APPELLATE CIVIL.

Before Sir Arthur Page, Kt., Chief Justice, Mr. Justice Mya Bu, and Mr. Justice Dunkley.

1935

Dec. 5.

THE BANK OF CHETTINAD

v.

THE CHETTYAR FIRM OF S.P.K.P.V.R. AND ANOTHER.*

*Mortgage decree by High Court—Land situate outside the jurisdiction—Suit by mortgagor to declare mortgage decree void—Dismissal of the suit—Application by mortgagee for personal decree for balance—Mortgagor's plea of mortgage-decree being void—Decree not set aside in any proceedings—Effect of dismissal of suit to set aside decree—*Res judicata *—Subsisting mortgage decree—Competency of the Court to grant personal decree.*

The appellant Bank filed a mortgage suit against the respondents on the Original Side of this Court, and obtained a preliminary mortgage-decree and afterwards a final decree for sale. By consent the final decree was transferred to the District Court of Hanthawaddy for sale of the mortgaged properties as they were situate in the jurisdiction of that Court. The properties were sold and realized less than the mortgage amount. The respondents filed a suit claiming that the Court had no inherent jurisdiction to entertain the mortgage suit as the properties were situate outside its jurisdiction, and prayed for a declaration that the preliminary and the final decrees in the mortgage suit were null and void. This suit was dismissed. The Bank now applied for a personal decree against the respondents for the balance due. The respondents contended that the Court had no jurisdiction to entertain the mortgage suit, and therefore had no jurisdiction to pass a personal decree. The learned Judge on the Original Side accepted this contention and dismissed the application. The Bank appealed.

Held, that the mortgage decree was subsisting between the parties, and not having been set aside in proceedings by way of appeal, revision, review, or otherwise, could not be treated as a nullity, and was binding and conclusive against the parties.

S. A. Nathan v. *S. R. Samson*, I.L.R. 9 Ran. 480—*followed.*

The suit for declaring the preliminary and final decrees null and void having been dismissed, the question whether the Court had jurisdiction to entertain the mortgage suit became *res judicata*, and therefore it was not open to the respondents to contend, nor was the Court at liberty to decide, that the Court had no jurisdiction to entertain, try or determine the mortgage suit. It followed, therefore, that in an application

* Civil First Appeal No. 121 of 1935 arising out of the order in Civil Regular Suit No. 183 of 1933 of this Court on the Original Side.

for a personal decree to be passed against the respondents in the mortgage suit the Court was bound to proceed upon the footing that the Court for the purpose in hand and *inter partes* must be treated as having jurisdiction to entertain and decide the suit, and to give the relief sought therein.

A.L.S.S. Chettiar v. *Maung Tun Yin*, I.L.R. 13 Ran. 305 ; *V.E.R.M.N.C.T. Chettyar* v. *A.R.A.R.R.M. Chettyar Firm*, I.L.R. 12 Ran. 370—*referred to.*

Cowasjee for the appellant. Both the preliminary and the final decrees in this suit were passed by consent, and therefore have become final and binding on the parties. The final decree was transferred by consent to the District Court of Hanthawaddy for execution, and the present application is for a personal decree in respect of the balance of the mortgage debt. The respondent cannot at this stage raise any question of jurisdiction. See s. 21 of the Civil Procedure Code which applies to the High Court (ss. 117 and 120 of the Code), though in *Manindra Chandra* v. *Lal Mohan* (1) a contrary view was taken.

The High Court has inherent jurisdiction to determine suits of the nature in question, and in passing the decrees in this case the High Court is not in the position, for instance, of a Court which passes a decree in a case which it is debarred by statute from entertaining.

Further, the respondent filed a regular suit to have the decrees set aside as being a mere nullity, but that suit was dismissed with costs by consent. In view of Order 23, r. 1, that judgment has become final, and the question of jurisdiction cannot be raised again.

Moreover, the appellant is not asking for a new decree. The final decree itself contained a clause giving the appellant a right to ask for a personal decree.

(1) I.L.R. 56 Cal. 940.

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[PAGE, C.J. Is not the application for a personal decree an application for a new decree? See *A.L.S.S. Chettiar* v. *Maung Tun Yin and another* (1).]

