Sushil Kumar Metha vs Gobind Ram Bohra on 10 November, 1989

Equivalent citations: 1989 SCR, SUPL. (2) 149 1990 SCC (1) 193, AIRONLINE 1989 SC 9, 1990 (1) SCC 193, 1990 HRR 1, (1990) 1 PUN LR 182, (1990) 1 REN CR 423, (1990) 1 APLJ 41, (1990) 1 LJR 777, (2016) 1 SCALE 254

Author: K. Ramaswamy

Bench: K. Ramaswamy, Misra Rangnath, P.B. Sawant

PETITIONER:
SUSHIL KUMAR METHA

Vs.

RESPONDENT:
GOBIND RAM BOHRA

DATE OF JUDGMENT10/11/1989

BENCH:
RAMASWAMY, K.
BENCH:
RAMASWAMY, K.
MISRA RANGNATH
SAWANT, P.B.

CITATION:
1989 SCR Supl. (2) 149 1990 SCC (1) 193
JT 1989 Supl. 329 1989 SCALE (2)1104

ACT:
Haryana Urban Rent Control Act, 1973--Section 13--Controller has exclusive jurisdiction to order eviction Civil Court inherently lacks jurisdiction to entertain suit for eviction.
Code of Civil Procedure 1908: Section 11 and 47 Order 9, Rule 13--Jurisdiction determination of--Court without jurisdiction passing decree-nullity ,and non est--Does not operate as res judicata.

HEADNOTE:
The respondent had filed a suit before the Senior Sub Judge, against the appellant for ejectment and recovery of arrears of rent and damages for use and occupation of the

shop, let out to him. The suit was decreed ex parte on October 20, 1977. The application under Order 9, Rule 13. C.P.C. to set aside the ex parte decree was dismissed on January 10, 1979 and was confirmed on appeal on August 7, 1979 and later in revision by the High Court.

When the respondent-landlord took out execution proceedings for ejectment of the appellant-tenant, he objected under Section 47 of Code of Civil Procedure contending that the decree passed by the civil court was a nullity, as the premises in question was governed by the Haryana Urban (Control of Rent and Eviction) Act 11 of 1973. According to him the Controller under the Act was the competent authority regarding claims for ejectment and by necessary implication, the civil Court was divested of jurisdiction to take cognisance and pass a decree for ejectment. That objection was overruled and further revision to the High Court also failed. Simultaneously the appellant had also filed a writ petition under Art. 227 of the Constitution which was also dismissed. Hence this appeal by the appellant-tenant by special leave.

Allowing the appeal, this Court,

HELD: Normally a decree passed by a court of competent jurisdiction after adjudication on merits of the rights of the parties, operates as res judicata in a subsequent suit or proceedings and binds the parties

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or the persons claiming right, title or interest from the parties. Its validity should be assailed only in an appeal or revision as the case may be. In subsequent proceedings, its validity cannot be questioned. [162G]

A decree passed by a court without jurisdiction over the subject matter or on other grounds which goes to the root of its exercise of jurisdiction, lacks inherent jurisdiction. It is a coram non judice. A decree passed by such a court is a nullity and is non est. Its invalidity can be set up whenever it is sought to be enforced or is acted upon as a foundation for a right, even at the stage of execution or in collateral proceedings. The defect of jurisdiction strikes at the authority of the court to pass a decree which cannot be cured by consent or waiver of the party. [162H; 163A]

(See Kiran Singh & Ors. v. Chaman Paswan & Ors., [1955] 1, SCR 117: Ferozi Lal Jain v. Man Mal & Anr., AIR 1979 SC 794: Bahadur Singh v. Muni Subrat Dass, [1969] 2 SCR 432; Smt. Kaushalya Devi & Ors. v. K.L. Bansal, AIR 1970 SC 838; Chandrika Misir & Anr. v. Bhaiya Lal, [1973] 2 SCC 474; Ledgard v. Bull, [1886] Law Report, 13 AC 134; Bartan v. Fincham, [1921] 2 K.B. Division, 291 at 299; Peachery Property Corporation v. Robinson, [1966] 2 All E.R. 981,983; Choudari Rama (dead) per L.R. Choudharv Ganapathi v. Qureshi Bee, [1983] 2 Andhra Law Times 133 approved;)

A question relating to jurisdiction of a court or interpretation of provisions of a statute cannot be deemed to have been finally determined by an erroneous decision of a

court. Therefore the doctrine of res judicata does not apply to a case of decree of nullity. If the court inherently lacks jurisdiction consent cannot confer jurisdiction. Where certain statutory rights in a welfare legislation are created, the doctrine of waiver also does not apply to a case of decree where the court inherently lacks jurisdiction. [163F-G]

(See Mathura Prasad Bajoo Jaiswal & Ors. v. Dossibai N.B. Jeejeebhey, [1970] 3 SCR 830; Tarini Charan Bhattacherjee's case I.L.R. 56, Cal. 723).

