Mohanlal Goenka

Vs

Benoy Krishna Mukherjee and Others

Civil Appeal No. 139 of 1951

(M.C.Mahajan, S.R. Dass, Vivian Bose, Gulam Hasan JJ)

09.12.1952

JUDGMENT

MAHAJAN J. -

In our opinions the decision cam be rested on either of the ground, which have been raised by our brothers Das and Ghulam Hasan respectively. We would therefore allow the appeal on both the grounds.

DAS J. -

I have had the privilege of perusing the judgment delivered by my learned brother Hasan and I agree with his conclusion that this appeal should be allowed. I would, however, prefer to rest my decision on a ground different from that which has commended itself to my learned brother and as to which I do not wish to express any opinion on this occasion.

The relevant facts material for the purpose of disposing of this appeal have been very clearly and fully set forth in the judgment of Hasan J. and I need not set them out in detail here. Suffice it to say that on June 12, 1931, the High Court, Original Side, which is the Court which had passed the decree, transmitted the same for execution to the Asansol Court through the District Judge of Burdwan and that the Asansol Court thereupon acquired jurisdiction to execute the decree against properties situate within its territorial limits. The application for execution made by the decree-holder which was numbered 296 of 1931 was, however, on February 27, 1932, dismissed for default and on March 11, 1932, the Asansol Court sent to the High Court what in form purported to be a certificate under section 41 of the Code. There is no dispute, however, that the Asansol Court did not return to the High Court the certified copy of the decree and other documents which had been previously transmitted by the High Court. The decree-holder on November 24, 1932, filed in the Asansol Court another petition for execution of the decree against the same judgment-debtors with the same prayer for the realisation of the decretal amount by sale of the same properties as mentioned in the previous execution case. The application was registered as Execution Case No. 224 of 1932. The judgment-debtors' contention is that the certificate sent by the Asansol Court to the High Court on March 11, 1932, was and was intended to be in form as well as in substance a certificate under section 41 of the Code, and that thereafter the Asansol Court ceased to have jurisdiction as the executing Court and that as there was no fresh transmission of the decree by the High Court the Asansol Court could not entertain Execution Case No. 224 of 1932 and consequently all subsequent proceedings in the Asansol Court were void and inoperative for lack of inherent jurisdiction in that Court. This contention was rejected by the Subordinate Judge of the Asansol Court in his judgment delivered on January 30, 1945, in Miscellaneous Case No. 70 of 1941 but

found favour with the High Court in its judgment delivered on February 10, 1950, which is now under appeal before us.

It appears that on March 17, 1933, the decree-holder took out a Master's summons in the Original Side of the High Court being the Court which passed the decree in Suit No. 1518 of 1923 praying, inter alia, that the Official Receiver be discharged from further acting as Receiver in execution, that leave be given to the Asansol Court to sell the colliery in execution of the decree dated June 25, 1923, and the order dated February 7, 1924, and that leave be given to the plaintiff to bid for and purchase the Sripur colliery. This summons was supported by an affidavit affirmed by one Pramatha Nath Roy Chowdhury, an assistant in the employ of the plaintiff. This affidavit refers to the consent decree of January 25, 1923, passed in the said suit and the additional terms of settlement embodied in the order of February 7, 1924, the payments made by the judgment-debtors from time to time amounting to Rs. 30,437-8-0 besides a sum of Rs. 3,500 which had been paid on account of settled costs and states that the balance of the decretal amount was still due and that there had been no other adjustment of the decree. It refers to a previous application by tabular statement for execution of the decree by the appointment of a Receiver and by the sale of the Sripur colliery which was charged under the order of February 7, 1924, and to the order made by the High Court on that tabular statement on June 21, 1926, appointing the Official Receiver of the High Court as Receiver of the Sripur colliery. The affidavit then recites that the Official Receiver who had been given liberty to sell the colliery on certain terms took steps to put up the same to sale but had been prevented from actually doing so by reason of an injuction obtained by one of the judgment-debtors Benoy Krishna Mukherjee in Suit No. 843 of 1928 filed by him. The affidavit further refers to the fact that the said Suit No. 843 of 1928 had since then been dismissed and that no appeal had been preferred against that decree of dismissal and that no order had been made for stay of execution of the said decree. Paragraph 13 of the affidavit then states as follows :-

> "that the plaintiff was advised that charge should be enforced and Sripur colliery should be sold in execution of the said order by the Asansol Court in the local jurisdiction of which the colliery is situate and the plaintiff accordingly by an order made on the 15th of April, 1931, obtained leave of the Court to execute the decree against Basantidas Chatterjee, Srimantodas Chatterjee and Bholanath Chatterjee as sons, heirs and legal representatives of the deceased Prankristo Chatterjee and the other defendants judgment-debtors and caused the certified copies of the decree dated 25th June, 1923, and the order dated 7th February, 1924, to be transmitted to District Judge at Burdwan who in his turn sent the decree to the Subordinate Judge of Asansol to execute the decree. Such execution proceedings are now pending before the Asansol Subordinate Judge's Court being Execution Proceedings No. 224 of 1932."

