(1982) 08 BOM CK 0043

Bombay High Court (Nagpur Bench)

Case No: Civil Rent. Application No. 464 of 1978

Gangabai and Others		APPELLANT
	Vs	
Ratan Kumar and Others		RESPONDENT

Date of Decision: Aug. 25, 1982

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 151

Citation: AIR 1983 Bom 291

Hon'ble Judges: Padhye, J

Bench: Single Bench

Advocate: C.P. Kalele, for the Appellant; M. Gordey, for the Respondent

Judgement

@JUDGMENTTAG-ORDER

1. Madangopal Zumbarlal Chaudhari Agarwal of Achalpur city, taluka Achalpur, district Amravati obtained a preliminary decree against defendants Bhagwant and his two sons Prabhakar and Madhukar for foreclosure on the basis of a mortgage for Rupees 5,510.82 Possession and defendant having failed to pay the amount, applied on 19-2-1968 by Exempted. 1, application for making the decree final. Defendants filed an application u/s 24 of the Bombay Money Lenders Act claiming in statements. It was registered as M. J. C. No. 34 of 1968 (at places this is referred as M. J. C. No. 134/1968). This application was filed on 13-10-1968 (at some places this date is indicated as 4-11-1968). On 15-10-1968 defendants filed an application u/s 3 of the Madhya Pradesh Temporary Postponement of Execution of Decrees Act, 1956 (for short, referred to hereinafter as M. P. Act), praying of postponement of final decree proceedings in terms of the said Act, Say of plaintiffs was filed on 25-10-1969. The M. P. Act was extended from time to time and the last such extension was by Act No. 2 of 1967. The M. P. Act came not force on 28th March, 1956 and the total extension was for a period of 13 years and, therefore, it expired on 27th March 1969. Maharashtra (Vidarbha Region) agricultural Debtors Relief Ordinance 1969

came into force on 7-3-1969 and it was replaced by Maharashtra Act of the same nomenclature being Act No. XXII of 1969 with a provision "that anything done or any action taken under the Ordinance or repealed, shall be deemed to have been done or taken under the Act." Defendants filed another application under the above referred Ordinance on 14-7-1969 praying that procedure for adjustment of debts, as provided in the Ordinance and thereafter by Act, had to be followed by the plaintiffs and, therefore, an application for making preliminary decree final was liable to be dismissed. Say of plaintiffs to this was filed on 25-10-1969; on 27-1-1970 arguments were heard and an order was passed in the following terms:--

"Heard Counsel. The decree in question comes within the ambit of Section 2(7) of the Maharashtra (Vidarbha Region Agricultural. Debtors Reliefs Act (No.XXII of 1969). which came into force on 7-3-1969. Hence the execution of the decree shall be in accordance with the provisions of that Act (ibid) viz., adjustment of debt and passing of award. the present application is, therefore, not tenable. I dismiss same and direct the parties to bear the costs as incurred".

Petitioner submits that this was a composite order disposing of Exempted. 7 as well as Exempted. 8 and was passed by the Court validly and with jurisdiction. On behalf of the respondents it is urged that the said order is not a composite order by an order disposing of application Exempted. 8 only since Exempted. 7 which was under M. P. Act could not have been decided after its repeal by Bombay Ordinance.

2. For a period of about 1 year and 8 months no steps were taken by plaintiff and it was for the first time on 6-10-1971 that plaintiff filed an application praying that order at Exempted. 9 be treated as a nullity and the application seeking final decree be decided or his application dt 6-10-1971 be treated as a fresh application for final decree, since it was within limitation and Order Exempted. 9 was invalid. After hearing the parties the learned trial judge allowed plaintiff''s application by order dated 13-2-1975 which is under challenge in this revision petition.

3. Defendants had challenged the above referred impugned order by filing an appeal before the District Judge, Amravati who held that appeal was not maintainable. The appellate order was challenged in C. R. A. No. 270 of 1978 which was disposed of by maintenance by order dated 8-7-1982 without going into merits and confirming the view adopted by the learned District Judge. the present C. R. A. No. 270 of 1978 but since the latter revision was being disposed of without going into merits of the controversy, the hearing of the present revision petition was postponed.

