

(2003) 07 CAL CK 0045

Calcutta High Court

Case No: G.A. No. 3015 of 2002 and C.S. No. 1228 of 1997

The Peerless General
Finance Investment Co.
Ltd.

APPELLANT

Vs

Developers Pvt. Ltd.

RESPONDENT

Date of Decision: July 15, 2003

Acts Referred:

Civil Procedure Code, 1908 (CPC) â€” Section 120, 16, 17, 20, 21#Constitution of India, 1950
â€” Article 226#Suits Valuation Act, 1887 â€” Section 11

Citation: (2003) 07 CAL CK 0045

Hon'ble Judges: Mahemmad Habeeb Shams Ansari, J

Bench: Single Bench

Final Decision: Allowed

Judgement

Mahemmad Habeeb Shams Ansari, J.

Decree holder is seeking to execute the decree of this Court and the relief prayed for in the tabular

statement, inter alia, are for attachment of certain immovable property situated at Gariahat Road, Kolkata and for a Receiver to be appointed over

the said properties and for sale thereof for realisation of the decree granted by this Court dated March 26, 1999.

2. It must be stated here that the decree holder herein was the Defendant in the suit C.S. No. 122 of 1997 which was filed by the judgment debtor

herein being the Plaintiff. Reliefs inter alia prayed were:

(a) Declaration that the Plaintiff is entitled to delivery and possession of the original Title Deeds in respect of two flats being Flat Nos. 2 and 2A at

40, Gariahat Road, Calcutta - 700031 from Defendant company upon payment of a sum of Rs. 9,62,177/- in full and final settlement of the dues

of the Plaintiff under the loan Agreement;

(b) Permanent injunction restraining the Defendant, its servants, agents and/or assigns from dealing with disposing of, alienating, encumbering

land/or selling the two flats, being Flat Nos. 2 and 2A at 40, Gariahat Road, Calcutta - 700031.

3. It is stated that the Defendant (decree holder) in the said suit filed a written statement and made a counter claim for Rs. 12,57,257.41p.

4. The suit was disposed of by the judgment and decree dated March 26, 1999 whereby it was decreed that Defendant (decree holder) would

deliver up to the Plaintiff (judgment debtor) the Title Deeds in respect of the said two flats situated at Gariahat Road, Kolkata and the Plaintiff

(judgment debtor) was directed to pay to the Defendant (decree holder) a sum of Rs. 9,62,177/- simultaneously with handing over of possession

of the aforesaid Title Deeds.

5. Defendant (decree holder) is seeking to execute the said decree for the amounts outstanding being the principal sum of Rs. 7,62,177 after

adjusting the amounts paid by the Plaintiffs (judgment debtors) pursuant to certain orders of the Company Court and for interest on outstanding

amounts.

6. It is the case of the decree holder that the execution application being G.A. No. 3802 of 2001 was moved before Court and interim order in

terms of prayer (e) was passed on September 28, 2001. Thereafter on December 6, 2001 the judgment debtor conceded its liability and prayed

for installments pursuant to which instead of the installment of Rs. 1,00,000/- stipulated by Court a cheque for Rs. 50,000/- was issued which had

not been encashed as it was not in compliance with the directions stipulating the installment. Instant application is, therefore, filed to direct the

judgment debtor to be orally examined in Court with respect to the assets or means of satisfying the decree.

7. In the affidavit-in-opposition filed by the Plaintiffs (judgment debtor) it has been contended that the decree is a nullity and cannot, therefore, be executed.

8. Learned advocate appearing for the Plaintiff (judgment debtor) sought to substantiate the submission made in the affidavit-in-opposition by

contending; firstly, that the suit was for the possession of immovable property situate outside the ordinary original jurisdiction of the High Court

and, therefore, the Court had no jurisdiction to entertain the suit the decree sought to be executed is therefore, nullity. Reliance has been placed

upon the judgment of the Division Bench of this Court in Tridandeeswami Bhakti Kusum Sraman Maharaj and Others Vs. Mayapore Sree

Chaitanya Math and Others, .

9. Secondly, it was contended that neither consent nor acquiescence can confer jurisdiction upon Court, which is not vested with such jurisdiction.

Reliance for the said proposition has been placed upon the judgments of the Supreme Court in Hakam Singh v. Gammon (India Ltd., AIR 1791

SC 740 and A.B.C. Laminart Pvt. Ltd. and A.B.C. Laminart Pvt. Ltd. and Another Vs. A.P. Agencies, Salem, .

10. Relying upon Section 17 of the CPC it was contended that the jurisdiction of Court in respect of immovable property has been laid down

therein and, therefore the Court had no jurisdiction to entertain the suit or pass decree in respect of immovable property situate beyond its

Ordinary Original Jurisdiction.