In the circumstances the plaintiffs asked for directions on the lines mentioned in the summons. The summons was duly served on all the judgment-debtors as mentioned in the affidavit of service filed in Court and referred to in the order made by the Court on the Master's summons on March 27, 1933. The operative part of the said order of the High Court was as follows :-

> "It is ordered that Official Receiver of this Court who was appointed the Receiver in this suit of the Sripur colliery pursuant to the said order dated the 21st day of June, 1926, be and he is hereby discharged from further acting as such Receiver as aforesaid : And it is further ordered that the said Receiver do pass his final accounts before one of the Judges of this Court and it is further ordered that the

> Subordinate Judge of Asansol be at liberty in execution of the said decree and order dated the 7th day of February, 1924, to sell either by public auction or by private treaty to the best purchaser or purchasers that can be got for the same provided the said Subordinate Judge shall consider that a sufficient sum has been offered the Sripur colliery aforesaid charged under the said order dated the 7th day of February, 1924 : And it is further ordered that the plaintiff be at liberty to bid for and purchase the said colliery at the said sale and if declared the purchaser to set off the amount of the purchase money pro tanto against the balance of his claim under the said decree : And it is further ordered that the plaintiff be also at liberty to add his costs of and incidental to this application to be taxed by the Taxing Officer of this Court to his claim under the said decree."

The order sheet of Execution Case No. 224 of 1932 has not been printed in extenso but there can be no doubt that this order of the High Court was communicated to the Asansol Court, for it was after this order that the Asansol Court proceeded with the execution case and Sripur colliery was sold for the first time on June 9, 1933, and the decree-holder purchased the same for Rs. 20,000. This sale of course was eventually set aside, but this order made by the High Court on the Original Side being the Court which passed the decree in Suit No. 1518 of 1923 appears to me to involve and imply, and may well be regarded as in substance amounting to, an order for transmission of the decree to the Asansol Court for execution under section 39 of the Code of Civil Procedure. The Civil Procedure Code does not prescribe any particular form for an application for transmission of a decree under section 39. Under sub-section (2) of that section the Court can even suo motu send the decree for execution to another court. It is true that Order XXI, rule 6, provides that the Court sending a decree for execution shall send a copy of the decree, a certificate setting forth that satisfaction of the decree had not been obtained by execution within the jurisdiction of the Court and a copy of the order for the execution of the decree but there is authority to the effect that an omission to send a copy of the decree or an omission to transmit to the Court executing the decree the certificate referred to in clause (b) does not prevent the decree-holder from applying for execution to the Court to which the decree has been transmitted. Such omission does not amount to a material irregularity within the meaning of Order XXI, rule 90, and as such cannot be made a ground for setting aside a sale in execution. Further, the fact remains that the certified copy of the decree and the certificate of non-satisfaction which had been sent by the High Court to the Asansol Court on April 15, 1931, through the District Judge of Burdwan who forwarded the same to the Subordinate Judge at Asansol were still lying on the records of that Court and the sending of another certified copy of the decree and a fresh certificate of non-satisfaction by the High Court would have been nothing more than a formality. In the circumstances, the omission to send those documents over again to the Asansol Court was a mere irregularity which did not affect the question of jurisdiction of the executing Court. In my opinion, after the order made by High Court on March 27, 1933, had been communicated to the Asansol Court the Asansol Court became fully seized of jurisdiction as the executing Court and none of the proceedings had thereafter in that Court can be questioned for lack of inherent jurisdiction.

I would, therefore, on this ground alone accept this appeal and concur in the order proposed by my learned brother.

GHULAM HASAN J. -

This case is illustrative of the difficulties which a decree-holder has to encounter in recovering the money in execution after he has obtained the decree of court. It is one of those cases, by no means

rare, in which the execution proceedings in the courts below have dragged on to inordinate lengths and led to consequent waste of public time and expense to the parties.

The decree in the present case was passed upon a compromise in Suit No. 1518 of 1923 on the original side of the Calcutta High Court as long ago as June 25, 1923, in favour of one Nagarmull Rajghoria against Pran Krishna Chatterjee and 5 others, hereinafter referred to as the Chatterjees. The decree was for a sum of Rs. 75,000 with interest at twelve per cent. per annum with quarterly rests. The Chatterjees hypothecated their Koradanga colliery as security for the payment of the decretal amount. Subsequent to this decree the Chatterjees entered into an agreement with one Benoy Krishna Mukherjee hereinafter referred to as Mukherjee on January 24, 1924, appointing the latter as Managing Agent of the aforesaid colliery whereby he became entitled to receive royalty of another colliery called Sripur colliery. The decree was adjusted on March 18, 1924, by making Mukherjee liable as surety and by the Chatterjees charging their Sripur colliery as additional security. The hypothecated properties were situate at Asansol and Nagarmull obtained an order from the High Court for permission to execute the decree at Asansol with the direction that a certified copy of the decree, a copy of the order of transmission and a certificate of partial satisfaction of the decree should be transferred to the court of the Subordinate, Judge at Asansol. This order was passed on April 15, 1931, and the three documents aforementioned were sent to the transferee court at Asansol through the District Judge, Burdwan on June 12, 1931. (Order XXI, rule 6, Civil Procedure Code.)

