the application for the final decree being passed. Notice of this application was issued to the decree-holder alone, but on the 22nd of February, 1930, when the application came up for disposal two of the other judgment-debtors, namely Chandika and Jagannath also appeared besides the applicant Shiam Behari and the decree-holder Sheo Behari Lal. The learned Subordinate Judge was wrongly informed that the other judgment-debtors had been served, although as a matter of fact no notice had been sent to them. He, therefore, made a note in the proceedings that the other judgment-debtors were absent, though served, and proceeded *ex parte* against them. After hearing the arguments of the parties present, the Subordinate Judge granted the application of Shiam Behari and set aside the final decree, which was passed on the 11th of January, 1930, and proceeded to rehear the application of Sheo Behari Lal for the passing of a final decree for sale. The same day the plaintiff Sheo Behari and the three defendants who were present filed a fresh compromise, in which some variation was made as regards the order in which some portions of the mortgaged property were to be sold according to the terms of the first compromise. A final decree for sale was prepared in terms of the new compromise. On the 20th of February, 1933, Sheo Behari Lal made an application for execution of the last-mentioned decree against all the judgment-debtors. Two of the mortgagors, Makrand Singh and Bharat Singh, objected to the execution on the ground

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that they were not bound by the decree, dated the 22nd of February, 1930, as they were no parties to it. They also pleaded that the said decree was fraudulent and collusive and that the application for execution was barred by time. The learned Subordinate Judge held that the decree, dated the 22nd of February, 1930, was not binding on the objectors as they were no parties to the second compromise. He accordingly ordered the names of the three mortgagors, who had not signed the second compromise, to be struck off from the array of the judgment-debtors and ordered execution to proceed only against the three subsequent mortgagees who had entered into the compromise. The decree-holder, Sheo Behari Lal, and one of the puisne mortgagees, Jagannath, preferred appeals against the order of the Subordinate Judge to this Court, *inter alia*, on the ground that the mortgagors, respondents Nos. 1 to 3, could not challenge the final decree, dated the 22nd of February, 1930, in execution proceedings. The Divisional Bench, which heard the appeal, being of opinion that the questions raised in the appeals were of great importance and involved interpretation of the Full Bench decision of this Court in *Ram Narain* v. *Suraj Narain* (1), referred the following questions of law to a Full Bench:

(1) Whether an execution court can refuse to execute a decree only on the ground that the Court had no jurisdiction to pass it or whether it can refuse on the ground of the nullity of the decree for any other reasons?

(2) Whether the final decree passed by the Court on the 22nd of February, 1930, in the present case is a nullity as against the respondents 1 to 3?

(3) If the answer to question No. 2 is in the affirmative, can the decree-holder proceed against the property of Jagannath, respondent No. 5?

The main question propounded before the Full Bench as regards the circumstances in which an execution Court can question the validity of the decree is one of consider-

(1) (1933) I.L.R., 9 Luck., 435: 11 O.W.N., 169.

able difficulty which has given rise to a sharp conflict of opinion in the different High Courts in the country. The question came up for consideration not long ago before a Full Bench of this Court of which I was a member in *Ram Narain* v. *Suraj Narain* (1). The conclusion reached by me in that case was that the decree in question passed by the Munsif was a mere nullity because he lacked inherent jurisdiction to take cognizance of the matter and that in such a case the executing Court could refuse to execute it. I took care to add that I confined my decision to this ground. I am glad to avail myself of this opportunity to explain my position a little more fully. A decretal Court may be lacking in jurisdiction, territorial, pecuniary, personal or inherent to pass the decree. It is only when the lack of jurisdiction is such as to make the decree *coram non judice,* a mere nothing or what is not a decree at all in the eye of law, that it can be treated as a mere nullity and disregarded by the execution Court. Although such cases must, if at all, be very rare, yet if in any case it can be shown that a decree passed by a Court of competent jurisdiction was a nullity in the sense just stated by me then I think it must be governed by the same principle and the execution court ought to be able to disregard such decree also.

