APPELLATE CIVIL

Before Mr. Justice G. H. Thomas and Mr. Justice Ziaul Hasan

1937
April, 8

GWALA PRASAD KHANNA (DECREE-HOLDER-APPELLANT) *v.* MATHURA PRASAD (JUDGMENT-DEBTOR-RESPONDENT)*

Execution of decree—Compromise decree for an amount beyond the pecuniary jurisdiction of the court—Decree, if a nullity—Execution court, if can go behind the decree—Limitation—Instalment decree not making entire amount payable on default of an instalment—Decree can be executed for instalments within time—Compromise decree mentioning properties as security and also containing personal covenant—Decree-holder, if bound to proceed first against properties given in security.

The defect in the territorial or pecuniary jurisidiction, 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. The mere fact of the amount of a compromise decree being beyond the pecuniary jurisdiction of the court passing it does not, in the absence of any intention of *mala fide* undervaluation by the plaintiff decree-holder, cause the decree to be a nullity. *Ram Narain* v. *Suraj Narain* (1), explained. *Sheo Bihari Lal* v. *Makrand Singh* (2), and *Ambadas Harirao Karante* v. *Vishnu Govind Baramaniker* (3), relied on.

Where a decree does not make the entire decretal amount payable at once after default about the first instalment, the decree should be executed for recovery of the instalments that are within time. *Joti Prasad* v. *Sri Chand* (4), and *Maung Sin* v. *Ma Tok* (5), distinguished.

Where certain properties are mentioned in the compromise as having been given as security for the recovery of the decretal amount but the compromise clearly shows that there is a personal covenant on the part of the judgment-debtor to pay the amount, the decree-holder is not bound to proceed against the properties first.

*Execution of Decree Appeal No. 61 of 1935, against the order of Pandit Brij Krishna Topa, Civil Judge of Malihabad at Lucknow, dated the 22nd of May, 1935, setting aside the order of Pandit Hari Shankar Chaturvedi, Munsif, South, Lucknow, dated the 4th of December, 1934.

(1) (1933) I.L.R., 9 Luck., 435. (2) (1935) O.W.N., 654.
(3) (1926) I.L.R., 50 Bom., 839. (4) (1929) I.L.R., 51 All., 237.
(5 (1927) L.R., 54 I.A., 272.

Mr. *D. K. Seth*, for the appellant.

Messrs. *Hyder Husain* and *Habib Ali Khan*, for the respondent.

THOMAS and ZIAUL HASAN, JJ.:—This is an execution of decree appeal against an order of the learned Civil Judge of Malihabad, Lucknow, who reversed an order of the learned Munsif, South Lucknow, dismissing the objections of the judgment-debtor.

The decree-holder appellant brought a suit in the Court of the Munsif, South Lucknow, for accounts and profits of some property, and the valuation of the suit was Rs.2,000. He also brought a suit in the Court of the Civil Judge against the same defendant for sale of the property on foot of a mortgage, and the valuation of this suit was Rs.8,000. On the 17th of April, 1930, the parties entered into a compromise in respect of both the suits and the compromise was filed in the suit pending before the Munsif, South Lucknow. By that compromise among other terms a sum of Rs.10,000 was decreed in favour of the present appellant, and the amount was made payable by yearly instalments of Rs.2,500 each, beginning from the 1st of August, 1930. A decree was passed by the learned Munsif in terms of the compromise.

The present application for execution was filed on the 1st of August, 1934, and the judgment-debtor filed an objection on several grounds. He pleaded that the decree was incapable of execution being a mere declaratory decree, that the application was barred by time, that the entire decretal amount could not be realised as sought by the decree-holder and lastly that the decree in question was a nullity as the amount decreed was beyond the pecuniary jurisdiction of the court passing the decree.

The learned Munsif decided all the points against the judgment-debtor and in appeal brought by the judgment-debtor the learned Civil Judge upheld the

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findings of the first court on all the points except the question that the decree was incapable of being executed on account of the want of jurisdiction in the court passing it. Against this order the decree-holder has brought this appeal.

Thomas and Ziaul Hasan, JJ.