4. Following submissions were advanced on behalf of petitioner by Shri Kalele Advocate:---

(A) Exempted. 9 was a valid order under M. P. Act and Bombay Ordinance and Bombay Act. It was not a nullity.

(B) Order Exempted. 9 could not be set aside if it was not a nullity by the same Court for correcting alleged earlier mistake.

(C) Inherent powers u/s 151, CPC were not available for recalling Exempted. 9 order because it was not challenged when it was passed.

(D) There was no inherent power besides S. 151 of the Code of Civil Procedure.

(E) There was no question of revival of Exempted. 9 Order since it was finally dead. On behalf of respondents it was contended by reference to provisions of M. P. Act and Bombay Act that order Exempted. 9 was an order which was passed without jurisdiction and was a nullity. Alternatively it was submitted that even if Exempted. 9 was not an order which was not a nullity and was only an invalid order, being contrary to law, Courts of Records had inherent jurisdiction to act ex debito Justitiae and to do that real and substantial justice for the administration for which along the courts exists. It was also contended that Courts of records have got inherent powers even apart from S. 151 of the Civil P. C. Argument regarding revival was met by pointing out that if Exempted. 9 was an invalid order it was not important whether the impugned order is considered as a revival of original application Exempted. 1 for making preliminary decree final because of an alternative prayer in the said application that in case revival was not possible the new application itself may be treated as an application for making preliminary decree final since that the filing of the new application was within limitation. The finding of the learned trial Judge in the impugned order is that earlier order Exempted. 9 was null and void and was passed on account of mistake and the court had inherent powers even outside S. 151 if the Civil P. C. to correct its own mistakes. The learned Judge observed that there was no saving clause in the Bombay Ordinance or Bombay Act regarding M. P. Act. Being a temporary measure its repeal did not save any proceedings under the said Act. According to learned trial Judge, there was authority for the proposition that provisions of S. 6 of General Clauses Act or S. 7 of the Bombay General Clauses Act, for saving proceedings under repealed enactments were not available when a temporary Act was repealed. On this reasoning it was found that the petitioner could not have come under the definition of debtor either under Bombay Ordinance or Bombay Act because debtor was defined thereunder to mean a defendant or judgment debtor against whom proceedings were stayed under the M. P. Act and, therefore, earlier order Exempted. 9 was a nullity.

5. (A) A perusal of the provisions of M. P. Act and Bombay Ordinance or Bombay Act can establish that order Exempted. 9 was an order which was passed without jurisdiction and in any case was an order which was a result of failure on the part of the learned Judge to correctly comprehend the provisions of the two Acts. S. 2 (b) of the M. P. Act defines agriculturist as under :---

"Agriculturist means a person who, in the agricultural year 1955-56 holds land as a Bhumiswami or the ordinary tenant in the year specified in a Notification issued by

the State Government in this behalf and who earns his livelihood fully or mainly from the agriculture."

It will, therefore, be clear that admissions of the plaintiffs and defendants that they were agriculturists may not be enough to establish that defendants were agriculturists within the meaning of S. 2 (b) of the M. P. Act. For that purpose they had to establish that they had been cultivating agricultural lands in the area specified in the State Government in that behalf and that they earned their livelihood fully or mainly from the agriculture. Turning to the provisions of the Bombay Ordinance or Bombay Act, one finds that debtor is defined in S. 2 (6) as under:---

"2 (6) :--- "debtor" means a person (including an undivided Hindu family) who is a judgment-debtor or defendant against whom all proceedings of the nature referred to in sub-section (1) of S. 3 the Madhya Pradesh Act have been stayed."

