APPELLATE CIVIL

Before Ranjit Singh Sarkaria, J.

DIAL DASS,—*Appellant.*

versus

JOINT HINDU FAMILY FIRM, KNOWN AS NIYADAR MAL-PIARA LAL AND OTHERS,—*Respondents.*

Execution Second Appeal No. 1513 of 1964

April 16, 1968.

Code of Civil Procedure (Act V of 1908)—S. 11—Trial Court passing a decree after deciding the issue of jurisdiction—Such decision based on High Court authority—The High Court authority over-ruled by Supreme Court—Objection regarding jurisdiction—Whether can be taken in the Executing Court—Bar of resjudicata—*Whether applies to such objection—Administration of Evacuee Property Act (XXXI of 1950, as amended by Act I of 1960)—S. 8(2-A—"Purports to have been vested as evacuee property"—Meaning of.*

Held, that there can be no quarrel with the fundamental principle that a decree passed by a Court without jurisdiction is a nullity and that its invalidity could be set up whenever and where ever it is sought to be enforced or relied upon, even at the stage of execution and even in collateral proceedings. A defect of jurisdiction, more particularly when it is with respect to the subject matter of the action, strikes at the very authority of the Court to pass any decree. But there is another equally important and no less fundamental principle resting on grounds of fairness and sound public policy, viz., that while human beings are mortal, litigation cannot be allowed to grow immortal, bringing in its wake repeated and endless vexation to parties about the same matter, and a disconcerting unpredictability in judicial process. According to that principle, if an objection as to jurisdiction was raised at the trial of the suit, and it was finally adjudicated after full enquiry and contest by the trial Court, the decision rendered on that issue, unless reversed or modified in appeal or revision, operates as *res judicata* between the parties, and the matter cannot be reagitated by them in a subsequent suit, much less in a subsequent stage of the same proceeding, or in execution of the same decree. Even if the decision of the trial Court on the issue of jurisdiction is based on the High Court authority and that authority is subsequently over-ruled, still that will not prevent the decision of the trial Court on the issue from operating as *res-judicata* between

the parties to it. Even an erroneous decision on a question of law is *res-judicata* because it is the decision and not the reasoning that operates as *res-judicata.*

[Para 3].

Held, that the phrase "purports to have vested as evacuee property" in section 8(2-A) of Administration of Evacuee Property Act, 1950, is indicative of what appears on the face of it or is apparent even though in law it may not be so. Despite the wide amplitude of the phrase, an essential element of it is that there must be some *prima facie* evidence or act indicative of outward manifestation of vesting as evacuee property in the Custodian.

[Para 9].

Execution Second appeal from the decree of the Court of Shri E. F. Barlow, District Judge, Karnal, dated 5th October, 1964, affirming that of Additional Sub-Judge, IIIrd Class, Karnal, dated 3rd June, 1964, dismissing the objection petition under section 47, Code of Civil Procedure; filed by the Judgment-Debtor.

CH. ROOP CHAND, ADVOCATE; for the Appellant.

D. N. AGGARWAL, ADVOCATE, for Respondent No. 1.

ANAND SARUP, ADVOCATE-GENERAL (HARYANA) WITH J. C. VERMA, ADVOCATE, for Respondent No. 2.

ORDER

SARKARIA, J.—This execution second appeal arises, out of the following circumstances:—

Niyadar Mal Piare Lal obtained a decree for possession from the Court of the Subordinate Judge, Karnal, against Dial Dass, in Suit No. 494 of 1959, decided on 9th February, 1960. The decree-holder took out execution of the decree on 28th February, 1968. Dial Dass judgment-debtor raised objections that the aforesaid decree, dated 9th February, 1960, being a nullity was not executable as it was passed by a Court which had no jurisdiction in the matter. The objection was two-fold: (1) That the jurisdiction of the Civil Court to pass the decree was barred under section 46 of the Administration of Evacuee Property Act, 1950, (hereinafter referred to as 'the Act'); and (2) the decree had been invalidated by the provisions of sub-section (2-A) of section 8 of the Act, which amendment was effected subsequently to the passing of the decree, by the Amending Act 1 of 1960. The executing Court dismissed these objections. The judgment-debtor went in appeal to

the District Judge, Karnal. The latter dismissed the appeal and affirmed the order of the executing Court. Hence this second appeal by the judgment-debtor.