It is the Controller under the Act that has exclusive jurisdiction to order ejectment of a tenant from a building in the urban area leased out by the landlord. Thereby the civil court inherently lacks jurisdiction to entertain the suit and pass a decree of ejectment. [164A]

(See Barrachlough v. Brown, [1897] A.C. 615; Doe v. Bridges, 151
[1831] 1, B & Ad. 847 at 859; Premier Automobiles v. K.S. Wadke, [1976] 1 SCR 427.

Therefore in the instant case, though the decree was passed and the jurisdiction of the court was gone into in issue Nos. 4 and 5 at the ex parte trial, the decree thereunder is a nullity and does not bind the appellant. Therefore it does not operate as res judicata. The courts below have committed grave error of law in holding that the decree in the suit operated as res judicata and the appellant cannot raise the same point once again at the execution. [164B]

Hari Prashad Gupta v. Jitender Kumar Kaushik, [1982] Vol. 84, Punjab Law Reporter, 150; Sadhu Singh v. District Board, Gurdaspur & Anr., [1962] Punjab Law Reporter, Vol. 64, 1; Vasudev Dhanjibhai Modi v. Rajabhat Rabdul Rehman & Ors., [1970] 1 SCC 670; Seth Hiralal Patni v. Sri Kali Nath, [1962] 2 SCR 747; Phool Chand Sharma & Ors. v. Chandra Shankar Pathak dr Ors., [1963] SCR Suppl. 2 828; Mohanlal Goenka v. Benoy Krishna Mukherjee & Ors., [1953] SCR 377.

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 4599 of 1989.

From the Judgment and order dated 16.9.1988 of the Punjab and Haryana High Court in Review Application 22-CII of 1988 in Civil Revision No. 2439 of 1980.

S.P. Goel, G.B. Singh and K.K. Mohan for the Appellant. S.M. Ashri for the Respondent.

The Judgment of the Court was delivered by K. RAMASWAMY, J. Special leave granted.

This appeal under Article 136 arises against the order dated Sept. 16, 1988 of the High Court of Punjab & Haryana refusing to review the order dated August 11, 1988 made in Civil Revision No. 2439/80 on its file. The facts leading to the decision are that the respondent Govind Ram, the father of the respondents/landlord laid the suit No. 118/77 (ini- tially numbered as O.S. No. 276/75) on the file of Sr. Sub Judge for ejectment and recovery of arrears of rent and damages for use and occupation of the shop in Gurgaon, let out to the appellant/tenant. The suit was originally laid in the Court of Sub Judge, IIIrd Class, Gurgaon, which was transferred later to the Sr. Sub Judge, Gurgaon, which was decreed ex-parte on October 20, 1977. The application under Order 9 Rule 13 C.P.C. to set aside the ex-parte decree was dismissed on January 10, 1979, and was confirmed on appeal on August 17, 1979 and in revision by the High Court on October 15, 1979. When the landlord laid the execution application for eject- ment the appellant objected under section 47 of C.P.C. contending that the decree of the Civil Court is a nullity as the premises in question is governed by the Haryana Urban (Control of Rent & Eviction) Act 11 of 1973, for short 'the Act'. The Controller under the Act is the competent forum regarding claims for ejectment on fulfilment of any of the conditions enumerated under Section 13 thereof. The Civil Court is divested of jurisdiction to take cognisance and pass a decree for ejectment of the appellant. That objection was overruled and on further revision the High Court dis- missed the revision by order dated March 19, 1980. Simulta- neously he also filed Writ Petition under Article 227 which was dismissed on September 30, 1988. This appeal is directed against that order of dismissal.