On August 20, 1931, Nagarmull filed his first application for execution of the decree by sale of Sripur colliery. The execution case is numbered as 296 of 1931. Notices under Order XXI, rule 22, rule 54 and rule 66, of the Civil Procedure Code were issued and served on various dates. The case was fixed for February 16, 1932. On this date Nagarmull applied for time to prove servicee of the notices and the case was adjourned to February 23, 1932. He again applied for time on that date and the case was adjourned to February 27, 1932. On this latter date Nagarmull was again not ready and asked for more time. But this was refused, and the execution case was dismissed for default without any amount being realized under the decree. The transferee court sent to the High Court what purported to be a certificate under section 41 of the Civil Procedure Code, stating that the execution case was dismissed for default on February 27, 1932. Neither the copy of the decree, nor any covering letter as required by the rules of the High Court was sent along with the certificate. The certificate was received by the High Court on March 11, 1932.

It appears that the decree-holder filed a second application for execution of the decree on November 24, 1932, by sale of the Sripur colliery. This case was numbered as Execution Case 224 of 1932. Notices under Order XXI, rule 22 and rule 66, of the Civil Procedure Code were duly served and the executing court ordered the issue of a sale proclamation fixing April 3, 1933, as the date of the sale. It appears that the decree-holder received only partial satisfaction of the decree out of the sale proceeds of Koradanga colliery which had been sold at the instance of the superior landlords and by certain cash payments. He applied for execution of the decree by appointment of a Receiver and by sale of the Sripur colliery. The Receiver was appointed on June 21, 1926, and he was directed to sell the Sripur colliery to the highest bidder permitting the decree-holder at the same time to bid for and purchase the property, but he was restrained from proceeding with the sale by an order of court passed in a certain suit filed by Mukherjee against the decree-holder. This suit was dismissed by the High Court. Accordingly the decree-holder applied on March 17, 1933, to the High Court praying that the Receiver be discharged and leave be given to the executing court to sell the Sripur colliery in execution of the decree of June 25, 1923, in which Execution Proceedings No. 224 of 1932 were pending at the time. He also asked that leave be given to him to bid for and to purchase the property.

Notices of this application were duly served on the parties and on March 27, 1933, the High Court granted all the prayers (Exhibit F. 5). The property was sold on the 9th of June, 1933, land was purchased by the decree-holder for Rs. 20,000. Mukherjee, however, filed an application on July 7, 1933, under section 47 and Order XXI, rule 90, of the Civil Procedure Code for setting aside the sale. The application was numbered as Miscellaneous Case No. 53 of 1933. The Chatterjees also started two Miscellaneous Cases Nos. 54 and 55 of 1933 on July 8, 1933. During the pendency of the three miscellaneous cases, the appellant Mohanlal Goenka purchased the decree on January 10, 1934. Miscellaneous Case No. 53 of 1933 was allowed and the sale was set aside on January 29, 1934, and Cases Nos. 54 and 55 of 1933 were dismissed for default. The result of these miscellaneous cases was communicated to the High Court in a document which purports to be a certificate under section 41 of the Civil Procedure Code and was received on February 1, 1934. Two appeals were preferred by the decree-holder on April 18, 1934, but the order setting aside the sale was confirmed and resale of the Sripur properties was ordered by the High Court. The properties were again sold on April 22, 1936, and were purchased by the decree-holder for Rs. 12,000. Mukherjee filed an appeal in the High Court and during the pendency of the appeal he filed an application under section 47 and Order XXI, rule 90, of the Civil Procedure Code for setting aside the sale. The appeal was disposed of by consent of parties and it was agreed that the application under Order XXI, rule 90, be heard by the executing court. Accordingly the application was heard and the sale set aside. Mukherjee then applied under section 47 on April 4, 1938, stating that Mohanlal Goenka could not continue the proceedings started by Nagarmull, but the application was dismissed and May 22, 1938, was fixed for the sale of the property. He filed an appeal in the High Court which was dismissed under Order XLI, rule 11, of the Civil Procedure Code. The property was sold for the third time and was purchased by the decree-holder for Rs. 2,50,000 on May 27, 1938. Mukherjee applied under section 47 and Order XXI, rule 90, of the Civil Procedure Code for setting aside this sale on June 27, 1938 : (E-4) - (Miscellaneous Case No. 76 of 1938). The application was dismissed on June 30, 1938, and the sale was confirmed. Execution Case No. 224 of 1932 was dismissed for part satisfaction. The executing court on July 9, 1938, sent to the High Court a certificate under section 41 of the Civil Procedure Code, accompanied with the covering letter communicating the result of the execution case. This was received by the High Court on July 12, 1938. Mukherjee carried the matter in appeal to the High Court but the appeal was dismissed on August 5, 1940 : (Exhibit F). Mukherjee filed an application for review under Order XLVII, rule 1, of the Civil Procedure Code against the aforesaid order on November 25, 1940, (Exhibit B). He also filed on November 28, 1940, an application for leave to appeal to the Privy Council (Exhibit A). The review application was dismissed on May 8, 1941, and leave was refused on June 16, 1941. On May 12, 1941, Mukherjee filed and application under sections 47 and 151 of the Civil Procedure Code (Miscellaneous Case No. 70 of 1941) and it is this application which has given rise to the present appeal before us. The application was supported by an affidavit filed on May 26, 1941.

