Rathindra Nath Mitra Vs. Smt. Angurbala Mullick and anr.

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Court : Kolkata

Decided On : Dec-16-1975

Reported in : AIR1976Cal217,80CWN471

Judge : Sabyasachi Mukharji, J.

Acts : Calcutta City Civil Court Act, 1953 - Section 5; ;Calcutta High Court Original Side Rules - Rule 29

Appeal No. : Suit No. 280 of 1974

Appellant : Rathindra Nath Mitra

Respondent : Smt. Angurbala Mullick and anr.

Advocate for Def. : P.K. Das and ;S. Sen, Advs.

Advocate for Pet/Ap. : A.N. Bose and ;N.G. Manna, Advs.

Judgement :

ORDER

Sabyasachi Mukharji, J.

1. This is an application for a final decree in a mortgage suit. But it raises interesting questions. On the 7th March, 1975, a preliminary decree was passed in suit No. 280 of 1974 instituted by the petitioner Rathindra Nath Mitra in this Court. By the preliminary decree after recording the charge it was ordered and decreed, inter alia, as follows:--

'I. That the defendants do pay into Court to the credit of this suit the said sum of Rs. 51,687/- with interest at the rate of 6% on the said principal sum of Rs. 43,500/- within six months of the date hereof or any later date up to which time for payment may be extended by the Court such sum as may be found due and the taxed costs of the suit awarded to the plaintiff.

II. That, on such payment and on payment thereafter before such date as may be fixed of such amount as may be adjudged due in respect of such costs of the suit, and such costs, charges and expanses as may be payable under Rule 10, together with such subsequent interest as may be payable under Rule 11, of Order XXXIV of the First Schedule to the Code of Civil Procedure 1908 the plaintiff shall bring into Court all documents in his possession or power relating to the said charged premises in the plaint mentioned, and all such documents shall be delivered over to the defendants or

to such person as he appoints, and the plaintiff shall if so required, reconvey or re-transfer the said charged premises free from the mortgage and clear of and free from all encumbrances created by the plaintiff or any person claiming under him or any person under whom he claims and shall, if so required deliver up to the defendants quiet and peaceable possession of the said premises.

And it is hereby further ordered and decreed that, in default of payment as aforesaid, the plaintiff may apply to the Court for a final decree for the sale of the mortgaged property; and on such application being made and granted the said charged property or a sufficient part thereof shall be directed to be sold; and for the purpose of such sale the plaintiff shall produce before the Court on such Officer as it appoints, all documents in his possession or power relating to the said charged premises.' As the time for payment of the decretal amount mentioned in the said preliminary decree expired without the defendants making payment of the decretal amount or any part thereof, the plaintiff petitioner made this application for a final decree. In the meantime it may be mentioned that an appeal has been preferred from the said preliminary decree and the same is pending. On behalf of the respondents this application is opposed on two grounds. It was contended that the preliminary decree passed by this Court was a nullity and as such a final decree upon that preliminary decree should not be passed. It was, secondly, urged that the decree had been drawn up in breach of the rules of this High Court and as such could not be enforced and the petitioner was not entitled to ask for a final decree on such irregular preliminary decree,

2. In support of the first contention raised in this application counsel for the respondents drew my attention to the judgment dated the 7th March, 1975, delivered by Salil K. Roy Chowdhury, J., in passing the preliminary decree. My attention was drawn to the findings of the learned Judge in respect of Issue No. 4. The said issue No. 4 as framed before the learned Judge was to the following effect:--

'Is the claim of the plaintiff governed by the Bengal Money Lenders Act ?' In answering the said issue No. 4 the learned Judge observed that the plaintiff was not a money lender and did not carry on the business of money lending and further the transaction which was the subject matter of the suit was not a loan covered by the Bengal Money Lenders Act, being a loan on the basis of a negotiable instrument under the Negotiable Instruments Act, 1881, other than a promissory note and as such excluded under Section 2(12)(e) of the Bengal Money Lenders Act from the operation of the said Act. Counsel submitted that in view of the finding that the transaction was on the basis of a negotiable instrument under the Negotiable Instruments Act, 1881, other than a promissory note under the provisions of Section 80 of the Negotiable,. Instruments Act, 1881, the plaintiff was entitled to interest at the rate of 6% on the principal sum from the date on which the sum ought to have been paid until realisation. Section 80 of the said Act provides as follows:--

