

BOMBAY HIGH COURT

Lakshmibai Anant Kondkar

Vs.

Ravji Bhikaji Kondkar

First Appeal No. 10 of 1926

(Patkar and Murphy, JJ.)

21.11.1928

JUDGMENT

Patkar, J.

1. This is an appeal in execution of a decree obtained 1928 by the plaintiff for partition of the property described in schedules A and B and for taking accounts and one half share in the assets of the company and moveable property in the possession of defendant No. 1 and for mesne profits of the properties A and B. In the darkhast he mentioned that the partition of property in schedule A was made and plaintiff and defendant had taken possession. It appears from the receipts, Exhibits 85 and 36, that in October 1920 the plaintiff obtained possession of the property in schedule A, We are not, therefore, concerned with the Immovable property in schedule A. The second prayer is that the plaintiff should be given half share after taking accounts of plaintiff's half share in defendant's share in the property of the company, moveables, outstandings and Immovable property in schedule B. With regard to the plaintiff's share in the Immovable property, the learned First Class Subordinate Judge has not dealt with the point. It appears that the prayer with regard to the possession of half share in the Immovable property in schedule B has escaped the attention of the learned Judge. With regard to the taking of accounts of the property, moveables and outstandings, it appears that the decree directed that the assets and liabilities of the company, so also the assets and liabilities of defendant No. 1, should be ascertained at the time of the execution. It is quite clear that the executing Court ought to have gone into the question of the assets and liabilities of the company, and also the assets and liabilities of defendant No. 1, which were directed by the decree to be ascertained at the time of the execution.

2. The third prayer with regard to the mesne profits of the property in schedules A and B has been disallowed by the learned Subordinate Judge on the ground that the mesne profits could not be determined in execution proceedings, but ought to have been ascertained by an application in

the suit itself under Order 20, Rule 12, and therefore he had no jurisdiction to go into the question of the ascertainment of the mesne profits. It appears that in the decretal portion of the judgment delivered by the Subordinate Judge it is ordered that the plaintiff should recover one-third share of the mesne profits from defendant No. 1 to be ascertained in execution proceedings till the plaintiff gets possession of the property after the actual division thereof. This direction as to the ascertainment of the mesne profits in execution does not find its place in the decree as drafted, but we must take it that the learned Judge ordered the mesne profits to be ascertained during the process of execution. It is urged on behalf of the respondent that the learned Subordinate Judge had no jurisdiction to order the ascertainment of the mesne profits in execution, and the executing Court properly declined to execute a decree which was passed without jurisdiction in contravention of the provisions of Order 20, Rule 12, and reliance has been placed on the cases of *Muhammad Ishaq Khan v. Muhammad Rustam Ali Khan*¹ *Rudra Pratap Singh v. Sarda Mahesh Prasad Singh*² and *Gora Chand Haldar v. Prafulla Kumar Roy*³ Under Order 20, Rule 12, the amount of the mesne profits must be determined during the course of the suit and an enquiry as to mesne profits under this rule is not a proceeding in execution, but a proceeding in continuation of the original suit. See *Rudra Pratap Singh v. Sarda Mahesh Prasad Singh*⁴ and *Shankar v. Gangaram*⁵, But the Subordinate Judge, instead of passing an order under Order 20, Rule 12, ordered the mesne profits to be recovered in execution and the decree though irregular is binding between the parties. The question, therefore, now for decision is whether an executing Court can go behind the decree and refuse to execute the decree on the ground that the order of the Court was without jurisdiction, in so far as it contravened Order 20, Rule 12. On account of the omission of the words or of the jurisdiction of the Court that passed it", appearing in Section 225 of the old Civil Procedure Code, in Order 21, Rule 7, of the present Code, there has been a conflict of judicial opinion on the point as to whether an executing Court can go into the question whether the Court, which passed the decree, had any jurisdiction to pass it. The view of the Calcutta High Court in *Gora Ghana Haldar v. Prafulla Kumar Roy I.L.R.(1925) . Cal. 166* that where a decree presented for execution was made by a Court which apparently had no 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, is not accepted by this Court in *Hari Govind v. Narsingrao Konherraao I.L.R.(1913) . 38 Bom. 194* and the Madras High Court in *Zamindar of Ettiyapurant, v. Chidambaram Chetty I.L.R. (1920) Mad. 675*. In *Gora Chand Haldar v. Prafulla Kumar Roy*, their Lordships however observed (p. 173):

We have to start by accepting the proposition that the Court that made the decree had no jurisdiction to make it, and by that expression is meant that the Court had not such territorial jurisdiction as would authorize it to make the decree, and not that having jurisdiction it exercised it erroneously.