The present appellant filed and objection on July 5, 1941, to the application. The application was dismissed by the Subordinate Judge on January 30, 1945, but the order was set aside on appeal by the High Court on February 10, 1950. Leave to appeal to this Court was granted by the High Court on July 28, 1950.

The case put forward by Mukherjee before the Subordinate Judge was that after the dismissal of Execution Case No. 296 of 1931 of February 27, 1932, and the sending of a certificate under section 41 to the High Court, the decree was never again transferred to the Asansol court for execution. According to him, the decree-holder fraudulently detached the certificate of non-satisfaction from the Execution Case No. 296 of 1931 and attached it to the second Execution Case No. 224 of 1932, inducing the court to believe that the certificate had been obtained from the High Court for taking

fresh proceedings in execution. Mukherjee had instituted Title Suit No. 3 of 1936 to recover some money and to enforce a charge against the Sripur colliery and for permission to redeem the charge declared in favour of the decree-holder if it was prior to his own claim. The suit was dismissed but on appeal the High Court allowed him to redeem the charge in favour of the decree-holder. In order to ascertain the amount of the charge Mukherjee instructed his attorney to search the record of Suit No. 1518 of 1923 and he came to know for the first time on August 23, 1940, that after the dismissal of the first application a certificate under section 41 of the Civil Procedure Code had been sent by the Asansol Court to the High Court and the latter never retransferred the decree for execution. Accordingly his case was that the Asansol Court had no jurisdiction to entertain Execution Case No. 224 of 1932, and all the proceedings in connection therewith were null and void. He therefore urged that the auction sale should be set aside. The present appellant denied the allegations of the judgment-debtor. He pleaded that no certificate under section 41 of the Civil Procedure Code was sent to the High Court in Execution Case No. 296 of 1931 and the execution court retained jurisdiction throughout, that the High Court had authorised the sale of the property in execution of the decree and that no fresh certificate of non-satisfaction was required to give jurisdiction to the Asansol Court to proceed with Execution Case No. 224 of 1932. The judgment-debtor was aware that the copy of the decree and the certificate of non-satisfaction were not sent to the High Court and he could not possibly have laboured under a wrong impression that a fresh certificate had been sent by the High Court for taking execution proceedings and that the decree-holder practiced no fraud upon him. He also pleaded that the application was barred by limitation, that it was barred by the principle of res judicata as the objection now raised had previously been made and either not pressed, or rejected and that the judgment-debtor was fully aware of all the proceedings that had taken place in connection with the decree. The Subordinate Judge framed the following three main issues in the case :-

1. Is this Miscellaneous Case maintainable under section 151 of the Civil Procedure Code ?

2. Did this Court act in accordance with section 41, Civil Procedure Code ? If so, was the decree retransmitted to this court for fresh execution in 1932 ? If not, had this court jurisdiction to execute the decree again in 1932 ?

3. Is this Miscellaneous Case barred according to the principle of res judicata ?

Upon the first point the learned Subordinate Judge held that the executing court did not lose jurisdiction to execute the decree, that the allegation about the detaching of certificate of non-satisfaction from the records in the custody of the court and its surreptitious insertion in Execution Case No. 224 of 1932 constitute grounds for a suit, and a fresh application under section 151 of the Civil Procedure Code, was not maintainable. Upon the second point the court held that having regard to the circumstances of the case, no certificate of non-satisfaction of the decree as required by section 41 was sent by the executing court to the High Court, that no re-transmission of the decree by the High Court was required to start Execution Case No. 224 of 1932 and that the executing court retained seisin of the execution and could execute the same without a further direction from the High Court. Upon the third point, the learned Subordinate Judge held that Mukherjee had alleged in para. 15 of his petition in Miscellaneous Case No. 53 of 1933 that the decree and the certificate were not sent by the High Court for starting the execution case afresh, but this objection of jurisdiction was not pressed at the time of the hearing. Again in para. 20 of his petition in Miscellaneous Case No. 76 of 1938 he had urged the same point but it was not passed. Mukherjee admitted in his evidence as P.W. 4 that all his applications were drawn up according to his instructions but despite this fact he did not press the allegations made in the miscellaneous cases.