'80. Interest when no rate specified-When no rate of interest is specified in the instrument, interest on the amount due thereon shall, (notwithstanding any agreement relating to interest between any parties to the instrument), be calculated at the rate of six per centum per annum, from the date at which the same ought to have been paid by the party charged, until tender or realisation of the amount due thereon, or until such date after the institution of a suit to 'recover such amount as the Court directs.

Explanation -- When the party charged is the indorser of an instrument dishonoured by non-payment, he is liable to pay interest only from the time that he receives notice of the dishonour.' Counsel for the respondents contended that the principal amount lent and advanced in this case as would be apparent from the judgment was Rs. 43,500/- calculating interest from the expiry of 240 days as per the stipulation in the instrument dated the 23rd September, 1963, which was the instrument in the instant case, i.e., from the 23rd May, 1964, being the date on which the principal sum ought to have been repaid until the institution of the suit, i.e., 30th June, 1974, as 6 per cent would have amounted to Rs. 25,665/- Adding the principal with the interest the total amount due to the petitioner on the date of the institution of the suit would have been Rs. 69,165/-. It has been found that the amount paid by the respondents to the petitioner on this account came to Rs. 26,970/-. That has also been found in the judgment by the learned trial Judge. Therefore, deducting the sum of Rs. 26,970/- from the aforesaid sum of Rs. 69,165/- the plaintiff being the petitioner herein would have been entitled to only Rs. 42,195/-and no more. Therefore, the court did not have the jurisdiction to try or entertain the suit. In the premises, it was submitted that the decree passed by this Court was a decree of incompetent jurisdiction and as such was a nullity.

3. Counsel drew my attention to the finding of the learned Judge on Issue No. 2 by which the learned Judge had found that the interest was payable at 8% per annum by agreement between the parties as appearing from the conduct of the parties and on pure mathematical calculation of the interest paid and on admission of the defendants by their Solicitor's letter dated 6th March, 1972. According to Counsel for the respondent this finding of the learned Judge was contrary to the mandatory provisions of Section 80 of the Negotiable Instruments Act 1881 and as such was void and without jurisdiction.

4. Section 5 of the City Civil Court Act, 1953 provides as follows:--

'Jurisdiction -- (1) The local limits of the jurisdiction of the City Civil Court shall be the City of Calcutta.

(2) Subject to the provisions of subsections (3) and (4) ..... the City Civil Court shall have jurisdiction and the High Court shall not have jurisdiction to try suits and proceedings of a civil nature, not exceeding rupees fifty thousands in value,

(3) The City Civil Court shall have jurisdiction and the High Court shall not have jurisdiction to try any proceeding under-

(i) the Guardians and Wards Act 1890 (VIII of 1890), and

(ii) Part X of the Indian Succession Act, 1925 (XXXIX of 1925), in respect of succession certificates.

(4) The City Civil Court shall not have jurisdiction to try suits and proceedings of the description specified in the First Schedule.

(5) All suits and proceedings which are not triable by the City Civil Court shall continue to be triable by the High Court or the Small Cause Court or any other Court, tribunal or authority, as the case may be, as here to before.'

