

(1955) 09 BOM CK 0082

Bombay High Court

Case No: Civil Revision Application No. 1423 of 1953

P. Krishnan Nair

APPELLANT

Vs

Ramchandra Vithal Sanghavi

RESPONDENT

Date of Decision: Sept. 1, 1955

Acts Referred:

- Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 - Section 14, 28
- Civil Procedure Code, 1908 (CPC) - Order 7 Rule 7, 11, 38
- Presidency Small Cause Courts Act, 1882 - Section 18
- Suits Valuation Act, 1887 - Section 11

Citation: AIR 1956 Bom 268

Hon'ble Judges: Shah, J

Bench: Single Bench

Advocate: R. Jethmalani and B.K. Hirani, for the Appellant; A.K. Dharmaraj, for the Respondent

Judgement

1. The plaintiff Ramchandra Vithal Sanghavi filed Suit No. 6578 of 1950 in the Court of Small Causes at Bombay against three defendants claiming a decree for possession of a portion of the ground floor of a building known as "Vishiani Building" Lakshmi Napoo Road, Matunga, Bombay alleging that he was a sub-tenant of the suit premises. The plaintiff claimed a declaration of his right and also asked for an injunction restraining defendants 1 and 2, their servants and agents from interfering in any way with or obstructing the right, title and interest of the plaintiff as a sub-tenant in the portion of the premises described in the plaint. The relief for declaration was plainly unnecessary because it was only if the plaintiff proved that he was a tenant or a sub-tenant that he could obtain a decree for possession.

2. The trial Court decreed the plaintiff's suit, and in appeal the decree, passed by the trial Court was confirmed. Thereafter execution was taken out by the plaintiff, and in

execution the plaintiff was resisted by a third person. P. Krishna Nair, who claimed to be a transferee pendente lite of the rights of defendant 2. Evidently as a transferee pendente lite of one of the defendants he was a representative of that defendant, and a decree passed against defendant 2 was. capable of execution against P. Krishna Nair. But Krishna Nair contended in execution proceedings that the decree passed by the Court which tried the suit was a nullity. The learned trial Judge held that the decree was not a nullity and accordingly directed that a warrant for possession do issue against Krishna Nair after 5-3-1953. Against the order passed by the trial Court, an appeal was preferred to the Appeal Court of the Court of Small Causes at Bombay. The Appeal Court held that the decree passed by the Court which tried the suit may have been passed without jurisdiction, but the contention could not be permitted to be raised in execution proceedings, because the question as to whether the Court had or had no jurisdiction to entertain the suit must be regarded as finally decided by the decree of the Court which tried the suit and by the Court which decided the appeal. On the ground of "res judicata" the decision of the trial Court was confirmed by the Appeal Court. It is against the decision of the Appeal Court of the Court of Small Causes, Bombay that this revision application has been filed.

3. Mr. Jethmalani who appears on behalf of the petitioner has contended that the learned Judges of the Appeal Court having held that the decree passed by the trial Court was without jurisdiction, the rule of "res judicata" cannot operate so as to enable execution of a decree passed by a Court which had no jurisdiction to pass it. It is well settled that a decree which is passed without jurisdiction to pass it is a nullity, and the question as to the absence of jurisdiction may be raised even in execution proceedings or in collateral proceedings.

But the rule is subject to the exception that where an objection is raised in execution proceedings as to. the want or absence of jurisdiction in the Court to pass the decree, the decree must be "apparently" without jurisdiction that is on the face of it the decree must show that it was passed by a Court which was incompetent to pass it.

If for purposes of ascertaining whether the Court which passed it had or had no jurisdiction to pass it, it is necessary to make investigation as to the jurisdiction of the Court then the executing Court has no competence to permit that investigation to be made.

The reason for such rule is clear. The executing Court is normally bound to execute the decree as it stands. It is not permissible for the executing Court to sit in appeal over decision of the Court which passed the decree and to "refuse to execute the decree because the reasons which appealed to the Court which passed the decree do not appeal to the executing Court.

4. in [Karashiddayya Shiddayya Bennur Vs. Shree Gajanan Urban Co-operative Bank, Ltd.](#), a Division Bench of this Court set out the principle as follows:

"Where there is nothing on the face of an award decree made pursuant to an award under the Bombay Co-Operative Societies Act, to indicate that it is without jurisdiction, the executing Court cannot go behind the decree and consider whether it is a valid decree or not. In a subsequent suit between the parties to such a decree the question of the validity of the decree cannot, therefore, be regarded "res judicata"."

5. Similarly in [Ambalal Chunthabhai Patel Vs. Somabhai Bakorbhai Patel](#), Lokur J. considered various authorities and pointed out that only a decree which is apparently without jurisdiction cannot be executed. Lokur J. observed on pp. 49-50 of the report that

"It does not necessarily follow that if the Court does not strictly follow the directions of the Code it is acting without jurisdiction. There is a great difference between want of jurisdiction and erroneous exercise of it.