The learned Judge of the lower appellate court has decided the question of the decree being a nullity in favour of the judgment-debtor on the authority of the Full Bench cases of this Court reported in *Ram Narain and others* v. *Suraj Narain, Lala* (1) and *Sheo Behari Lal* v. *Makrand Singh and others* (2). We are, however, of opinion that the learned Judge has not correctly interpreted these two cases. In the first case it was held that if a court passing a decree has no inherent jurisdiction to pass it, the decree is a mere nullity and is void, inoperative and incapable of execution and the same principle was further developed in the latter case in which it was said, "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". The question, therefore, is whether in the present case there was want of inherent jurisdiction in the Munsif to pass the decree in question. We think not. In the 1935 case it was said that the 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, and as an example of the lack of inherent jurisdiction was mentioned a case where a decree was passed against a dead person.

In *Ambadas Harirao Karante* v. *Vishnu Govind Baramaniker and others* (3), a compromise decree was passed by a second class Subordinate Judge for an

(1) (1933) I.L.R., 9 Luck., 435. (2) (1935) O.W.N., 654.
(3) (1926) I.L.R., 50 Bom., 839.

amount exceeding his pecuniary jurisdiction, but it was held that the mere fact of the compromise decree being for Rs.5,700 did not, in the absence of any intention of *mala fide* undervaluation by the plaintiff decree-holder, cause the decree to be a nullity.

We, therefore, hold that in the present case there was no want of inherent jurisdiction in the Court of the Munsif, South Lucknow, to pass the decree in question.

Thomas and Ziaul Hasan, JJ.

The learned counsel for the respondent has challenged the finding of the learned Judge of the court below that the application for execution is not barred by time. His argument is that as the decree-holder prayed in his application that the entire balance of Rs.8,700 (after the deduction of the amount said to have been realised) is due to him, and as he sought to recover that amount but has failed to prove the alleged payment, the application brought more than three years after the date of the first instalment is barred by time. No doubt the decree-holder's application shows as if he treated the decree as authorising him to recover the entire decretal amount on default about the first instalment but as the learned Judge of the court below has pointed out it is not the correct interpretation of the decree, and we see no reason why the executing court should not look to the terms of the decree. As the decree does not make the entire decretal amount payable at once after default about the first instalment, the decree should be executed for recovery of the instalments that are within time. The cases of *Joti Prasad and others* v. *Sri Chand and another* (1), and *Maung Sin* v. *Ma Tok* (2), relied on by the learned counsel for the respondent are distinguishable inasmuch as in those cases the decree provided for payment of the entire balance on default about any of the instalments. We, therefore, overrule the objection raised on behalf of the respondent.

Further, it was contended on behalf of the judgment-debtor-respondent that as by the compromise he had

(1) (1929) I.L.R., 51 All., 237. (2) (1927) L.R., 54 I.A., 272.

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given security of some items of property to the decree-holder, the decree-holder should first proceed against those properties and can claim to recover the decretal amount against the person and other properties only after exhausting the properties given as security. We see no force in this argument also. No doubt properties were mentioned in the compromise as having been given as security for the recovery of the decretal amount but the compromise clearly shows that there was a personal covenant on the part of the judgment-debtor to pay the amount.

Thomas and Ziaul Hasan, JJ.

The result, therefore, is that the appeal is decreed with costs and the order of the lower appellate court is set aside. The order of the trial Court is restored.

Appeal allowed.

APPELLATE CIVIL

Before Mr. Justice Bisheshwar Nath Srivastava, Chief Judge and Mr. Justice H. G. Smith

1937
April, 8

CHANDRIKA BAKHSH SINGH AND OTHERS (DEFENDANTS-APPELLANTS) *v.* BHOLA SINGH AND OTHERS PLAINTIFFS, AND OTHERS, DEFENDANTS (RESPONDENTS)*

Hindu Law—Endowment—Religious endowment—Shebaitship, *devolution of*—Shebaitship *not being disposed of by founder, vests in his heirs—Limitation Act* (*IX of* 1908), *Articles* 124 *and* 120—*Hereditary office, meaning of—Suit for recovery of possession of office of* shebaitship, *limitation applicable to—Trustee* de son tort—*Limitation Act* (*IX of* 1908), *section* 10, *applicability of, to trustee* de son tort.

According to Hindu Law, when the worship of a *Thakoor* has been founded, the *shebaitship* is vested in the heirs of the founder, in default of evidence that he has disposed of it otherwise, or that there has been some usage, course of dealing, or circumstances to show a different mode of devolution. Where, therefore, no right is conferred on a person under a will or a *tamliknama* except that of a bare trustee and there is no provision about the appointment of subsequent trustees and no disposition is made in respect of the *shebaitship* after

*First Civil Appeal No. 50 of 1935, against the decree of Pandit Pradyumna Krishna Kaul, Civil Judge of Sitapur, dated the 30th of March, 1935.