The contention raised by Shri S.P. Goel, the learned Sr. counsel for the appellant is that by operation of Section 13 of the Act the only authority to pass a decree of ejectment of the appellant tenant is the Controller under the Act and by necessary implication the jurisdiction of the Civil Court is ousted. The Civil Court lacked inherent jurisdiction to take cognisance of the cause and to pass a decree. The decree is thus a nullity. The challenge to a decree on the ground of nullity can be raised at any stage and even in execution. The courts below have committed manifest error of law in not considering the legal question in its proper perspective. The shop consists of the original building belonging to the landlord, but a small part thereof in the frontside was constructed on municipal land. Tenancy of the building is governed by the Special Act and, therefore, the decree of the Civil Court is a nullity and is inexecutable. Shri Ashri, the learned counsel for the respondents refuted this contention. Firstly he argued that the leave applica- tion is barred by limitation. Secondly, he contended that the appellant had raised the plea of want of jurisdiction at the trial. Though he remained ex-parte, the trial court considered the objection under issue Nos. 4 and 5 and over- ruled the objection. The decree became final; thereby the decree operates as res judicata. He also further contends that the Act does not apply to the building in question. Under Section 3, municipal land is exempted from the provi- sions of the Act and thereby the only forum to lay the action is the Civil Court. The Civil Court having jurisdic- tion has validly granted the decree. The decree having been allowed to become final, it is not open to the appellant to ask the executing court to go behind the decree The question that emerges is whether the Civil Court lacked inherent jurisdiction to entertain the suit for ejectment of the appellant-tenant and the decree so passed is a nullity. The Act was enacted with the object of con- trolling the increase of rent of buildings and rented lands situated within the limits of urban areas and "the eviction of the tenants therefrom". Section 2(a) defines 'building' which means any building or a part of a building let for any purpose whether being actually used for that purpose or not, including any land .....appurtenant to such building ..... but does not

include a room in a hotel, hostel or boarding house. Section 2(b) defines 'Controller' as any person who is appointed by the State Government to perform the functions of a Controller under the Act. Landlord has been defined under Section 2(c) and Section 2(f) defines rented lands to mean any land let separately for the purpose of being used principally for business or trade. 'Tenant' has been defined under Section 2(h). Section 3 authorises the State Government by notifica- tion to exempt any particular building or rented land or any class of building or rented lands from the application of any or all the provisions of the Act. Section 13 contains the provisions for eviction of tenants, Sub-s. (1) thereof reads:

> "Eviction of tenants--(1) A tenant in posses- sion of a building or a rented land shall not be evicted therefrom except in accordance with the provisions of this section."

The other provisions are not necessary. The sole ground raised by the landlord for eviction was that the appellant had committed default in the payment of rent and thereby had became liable for ejectment. Accordingly, he issued a notice under Section 106 of the Transfer of Property Act determin- ing the tenancy and laid this suit. Section 13 gives the right to the landlord to seek eviction of the tenant for default in the payment of rent. The Act provides the protec- tion of continued tenancy and remedy of ejectment for breach of covenants in the lease and other statutory grounds as provided. It provides that the remedy and the forum and the decree of ejectment passed by the Controller or the appel- late authority or the revisional authority or confirmation thereof either in appeal or revision is final under the Act. Thereby the exclusive jurisdiction to take cognisance of the cause of action for ejectment of the tenant from a building or rented land situated in urban areas is governed by the provisions of the Act and is exclusively to be dealt with under Section 13 of the Act. By necessary implication the jurisdiction of the Civil Court under Section 9 of C.P.C. is excluded. It is undoubtedly true that open land is a part of the frontage of the shop and belonged to the municipality which the landlord had taken on lease from the Municipality. As regards the munici- pal land, the landlord was a lessee of the Municipal Commit- tee. But on construction of the building covering a portion of the municipal land the landlord became landlord and the appellant his tenant for the purposes of the Act. This view was held by the full Bench of the Punjab and Haryana High Court in Hari Parshad Gupta v. Jitender Kumar Kaushik, [1982] Vol. 84, Punjab Law Reporter, 150. We agree with the view. Thereby though there is a notification issued by the State Government exempting the lands belonging to Gurgaon Municipality from the provisions of the Act, the building of the respondent does not get exempted from the provisions of the Act. It is the finding of the forums below that the shop in question stands mainly on the land of the landlord and a small portion is located on municipal land. Therefore, we are of the view that the building was governed by the provi- sions of the Act and the exemption accorded by the Govern- ment under Section 3 was not attracted to the premises. In Sadhu Singh v. District Board, Gurdaspur & Anr., [1962] Punjab Law Reporter, Vol. 64, 1 the question was whether to the reconstructed building governed by the provisions of East Punjab Urban Rent Restriction Act the exemption under Section 3 applied. It was held to be so by the Division Bench. But the present facts are different.