Section 21 of the Code of Civil Procedure provides that a defect of want of territorial jurisdiction will not be entertained by any appellate or revisional Court, unless the objection was taken at the earliest possible opportunity and unless there has been a consequent failure of justice. It shows that the defect of lack of territorial jurisdiction, if an objection as regards it has not been taken as provided by that section, must be deemed to be cured for all purposes. It seems to follow that the execution Court cannot entertain such an objection in the execution proceedings. Similarly section 11 of the Suits Valuation Act (VII of 1887) shows

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that a plea as regards lack of pecuniary jurisdiction can also be waived. Thus in my opinion a defect in the territorial or pecuniary jurisdiction, such as can be cured by section 21 of the Code of Civil Procedure or section 11 of the Suits Valuation Act, does not make the decree *ab initio* void and a nullity, so as to justify the execution Court going behind it. As regards the personal jurisdiction the most familiar instance is that of a case in which a decree is passed against a dead person. In such a case it needs no argument to say that the decree is not a decree at all in the eye of the law, and can be disregarded as a nullity on account of absolute lack both of personal and inherent jurisdiction, by any court before which it is presented. I refrain from expressing any opinion as regards another class of cases in which the question of personal jurisdiction sometimes arises, namely the case of decrees against persons under a legeal disability as it is not necessary for me to do so in the present case. Cases of lack of inherent jurisdiction may be illustrated by the case of *Rabindranath Chakravarti* v. *Jnanedramohana Bhaduri* (1) which was confirmed by their Lordships of the Judicial Committee in *Jnanendra Mohan Bhaduri* v. *Rabindra Nath Chakravarti* (2), a case under the Indian Arbitration Act in which the Statute did not give the Court any jurisdiction to pass a decree but authorised it only to order the award to be filed, and by the case which formed the subject of reference to the Full Bench of this Court in *Ram Narain* v. *Suraj Narain* (3), in which a final decree for sale was passed by the Munsif of Bilgram, although the suit had been instituted and a preliminary decree passed by the Subordinate Judge of Hardoi and the case had never been transferred to the Munsif's Court.

In support of my view I might also point out that the Legislature in enacting order XXI, rule 7 of the Code of Civil Procedure (Act V of 1908) has omitted the words "or

(1) (1930) I.L.R., 58 Cal., 1018. (2) (1932) L.R., 60 I.A., 71.
(3) (1933) I.L.R., 9 Luck., 435.

of the jurisdiction of the Court which passed it" which found place in the corresponding section 225 of the Code of Civil Procedure (XIV of 1882). This omission appears to be a deliberate one and clearly manifests the intention that an execution Court is not to be allowed to question the jurisdiction of the Court which passed the decree. But as I have said before, a case in which the decree is an absolute nullity for lack of inherent jurisdiction to pass it, appears to stand on a different footing. Such a decree has no existence in law and can be ignored altogether. The view which I have expressed above appears to me to be the only reasonable view of the matter, because an execution Court is merely a hand-maid or a servant of the Court which passed the decree, and it would be opposed to sound principles to allow a servant to question the authority of the master, except of course in cases where the decree or order can be treated as non-existent or a mere nothing. I do not think it necessary to discuss the case law bearing on the subject because of the great divergence in the views expressed by the various High Courts and because it has been reviewed at length in the leading judgment in our Full Bench decision in *Ram Narain* v. *Suraj Narain* (1).

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Turning now to the facts of the present case, the question is whether the decree, dated the 22nd of February, 1930, can be regarded as an absolute nullity for any lack of inherent jurisdiction in the Court which passed it. It has properly been conceded by the learned Counsel for the respondents that there was no lack of inherent jurisdiction in the Subordinate Judge to pass the decree. It is, however, contended strongly that a compromise decree stands on the same footing as a contract, and as the mortgagors respondents were no parties to the compromise, therefore, the compromise was absolutely void as against them and the decree passed on it is, therefore, to be treated as a mere nullity. No doubt there is ample authority for the proposition that