Yes. But the final decree which has become final and conclusive provides for the passing of a personal decree.

[PAGE, C.J. May not the case be dealt with on the basis of the decision in *S. A. Nathan* v. *S. R. Samson* (2)?]

That case supports the appellant's contention that the defendant cannot, in execution proceedings, question the validity of the decree. The present proceedings are really in the nature of execution proceedings. The trial Judge when he entertained the objections raised by the respondent was in fact exercising appellate powers over the judgment passed by consent dismissing the suit brought by the respondent for a declaration that the decrees were void.

Kalyanwalla for the respondent. In execution proceedings the question of jurisdiction cannot be raised, but the objection in this case was raised in the course of the same proceedings. The application for a personal decree is a new application, and a defendant cannot be barred from raising any objections that may be available to him.

[PAGE, C.J. But is not the application for the personal decree based on the same cause of action?]

It may be so. But the Court cannot pass a personal decree if it is barred by limitation, for instance.

(1) I.L.R. 13 Ran. 305. (2) I.L.R. 9 Ran. 480.

The wording of s. 21 itself indicates that it is inapplicable to the High Court. See *Maharaja Bahadur of Hathwa* v. *H. E. Beal* (1). Further, a reference to clause 10 of the Letters Patent suggests that the High Court cannot be said to have had inherent jurisdiction to try this suit. And consent cannot confer on a Court jurisdiction which it does not possess. *Gurdeo Singh* v. *Chandrikah Singh* (2).

Cowasjee in reply. The personal decree depends upon the final decree. The final decree is binding on the respondent, and the personal decree follows as a matter of course, and is equally binding.

PAGE, C.J.—This appeal must be allowed.

The material facts lie within a narrow compass and are not in dispute. The appellant Bank filed a mortgage suit against the respondents in common form, and a preliminary decree was passed without objection from the respondents. An application was then made for a final decree for sale of the mortgaged properties. A final decree was passed, and by consent the decree was transferred to the District Court of Hanthawaddy for the property to be sold by that Court within the jurisdiction of which it was situate. The properties were duly sold, and a balance of the amount due under the mortgage remained outstanding after deducting the amount received from the proceeds of sale. Thereafter Civil Regular Suit No. 15 of 1935 was filed by the respondents in which the respondents alleged that the trial Court "had no inherent jurisdiction to entertain such a mortgage suit", and the relief sought was that the preliminary and final mortgage decrees in the mortgage suit should be declared null and void. That suit

(1) 40 C.W.N. 65. (2) I.L.R. 36 Cal. 193, 206.

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was dismissed with costs. Subsequently an application for a personal decree against the respondents was made, and it is out of that application that the present appeal arises. The application was made pursuant to the final decree in the mortgage suit under which it was ordered that the appellants should "be at liberty (where such remedy is open to them under the terms of their mortgage and is not barred by any law for the time being in force) to apply for a personal decree against the defendants for the amount of the balance." The respondents objected *inter alia* that the Court had no inherent jurisdiction to entertain the mortgage suit, and therefore had no jurisdiction to pass any personal decree against the respondents in the suit. Braund J. accepted the view presented on behalf of the respondents, and dismissed the application for a personal decree upon the ground that the Court had no jurisdiction to entertain the application or to pass a personal decree pursuant thereto.

The learned Judge in the course of his judgment observed :

"At the date of the plaint the Court had no more jurisdiction than at the date when the Full Bench gave its decision. And it would appear to follow that *prima facie* upon the principles which I have enunciated the Court had not from the beginning of this suit the slightest jurisdiction and accordingly that its orders passed in the suit are a mere nullity, not susceptible of being made valid by any consent or waiver of or by the parties. As a valid decree the preliminary decree does not exist ; nor does the final decree."

In our opinion the law thus stated is laid down too broadly, and it does not appear that the attention of Braund J. was called to the decision of a Full Bench of this Court in *S. A. Nathan* v. *S. R. Samson* (1).

(1) (1931) I.L.R. 9 Ran. 480.