In Barrachlough v. Brown, [1897] A.C. 615 the House of Lords held that when a special statute gave a right and also provided a forum for adjudication of rights, remedy has to be sought only under the provisions of that Act and the common law court has no jurisdiction.

In Doe v. Bridges, [1831] 1 B & Ad. 847 at 859 the famous and oft quoted words of Lord Tenterdan, occur:

> "Where an Act creates an obligation and en- forces the performance in a specified manner, we take it to be a general rule that perform- ance cannot be enforced in any other manner."

This statement of law was approved not only by the House of Lords in several cases, but also by this Court in Premier Automobiles v. K.S. Wadke, [1976] 1 SCR 427 where this Court was called upon to consider whether the Civil Court can decide a dispute squarely coming within the provisions of the Industrial Disputes Act. While considering that question, this Court laid down four propo- sitions and third of them is relevant for consideration here. It is as follows:

> "(3) If the industrial dispute relates to the enforcement of a fight or an obligation creat-

ed under the Act, then the only remedy avail-

able to the suitor is to get an adjudication under the Act."

Thus on construction of relevant provisions of the Act and in the light of the position in law it must be held that the provisions of Section 13 of the Act applies to the building leased out to the appellant by the landlord and the Controller was the competent authority to pass a decree of ejectment against the appellant and the Civil Court lacked inherent jurisdiction to take cognisance of the cause and to pass a decree of ejectment therein. The next question is whether the impugned decree is a nullity and whether the plea can be raised in execution and further whether the decree in the suit does not operate as res judicata. In Kiran Singh & Ors. v. Chaman Paswan & Ors., [1955] 1 SCR 117 = AIR 1954 SC 430 the facts were that the appellant had undervalued the suit at Rs.2,950 and laid it in the court of the Subordinate Judge, Monghyr for recovery of possession of the suit lands and mesne profits. The suit was dismissed and on appeal it was confirmed. In the second appeal in the High Court the Registry raised the objection as to valuation under Section 11. The value of the appeal was fixed at Rs.9,980. A contention then was raised by the plaintiff in the High Court that on account of the valuation fixed by the High Court the appeal against the decree of the court of the Subordinate Judge did not lie to the District Court, but to the High Court and on that account the decree of the Dis- trict Court was a nullity. Alternatively, it was contended that it caused prejudice to the appellant. In considering that contention at page 121, a four Judge Bench of this Court speaking through Vankatarama Ayyar, J. held that:

> "It is a fundamental principle well-estab- lished that a decree passed by a Court without jurisdiction is a nullity, and that its inva- lidity 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 jurisdic- tion, whether it is pecuniary or territorial, or whether it is in respect of the subject- matter of the action, strikes at the every authority of the Court to pass any decree, and such a defect cannot be cured

> even by consent of parties. If the question now under consideration fell to be determined only on the application of general principles governing the matter, there can be no doubt that the District Court of Monghyr was coram non judice, and that its judgment and decree would be nullities."

On merits it was held that since the appellant himself had invoked the jurisdiction of the Civil Court with under valuation, the objection as to jurisdiction was not avail- able by operation of Section 99 of the Code and as to the territorial jurisdiction he was precluded by operation of Section 21 of C.P.C.; and on such premise it was held that the decree of the District Court could not be treated to be a nullity and person who invoked the jurisdiction cannot plead prejudice to himself by his own act.

This Court has held that it is a well established prin- ciple that a decree passed by a court without jurisdiction is a nullity and the plea can be set up whenever and wherev- er the decree is sought to be enforced or relied upon, and even at the stage of execution or in collateral proceedings. In the case of Ferozi Lal Jain v. Man Mal & Anr., AIR 1979 SC 794 the facts were that the appellant was the owner of a shop. One of the covenants under the lease was that the lessee respondent should not sub-let the shop. On the ground that the respondent had sub-let the shop, a suit was laid for eviction under Section 13 of the Delhi and Ajmer Rent Control Act, 1952. The matter was compromised and a compro- mise decree was passed. Twice time was given for delivery of the vacant possession by the respondent. On his failure to deliver vacant possession the appellant filed execution to recover possession. The tenant raised the objection that unless any one of the grounds prescribed under Section 13 of the Rent Control Act was satisfied, the decree even on compromise was a nullity, and therefore, he could not be evicted. This Court held that the order made did not show that it was satisfied that the sub-letting complained of had taken place, nor was there any other material on record to show that it was so satisfied. It is clear from the record that the Court had proceeded solely on the basis of the compromise arrived at between the parties. That being so there was hardly any doubt that the Court was not competent to pass the impugned decree. Hence the decree under execu- tion must be held to be a nullity. On that basis it was held that the objection could be raised even at the execution stage. Ultimately, the decree was held to be void.