11. Thirdly, the decree passed by this Court without jurisdictions a nullity and its invalidity can be set up whenever and wherever it is sought to be

enforced even at the stage of execution and even in collateral proceedings.

12. Lastly, it was contended that this Court has no jurisdiction to execute the decree since the immovable properties are situate outside the

territorial jurisdiction of this Court. Therefore, it was contended the execution, if any, should be made by the Alipore Court under whose

jurisdiction the property is situated. Reliance was placed for the said proposition upon Section 39 of CPC and more particularly Sub-section (4)

thereof. Learned Counsel also relied upon the Full Bench judgment of the Madras High Court in Vasireddi Srimanthu and Ors. v. Devabhaktuni

Venkatappayya and Anr., AIR 1947 Mad 347.

13. On the other hand, learned Counsel for the decree holder (Defendant) contended that the above contentions of law are wholly misplaced, as it

is the judgment debtor herein who had invoked the jurisdiction of this Court by filing the suit. The validity of the decree can be challenged in the

execution proceedings only on the ground that the Court was lacking in inherent jurisdiction. It was thereupon contended that this High Court on

the Original Side has the jurisdiction to pass decrees even in respect of properties situate beyond its Ordinary Original Jurisdiction by virtue of

Clause 12 of the Letters Patent. It was therefore submitted that the question is not one of lack of inherent jurisdiction in passing the decree but

reduces to the objection as to territorial jurisdiction of the Court. Such objection as to territorial jurisdiction of a Court can be waived and this

principle has been given statutory recognition in Section 21 of the Code of Civil Procedure. Judgment debtor, it was contended; having filled the

suit and thereby having invoked the jurisdiction of this Court is stopped from challenging the jurisdiction of this Court. Reliance was placed upon

the judgment of the Supreme Court in Seth Hiralal Patni Vs. Sri Kali Nath, .

14. As regards the jurisdiction of this Court to execute its decree even beyond its ordinary original jurisdiction, the matter is concluded, it was

contended, by the judgment in Benaras Ice Factory Ltd. Vs. Sukhlal Amarchand Vadnagra, .

15. There can be no dispute with the proposition of law as set out in the judgment of the Supreme Court in Hakam Sing Vs. Gammon (India) Ltd.,

and in A.B.C. Laminart Pvt. Ltd. and Another Vs. A.P. Agencies, Salem, that parties cannot by agreement confer jurisdiction on Court not vested

in it.

16. As held in Laminart's case (cited supra) that it is now a settled principle that where there may be two or more competent Courts which can

entertain a suit consequent upon a part of the cause of action having arisen therein if the parties to the contract agree to vest jurisdiction in one such

Court the agreement would be valid.

17. In Kiran Singh and Others Vs. Chaman Paswan and Others, being the judgment relied upon by the learned Counsel for judgment debtor, it

was held as under:

?It is a fundamental principle well established that a decree passed by a Court without jurisdiction is a nullity and that its invalidity could be set up

whenever and wherever it is sought to be enforced or relied upon, even at the stage of execution and even in collateral proceedings. A defect of

jurisdiction, whether it is pecuniary or territorial, or whether it is in respect of the subject matter of action, strikes at the very authority of the Court

to pass any decree, and such a defect cannot be cured even by consent of parties. If the question now under consideration fell to be determined

only on the application of general principles governing the matter, there can be no doubt that the District Court of Monghyr was "coram non

judice", and that its judgment and decree would be nullities. The question is what is the effect of Section 11 of the Suits Valuation Act on this

position.

18. Significantly, in that, judgment reference was also made to Section 21 of the CPC in the context of the objection relating to territorial

jurisdiction and it was held as follows:

With reference to objections relating to territorial jurisdiction, Section 21 of the CPC enacts that no objection to the place of suing should be

allowed by an appellate or revisional Court, unless there was a consequent failure of justice. The policy underlying Sections 21 and 99, CPC and

Section 11 of the Suits Valuation Act is the same, namely that when a case had been tried by a Court on the merits and judgment rendered, it

should not be liable to be reversed purely on technical grounds, unless it had resulted in failure of justice, and the policy of the legislature has been

to treat objections to jurisdiction both territorial and pecuniary as technical and not open to consideration by an appellate Court, unless there has

been a prejudice on the merits?.

19. The judgment of the Supreme Court in *Oil and Natural Gas Commission v. Utpal Kr. Bose and Ors.*, (1994)1 SCC 771 is really of no

assistance to the judgment debtor as that was a case relating to jurisdiction of the High Court under Article 226 of the Constitution. No doubt

certain observations have been made in the said judgment with respect to Section 21 of the CPC and the context of the contention raised in that

case by the Respondent that in the absence of proof of prejudice, Court should not interfere with the decision of High Court unless it was

otherwise found to be erroneous. The Supreme Court repelled the said contention in the following terms:

“While the spirit of Section 21 of the CPC may support such a submission, we are afraid, the discretion cannot be used in favour of a party which

deliberately invokes the jurisdiction of a Court which has no jurisdiction whatsoever for ulterior motives?.