It was accordingly held on the authority of Annada Kumar Roy and Another v. Sheik Madan and Others [(1934) 38 C.W.N. 141] and Mahadeo Prasad Bhagat v. Bhagwat Narain Singh [A.I.R. 1938 Patna 427] that the principle of constructive res judicata is applicable to execution proceedings. The view taken by the Court was that having made the allegations in the miscellaneous cases and then abandoned them, the judgment-debtor was precluded from raising the plea of jurisdiction of the court to execute the decree. Mukherjee preferred an appeal to the High Court. The matter came up before Harries C.J. and Sarkar J. The learned Chief Justice held that the Asansol Court not only sent what purported to be a certificate under section 41 of the Civil Procedure Code to the High Court, but intended such certificate to be a certificate of non-satisfaction. He did not agree with the Subordinate Judge that the document was not intended to be a certificate and was merely an intimation that the first attempt at execution had failed. In the view of the learned Chief Justice there was no need for the Court at Asansol to send any intimation at all. The learned Chief Justice agreed that upon a true construction of section 41, failure to execute the decree at the first attempt for non-appearance of the decree-holder was not the total failure to execute the decree as contemplated in that section. He, however, held that the fact that the certificate was sent when it should not have been sent cannot affect the question if, as he held, the certificate was intended to be a certificate of non-satisfaction. The learned Chief Justice referred to a number of authorities in support of his conclusion. He accordingly held that the Asansol Court had ceased to have jurisdiction to execute the decree and was not entitled to entertain the second application for execution. Upon the question of res judicata the learned Chief Justice observed that "a judgment delivered by a Court not competent to deliver it cannot operate as res judicata and the order of the Subordinate Judge of Asansol, being wholly without jurisdiction, cannot be relied upon to found a defence upon the principle of res judicata." He went on to say : "It is true that the appellant could and should have raised the question in the second execution case that the Asansol Court had no jurisdiction in the absence of a certificate of non-satisfaction from the High Court to entertain the application. But in my view though this point was neither made nor pressed, these orders of the learned Subordinate Judge in the second execution application cannot be urged as a bar to the present application under the doctrine of res judicata. It is true that section 11 of the Code of Civil Procedure does not apply to execution proceedings, but it has been held by their Lordships of the Privy Council that the principles of the law relating to res judicata do apply to execution proceedings and Mr. Atul Gupta has urged that the present application is barred by res judicata....." He drew a distinction between the case of an irregular assumption of jurisdiction and want of inherent jurisdiction and holding that the order of the Subordinate Judge at Asansol fell under the latter category, he came to the conclusion that the order is wholly null and void and cannot be pleaded in bar of the application on the principle of res judicata.

It has been contended before us on behalf of the appellant (assignee decree-holder) that the execution Court at Asansol never lost jurisdiction over the execution proceedings and that what purported to be a certificate under section 41 of the Civil Procedure Code was no more than a mere intimation to the High Court that the execution case had been dismissed only for default, that it was no failure to execute the decree within the meaning of section 41 of the Civil Procedure Code, that in any case the subsequent orders of the High Court passed from time to time in the presence of the parties conferred jurisdiction upon the execution Court to proceed with the execution and that in any event the question whether the execution Court had or had not jurisdiction to execute the decree was barred by the principle of res judicata. Having heard learned counsel for the parties, we are of opinion that the appeal can be disposed of on the ground of res judicata without entering into other questions.

It cannot be disputed that the transferee Court was invested with jurisdiction by the High Court

when its decree was transferred to it for execution. The first application for execution of the decree was dismissed for default on February 27, 1932, and a document purporting to be a certificate of non-satisfaction under section 41 of the Civil Procedure Code was sent by the execution Court to the High Court. The decree was admittedly not retransmitted for execution by the High Court. Despite this fact the decree-holder made a second application for execution on November 24, 1932, (Execution Case No. 224 of 1932). Notice was duly served upon the judgment-debtor but he preferred no objection before the execution Court that it had no jurisdiction to execute the decree. This is the first occasion on which he could have raised the plea of jurisdiction. The second occasion arose when the decree-holder filed an affidavit (Exhibit C) before the High Court on March 17, 1933, praying that certain directions should be given to the execution Court for the sale of Sripur properties and for an order discharging the Receiver. Notice was duly served upon the judgment-debtors, including Mukherjee (Exhibit 13) and the order granting the prayers of the decree-holder was passed on March 27, 1933 (Exhibit F. 5). The judgment-debtor could have pointed out that the Asansol Court was functus officio after sending the certificate under section 41 and had no further jurisdiction to sell the property in execution but no such objection was raised. This order clearly recites that notice was sent to the Chatterjees as well as to Mukherjee and was proved by an affidavit to have been duly served upon them. The decree-holder's prayer was granted and in pursuance of the order of the High Court the property was sold and was purchased by the decree-holder for Rs. 20,000, whereupon Mukherjee started Miscellaneous Case No. 53 of 1933 for setting aside the sale. In this application (Exhibit E) the judgment-debtor raised the question of jurisdiction in paragraph 19 which runs thus :-

> "As the said decree has not been sent to this court for execution nor has any certificate come to this Court therefore the execution proceedings and the auction sale are wholly irregular, illegal, fraudulent and collusive."