Section 3 provides that such "debtor" could move an application before a prescribed date to the court for adjustment of debts of the debtor. Detailed procedure for adjustment of debt is provided but I need not refer to the same since we are not concerned with it. It can thus be seen that even without going into the question as to whether the repealed M. P. Act or Bombay Ordinance had the effect of saving actions or proceedings started thereunder or not. It is apparent that applications Exs. 7 and 8 came to be disposed of by a cryptic order Exempted. 9 without assigning any reasons and this was because of failure on the part of the court to take into account the above referred pleadings. It may be that the learned Judge had every jurisdiction to decide Exempted. 7 and Exempted. 3 which were applications filed under M. P. Act and Bombay Act, by defendants but this is true only in a very narrow sense. Looking to what the learned Judge has done, one has to conclude that order Exempted. 9 is an order which has been passed without jurisdiction. Different shades of the concept of jurisdiction were pointed out by the Supreme Court of India in the case of Shri M.L. Sethi Vs. Shri R.P. Kapur, Referring to two English decisions Mathew J. of the Supreme Court has observed as under (Para 10):---

"The word "jurisdiction" is a verbal cast of many colours. Jurisdiction originally seems to have had the meaning which Lord Reid ascribed to it in Anisminio Ltd. v. Foreign. Compensation Commission (1969) 2 AC 147, namely, the entitlement "to enter upon the enquiry in question". If there was an entitlement to enter upon an inquiry into the question, then any subsequent error could only be regarded as an error within the jurisdiction. The best known formulation of this theory is that made by Lord Denman in R. v. Bolton (1841) 1 QB 66. He said that the question of jurisdiction is determinable at the commencement, not at the conclusion of the enquiry. In Anisminic Ltd. (1969) 2 AC 147 Lord Reid said:

"But there are many cases where, although the tribunal had jurisdiction to enter on the enquiry, it has done or failed to do something in the course of the enquiry which is of such a nature that its decision is a nullity. It may given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the enquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to set so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive."

In the same case, Lord Pearce said:

"Lack of jurisdiction may arise in various ways. there may be an absence of those formalities or things which are conditions precedent to the tribunal having any jurisdiction to embark on an enquiry. or the tribunal may at the end make an order that it has no jurisdiction to make. Or in the intervening stage while engage on a proper enquiry, the tribunal may depart from the rules of natural justice. or it may ask itself the wrong questions, or it may take into account matters which it was not directed to take into account. Thereby it would step outside its jurisdiction. It would turn its inquiry into something not directed by Parliament and fail to make the inquiry which the Parliament did direct. Any of these things would cause its purported decision to be a nullity."

6. Applying the above dictum I have no doubt in my mind that order Exempted. 9 was an order which a passed without jurisdiction and was a nullity.

7. (B) For a Court which desires to do justice by correcting its own mistakes it is not always necessary that the order to be corrected must be a nullity and it was so found by a Division Bench of Allahabad High Court in the case of Sita Ram Sahu and Others Vs. Kedarnath Sahu, The relevant observation is:---

"A Court has got jurisdiction to recall an order which it has made earlier in the suit. A Court always has power to recall order which has the effect of perpetrating an injustice on a party. It is open to the Court to reconsider its order refusing to grant further time to the plaintiff to make good the deficiency which was made on the assumption that the plaintiff''s illness was not genuine. It can recall its order when it is found that that order had been made in the absence of materials on the record, materials which were subsequently put before the Court. Once then the order rejecting the plaint automatically fall."

8. For the proposition that an order could not be disregarded unless it was a nullity, reliance was placed on four decisions on behalf of petitioners. In the case of Ittavira Mathai Vs. Varkey Varkey and Another, the Supreme Court found (at p. 910):---

"Where a court having jurisdiction over the subject-matter and the Party passes a decree it cannot be treated as a nullity and ignored in subsequent litigation even if the suit was one barred by time.

If the suit was barred by time and yet, the court decreed it, the court would be committing an illegality and, therefore, the aggrieved party would be entitled to have the decree set aside by preferring an appeal against it. But it is well settled that a court having jurisdiction over the subject-matter of the suit and over the parties thereto, though bound to decide right may decide wrong; and that even though it decided wrong it would not be doing something which it had no jurisdiction to do."