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a compromise decree is a creature of the agreement and merely carries out the terms of the agreement embodied in the compromise—*Amrita Sundari Debi* v. *Serjuddin Ahmed and others* (1), but I am of opinion that even though the principle may be conceded, it cannot help the respondents in the present case. The decree in question is a subsisting decree and was passed by a duly constituted Court in a suit to which all the respondents were parties. The compromise in question was arrived at between the mortgagee plaintiff and the puisne mortgagees. The mortgagors though not parties to the compromise were properly parties to the litigation. No notice of the application for setting aside the previous decree was served on them, but the Court acted under the impression that they had been served with notice and, therefore, decided to proceed *ex parte* against them. It is not denied that if the order for *ex parte* proceedings had been regularly made, it would have been competent for the Court to pass a decree against the absent mortgagors on the same terms as were agreed to by the parties which were present in their compromise. It seems to me that there is no difference in principle between a case like the present one and a case in which a Court passes an order for *ex parte* proceedings, where the service has not been properly made. In either case it seems to me that there is no lack of jurisdiction in the Court passing the decree, but they are cases merely of an irregular exercise of jurisdiction. In other words, the view I take of the proceedings, dated the 22nd of February, 1930, of the Subordinate Judge is that he did not treat the compromise as binding upon the mortgagors respondents in spite of their not being parties to it, but merely passed a decree *ex parte* against them in the same terms as were embodied in the compromise entered into by the other parties. Although the ordinary practice is to send notice to the mortgagors when an application is made for a final decree for sale, yet it should be noted that order XXXIV, rule 5

(1) (1914) 19 C.W.N., 565.

does not prescribe such a notice being sent. It was so held also by the Allahabad High Court in a case of foreclosure—*Mahadeo Pande* v. *Somnath Pande* (1). Obviously the mortgagee had as against the mortgagors a right to sell the whole and every portion of the mortgaged property. By means of the compromise the puisne mortgagees, who were interested only in certain portions of the mortgaged property agreed to portions of the mortgaged property being sold in a particular order which was agreed between them and the decree-holder. If the proceedings *ex parte* had been regularly taken against the mortgagors no legitimate exception could, under the circumstances, have been taken against the Court passing an *ex parte* decree against the mortgagors in terms of the compromise made by the other parties. The case, therefore, in my opinion is not one of the Court passing a decree against the mortgagors on the basis of a compromise to which they were not parties but merely one of a decree being passed in terms of the compromise against persons, proceedings against whom were *ex parte*. In this view of the matter no question of want of jurisdiction or of the decree being a nullity arises. The defect is no more than one of an irregular exercise or improper assumption of jurisdiction. The mortgagors may have their remedy by means of proper proceedings against the irregularity complained of, but they cannot in the circumstances treat the decree as a nullity.

For the above reasons my answers to the questions referred to the Full Bench are as follows:

(1) That an execution Court can refuse to execute a decree on the ground of its being a nullity in the sense of its not being a decree at all in the eye of law either for want of inherent jurisdiction to pass it or for any other reason.

(2) The final decree passed on the 22nd of February, 1930, is not a nullity as against the respondents Nos. 1 to 3.

(1) (1926) I.L.R., 48 All., 828.

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(3) In view of the answer given to question No. 2, this question does not arise.

KING, C.J.:—I agree. The question has been very fully discussed by my learned brother and I have nothing to add.

ZIAUL HASAN, J.:—I also agree.

By the Court. (KING, C.J. and SRIVASTAVA and ZIAUL HASAN, JJ.): Our answers to the questions referred to the Full Bench are as follows:

(1) That an execution Court can refuse to execute a decree on the ground of its being a nullity in the sense of its not being a decree at all in the eye of law either for want of inherent jurisdiction to pass it or for any other reason.

(2) The final decree passed on the 22nd of February, 1930, is not a nullity as against the respondents Nos. 1 to 3.

(3) In view of the answer given to question No. 2, this question does not arise.

REVISIONAL CIVIL

Before Mr. Justice Bisheshwar Nath Srivastava and Mr. Justice E. M. Nanavutty

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ANANDPAL SINGH AND OTHERS (PLAINTIFFS-APPLICANTS) *v.* RAM CHARAN, ADVOCATE, RAE SAHEB (DEFENDANT OPPOSITE-PARTY)*

Indian Succession Act (XXXIX of 1925), section 265—Oudh Courts Act (IV of 1925), section 31 and rule 239—Probate, proceedings for—Transfer of probate application by District Judge to Subordinate Judge for disposal—Case becoming contentious after transfer—Jurisdiction of Subordinate Judge, to dispose it of.

The test as to whether a Subordinate Judge has jurisdiction to dispose of an application for grant of probate, which has been transferred to his Court by the District Judge after which a caveat is lodged and the proceedings become contentious, is

*Section 115 Application No. 6 of 1935, against the order of Pandit Brij Kishan Topa, Subordinate Judge of Malihabad at Lucknow, dated the 9th of January, 1935.