

APPELLATE CIVIL.

Before Courtney Terrell, C. J. and Saunders, J.

MUHAMMAD ISMAIL

v.

BIBI SHAIMA.*

1933.

Sept. 4.

Executing court, whether has power to discuss the validity of the decree—compromise decree—objection as to one of the terms being “outside the scope of the suit”, whether can be entertained by the executing court.

An executing court has no power to discuss the validity of the terms of the decree which he is directed to execute.

Therefore, the objection that one of the terms of a compromise decree was “outside the scope of the suit” is not one for the executing court to consider.

If the court had no power to pass the decree the matter should have been raised either by way of review or by way of appeal, but the executing court cannot go behind it.

Jagabandhu Saha v. Hari Mohan Roy(1), dissented from.

Rani Hemanta Kumari Debi v. Midnapore Zemindari Company, Limited(2), and *Jasimuddin Biswas v. Bhuban Jelini*(3), distinguished.

Appeal by the decree-holder.

The facts of the case material to this report will appear from the judgment of Courtney Terrell, C. J.

Khurshed Husnain and Syed Ali Khan, for the appellant.

C. P. Sinha and P. P. Varma, for the respondent.

* Appeal from: Original Order no. 45 of 1932, from an order of M. E. A. Khan, Subordinate Judge of Saran, dated the 30th November, 1931.

(1) (1921) 62 Ind. Cas. 658.

(2) (1919) 53 Ind. Cas. 534, P. C.

(3) (1907) I. L. R. 34 Cal. 456.

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COURTNEY TERRELL, C. J.—This is an appeal from a decision of the Subordinate Judge of Saran in an execution case rejecting an application for execution on a preliminary objection by the decree-holder upon the ground that whereas the decree for execution was by compromise and whereas one of the terms of the compromise which was decreed was in the opinion of the Subordinate Judge outside the terms of the suit he could not enforce that term by execution. I may mention that this is the fourth of a series of execution cases which have been taken out with the object of enforcing other terms of the decree. The objection that the decree travels “outside the scope of the suit,” although that is not the correct phrase to employ, is in any case not one for the executing court to consider. If the Court had no power to pass the decree the matter should have been raised either by way of review or by way of appeal, but the executing court could not go behind it. There have been some reported cases which would seem to indicate that from time to time in certain High Courts it has been suggested that there were difficulties in the way of the executing Court when asked to execute a term which is, as they say, “outside the scope of the suit.” We have not, however, been shewn any case in which the matter has been directly and properly in issue and in which any direct decision has been given and I find in the well-known text book by Mr. Mulla upon the Code of Civil Procedure some observations which might lead one to believe that the matter was still in doubt by reason of differences of opinion; but having looked at the authorities referred to in that book and having had the assistance of learned Advocate on behalf of the respondents who has presented such authorities as he was able to find I am unable to find any authority which would lead one to suppose that the executing court had such a power of deciding upon the validity of the decree passed by the Court in the suit. The first case of which I will make mention is that of *Jagabandhu Saha v. Hari*

Mohan Roy⁽¹⁾. It is true that in that case the appeal arose out of an order in execution proceedings. The question was to some extent canvassed in that case and the learned Judge who delivered the decision said, in referring to the case of *Jasimuddin Biswas v. Bhuban Jelini*⁽²⁾, "It has been held that, so far as a *sulehnama* decree covers matters not directly in issue in the suit, these terms of the *sulehnama* cannot be enforced in execution of the decree, but the decree is evidence of the agreement entered into as regards those matters. On behalf of the appellant it is pointed out that a different view has been taken by other High Courts in this country and that the decision referred to is an *obiter dictum* and was not necessary for the decision of the appeal in which it was made. It appears, however, that this view has never been dissented from in this Court, and in a recent decision of the Judicial Committee in *Hemanta Kumari Debi v. Midnapore Zemindari Company, Limited*⁽³⁾ their Lordships expressed a similar view. I refer more particularly to their remarks at p. 539 where they said 'it may be that, as a decree, it was incapable of being executed outside the lands of the suit, but that does not prevent it being received in evidence of its contents.' Taking this view I would hold that, whether under the terms of the *sulehnama* the decree-holder is entitled to recover possession of the property of schedule VIII or not, he cannot enforce that right in execution of that decree, and, for this reason, I would dismiss this appeal with costs". An examination of the two cases, namely, that of *Jasimuddin Biswas v. Bhuban Jelini*⁽²⁾ and *Hemanta Kumari Debi v. Midnapore Zemindari Company, Limited*⁽³⁾ does not in my opinion support the view or bear the construction that the learned