5. According to Counsel for the respondents the City Civil Court would have jurisdiction and the High Court would not have jurisdiction to try any suit which was for a claim below Rs. 50,000/-. Inasmuch as the learned Judge has held that the rate of interest was payable at 8% per annum as such the plaintiff was entitled to Rs. 51,687/-upto the date of the institution of the suit, the learned Judge was acting contrary to the mandatory provisions of Section 80 of the Negotiable Instruments Act, 1881 and such finding was without jurisdiction. Counsel submitted that it was not an error within jurisdiction but was an error of jurisdiction. The question whether in coming to the aforesaid decision, i.e., in directing that the interest was payable at 8% per annum the learned Judge had committed an error and had acted without jurisdiction has to be judged from the view point of the jurisdiction of this Court. The first contention is that the finding of the learned Judge, so far as he found, that the interest was payable at 8% per annum on the principal sum was contrary to Section 80 of the Negotiable Instuments Act 1881. In my opinion, at this stage this Court is not competent to decide this question whether the finding of the learned Judge on the point of interest was contrary to the provisions of Section 80 of the said Act or not in the facts and circumstances of this case. That is a matter which is the subject-matter of appeal before this Court. So long as that finding stands the petitioner is entitled to ask for a final decree on the basis of that finding of the learned Judge. Even assuming, however, that that finding is erroneous or contrary to the provisions of Section 80 of the Negotiable Instruments Act, 1881 the question arises whether such an erroneous finding is an error within the jurisdiction or an error by which the learned Judge had assumed jurisdiction and on such erroneous assumption of jurisdiction the decree passed by the learned Judge was a nullity. The question of jurisdiction of this Court to pass the preliminary decree, in my opinion, will have to be judged in the background of the claim made in this suit and under the provisions of Section 5 of the City Civil Court Act 1953. The High Court, as the Section provides, has no jurisdiction to try any proceeding of a civil nature unless the same exceeds the value of Rs. 50,000/-. In this case the claim made by the plaintiff was for a sum of over Rs. 50,000/-. The learned Judge has found that the claim was for a sum of over Rs. 50,000/-. Counsel for the respondents contends that the claim of the plaintiff was on erroneous basis and the finding of the learned Judge that the claim was for a sum exceeding Rupees 50,000/- was contrary to the mandatory provisions of the Negotiable Instruments Act, 1881 and as such is an error by which there was assumption of jurisdiction by this Court which this Court did not possess.

6. Speaking for the Full Bench of this Court in the case of Hriday Nath Roy v. Ram Chandra Barna, reported in AIR 1921 Cal 34. Sir Asutosh Mookerjee the Acting Chief Justice observed, as follows at page 36 of the report-

'This jurisdiction of the Court may be qualified or restricted by a variety of circumstances. Thus, the jurisdiction may have to be considered with reference to place, value and nature of the subject-matter. The power of a tribunal may be exercised within defined territorial limits. Its cognizance may be restricted to subject-matters of prescribed value. It may be competent to deal with controversies of a specified character, for instance, testamentary or matrimonial causes, acquisition of lands for public purposes, record of rights as between landlords and tenants. This classification into territorial jurisdiction, pecuniary jurisdiction and jurisdiction of the subject-matter is obviously of a fundamental character. Given such jurisdiction, we must be careful to distinguish exercise of jurisdiction from existence of jurisdiction, for fundamentally different are the consequences of failure to comply with statutory requirements in the assumption and in the exercise of jurisdiction. The authority to

decide a cause at all not the decision rendered therein is what makes up jurisdiction; and when there is jurisdiction of the person and subject-matter, the decision of all other questions arising in the case is but an exercise of that jurisdiction. The extent to which the conditions essential for creating and raising the jurisdiction of a Court or the restraints attaching to the mode of exercise of that jurisdiction should be included in the conception of jurisdiction itself, is sometimes a question of great nicety as is illustrated by the decisions reviewed in the order of reference in Sukhlal v. Tarachand, (1905) ILR 33 Cal 68 (FB) and Khosh Mahomed v. Nazir Mahomed, (1905) ILR 33 Cal 352 (FB); see also the observation of Lord Parker in Raghunath v. Sundar Das, ILR 42 Cal 72 = (AIR 1914 PC 129). But the distinction between existence of jurisdiction and exercise of jurisdiction has not always been borne in mind and has sometimes led to confusion. We must not thus overlook the cardinal position that in order that jurisdiction may be exercised, there must be a case legally before the Court and a hearing as well as a determination. A judgment pronounced by a Court without jurisdiction is void, subject to the well-known reservation that, when the jurisdiction of a Court is challenged, the Court is competent to determine the question of jurisdiction, though the result of the enquiry may be that it has no jurisdiction to deal with the matter brought before it: Rashmoni Dasi v. Gunada Sundari Dasi, 20 Cal LJ 218 -(AIR 1915 Cal 49).'