It is laid down in [Gora Chand Haldar and Another Vs. Prafulla Kumar Roy and Others](#), that where a decree presented for execution was made by a Court which apparently had not jurisdiction, whether pecuniary or territorial or in respect of the judgment-debtor's person, to make the decree, the executing Court is entitled to refuse to execute it on the ground that it was made without jurisdiction.

Gora Chand's case (C) was considered by this Court in "Karashiddayya v. Shree Gajanan Urban Co-Operative Bank Ltd.", (A), to which I was a party. Broomfield J. who delivered the judgment, observed that the view taken in "Gora Chand's" case (B), that when a decree is made by a Court which "apparently" had no jurisdiction to make it, the executing Court was entitled to refuse to execute it, was accepted in [Rabindra Nath Chakravarti Vs. Jnanendra, Mohan Bhaduri and Others](#), which came before the Privy Council in AIR 1933 61 (Privy Council) and though there was no discussion on the point, their Lordships approved of the Calcutta view." The view implicit in AIR 1933 61 (Privy Council) also supports the view that only when a decree is made by a Court which "apparently" had no jurisdiction to make it, the executing Court will be entitled to refuse to execute it. Mr. Jethmalani, however, contends that the view taken by this Court in [Odhavji Anandji Vs. Haridas Ranchhordas](#), that where there is nothing on the face of a decree to indicate that it is without jurisdiction, the executing Court cannot go behind the decree and refuse to execute it and that only a decree which is apparently without jurisdiction cannot be executed, must be regarded as having gone by the board in view of the observations made by the Supreme Court in [Kiran Singh and Others Vs. Chaman Paswan and Others](#). The observations relied upon from that judgment of their Lordships of the Supreme Court are these:

"It is a fundamental principle 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".

There can be no doubt as to the principle so expressed. But their Lordships have nowhere stated as to how far the executing Court is entitled to enter upon investigation of the question of jurisdiction of the Court which passed the decree.

If the decree is "apparently" without jurisdiction, then it would not be enforced in execution proceedings. It must be pointed out that in that case absence of jurisdiction of the Court of first instance was sought to be founded upon the valuation of the subject-matter of the suit made by the High Court in second appeal, which valuation, if correct, would have shown that the District Court had no jurisdiction to entertain the appeal against the decree of the Court of first Instance. Their Lordships of the Supreme Court, however, held that by reason of the provisions of Section 11, Suits Valuation Act. 1887, a decree passed by the High Court when hearing the appeal from the decrees passed by the District Judge as second appeal could not be interfered with.

That case in my judgment has no application to the facts of the present case. There is no observation in the judgment in [Kiran Singh and Others Vs. Chaman Paswan and Others](#), which has been pointed out to me which is directly or indirectly inconsistent with the view taken by this Court and the Privy Council.

6. Reliance was also sought to be placed upon [Mohanlal Goenka Vs. Benoy Krishna Mukherjee and Others](#), and it was contended that the observations made by the Supreme Court in that case are also inconsistent with the view taken by this Court in earlier decisions. But the only point which was decided in "Mohanlal v. Benoy Kishan" (G) was that the principle of constructive "res Judicata" is applicable to execution proceedings was no longer open to doubt, and it was further decided that even an erroneous decision on a question of law operates as "res Judicata" between the parties to it.

The correctness or otherwise of a judicial decision has no bearing upon the question whether it operates as "res Judicata". That case can have no application for ascertaining the limits which the executing Court must place upon itself in ascertaining whether the Court which passed the decree had jurisdiction to pass it.

I may also observe that I am not approving of the view taken by Appeal Court of the Small Causes that even if the decree under execution be regarded as a nullity the contention of Krishna Nair cannot be entertained. The learned Judges appear to have expressed the view that a decree passed by a Court which has no jurisdiction must operate as "res Judicata", and be binding between the parties to the suit.

It is, however, well settled that a Court by an erroneous decision as to its jurisdiction cannot clothe itself with powers to adjudicate upon matters which it cannot on a true interpretation of the limits of its jurisdiction, and the adjudication cannot be regarded as binding upon the parties in other proceedings. "But since the passing of Bombay Act 57 of 1947 certain suits between landlords and tenants and relating to possession of the moveable properties may notwithstanding the provisions of the Presidency Small Cause Courts Act be triable by the Court of Small Causes.

The suit was filed by the plaintiff on the allegation that he was a sub-tenant and was entitled to certain rights u/s 14 of Bombay Act 57 of 1947. A suit claiming possession of premises in execution of such a right is not excluded from the Jurisdiction of the Court of Small Causes.

As I have observed earlier that the claim for a declaration was a futile claim which would have been ignored and the fact that the plaintiff did make a claim does not exclude the jurisdiction of the Court. Also the decree under execution was "apparently" not without jurisdiction and therefore, the executing Court was incompetent to entertain objections as to the executability of the decree against the party to the suit, or its representatives.

7. The rule is, therefore, discharged with

8. Revision dismissed.