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(1) (1921) 62 Ind. Cas. 653.

(2) (1907) I. L. R. 34 Cal. 456, 463.

(3) (1919) 53 Ind. Cas. 534, P. C.

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Judge of the Calcutta High Court put upon them. The case of *Jasimuddin Biswas v. Bhuban Jelini*(1) is one in which the Judges were considering the validity of the *sulehnama* decree but not in an execution case, nor were they considering the powers of the executing court to determine the validity of such decree. It is true that the Judges in that case said "we think that in execution of the decree itself the amount agreed to be paid as damages could alone be recovered from the defendants. The court executing the decree would not have been empowered under it to compel the defendants to execute a *kabuliyat* in favour of the plaintiffs or to accept a lease on the terms agreed to". The question before the Court in that case was not that of the powers of an executing court and the speculative observations about the powers of an executing court are entirely *obiter dicta*. In the other case of *Hemanta Kumari Debi v. The Midnapore Zemindari Company*(2) again the powers of an executing court were not under consideration. Lord Buckmaster, in delivering the opinion of their Lordships, quoted the words of section 375 of the Code of Civil Procedure of 1882. It is to be noted that under the Code of 1908 this section is replaced by Order XXIII, rule 3, and the last sentence of the original section is omitted in the present rule. Their Lordships in that case were dealing merely with the power of the court which granted the decree to give effect by that decree to terms which did not relate to the suit. They were in no way considering the powers of the executing court to enforce such terms if the decreeing court had decided that it had power to grant such a decree and the decreeing court must in this case be implied to have decided that the term said to be objectionable did relate to the matters in suit. As far as I have been able to see, therefore, there is no support to be

(1) (1907) I. L. R. 34 Cal. 545.

(2) (1919) 53 Ind. Cas. 534, P. C.

found for the view expressed, though somewhat tentatively, in the case of *Jagabandhu Saha v. Hari Mohan Roy*⁽¹⁾ that the executing court has any of the suggested power to go behind the decree which it is ordered to execute. For this reason I think the judgment of the Subordinate Judge on the preliminary point is erroneous. He has no power to discuss the validity of the terms of the decree which he is directed to execute. The matter must be remanded to him to try the objection case on its merits and the judgment-debtor must pay the costs of this court and of the lower court.

SAUNDERS, J.—I agree.

Appeal allowed.

Case remanded.

APPELLATE CIVIL.

Before Courtney Terrell, C. J. and Saunders, J.

CHANDMAL MARWARI

v.

RAJA SHIBA PRASAD SINGH.*

Execution—constitution of Civil Courts—Bengal, Agra and Assam Civil Courts Act, 1887 (Act XII of 1887), section 3—court of Subordinate Judge and court of Additional Subordinate Judge, whether one—section 13, effect of—division of work between the two courts, whether affects jurisdiction—suit in respect of property situated in Dhanbad instituted in the court of Subordinate Judge of Manbhumi sitting at Purulia—decree passed by that court—subsequent Government notification establishing court of Subordinate Judge at Dhanbad in the district of Manbhumi—execution levied in the court of Subordinate Judge of Manbhumi, whether bad—notification, effect of—decree-holder, whether can apply to the court which

* Appeals from Original Order nos. 225, 226 and 274 to 277 of 1931, from an order of Babu Jitendra Nath Ghosh, Subordinate Judge of Manbhumi, dated the 29th August, 1931.

(1) (1921) 62 Ind. Cas. 653.

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Aug. 30.
Sept. 5.