20. It is not and cannot be the case of the judgment debtor Plaintiff herein that the suit, decree passed herein which is under execution in the

present proceedings, had been filed by him with ulterior motives.

21. We have, therefore, now to see whether the decree under execution is one passed by the Court lacking inherent jurisdiction the question is

merely one of lack of territorial jurisdiction in the Court.

22. Learned Counsel for the judgment debtor-Plaintiff contended that the forum for institution of a suit is governed by the provisions contained in

Sections 16, 17 and 20 of the CPC. Learned Counsel has overlooked the provisions contained in Section 120 of the Code, which provides that

the provisions namely Sections 16, 17 and 20 of the CPC shall not apply to the High Court in the exercise of its Original Civil Jurisdiction. The said

provisions thus would apply to Courts other than the High Court. Clause 12 of the Letters Patent governs a suit to be filed in the Original Side of

the High Court. As in terms and as regards the question of jurisdiction of this Court with regard to suits for land suffice it here to extract a relevant

portion from the judgment of the Division Bench in *Tridandeeswami Bhakti Kusum Sraman Maharaj and Others Vs. Mayapore Sree Chaitanya*

Math and Others, .

Under Clause 12 of the Letters Patent suits have been divided into two classes - (1) suits for land or other immoveable property and (2) other

suits. In the case of suits for land or other immovable property, the High Court will have jurisdiction to try such suits, if such land or immoveable

property is situate wholly within the local limits of the Ordinary Original Jurisdiction of the High Court. Where the land or immoveable property is,

situate partly within the local limits and partly outside such limits, such suit can be instituted in the High Court only after first obtaining leave of the

High Court under Clause 12. In the case of other suits, such suits can be instituted in the High Court if the cause-of-action arises wholly within the

local limits of the ordinary original jurisdiction of the High Court or by Defendant resides or carries on business or works for gain within such limits.

Where, however, the cause of action arises in part only within such limits, the suit can be instituted after first obtaining leave of the Court under

Clause 12. Thus leave under Clause 12 is required to be taken in the case of a suit for land or immoveable property, if a part of such land or other

immovable property is situate within the local limits of the Ordinary Original Jurisdiction of the High Court and, in the case of other suits, if a part of

the cause of action arises within such limits.

(Emphasis added)

23. In that case after having held that the suit is a suit for land and that no part of the land or buildings having been situate within the Ordinary

Original Jurisdiction of this Court, this Court having no jurisdiction to try the suit, Court directed that the leave granted under Clause 12 of Letters

Patent be revoked and consequently directed the plaint to be returned for presentation to proper Court.

24. Whether a suit is a suit for land the determining factor is the primary object of the suit and the test to be applied for determining the same is

whether the relief claimed can be granted to the Plaintiff without the necessity of any adjudication on the question of title to land or possession or

control thereof. If the relief can be granted without determining the question of title to or possession, control or management of a land and

immovable property, the suit cannot termed to be a suit for land.

25. As held by the Supreme Court in Hira Lal Patni's case, it is well settled that the objection as to local jurisdiction of a Court does not stand on

the same footing as an objection to the competence of a Court to try a case. Competence of a Court to try a case goes to the very root of the

jurisdiction and where it is lacking, it is a case of inherent lack of jurisdiction. On the other hand, an objection as to the local jurisdiction of a Court

can be waived and this principle has been given a statutory recognition by enactments like Section 21 of the Code of Civil Procedure.

26. The case on hand, in my view, is not a case of lack of inherent jurisdiction in the sense that this Court cannot at all entertain or try any suit for

land or that it cannot entertain or try suit for land where the land is situate beyond its ordinary original jurisdiction. Under Clause 12 of the Letters

Patent jurisdiction has been conferred upon this Court to entertain and try suits for land even in respect of lands situate beyond its ordinary original

jurisdiction if the circumstances stated in Clause 12 of Letters Patent exist. Entertaining such suit for land is therefore not ""wholly foreign to its

jurisdiction"". Whether the circumstances stipulated in Clause 12 of the Letters Patent existed or the question as to whether this Court was justified

in, entertaining the suit in question is really one, which could have been agitated in the suit. It must not be forgotten that the jurisdiction of this Court

was invoked by the very party that is now raising the objection as to the jurisdiction of the Court to entertain the suit. Judgment debtor herein filed

the suit in question he is therefore not entitled to plead in execution that the decree was passed without jurisdiction. A person who has not

submitted the jurisdiction of Court or was not a party to the suit may be entitled to raise such question in execution or any collateral proceedings.