The Acting Chief Justice quoted with approval the decision of the Madras High Court in the case of Thuljaram v. Gopala, reported in AIR 1918 Mad 1093 where Srinivas Aiyangar, J., laid down that if a Court had jurisdiction to try a suit and had authority to pass orders of a particular kind, the fact that it had passed an order which it should not have made in the circumstances of the litigation, did not indicate total want or loss of jurisdiction so as to render the order a nullity. Lord Reid in Anisminic Ltd. v. Foreign Compensation Commission (1969) 2 AC 147 at P. 171 of the report spoke of jurisdiction as the entitlement to enter on the enquiry in question. The Supreme Court in the case of Official Trustee, West Bengal v. Sachindra Nath Chatterjee reported in : [1969]3SCR92 observed that before a Court could be held to have jurisdiction to decide a particular matter it must not only have jurisdiction to try the suit brought but must also have the authority to pass the orders sought for. It was not sufficient that it had some jurisdiction in relation to the subject-matter of the suit. Its jurisdiction must include the power to hear and decide the questions at issue, the authority to hear and decide the particular controversy that had arisen between the parties. The Supreme Court further observed that what was relevant was whether it had the power to grant the relief asked for in the application made by the applicant in that case. The Supreme Court held that it could not be disputed that if it be held that the learned Judge had competence to pronounce on the issue presented for his decision then the fact that he decided that issue illegally or incorrectly was wholly besides the point-Some of these principles and the recent trend of this aspect of the matter was reviewed by the Supreme Court in the case of M.L. Sethi v. R. P. Kapur reported in : [1973]1SCR697 . There the Supreme Court after referring to the dicta of the majority of the House of Lords in the case of R. v. Bolton, (1841) 1 QB 66 and also in the case of Anisminic Ltd, v. Foreign Compensation Commission, (1969) 2 AC 147 observed at page 2385 of the report-

'The dicta of the majority of the House of Lords in the above case would show the extent to which 'lack' and 'excess' of jurisdiction have been assimilated or, in other words, the extent to which we have moved away from the traditional concept of 'jurisdiction'. The effect of the dicta in that case is to reduce the difference between jurisdictional error and error of law within jurisdiction almost to vanishing point. The

practical effect of the decision is that any error of law can be reckoned as jurisdictional. This comes perilously close to saying that there is jurisdiction if the decision is right in law but none if it is wrong. Almost any misconstruction of a statute can be represented as 'basing their decision on a matter with which they have no right to deal', 'imposing an unwarranted condition' or 'addressing themselves to a wrong question'. The majority opinion in the case leaves a Court or Tribunal with virtually no margin of legal error. Whether there is excess of jurisdiction or merely error within jurisdiction can be determined only by construing the empowering statute, which will give little guidance. It is really a question of how much latitude the Court is prepared to allow. In the end it can only be a value judgment (See H. W. R. Wade, 'Constitutional and Administrative Aspects of the Anismenic case', Law Quarterly Review, Vol. 85, 1969 p. 198). Why is it that a wrong decision on a question of limitation or res judicata was treated as a jurisdictional error and liable to be interfered with in revision. It is a bit difficult to understand how an erroneous decision on a question of limitation or res judicata would oust the jurisdiction of the Court in the primitive sense of the term and render the decision or a decree embodying the decision a nullity liable to collateral attack. The reason can only be that the error of law was considered as vital by the Court and there is no yardstick to determine the magnitude of the error other than the opinion of the Court.'