The order of the Subordinate Judge dated January 29, 1934, by which he set aside the sale does not mention that the plea raised in paragraph 19 of the application was pressed. The decree-holder who was aggrieved by this order preferred two appeals Nos. 254 and 255 of 1934. The order of the High Court (Exhibit F. 2) dated July 11, 1935, shows that the decision of the Subordinate Judge setting aside the sale was confirmed. It appears that the judgment-debtors had raised the question that the decree could not be executed without the decree-holder applying for making the decree absolute. In view of this dispute the learned Judges added in the order that although they were confirming the order of the Subordinate Judge setting aside the sale, the judgment-debtors will not be entitled to raise any objection as to the nature of the decree which in their opinion was executable under the terms of the compromise arrived at by the parties concerned. Here again no objection was raised by the judgment-debtors that the execution Court had no jurisdiction to execute the decree and sell the property.

The next occasion when the objection to jurisdiction should have been raised was when the property was to be resold. Mukherjee started Miscellaneous Case No. 52 of 1936 on April 2, 1936, (Exhibit 1), in which he raised all sorts of objections to the execution but nowhere stated that the execution Court had no jurisdiction to sell the property after the certificate under section 41 of the Civil Procedure Code had been sent to the High Court. The property was sold for the second time and was purchased by the decree-holder on April 22, 1936. Mukherjee preferred an appeal No. 238 of 1936 and at the same time started a Miscellaneous Case No. 80 of 1936 in the execution Court to set aside the sale. No plea of jurisdiction was raised either in the grounds of appeal to the High Court or in the application for setting aside the execution sale. The appeal was disposed of by consent of parties with the direction that Miscellaneous Case No. 80 of 1936 should be reheard by the execution

Court. The sale was set aside on rehearing. Mukherjee then started Miscellaneous Case No. 40 of 1938 under section 47 of the Civil Procedure Code on April 4, 1938. The objection of lack of jurisdiction in the execution Court was again missing in this application. The application was dismissed and the appeal against it was also dismissed on May 25, 1938.

When the property was sold for the third time, Mukherjee started Miscellaneous Case No. 76 of 1938 on June 27, 1938, for setting aside the sale (Exhibit E. 4). In paragraph 20 of his application he stated :-

> "That this court has no jurisdiction to entertain this application for execution without a fresh certificate (sic) the court passing the decree under execution. The previous certificate creating jurisdiction in the present court has long expired after the dismissal of the previous execution case. The whole proceeding and the sale thereunder is not only illegal and materially irregular but is absolutely void for want of jurisdiction."

This plea was apparently not pressed and the Miscellaneous Case was dismissed on June 30, 1938. Mukherjee filed and appeal F.M.A. No. 262 of 1938 (Exhibit F) on August 23, 1938, but the appeal was dismissed on August 5, 1940, on the ground that there was no material irregularity in publishing the sale and the colliery had not been sold at an inadequate price on account of any such irregularity. This again shows that no question of jurisdiction was raised before the learned Judges of the High Court. Then followed the review application (Exhibit B) presented on November 25, 1940, to the High Court. Paragraphs 11, 12 and 13 of this application are important and they run as follows :-

> "11. That after passing the judgment in F.A. No. 246 of 1937 on 13th August, 1940, your petitioner got the records of Suit No. 1518 of 1923 of the Original Side of this Hon'ble Court searched for ascertaining the amount due under the decree of the said suit and came to know for the first time on 23rd August, 1940, that after dismissal of the old Execution Case No. 296 of 1931 by the Subordinate Judge of Asansol on 27th February, 1932, the result of the said execution case was sent to the Original Side of this Hon'ble Court under section 41, Civil Procedure Code, and that was received on 11th March, 1932, and that no fresh certificate of non-satisfaction of the decree was sent by the Original Side of this Hon'ble Court for fresh execution and so there was no basis on which the Execution Case No. 224 of 1932 could be started in the Court of the Subordinate Judge of Asansol.
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> 12. That your petitioner submits that the copies of the decree and certificate of non-satisfaction were taken by the decree-holder on detaching the same from the records of old used Execution case No. 296 of 1931 and fraudulently used afterwards in Execution Case No. 224 of 1932 by practising fraud upon the Court.
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> 13. That your petitioner further begs to submit that he was misled by order of the Court of the Subordinate Judge which runs as follows :-
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> 'Register. Let the certificate of non-satisfaction received be annexed to the record.'"

This application was rejected on May 8, 1941, and the order of the learned Judges which is brief

may be reproduced in full :-

> "The ground for review is that after the dismissal of the said appeal the petitioner discovered that the execution proceedings in which the sale took place was held by the executing Court although that Court did not receive any certificate of non-satisfaction from the Court which passed the decree under execution. This objection does not properly come for investigation in a proceeding under Order XXI, rule 90, Civil Procedure Code. Even if the allegation of the petitioner about the discovery of new matter is correct, it cannot affect the decision of the appeal which we have dismissed."