For the purpose of disposing of this appeal it may be taken, indeed it is not disputed, that having regard to the Full Bench decision of this Court in *V.E.R.M.N.C.T. Chettyar* v. *A.R.A.R.R.M. Chettyar Firm* (1) the Court had no jurisdiction to entertain the mortgage suit. But it does not necessarily follow that a decree passed in the suit is to be treated *inter-partes* in the circumstances that have taken place as a mere nullity, or that the decrees passed in the suit are not to be regarded *inter-partes* as final, valid and conclusive. At page 493 it was pointed out that

"the consent of the parties cannot give a Court inherent jurisdiction that it does not possess; * * * and a decree passed without inherent jurisdiction can be declared *ab initio* null and void if proceedings in that behalf are taken as provided by law. But if the parties have not taken the steps prescribed by law to have the decree declared to be without jurisdiction and set aside, why should the executing Court *suo motu* or on application by a party be permitted to challenge its validity? It is a fundamental and necessary rule of law that the decrees and orders of a properly constituted Court are binding on the parties thereto unless and until they are declared to be null and void, or are set aside by competent authority. It is a rule the soundness and good sense of which cannot be gainsaid. Further, a Court has jurisdiction to decide in any particular case whether it possesses jurisdiction to entertain the suit or not, and when a duly constituted Court assumes jurisdiction to try a suit it must be taken thereby implicitly to assert that it possesses the jurisdiction which it is exercising, and *prima facie* it will be presumed that the decrees which it passes have duly been passed in the exercise of jurisdiction in that behalf with which the Court is invested. *Omnia presumuntur esse rite acta.* No one will pretend, of course, that such a presumption is irrebutable, or that if the Court had no inherent jurisdiction to pass a decree such a decree cannot be set aside in appropriate proceedings as null and void. But, if such a decree is not set aside or declared to be void by competent authority,

(1) (1934) I.L.R. 12 Ran. 370.

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in my opinion in execution proceedings its validity cannot be challenged."

It follows that if the application for a personal decree under consideration was made in execution of the final decree the executing Court would not be at liberty to dispute the jurisdiction of the trial Court to pass it. And the learned advocate for the respondents, who has argued his case very fairly, conceded that in the circumstances obtaining in the present case it was not open to him to challenge the validity of the preliminary decree or the final decree in the mortgage suit upon the ground that the proceedings in the course of which these decrees were passed could be treated *inter partes* as void *ab initio*, or that the Court had no jurisdiction to pass them. Having regard, however, to the form in which the final decree was drawn up we are of opinion that we are not at liberty to hold that the application for a personal decree was a mode of executing the final decree. *A.L.S.S. Chettiar* v. *Maung Tun Yin and another* (1). The application for a personal decree, however, is founded upon the same cause of action as that upon which the preliminary and final decrees in the suit have been passed, and but for the final decree the appellants could not have applied for a personal decree, the claim in debt having merged in the claim in the mortgage suit the outcome of which were the preliminary and final decrees that were passed. It may well be, although it is not necessary to express a definite opinion on the question, that the personal decree that is now sought, which arises from and implements the final decree, in the circumstances and *inter-partes* could not be treated as being *ultra vires*

(1) (1935) I.L.R. 13 Ran. 305.

the Court or that the Court could be regarded as having no jurisdiction to pass it in the mortgage suit.

It is sufficient, however, to rest our decision upon another ground. Before the application for a personal decree was made the respondents had filed Civil Regular Suit No. 15 of 1935 in which they claimed a declaration that the preliminary and final decrees in the mortgage suit were null and void, upon the footing that the Court had no inherent jurisdiction to entertain the mortgage suit. That suit was dismissed with costs, and in the circumstances and having regard to Order XXIII, rule 1 a fresh suit could not be brought in which the issue whether the Court had inherent jurisdiction to entertain the mortgage suit could be reopened. In *S. A. Nathan* v. *S. R. Samson* (1) the Court observed that

"any decree passed by a Court without inherent jurisdiction,—whether the want of jurisdiction has been waived by the parties or not,—will be declared in proceedings taken by way of appeal, revision, review, or otherwise as prescribed by law, to have been *coram non judice* and *ab initio* void and a nullity. But, in my opinion, a subsisting decree passed by a duly constituted Court that has not been set aside in proceedings by way of appeal, revision, review, or otherwise, is not to be treated as a mere nullity, but is binding and conclusive against the parties thereto duly impleaded in the suit."