I feel that for appreciating the above proposition of law a brief reference to facts of the case before the Supreme Court of India will be useful. Ramalinga Iyer and one other sold some property to father of appellant-defendant No. 1 Ittyavira partly for cash consideration and partly in consideration of execution of hypothecation bond of some immovable properties. In execution of a money decree against Ramalinga Iyer''s son after his death, the hypothecation bond in favour of Ramalinga Iyer was attached alleging that earlier assignments of the said bond by Ramalinga Iyer during his lifetime were sham and bogus. When the bonds were auctioned they were purchased by Venkiteswara Iyer who filed Os. S. No. 59 against Ittyavira and others. Earlier to the institution of Os. S. 59 the properties were already transferred to appellant-defendant No. 1 by his father. Defendant No. 1 appellant succeeded in 145 Criminal P. C. proceedings against the purchasers of the properties from Venkiteswara Iyer and, therefore, plaintiff-respondent was driven to file a suit. In that suit it was contended on behalf of defendants that decree in Os. S. 59 was a nullity whereas the suit was time barred and court was mandatory bound to dismiss it under the provisions of Section 3 of the Limitation Act. I do not think that the proposition laid down in this case can be of any help to the petitioners for the simple reason that according to Supreme Court of India a decree passed by a Court having jurisdiction cannot be treated as a nullity and ignored "in subsequent litigation" even if the decree was passed in contravention of law. This does not mean that an order passed in a proceeding contrary to law could not be corrected by the same court after discovery that the order was passed by mistake of the court. The other case that was referred to is Isher Singh Vs. Sarwan Singh and Others, . It is sufficient to point out that what was found in this case was that an invalid order could not be disregarded or attacked collaterally. My attention was also invited to a decision of this Court reported in Erandol Taluka Gramodyog, Utpadak Sahakari Society, Erandol Vs. Sunil Waste Corporation, . In this case a decree was sought to be attacked in execution proceedings on the ground that it was passed in disregard of mandatory provisions of Section 164 of the Maharashtra Co-operative Societies Act and the learned single judge, relying upon Ittyavira''s case (cited supra) rightly held that such a challenge was not available in execution proceedings. The last case that was referred to is Sivathanu Pillai v. Lakshmi Rajamm (AIR 1981 Ker 2140. I do not think that a reference to this case is necessary since it deals with the question of res

judicata. Administration examination of the cases cited discloses that the principle of law enunciated is that a decision contrary to law but with jurisdiction could not be treated as nullity n "subsequent proceedings" or could not be so attacked collaterally or disregarded in subsequent proceedings. these cases are not applicable when, as in the present case, the question is, correction of earlier illegal order by court in the same proceedings.

9. In the case of Jang Singh Vs. Brijlal and Others, Justice Hidayatullah of Supreme Court of India said "There is no higher principle for the guidance of the Court than the one that no act of Court should harm a litigant and it is the bounden duty of Courts to see that if a person is harmed by a mistake of the Court he should be restored to the position he would have occupied but for that mistake. This is aptly summed up in the maxim "Acts us curiae neminem gravabit"."

10. (C) It was submitted that the failure to challenge Exempted. 9 by taking appropriate proceedings in higher courts prevented the court from recalling its own earlier order Exempted. 9 under the inherent powers under S. 151 of the Civil Procedure Code. Reliance was placed by Shri Kalele on three Su decision and one Calcutta High Court decision. In Nain Singh Vs. Koonwarjee and Others, it was held by the Supreme Court of India that earlier appellate order remanding the proceedings could not be interfered under inherent powers u/s 151 of the Civil P. C. when the proceedings again travelled up to the stage of appeal because there was specific provision in that behalf continued in Section 105(2) of the Civil P. C. prohibiting a party not appealing against the order of remand, from disputing its correctness at any subsequent stage. The second decision of the Supreme Court referred to is Ramkarandas Radhavallabh Vs. Bhagwandas Dwarkadas, . It was found that in the case of a proceeding under Order 37, Rule 4 if the Civil P. C. for setting aside decree passed under the summary procedure provisions of Section 151 of the Civil P. C. could not be invoked. The third decision of the Supreme Court of India in the case of Padam Sen and Another Vs. The State of Uttar Pradesh, is an authority for the proposition that courts could not interfere with substantive rights under inherent powers u/s 151 of the Civil P. C. It was held in that case that a party had a right to be in possession of account books and court could not, in exercise of inherent powers u/s 151 C. P. C. physically compel the party to produce the accounts by appointing a Commissioner. In the case of Durga Charan Sonar and Others Vs. Kaliprosad Sonar and Others, decided by Calcutta High Court, the court came to a conclusion that a party claiming setting aside of dismissal under Order 9, Rule 9 had no established its case and the reasons adduced by the party were not acceptable. In spite of this finding, court proceeded to set aside dismissal under inherent powers u/s 151 the Civil P. C.