Plaintiff is estopped from raising such question. Also, such question at the instance of a party who participated in the trial in the suit cannot be

raised and considered by the Court executing the decree as we shall presently see.

27. The Supreme Court in *Seth Hiralal Patni Vs. Sri Kali Nath*, in categorical terms held as under:

“The validity of a decree can be challenged in execution proceedings only on the ground that the Court which passed the decree was lacking in

inherent jurisdiction in the sense that it could not have seized of the case because the subject matter was wholly foreign to its jurisdiction or that the

Defendant was dead at the time the suit had been instituted on decree passed, or some such other ground which could have the effect of rendering

the Court entirely lacking in jurisdiction in respect of the subject matter of the suit or over the parties to it. However, in the instant case there was

no such inherent lack of jurisdiction.

[Emphasis added]

28. The full Bench judgment of the Madras High Court in *Vasireddi Srimanthu and Ors. v. Devabhaktuni Venkatappayya and Anr.*, AIR 1947

Mad 347 relied upon by the learned advocate for the judgment debtor, while observing that Section 17 CPC allows a suit to be instituted in any

Court within whose territory any portion of the property is situate; since such Court has jurisdiction to entertain such suit, it has also jurisdiction to

execute against the properties, in respect of which it can pass a decree. It was further observed that with respect to territorial jurisdiction, Section

21 CPC provides that unless objection is taken to the place of suing at the earliest possible opportunity, no objection in that behalf shall be allowed

by any Appellate or Revisional Court. Further relying upon certain authorities cited in the said judgment, it was observed that if a party does not

raise objection to the jurisdiction, he is not entitled to plead in execution that the order was passed without jurisdiction. In other words, the effect of

Section 21 CPC is that the objections which the Appellate or Revisional Court is thereby precluded from allowing must be considered cured for all

purposes unless they were taken before the passing of the decree in the original Court. Their Lordships further clarified that Section 21 applies to a

suit in which objection could have been taken to the jurisdiction before a decree had been passed and that the failure to take objection in the suit

precluded it being done at any latter stage including the proceedings in execution. It was also clarified by Their Lordships that Section 21 refers to

objection as to place of a "suing" and that execution petition is not a suit and its presentation is not "suing". It must be stated here that the learned

Counsel for judgment debtor relied upon this judgment of the High Court of Madras mainly for the contention as to the jurisdiction of an executing

Court to execute the decree in respect of the properties situate beyond its territorial jurisdiction. Let us, therefore, look at this case from that angle.

The case before Their Lordships in the Madras judgment arose out of a money decree which was transmitted to another Court for execution and

when an execution petition was pending for attachment and sale of immoveable property belonging to the judgment debtor situate within the

territory of the transferee Court and after an order for attachment had been made by that Court, the property was removed from the territory of

the transferee Court to another Court. The question for consideration, therefore, was whether the transferee Court can make an order for sale of

the property by Court auction to give good title to the purchaser. It was held that a Court cannot make a valid order for sale in execution unless at

the time order is made the property is within its territory. Any sale affected pursuant to an order made without jurisdiction is not in conformity with

the requirements of Code and is invalid, it was held:

I am in respectful agreement with the view as above of Their Lordships of the Full Bench of the Madras High Court as regards the jurisdiction of

transferee Court executing the Decree.

29. This Court is executing the decree passed by it. In so far as the jurisdiction of this High Court to execute its own decree beyond its jurisdiction

is concerned, we shall consider the same on the authority of the judgments of this High Court.

30. In my view as contended by the learned Counsel on behalf of the decree holder, the matter is concluded by the judgment in Gaikhatta Tea

Co. Ltd. and Another Vs. State of West Bengal, . Suffice it here to extract a relevant portion from the said judgment:

The jurisdiction of the Court to appoint receivers outside the ordinary original jurisdiction in my opinion is the same whether such appointment is in

West Bengal or outside. I do not see as to on what logic or principle it could be contended that this Court would have jurisdiction to appoint

receivers within the State of West Bengal but would not have jurisdiction to appoint receivers outside the State of West Bengal.

31. Thus, where the objection as to the jurisdiction of the Court to pass a decree, as has been taken by judgment-debt or/Plaintiff in the case on

hand, which could have been raised but have not been raised in the suit cannot now be allowed to be raised by him in the execution proceedings.

32. In my view, therefore, the objections of the Plaintiff (judgment debtor) as to the decree being nullity on the ground of jurisdiction are to be

rejected as not maintainable.

33. Accordingly application is allowed in terms of prayer (e). Time allowed for making such affidavit of assets is 3 (three) weeks from date hereof.

No order as to costs.