Developing this aspect of the matter in the subsequent decision in the case ofHari Prasad Mulshanker Trivedi v. V.B. Raju : [1974]1SCR548 , Supreme Court observed at page 423 of the report inter alia as follows: --

'The question whether a person whose name is entered in the electoral roll is qualified under the Constitution and whether he suffers from any of the disqualifications specified in Section 16 can always be gone into by the Court trying an election petition. The electoral roll is never conclusive or final in respect of these matters (see the decision in P.R. Belagali v. B. D. Jatti, : [1971]2SCR611 . The argument that the question whether a person is ordinarily resident in a constituency for the purpose of registering him as a voter is a jurisdictional fact, and therefore the registering officer cannot by a wrong decision give himself jurisdiction to enter his name in the electoral roll, revives all the casuistic difficulties spawned by the doctrine of jurisdictional fact and the practical difficulty of formulating a test to distinguish jurisdictional fact from other facts. See in this connection the concurring judgment of Justice Frankfurter in William Murray Estep v. U. S. A., (1945) 327 US 114 at p. 142) and the dissenting judgment of Brandeis, J., In Letus N. Crowell v. Charles Benson, ((1931) 285 US 22). The basis for identifying jurisdictional facts has never been clarified. And, reflection on many of the reported decisions dealing with the subject will only serve to induce a feeling of desperation. We infer an intention to withhold Judicial review in the situation with which we are concerned as we think that the Parliament was acting upon the conviction that it was dealing with matters which were fully lodged in the exclusive jurisdiction of the registering officers and the appellate authorities.' In that case Mathew, J-, observed-

'Though the dividing line between lack of jurisdiction or power and erroneous exercise of it has become thin with the decision of the House of Lords in the Anisminic Case, we do not think that the distinction between the two has been completely wiped out. We are aware of the difficulty in formulating an exhaustive rule to tell when there is lack of power and when there is an erroneous exercise of it. The difficulty has arisen because the word jurisdiction is an expression which is used in a variety of senses and takes its colour from its contents (See Per Diplock, J., at page

394 in The Anisminic case). Whereas the pure theory of jurisdiction would reduce jurisdictional control to a vanishing point, the adoption of a narrower meaning might result in a more useful legal concept even though the former structure of law may lose something of its logical symmetry'. At page 98 of the 2nd Edition of S. A. Smith's Judicial Review of Administration Action it has been observed: At bottom the problem of defining the concept of jurisdiction for purpose of judicial review has been one of public policy rather than one of logic.'

7. Bearing the aforesaid trend and as also difficulties in mind a practical though not exhaustive test has to be applied in determining the question whether a particular error is a jurisdictional error making the decision vulnerable to collateral attack or merely an error within jurisdiction. It must depend upon the subject-matter of the dispute or claim and the terms of the enabling statute entitling the forum or the tribunal to adjudicate upon the claim. Section 5 of the City Civil Court Act, 1953 takes away the jurisdiction of the High Court to try suit and proceedings of civil nature if the same does not exceed Rs. 50,000/- in value, In the instant case the suit filed by the petitioner was for a sum exceeding Rupees 50,000/-. The High Court is the forum to decide the claim. Error, if there be any in deciding the claim does not affect the jurisdiction of the High Court.

