

## APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.

1913.

September 29.

HARI GOVIND KALKUNDRI (ORIGINAL PLAINTIFF), APPELLANT, v. NAR-SINGRAO KONHERRAO DESHPANDE, BY THE COURT OF WARDS, AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.\*

*Civil Procedure Code (Act V of 1908), Order XXI, Rule 7 (corresponding to Act XIV of 1882, section 225)—Court of Wards Act (Bom. Act I of 1905), sections 31 and 32—Executing Court, power of—Jurisdiction of the Court which passed the decree under execution—Section 32 of the Court of Wards Act (Bom. Act I of 1905) not retrospective.*

Under Order XXI, Rule 7 of the Civil Procedure Code (Act V of 1908) the executing Court has no power to question the jurisdiction of the Court which passed the decree under execution.

Section 32 of the Court of Wards Act (Bom. Act I of 1905) was not intended to apply to pending suits. In terms it refers to suits "brought by or against" a Government ward. Section 32 must be read with section 31 which provides that before such a suit is brought notice shall be delivered to, or left at, the office of the Court of Wards. Thus section 32 does not apply to suits pending at the time of the assumption of superintendence of the ward's estate by the Court of Wards.

FIRST appeal against the decree passed by L. C. Crump, District Judge of Belgaum, in a darkhast for execution of a decree.

The plaintiffs brought a suit against the defendants in the Court of the Joint Subordinate Judge of Belgaum for the recovery of Rs. 950 due to them under a bond dated the 22nd September 1894. On the 27th May 1907, the Subordinate Judge passed a decree for the recovery of the amount from defendant 1 personally and from the joint property of defendants 1 and 2.

Subsequently the plaintiffs having presented a darkhast to the District Judge against the defendants'

\* First Appeal No. 105 of 1913.

property which had passed under the control of the Collector of Belgaum as the Court of Wards, the District Judge dismissed the darkhast on the ground that under the provisions of the Court of Wards Act (I of 1905) the decree was a nullity and incapable of execution.

The plaintiffs preferred an appeal.

*S. R. Bakhle*, for the appellants (plaintiffs) :—This is an application for the execution of a decree in a suit brought against the defendants before they were made the wards of Court. The suit was brought in 1906. On the 13th May 1907 Government passed a Resolution, No. 2098, notifying that the Court of Wards would take up the management of the estate of the defendants on the 15th May 1907. These facts were brought to the notice of the Subordinate Judge before whom the suit was pending and he was requested to make the Court of Wards a party, but he declined to do so on the ground that “the section had no retrospective effect”. The decree was passed on the 29th May 1907 against defendant 1 personally and against the joint estate of defendants 1 and 2. On the 5th June 1907, a notification under section 13 of the Court of Wards Act was issued calling upon persons having claims against the Government wards or their property to appear. The claim of the plaintiffs was accordingly submitted to the Court of Wards under section 15 of the Act, and after investigation the Court of Wards issued a certificate under section 17 of the Act and this certificate was filed with the darkhast for execution. The lower Court held that under section 32 of the Court of Wards Act, it was obligatory on the Court to make the Court of Wards a party to the suit and that as the decree was passed without the Court of Wards being on the record, it was a nullity. The District Judge had the matter before him as an executing Court and it has been held that such Court

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has no jurisdiction to go into the question of the validity of the decree : *Chintaman Vithoba v. Chintaman Bajaji*<sup>(1)</sup>.

Next we contend that the District Judge was wrong in holding that section 32 of the Court of Wards Act was applicable to the facts of the present case. Section 32 is to be read with section 31 of the Act and they both refer to suits brought after the application of the Act. They do not apply to pending suits. The Court of Wards is cognizant of pending suits and has made provision about them in appropriate terms. Section 15 refers to pending suits and section 17 refers to proceedings in execution being "instituted or continued". If section 32 had been intended to apply to pending suits, the Legislature would have used similar words. We contend, therefore, that the view of the Subordinate Judge, who tried the suit and passed the decree, was correct.

We took all the steps necessary under the Court of Wards Act and obtained a certificate under section 17 by which it would appear that the Court of Wards had adjudicated the claim and recognized the decretal debt as a just debt. The District Judge should have, therefore, allowed the execution to proceed.

*N. A. Shiveshwarkar* for the respondents (defendants represented by the Court of Wards) :—

[SCOTT, C. J. :—What *locus standi* have you ?]

We are brought on the record by the plaintiffs as the person in possession of the estate against which the decree has been passed.

We contend that the question of the validity of the decree can be raised before the executing Court : *Imdad Ali v. Jagan Lal*<sup>(2)</sup>. The Court has to be satisfied

<sup>(1)</sup> (1896) 22 Bom. 475.

<sup>(2)</sup> (1895) 17 All. 478 at p. 482.

that the decree is good before it executes it : *Haji Musa Haji Ahmed v. Purmanand Nursey*<sup>(1)</sup>.

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If the defendants are minors, the Court cannot pass a decree unless the minors are properly represented before the Court. The Court of Wards Act puts the wards also under a disability, similar to that suffered by minors and lunatics. Consequently a decree obtained against a ward when he is not properly represented by the Court of Wards would be a nullity. Proceedings before the Court prior to the decree without a proper representation would be unauthorized.

[BATCHELOR, J. :—There is nothing beyond section 32 to make the proceeding bad.]

That would be so. If the Legislature wanted to exclude pending suits, it would have done so in express terms. The Legislature was aware of pending proceedings since it refers to them in section 17. The fact of the certificate being granted does not make any difference.