In Bahadur Singh v. Muni Subrat Dass, [1969] 2 SCR 432 the decree under execution was made on the basis of an award and it was held that the decree was passed in contravention of section 13(1) of the Rent Control Act. Thereby the decree was held to be void and hence no execution could be levied on the basis of the void decree. A similar view was also taken by this Court in Smt. Kaushalya Devi & Ors. v. K.L. Bansal, AIR 1970 SC 838. This was also a case under the Delhi and Ajmer Rent Control Act and was on the basis of a compromise. It was held that the decree passed on the basis of the award was in contravention of Section 13(1) of the Act as the Court had passed the decree without satisfying itself that any good ground of eviction existed. Therefore, the decree for delivery of possession was held to be a nullity and could not be executed. This is also a decision by a Bench of three Judges speaking through Sikri, J. as he then was.

In Chandrika Misir & Anr. v. Bhaiya Lal, [1973] 2 SCC 474 Palekar J. speaking for a Bench of two Judges held that the decree passed by the Civil Court in relation to matters governed by U.P.

Zamindari Abolition and Land Reforms Rules, 1952 for possession was a nullity and in the appeal it was for the first time permitted to be raised in this Court and the decree was declared to be a nullity.

In Ledgard v. Bull, [1886] Law Report, 13 AC, 134 the Privy Council laid down that where the original Court in a suit was inherently lacking jurisdiction, and was incompe- tent to try the same, on its transfer by consent of parties, to a Court with jurisdiction such consent did not operate as a waiver of the plea of want of jurisdiction.

In Bartan v. Fincham, [1921] 2 Kings Bench Division, 291 at 299 it was held that:

> "Parties cannot by agreement give the Courts jurisdiction which the Legislature has enacted they are not to have The Court cannot give effect to an agreement whether by way of compromise or otherwise, inconsistent with the provisions of the Act."

In Peachery Property Corporation v. Robinson, [1966] 2 All Eng.

Report 981 at 983 Winn, Lord J. took the same view. In Choudari Rama (dead) per L.R. Choudhary Ganapathi v. Qureshi Bee, [1983] 2 Andhra Law Times 133 one of us Ramas- wamy, J. was called upon to consider the question on a set of similar facts. Therein the petitioner who died subse- quently was protected under A.P. (Telangana Area) Tenancy and Agricultural Holdings) Act, 1950. The protected tenant was given possession in exercise of statutory power under Section 38-A of that Act. That was done during the pendency of the suit for partition between the co-sharers. The tenant was impleaded co-nominee defendant to the suit. A prelimi- nary decree for partition and for possession was passed. A final decree followed. The decree became final and execution was levied for possession. Objection was taken that since the tenant was a protected tenant under the Act, the decree was a nullity and could not be executed against the legal representatives. After considering the scope of relevant provisions of the Act, it was held that the Civil Court cannot go into the legality or correctness of the Exhibit B-I issued by the Tehsildar. The revenue authorities consti- tuted under that Act were competent to go into the validity thereof. Civil Court inherently lacked jurisdiction and the decree of ejectment of the protected tenant from the lands covered by the protected tenancy was a nullity because of the provisions of Chapter IV of the Act. The plea can be set up even at the stage of execution, as was rightly done in that case. Otherwise it would have the effect of nullifying the operation of the statutory provisions in Chapter IV of the Act and deprived the protected tenant of his vested interest in the land created in his favour under the tenancy certificate (Ex. B-I). It was also held in paragraph 64 that "Its validity can be assailed in the execution proceedings." We approve the view of the High Court.