8. In this case, assuming thatthe finding of the learned Judge that theplaintiff was entitled to interest at therate of 8% per annum was contrary toSection 80 of the Negotiable InstrumentsAct, 1881, the question is whether such afinding was an error within jurisdictionor an error which amounts to excess ofjurisdiction. In my opinion, when a suitormakes a claim for a sum of money exceeding Rs. 50,000/- then whether he hasa right to maintain that claim is a question which will have to be decided bythe forum which has been given the jurisdiction to decide that claim. If the contention of counsel for the respondentsis accepted then, where, a suitor makesa claim for any sum over Rs. 50,000/-for interest or for damages orfor non-payment of a particularsum but if on enquiry the learnedJudge comes to the conclusion that thesum claimed by the suitor was not thatmuch but less than Rs. 50,000/- then thatclaim would remain without any forumto be adjudicated upon. In a case of this nature, in my opinion, even though there has been much refinement on the concept of jurisdiction, a common sense point of view has to be approached. Judged from that point of view, in my opinion, in a case where a suitor has contended that the claim was beyond Rs. 50,000/- in such a situation unless it can be said that the claim ex facie was illegal, this court would lave jurisdiction to try that contention. An erroneous finding in deciding that contention or finding contrary to any provisions of law would not, in my opinion, amount to excess of jurisdiction but would be an error within jurisdiction. In the instant case, the issue of jurisdiction was specifically raised before the learned Judge and was negatived. In the aforesaid view of the matter, I am of the opinion that the decree was not a nullity. Whether the finding of the learned Judge on the question of interest was erroneous or not I am not deciding as this is the subject-matter of appeal before this court. Counsel drew my attention to the observations of the Supreme Court in the case of Kiron Singh v. Chaman Paswan, : [1955]1SCR117 . The ratio of the said decision is not in dispute in the instant case,

8-A. The next question that arises for consideration is that in this case it was contended that the decree drawn up was contrary to the provisions of the High Court Rules and as such was incapable of execution. My attention was drawn to Rule 29 of Chapter VI of the Original Side Rules of the High Court of Calcutta. The said rule provides as follows: --

'29. Where the draft of any decree or order requires to be settled in the presence of the parties, the Registrar or Master shall, by notice in writing, appoint a time for settling the same; and the parties must attend such appointment, and produce to the office their briefs and such other documents as may be necessary to enable him to settle the draft. The notice will be sent from the Registrar's office to the attorneys of the parties, with a receipt book in which shall be obtained the signature of the attorney or clerk with whom the notice shall be left.

The notice shall be served on the parties who have appeared in person, by the party who has the carriage of the decree or order. When so served the original notice, with a memorandum endorsed thereon of the service of a copy thereof, signed by the party by whom such service was made, must be delivered to the officer, who may, if not satisfied that service has been duly made, require such service to be verified by affidavit.'

9. In this connection, counsel drew my attention to the observations of the Bench decision of this Court in the case of Nanalal M. Varma & Co. (Gunnies) Pvt- Ltd. v. Gordhandas Jerambhai, : AIR1965Cal547 as also to the observations of mine in the decision in the case of The Administrator General of West Bengal v. Kumar Purnendu Nath Tagore, : AIR1970Cal231 . It was contended that the signature of the attorney or the clerk of the service of the notice for settlement of the draft had not been obtained. It is apparent from the records that the notice was sent from the Registrar's office to the attorney concerned. But it appears that there was no evidence of any signature having been obtained from the attorney or the clerk of the respondents. Counsel for the respondents contended that obtaining of such signature was mandatory. Therefore, for non-obtainment of the said signature the decree drawn up could not be enforced by a final decree, In the instant case, if it be held that obtaining of the signature from the attorney or the clerk to whom the notice is intended to be given is a mandatory provision then by refusing to sign the attorney or the clerk or the party concerned can hold up settlement of the decree. In my opinion, such a construction cannot be made that in all cases obtaining of the signature of the attorney or the clerk where notice has to be given for settlement of the decree is mandatory Furthermore, in the instant case the respondent has not indicated what prejudice the respondent has suffered by non-receipt of the notice, that is to say, in what other fashion the decree should have been settled. In the aforesaid view of the matter, I am unable to accept the contention that because of failure to obtain signature of the attorney or the clerk of the service of notice there has been such non-compliance of the provisions of rule that the preliminary decree as settled becomes non est or non-enforceable. In the aforesaid view of the matter, both the contentions urged in opposition to this application are rejected.

10. Therefore, there will be an order in terms of prayers (a), (b), (c) and (d) of the petition.

11. There will be a stay of operation of this order till 15th January, 1976.