The certificate merely certifies that there is a claim. It cannot make a decree good if it is bad. The Court has to consider if there was inherent defect of jurisdiction in passing the decree.

[SCOTT, C. J. :—The Civil Procedure Code of 1908 has made a change in section 225 of the Code of 1882 by omitting the words “or of the jurisdiction of the Court which passed it”. Therefore the *ratio* of the decision in *Haji Musa Haji Ahmed v. Purmanand Nursey*<sup>(1)</sup> no longer exists.]

We object to the darkhast for execution being presented to the District Judge. The decree was passed by the Court of the Joint Subordinate Judge of Bel-

<sup>(1)</sup> (1890) 15 Bom. 216.

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gaum and under section 34 of the Civil Courts Act the darkhast ought to have been made to that Court.

*Bakhle* in reply :—The darkhast was filed in the District Court as that Court alone has the jurisdiction to entertain matters before the Court of Wards. The objection of presentation in the wrong Court was not raised in the lower Court under the present Code of 1908. Therefore it cannot be allowed to be raised now. It must be taken to have been waived.

SCOTT, C. J. :—This is an appeal against an order of the District Judge of Belgaum dismissing an application for execution of a decree which had been passed by the Joint Subordinate Judge at Belgaum in suit No. 246 of 1906. The decree was against defendant 1 personally and against the joint estate of defendants 1 and 2. It has not been made clear to us why the application for execution was not made to, or entertained by, the Court which passed the decree. But we will assume that the application was rightly made to the District Court. The learned District Judge dismissed the application on the ground that the decree was a nullity and incapable of execution. There are cases which were decided under the Code of 1882 in which the opinion was expressed that it is open for an executing Court to consider whether the decree sent to it for execution was passed by a Court having jurisdiction to pass it. The dictum to that effect in the Bombay Reports is to be found in *Haji Musa Haji Ahmed v. Purmanand Nursey*<sup>(1)</sup> and it was accepted in *Imdad Ali v. Jagan Lal*<sup>(2)</sup>. The ratio of the dictum in *Haji Musa Haji Ahmed v. Purmanand Nursey*<sup>(1)</sup> was that the Code recognizes in section 225 the right of the executing Court to enquire into the jurisdiction of the Court which passed the decree. That section, however,

(1) (1890) 15 Bom. 216,

(2) (1895) 17 All. 478

has been altered in the Code of 1908, for the words: "or of the jurisdiction of the Court which passed it," have been omitted in Order XXI, Rule 7, and we think that the inference is clear that the executing Court has no power under the present Code to question the jurisdiction of the Court which passed the decree under execution. We are, therefore, of opinion that the learned District Judge acted *ultra vires* in deciding that the decree which he was called upon to execute was a nullity. We further disagree with him in the reasons which he assigned for holding that the decree was a nullity. The facts upon which he based his conclusion were, that on the 13th May 1907, a few days before the decree, a notification was issued under section 13 of the Court of Wards Act (I of 1905) to the effect that the Court of Wards would assume superintendence of the estate of the defendants with effect from the 15th May 1905. The Joint Subordinate Judge was informed of the notification, and was asked by the defendants to make the Court of Wards a party. He, however, declined to do so, saying that the section had no retrospective effect. Presumably by "the section" he meant section 32 of the Court of Wards Act of 1905. We agree with the learned Subordinate Judge in thinking that that section was not intended to apply to pending suits. In terms it refers to suits "brought by or against" a Government ward. The suit before the Joint Subordinate Judge was not such a suit. Section 32 must be read with section 31, which provides that before such a suit is brought, notice shall be delivered to, or left at the office of, the Court of Wards. This is impossible in the case of a suit pending at the time of the assumption of superintendence of the estate by the Court of Wards. Moreover, the phraseology of section 32 relating to suits makes no such distinction as that of section 17 which

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relates to execution of decrees, and provides that no proceeding, in execution of any decree against the Government ward or his property shall be *instituted or continued* until the decree-holder files a certificate from the Court of Wards that the decree claim has been duly submitted. That apparently is the only provision which the Legislature has thought necessary to make for the protection of the estate of a Government ward where a decree has been passed in a suit instituted before the assumption of superintendence by the Court of Wards. For the above reasons, we set aside the order of the District Judge dismissing the darkhast with costs. The respondents must pay the costs, if any, of the hearing in the lower Court and the costs of this appeal.

*Order set aside.*

G. B. R.

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ORIGINAL CIVIL.

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*Before Mr. Justice Macleod.*

1912.

December 4.

IN RE SUBRATI JAN MAHOMED, AN INSOLVENT.\*

*Presidency Towns Insolvency Act (III of 1909), sections 15 (2) and 21 (1)—Adjudication, annulment of, when Court has jurisdiction to pass order for—Debts, necessity that all debts of the insolvent actually and properly proved in the bankruptcy should have been fully paid in cash—Conduct of insolvent applying for annulment of an adjudication order, duty of Court to scrutinize—Discretion of Court, how exercised.*

A debtor who has been adjudicated insolvent on his own petition cannot, even with the leave of the Court, withdraw his petition. Section 15 (2) of the Presidency Towns Insolvency Act only applies to petitions that are pending before any order has been made, as also does section 13 (8) dealing with petitions by creditors. Once an order of adjudication has been made the debtor becomes an insolvent and remains so until the order of adjudication is annulled or he obtains his discharge. The Court can only annul the order of

\* Insolvency Suit No. 338 of 1912.