In the present case, we do not think that there was any want of jurisdiction in the Court passing an order in contravention of Order 20, Rule 12, but that it was merely an erroneous or irregular exercise of jurisdiction. See *Malkarjun v. Narhari I.L.R.(1900) . 25*

Bom. 337. The distinction between an irregularity and nullity has been pointed out by Mookerjee J. in *Ashutosh Sikdar v. Behari Lal Kirtania I.L.R.(1907) Cal. 61* . An irregularity is a deviation from a rule of law which does not take away the foundation or authority for the proceeding or apply to its whole operation, whereas a nullity is a proceeding taken without any foundation for it and is so essentially defective as to be of no avail or effect whatever, or is void or incapable of being validated. We think, therefore, that the executing Court had no

¹ I.L.R.(1918) All. 292

³ I.L.R.(1925) Cal. 166

² I.L.R. (1925) All. 543

⁴ I.L.R. (1925) All. 543

⁵ AIR 1928 Bom 236 : (1928) 30 Bom LR 503 : ILR 1928 52 Bom 360

jurisdiction to go into the question whether the Court which passed the decree committed any error in the exercise of its jurisdiction. The First Class Subordinate Judge, Thana, ordered that the mesne profits should be ascertained in execution, and it was incumbent on the executing Court to ascertain the mesne profits and it was not open to the executing Court to go behind the decree and go into the question, whether there was an irregular or erroneous exercise of jurisdiction by the Court which passed the decree.

3. It is urged on behalf of the respondent that the present question is barred by res judicata on the ground that in darkhast No. 80 of 1916, disposed of on July 19, 1922, the learned Subordinate Judge expressed the view now taken by the First Class Subordinate Judge in the present darkhast, and reliance has been placed on the decision in *Ram Kirpal Shukul v. Mussuwat Rup Kuari*⁶ It appears, however, that on July 19, 1922, the plaintiff's pleader was absent. It cannot, therefore, be said that this point was heard and decided by the Court on July 19, 1922. The darkhast was disposed of for default of appearance as the plaintiff's pleader was absent, and Order 9, Rule 8, would not apply to execution proceedings. The plaintiff could not have applied for the restoration of the darkhast under Order 9, Rule 8, nor could he have appealed against that order: see *Hajrat Akramnissa Begam v. Valiunnissa Begam*⁶ and *Bharat Indu v. Asghar Ali Khan*⁷ We think, therefore, that the decision in the previous darkhast No. 80 of 1916, which was passed without hearing the plaintiff or his pleader and which could not be challenged except in a subsequent darkhast, does not operate as res judicata. We think, therefore, that the lower Court erred in not going into the questions which were reserved by the First Class Subordinate Judge to be determined in execution.

4. Similarly, with regard to the fourth clause regarding the half share in the moveables, outstandings, &c., which may be in the defendant's possession, we think the view of the lower Court declining to go into the question on the ground that the moveable property ought to have been divided in the suit itself (vide Order 26, Rules 13 and 14) is not correct as the final decree was passed by the Court and the executing Court was bound to execute it. We would, therefore, reverse the order of the lower Court and remand the darkhast for disposal according to law. Costs of this appeal will be costs in the darkhast,

Murphy, J. - 5. I agree. There were several reliefs asked for in the application for execution, but

the learned Subordinate Judge held that the prayer for mesne profits was unsustainable, because under Order 20, Rule 12, this should have been provided for in a proceeding in the suit; and similarly, as to moveable property under Order 26, Rules 13 and 14, such a partition can only be carried out in the suit. The learned Subordinate Judge is technically right in his view that such questions must be decided in the suit as laid down in the rules and orders quoted. But the truth of the matter is, that the original Court made an anomalous decree which is partly preliminary and partly final, whereas it should have first made a preliminary decree, and after disposing of the matters provided for under it, passed final orders. But the decree stands unchallenged and where the original Court's decision is irregular. I think, the executing Court cannot now examine and go into this question and refuse to execute on this account. The leading case on the point in Bombay is that of *Hari Govind v. Narsingrao Konherra*⁸ and the rule there laid down is that the executing Court cannot question the jurisdiction of the Court which originally

⁶ I.L.R.(1893). 18 Bom. 429

⁸ I.L.R.(1913) . 38 Bom. 194

⁷ I.L.R.(1922) All. 148.

made the decree. Here, it is not a question of jurisdiction, but rather one of irregularity and, I think, it was not for the executing Court to hold that it should not inquire into the question, which was ordered to be investigated in execution, viz., the question of mesne profits.

6. It has also been urged that in a former darkhast the same Court had held that it could not execute the decree at all because it was not a final one. This was in 1922, when the papers had been returned by the Collector, and the order was made in the absence of the plaintiff's pleader.

7. Therefore, for the reasons just given by my learned brother Patkar J., I agree that this order does not bar the present proceedings, and that the First Class Court's order must be reversed and the darkhast remanded to it for disposal according to law.

Appeal allowed.