(2) The first contention of the learned counsel for the appellant is, that the jurisdiction of the trial Court to hear and determine the suit in which the decree was passed, was already barred under section 46 of the Act. In support of this contention, reliance has been placed on the recent dictum of the Supreme Court in *Custodian Evacuee Property Punjab and others* v. *Jafran Begum* (1). It is argued that where the decree suffers from an inherent lack of jurisdiction with the Court that passed it, the objection can be taken at any stage even in execution proceeding. In support of this argument, counsel has referred to *Kiran Singh and others* v. *Chaman Paswan and others* (2).

(3) I have no quarrel with the fundamental principle that a decree passed by a Court without jurisdiction is a nullity and that its invalidity could be set up whenever and wherever it is sought to be enforced or relied upon, even at the stage of execution and even in collateral proceedings. A defect of jurisdiction, more particularly when it is with respect to the subject matter of the action, strikes at the very authority of the Court, to pass any decree. But there is another equally important and no less fundamental principle resting on grounds of fairness and sound public policy, viz., that while human beings are mortal, litigation cannot be allowed to grow immortal, bringing in its wake repeated and endless vexation to parties about the same matter, and a disconcerting unpredictability in judicial process. According to that principle, if an objection as to jurisdiction was raised at the trial of the suit, and it was finally adjudicated after full enquiry and contest by the trial Court, the decision rendered on that issue, unless reversed or modified in an appeal or revision, operates as *res judicata* between the parties, and the matter cannot be reagitated by them in a subsequent suit, much less in a subsequent stage of the same proceeding, or in execution of the same decree. In such cases, the executing Court will refuse to go behind the decree and reopen the matter finally settled at the trial. This is exactly the situation here. At the trial, an objection

(1) 1968 P.L.R. 1.
(2) A.I.R. 1954 S.C. 340.

as to the jurisdiction of the civil Court was taken. An issue was framed on the point; evidence was led on that issue, and it was heard and finally decided in favour of the plaintiff. Previously, on the point, there was some conflict of judicial decision. To settle that conflict a Full Bench of this Court in *Mst. Jafran Begum* v. *Custodian, Evacuee Property* (3), held that the Custodian could not finally decide a question of title even if it properly arose in any proceedings under the aforesaid Act. The *ratio* of the Full Bench being binding on the Courts below, was followed by them in passing the orders impugned in this appeal.

(4) It is true that subsequently, the Supreme Court in (*Jafran Begum's case*) (1), found the aforesaid decision of the Full Bench to be erroneous in law. But that will not prevent the decision of the trial Court on this issue from operating as *res judicata*. There is 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 judicial decision has no bearing upon the question, whether or not it operates as *res judicata*, because it is the decision and not the reasoning on which it is based, that operates as res judicata.

(5) Calcutta High Court in its judgment reported as *Benoy Krishna Mukerjee* v. *Mohan Lal Goenka* (4), has taken the view that the execution proceedings conducted in the Asansol Court were void and inoperative for lack of inherent jurisdiction in that Court, and that such a plea was not barred on the principle of *res judicata*. Reversing that finding, the Supreme Court held that a decision in the previous execution case between the parties, viz., that the matter was not within the competence of the executing Court, even though erroneous, is binding on the parties *Mohanlal Goenka* v. *Benoy Krishna Mukerjee and others* (5), Gulam Hasan, J., in para 26, observed:—

> "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, but whether the

(3) I.L.R. (1963) 1 Punj. 281=1962 P.L.R. 709.
(4) A.I.R. 1950 Cal. 287.
(5) A.I.R. 1953 S.C. 65.

judgment-debtor is precluded by the principle of constructive *'res judicata'* from raising the question of jurisdiction. We accordingly hold that view taken by the Court on the question of 'res judicata' is not correct."

(6) It is well settled that a civil Court has power to decide its jurisdiction to try a suit or proceeding pending before it is barred by certain statute, even though it may turn out an investigation that it has no jurisdiction. (See *Messrs Bhatia Co-operative Housing Society, Ltd.* v. *D. C. Patel* (6). In the instant case, the issue as to jurisdiction was heard and finally decided by the Court passing the decree. The principle enunciated by the Supreme Court in *Mohanlal* Goenka's case applies with greater force to the facts of the present case. Whereas in *Mohanlal Goenka's case,* the doctrine, of *res judicata* was applied constructively, in the case before me it will apply directly. The first contention of the learned counsel for the appellant, not being sustainable, is rejected.