11. It can thus be seen that three Supreme Court cases cited, negative inherent powers u/s 151 of the Civil P. C. in the face of specific provisions in C. P. C. while one case lays down that powers u/s 151 C. P. C. cannot be invoked for interference with

substantive rights of the parties. there is no specific provision in C. P. C. enabling the Court to recall an earlier order which is the result of mistake committed by Court. No question of interference with substantive rights arises. The question involved in the present case is very much procedural. Only be cause some rights are wrongly presumed in favour of a party, it cannot be said that the case involves a question of substantive rights.

12. (D) Even otherwise and apart from the provisions of Section 151 C.P.C. every Court of record has got inherent powers to correct its own mistakes. If an authority is needed for this proposition one can find it in Raja Debi Bakhsh Singh v. Habib Shah 1913 40 Ind App 151. this was an appeal before Privy Council from the judgment and decree passed by the Judicial Commissioner, Oudh. Due to mistake of court orders and rules applicable to a defaulter were applied to a dead man Privy Council was of the opinion that the case was covered by provisions of Section 151 of the C.P.C. but while expressing such an opinion their Lordships further observed:--

"Lordships opined that such abuse has occurred by the course adopted in the Court of the Judicial Commissioner. Quite apart from Section 155, any Court might have rightly considered itself to possess an inherent power to rectify the mistake which had been inadvertently made".

To similar effect are the observations of the Division Bench of the Allahabad High Court in the case of Jodha Singh Vs. Padey Gokaran Das, where it was held:---

"That the order of the Court was wrong and that the court was right in setting it aside when the mistake was brought to its notice by the party."

13. (E) That takes maintenance to the last submission made on behalf of petitioner that there was no question of revival of Exempted. 1, application for making decree final when it has been finally dismissed by order at Exempted. 9. I have already pointed out that alternative prayer made on be behalf of the plaintiffs was that if revival was not possible their application moved on 13-1-75 should be treated as a fresh application for making the decree final since the earlier order Exempted. 9 was a nullity. On behalf of petitioner my attention was invited to a decision of this Court in Channappa Girimallappa Jolad Vs. Shankardas Vishnudas Darbar, , a decision of the Andhra Pradesh High Court in Katragadda Ramayya and Another Vs. Kolli Nageswararao and Others, and a decision of the Madras High Court in Bala Tripura v. Abdul Khader AIR 1933 Mad 418. these cases deal with subsequent applications for execution which were admittedly time barred and in each of these cases it was submitted on behalf of the decree-holder that these applications should be treated as applications for revival of earlier execution of cases. Since the subsequent applications were time-barred it was observed that what has come to an end could not be revived. My attention was also invited to a case decided by Travancore Kochin High Court in Krishna Panicker v. Kunchu AIR 1954 T C. 1. The earlier execution application having been dismissed, it was submitted that execution application

should be treated as revival of the earlier application. The argument came to be rejected because of bar contained in Section 48 of the Civil P. C. as it then stood. It is thus clear that whenever there is an attempt to revive an earlier application because of some specific bar to the maintainability of the subsequent application no revival can be allowed when it had come to an end finally. In the present case revival application was well within time and, therefore, permissible.

14. Result is that the revision fails and shall stand dismissed but with no order as to costs.

15. Revision dismissed.