The foregoing narrative of the various stages through which the execution proceedings passed from time to time will show that neither at the time when the execution application was made and a notice served upon the judgment-debtor, nor in the applications for setting aside the two sales made by him did the judgment-debtor raise any objection to execution being proceeded with on the ground that the execution Court had no jurisdiction to execute the decree. The failure to raise such an objection which went to the root of the matter precludes him from raising the plea of jurisdiction on the principle of constructive res judicata after the property has been sold to the auction-purchaser who has entered into possession. There are two occasions on which the judgment-debtor raised the question of jurisdiction for the first time. He did not, however, press it with the result that the objection must be taken to have been impliedly overruled. One such occasion was when the property was sold for the second time and was purchased by the decree-holder for Rs. 20,000. In paragraph 19 of his application dated July 7, 1933 (Exhibit E) to set aside the sale he challenged the jurisdiction of the Court, but the order of the Court dated the 29th January, 1934, does not show that the plea was persisted in. The second occasion was when the property was sold for the third time and in his application (Exhibit E. 4) dated June 27, 1938, for setting aside the sale he raised the question in paragraph 20. The objection application was dismissed but there is no trace of the judgment-debtor having pressed this objection. When he preferred an appeal to the High Court, he did not make the plea of jurisdiction a ground of attack against the execution of the decree and the appeal was dismissed on other points. Finally he filed a review application and in paragraphs 11, 12 and 13 he raised the objection to execution in more elaborate words, but the application was rejected by the High Court on the ground that such an objection did not fall within the purview of Order XXI, rule 90, of the Code of Civil Procedure. This order therefore became final. The judgment-debtor admitted that the two applications (Exhibits E and E. 4) were prepared according to his instructions. It is not possible therefore for the judgment-debtor to escape the effect of the above orders which became binding upon him.

That the principle of constructive res judicata is applicable to execution proceedings is no longer open to doubt. See Annada Kumar Roy and Another v. Sheik Madan and Others [(1934) 38 C.W.N. 141], and Mahadeo Prasad Bhagat v. Bhagwat Narain Singh [A.I.R. 1938 Patna 428]. In the first case an application was made by a certain person for execution of a decree and no objection was raised that the decree was not maintainable at the instance of the applicant and the application was held to be maintainable. It was held that no further objection on the score of the maintainability of a fresh application for execution on the part of the same applicant could be raised. In the second case a money decree had been obtained on the foot of a loan which was the subject-matter of a mortgage and the property was sold in execution. The judgment-debtor raised the question of the validity of the execution proceedings and objected that the execution court had no jurisdiction to sell the property in execution of a money decree as no sanction of the Commissioner had been obtained under section 12-A, Chota Nagpur Encumbered Estates Act. The objection was not decided but the

objection petition was dismissed with the result that the property came into the possession of the auction-purchaser. In an action for a declaration that the sale to the purchaser was void for want of sanction of the Commissioner it was held that as the point was raised, although not decided in the objection petition under section 47, it was res judicata by reason of Explanation IV to section 11.

The Privy Council as early as 1883 in Ram Kirpal Shukul v. Mussamat Rup Kuari [(1884) 11 I.A. 37] held that the decision of an execution Court that the decree on a true construction awarded future mesne profits was binding between the parties and could not in a later stage of the execution proceedings be set aside. Their Lordships ruled that the binding force of such a decision depends upon general principles of law and not upon section 13, Act X of 1877, corresponding to section 11 of the present Code. In that case the Subordinate Judge and the District Judge had both held that the decree awarded mesne profits, but their decision was reversed by the Calcutta High Court. The Full Bench of that Court also held that the law of res judicata did not apply to proceedings in execution of the decree. This decision was reversed in appeal by the Privy Council. At page 43, Sir Barnes Peacock, who delivered the judgment of the Board, observed :-

> "The High Court assumed jurisdiction to decide that the decree did not award mesne profits, but, whether their construction was right or wrong, they erred in deciding that it did not, because the parties were bound by the decision of Mr. Probyn, who, whether right or wrong, had decided that it did; a decision which, not having been appealed, was final and binding, upon the parties and those claiming under them."

In Raja of Ramnad v. Velusami Tevar and Others [(1921) 48 I.A. 45] an assignee of a partially executed decree applied to the Subordinate Judge to be brought on the record in place of the decree-holder. The judgment-debtor denied the assignment and the liability of certain properties to attachment and alleged that the right to execute the decree was barred by limitation. The Subordinate Judge recognized the assignment, allowed the assignee to execute the decree and gave his permission to file a fresh application for attachment. This order was not appealed against. In the final proceedings the Subordinate Judge permitted the judgment-debtors to raise again the plea of limitation. In the course of the judgment Lord Moulton observed as follows :-

> "Their Lordships are of opinion that it was not open to the learned Judge to admit this plea. The order of December 13, 1915, is a positive order that the present respondent should be allowed to execute the decree. To that order the plea of limitation, if pleaded, would according to the respondents' case have been a complete answer, and therefore it must be taken that a decision was against the respondents on the plea. No appeal was brought against that order, and therefore it stands as binding between the parties. Their Lordships are of opinion that it is not necessary for them to decided whether or not the plea would have succeeded. It was not only competent to the present respondents to bring the plea forward on that occasion but it was incumbent on them to do so if they proposed to rely on it, and moreover it was in fact brought forward and decided upon."