(7) As regards the second contention, the principle of *res judicata* will not be attracted either constructively or directly. Sub-section (2-A) was inserted by an amendment in section 8 of the Act after the passing of the decree in question. It could not, therefore, be taken before the trial Court. The language of the amendment clearly shows that it was intended to be retrospective. This sub-section (2-A) says:—

"(2-A) Without prejudice to the generality of the provisions contained in sub-section (2), all property which under any law repealed hereby *purports to have vested as evacuee property* in any person exercising the powers of Custodian in any State shall, notwithstanding any defect in, or the invalidity of, such law or any judgment, decree or order of any court, be deemed for all purposes to have validly vested in that person, as if the provisions of such law had been enacted by Parliament and such property shall, on the commencement of this Act, be deemed to have been evacuee property declared as such within the meaning of this Act and accordingly any order made or other action taken by the Custodian or any other authority in relation to such property shall be deemed to have been validly and lawfully made or taken."

(6) A.I.R 1963 S.C. 16.

(8) Sub-section (2-A) was introduced by section 2 of Act 1 of 1960, which came into force on the 27th February, 1960. It is aimed to cure possible defects in the matter of vesting under some Provincial or State laws. The validity of these Provincial or State laws was questionable. In order to validate the original defective vesting in the Custodian under the Provincial or State Laws before the 17th April, 1950, that is, before the commencement of the Central Act 34 of 1950, the words "purports to have vested" were introduced in this sub-section. The word "purport" has a wide meaning. In its dictionary sense, it means, 'to give out as its meaning'; 'to convey, to imply, or profess outwardly'; 'to have the appearance of being, intending, claiming, etc.'.

(9) As pointed out by their Lordships of the Supreme Court in *Azimunnissa* v. *Deputy Custodian* (7), it means "what appears on the face of the instruments; the apparent and not the legal import". It is indicative of what appears on the face of it or is apparent even though in law it may not be so. Despite the wide amplitude of the phrase "purports to have vested as evacuee property", an essential element of it is that there must be some *prima facie* evidence or act indicative of outward manfestation of vesting as evacuee property in the Custodian. In the case before me, both the Court below have found it as a fact that even such *prima facie* evidence was lacking in this case. The concurrent finding of the Courts below is, that so far as the shop in dispute (No. 748), claimed by Dial Dass judgment-debtor, is concerned, it was 'not entered as evacuee property in the relevant register of the Custodian'. The District Judge has affirmed the finding recorded by the Court of first instance, as below: —

> "In the suit against Dayal Dass there is different position altogether. According to the plaintiff, the property in suit is No. 748, marked 'B' in Exhibit P. 4, and not 749 which is towards the north of 748. In the plaint also, the boundary of the property in suit towards the north is shown to be the shop of the plaintiff. Thus, it is clear that the plaintiff has filed the suit for shop No. 748 and not for 749. According to the statement of Avtar Singh, property No. 748 has not been entered in the register. It is only 749 that is so entered. Even regarding No. 749, it is shown as Hindu property. Thus, this property in suit is not an evacuee property."

(7) A.I.R. 1961 S.C. 365.

(10) In the circumstances, the finding of the Courts below is correct, that shop No. 748 not being evacuee property, did not 'purport to have vested' as such in the Custodian. Sub-section (2-A) of section 8 of the Act is thus of no avail to the appellant. The result is that the appeal fails and is hereby dismissed. In view of the law point involved, I would leave the parties to bear their own costs.

K. S. K.

APPELLATE CIVIL

Before Gurdev Singh, J.

JAGJIT SINGH,—*Appellant.*

versus

MOHINDER KAUR,—*Respondent.*

Regular Second Appeal No. 763 of 1967

April 17, 1968.

Hindu Marriage Act (XXV of 1955)—Ss. 13 and 29(2)—Right of divorce of a person governed by the Act—Whether confined to the grounds specified in section 13—Such right recognised by Custom or conferred by special enactment on other ground—Whether saved—Divorce on such other grounds—Whether can be obtained without the intervention of the Court—Custom (Punjab)—Husband—Whether can dissolve marriage by repudiation—Riwaj-i-am *(Ludhiana District)—Husband's right of divorce under—Grounds of—Stated.*

Held, that though the provisions of the Hindu Marriage Act have overriding effect and they must prevail irrespectively of any text or rule of Hindu Law or any custom or usage in force immediately before the commencement of the Act so far as it is inconsistent with any of the provisions of the Act. Section 29(2) of the Act keeps in tact the right of a Hindu to obtain dissolution of marriage, whether such right is recognised by custom or conferred by any special enactment, even after the passing of the Act. In other words, if under custom or any special enactment, a Hindu has a right to obtain dissolution of marriage on grounds other than those enumerated in section 13 of the Act, 1955, he is entitled to avail of the same.

[Paras 8 and 9].