The respondents took no proceedings by way of appeal, revision or review for the purpose of setting aside the preliminary and final decrees in the mortgage suit, but they adopted the course of filing a regular suit for the purpose of having these decrees declared null and void upon the ground that the Court had no jurisdiction to entertain the suit. That suit having been dismissed in my opinion the question

(1) (1931) I.L.R. 9 Ran. 480.

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whether the Court had jurisdiction to entertain the mortgage suit became *res judicata*, and thereafter it was not open to the respondents to contend, nor was the Court at liberty to decide, that the Court had no jurisdiction to entertain, try or determine the mortgage suit. It follows, therefore, that in an application for a personal decree to be passed against the respondents in the mortgage suit the Court was bound to proceed upon the footing that the Court for the purpose in hand and *inter-partes* must be treated as having jurisdiction to entertain and decide the suit and to give the relief sought therein. Upon that ground, in my opinion, the order passed by Braund J. must be set aside.

The result is that the appeal is allowed, and the order from which the appeal is brought is set aside. The proceedings will be returned to the Original Side in order that the application for a personal decree may be determined upon the merits. The appellants are entitled to the costs of the appeal against the respondents, advocate's fee ten gold mohurs. The costs of and incidental to the application on the Original Side will abide the event.

MYA BU, J.—I agree that this appeal must be allowed and in the order proposed by my Lord the Chief Justice. I rely on the principles enunciated in *S. A. Nathan* v. *S. R. Samson* (1), which the learned Chief Justice has already quoted in his judgment, and on the provisions of Order XXIII, rule 1 (*3*) of the Code of Civil Procedure, which, in my opinion, conclude the matter against the respondents.

DUNKLEY, J.—It is clear from his judgment that the proceedings in Civil Regular Suit No. 15 of 1935

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were not brought to the notice of my learned brother Braund J. The effect of the dismissal of that suit was, in my opinion, that the question of jurisdiction became *res judicata* between the parties, and could not be raised again by the respondents, or considered by the Court, in any subsequent proceedings in the mortgage suit. The cases of *Fateh Singh* v. *Jagannath Baksh Singh* (1) and *Bhaishanker Nanabhai* v. *Morarji Keshavji & Co.* (2) are sufficient authority for this proposition. I agree that the appeal should be allowed and the application for a personal decree remitted to the Original Side of the Court for a decision on the merits.

APPELLATE CIVIL.

Before Sir Arthur Page, Kt., Chief Justice, and Mr. Justice Mya Bu.

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Dec. 9.

OFFICIAL ASSIGNEE, RANGOON
v.
FATIMA BIBI.*

Insolvency—Transfer within two years of insolvency—Burden of proof to set aside transfer—Presidency-Towns Insolvency Act (III of 1909), s. 55—Onus on the Official Assignee—Unfairness of the onus—Transaction within the knowledge of the transferee—Evidence Act (I of 1872), s. 106.

On an application to set aside a transfer by an insolvent of his property under the provisions of section 55 of the Presidency-Towns Insolvency Act the onus of proving that the transfer was not made in good faith and for valuable consideration lies upon the Official Assignee.

Official Assignee of the Estate of Cheah Soo Tuan, (1931) A.C. 67 ; *Official Receiver* v. *P.L.K.M.R.M. Chettyar Firm*, I.L.R. 9 Ran. 170 ; *Pope* v. *Official Assignee, Rangoon*, I.L.R. 12 Ran. 105—*followed.*

This rule of law places an unreasonable and unfair burden upon the Official Assignee. Under section 106 of the Evidence Act when any fact is specially within the knowledge of any person the burden of proving that fact is upon him. The law ought to provide that the transferee from an

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(1) (1924) 52 I.A. 100. (2) (1911) I.L.R. 36 Bom. 283.

* Civil Misc. Appeal No. 65 of 1935 from the order of this Court on the Original Side in Insolvency Case No. 148 of 1930.