Sha Shivraj Gopalji v. Edappakth Ayissa Bi and Others [A.I.R. 1949 P.C. 302; 54 C.W.N. 54] : In this case the decree-holder in the earlier execution proceedings could have raised a plea that the judgment-debtor had an interest in certain property which could be attached under his decree but the plea was not raised through his own default and the execution was dismissed. It was held under such circumstances that the dismissal operates as res judicata in the subsequent execution proceedings

and even apart from the provisions of section 11 of the Civil Procedure Code, it is contrary to principle to allow the decree-holder in fresh proceedings to renew the same claim merely because he neglected at a proper stage in previous proceedings to support his claim by the argument of which he subsequently wishes to avail himself.

There is ample authority for the proposition 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 or not it operates as res judicata. A decision in the previous execution case between the parties that the matter was not within the competence of the executing Court even though erroneous is binding on the parties; see Abhoy Kanta Gohain v. Gopinath Deb Goswami and Others [A.I.R. 1943 Cal. 460].

The learned Chief Justice concedes that the principle of res judicata applies to the execution proceedings but he refused to apply it to the present case on the ground that there was lack of inherent jurisdiction in the execution Court to proceed with the execution. He relied upon Ledgard and Another v. Bull [(1886) 13 I.A. 134]. This case is distinguishable upon the facts. This was a suit instituted before the Subordinate Judge for infringement of certain exclusive rights secured to the plaintiff by three Indian patents. Under the Patents Act the suit could be brought only before the District Judge. The defendant raised an objection to the jurisdiction of the Court. It appears that subsequently the defendant joined the plaintiff in petitioning the District Judge to transfer the case to his own Court. This was done. The suit was transferred under section 25 of the Civil Procedure Code. It was admitted that the suit could not be transferred unless the Court from which the transfer was sought to be made had jurisdiction to try it. The defendant adhered to the plea of jurisdiction throughout the proceedings but it was urged that by his subsequent conduct he had waived the objection to the irregularity in the institution of the suit. Their Lordships held that although a defendant may be barred by his own conduct from objecting to the irregularity in the institution of the suit, yet where the Judge had no inherent jurisdiction over the subject-matter of the suit, the parties cannot by their mutual consent convert it into a proper judicial process. This decision has no bearing upon the present case as no question of constructive res judicata arose in that case.

The cases of Gurdeo Singh v. Chandrikah Singh and Chandrikah Singh v. Rashbehary Singh [(1909) I.L.R. 36 Cal. 193] and Rajlakshmi Dasee v. Katyayani Dasee [(1911) I.L.R. 38 Cal. 639] are both distinguishable as they did not involve any question of constructive res judicata.

Two cases of the Allahabad High Court (1) Lakhmichand and Others v. Madho Rao [(1930) I.L.R. 52 All. 868], (2) Raghubir Saran and Another v. Hori Lal and Another [(1931) I.L.R. 53 All. 560] were also relied upon in the judgment under appeal. The first was a case of the grant of assignment of the land revenue of a village in favour of the grantee. He mortgaged it and a suit brought on foot of the mortgage was decreed. In a subsequent suit for a declaration that the previous decree of the Court was null and void by reason of the fact that the suit was not cognisable in the absence of a certificate from the Collector as required by the Pensions Act authorizing the trial of such a suit, it was held that the decree was one without jurisdiction and that it did not operate as res judicata in the subsequent suit for which the certificate was obtained. It was obvious that the statutory provisions of the Act forbade the trial of any suit without the certificate of the Collector. There was, therefore, an initial lack of jurisdiction to try the case and the case is inapplicable to the facts of the present case. The second case which involved the question of territorial jurisdiction was in our view not correctly decided. There a suit against a minor for enforcement of the mortgage was decreed in respect of property which was beyond the territorial jurisdiction of the Court passing the decree. When the decree was transferred for execution to the Court within whose jurisdiction the property was situate,

it was objected that the decree was a nullity. The objection was overruled and the objector was referred to file a regular suit. In the regular suit filed by him it was decided that an independent suit was maintainable for avoiding the decree although no objection was raised to jurisdiction in the Court passing the decree. It was also held that the bar of section 11, Explanation IV, of the Code of Civil Procedure did not apply to the case. We think that although section 21 of the Code of Civil Procedure did not apply in terms to the case, there is no reason why the principle underlying that section should not apply even to a regular suit. The objection to jurisdiction must be deemed to have been waived and there was no question of inherent lack of jurisdiction in the case. The suit was clearly barred by the principle of res judicata and was wrongly decided. The question which arises in the present case is not whether the execution Court at Asansol had or had not jurisdiction to entertain the execution application after it had sent the certificate under section 41 but whether the judgment-debtor is precluded by the principle of constructive res judicata from raising the question of jurisdiction. We accordingly hold that the view taken by the High Court on the question of res judicata is not correct.

We allow the appeal, set aside the judgment and the decree of the High Court and restore that of the Subordinate Judge dismissing the application of the judgment-debtor. The appellant will be entitled to his costs here and hitherto.

Appeal allowed.

Agent for the appellant : P. K. Chatterjee.

Agent for the respondent No. 1 : R. R. Biswas.

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