In Mathura Prasad Bajoo Jaiswal & Ors. v. Dossibai N.B. Jeejeebhey, [1970] 3 SCR 830 the Bench consisting of Shah, CJ., Hegde and Grover, JJ. was called upon to consider whether a decree passed without jurisdiction operates res judicata. The facts therein were that the respondent leased out the land for construction of a building to the appel- lant, which was duly constructed. The tenant applied for fixation of the standard rent. The Civil Court rejected the prayer holding that the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 does not apply to the open land let out for construction. But later the High Court reversed that view in another decision and held that

the Act applied to the open land leased out. Relying upon that judgment, an application was again filed for fixation of the standard rent of the premises. Objection was raised that the earlier rejection operated as res judicata. In that context, in negating the contention, this Court held that the doctrine of res judica- ta belongs to the domain of procedure. It cannot be exalted to the status of a legislative direction between the parties so as to determine the question relating to the interpreta- tion of enactment affecting the jurisdiction of a Court finally between them, even though no question of fact or mixed question of law and fact relating to the right in dispute between the parties has been determined thereby. A decision of a competent Court on a matter in issue may be res judicata in other proceedings between the same parties. The matter in issue may be an issue of fact. The fact decid- ed by a competent Court is final determination between the parties and cannot be re-opened between them in another proceeding. The previous decision on a matter in issue alone is res judicata. The reasons for the decision are not res judicata. A matter in issue between the parties is the right claimed by one party and denied by the other. The claim of right from its very nature depends upon proof of facts and application of the relevant law thereto. A pure question of law unrelated to facts which give rise to a right, cannot be deemed to be a matter in issue. When it is said that a previous decision is res judicata, it is meant that the right claimed has been adjudicated upon and cannot again be placed in contest between the same parties. A previous decision of a competent Court on facts which are the founda- tion of the right and the relevant law applicable to the determination of the transactions which is the source of the right is res judicata. A previous decision on a matter in issue is a composite decision; the decision of law cannot be dissociated from the decision on facts on which the right is founded. A decision on an issue of law will be res judicata in a subsequent proceeding if it be the same as in the previous proceeding, but not when the cause of action is different, nor when the law has since the earlier decision been altered by a competent authority, nor when the decision relates to the jurisdiction of the Court to try the earlier suit nor when the earlier decision declares valid a transac- tion which is prohibited by law:

> "A question of jurisdiction of the Court, or of procedure, or a pure question of law unre- lated to the right of the parties to a previ- ous suit, is not res judicata in the subse- quent suit. Rankin, CJ., observed in Tarini Charan Bhattacherjee's I.L.R. 56 Cal. 723 case:--
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> "The object of the doctrine of res judicata is not to fasten upon parties special principles of law as applicable to them inter se, but to ascertain their rights and the facts upon which these rights directly and substantially depend; and to prevent this ascertainment from becoming nugatory or pre- cluding the parties from reopening or recon- testing that which has been finally decided."
>
> "A question relating to the jurisdiction of a Court cannot be deemed to have been finally determined by an erroneous decision of the Court. If by an erroneous interpretation of the statute the Court holds that it has no jurisdiction, the question would not, in our judgment, operate as res judicata. Similarly, by an erroneous decision if the Court assumes jurisdiction which it does not possess under the statute, the question cannot operate as res judicata between the same parties, whether the cause of action in the subsequent litiga- tion is the same or otherwise."

(Emphasis supplied) In that case it was held that since it relates to the jurisdiction of the Court as per law declared by the legis- lature, it does not operate as res judicata.

In Vasudev Dhanjibhai Modi v. Rajabhai Abdul Rehman & Ors., [1970] 1 SCC 670 a Bench of three Judges of this Court consisting of Shah, J., as he then was, Hegde and Grover, JJ. was considering the question of nullity of a decree. The facts therein were that the appellant, owner of the plot of land, leased out the same to the respondent at an annual rental of Rs.411. The suit was dismissed and on appeal it was reversed and suit was decreed. On revision it was con- firmed by the High Court. Special leave petition filed in this Court was also dismissed. In the execution the conten- tion was raised that the Small Causes Court had no jurisdic- tion to entertain the suit. It was contended that the decree was a nullity on the ground that Bombay Rents Hotel and Lodging House Rates (Control) Act 57 of 1947 applied to the facts in that case. In that context Shah, J., as he then was, speaking for the Court held that challenge to a decree which is a nullity can be raised at any time, but the Court executing the decree cannot go behind the decree between the parties or on their representation it cannot entertain any objection that the decree was incorrect in law or on facts, unless it is set aside by an appropriate proceeding in appeal or revision. A decree even if it be erroneous is still binding between the parties. In that context it was held that the question whether the Court of Small Causes had jurisdiction to entertain the Suit depended upon the interpretation of the terms of the agreement of lease, and the use to which the land was put at the date of the grant of the lease. These questions cannot be permitted to be raised in an execution proceedings so as to displace the jurisdiction of the Court which passed the decree. It was further held that for the purpose of determining whether the Court which passed the decree had jurisdiction to try the suit, it is necessary to determine facts relevant to the issue on which the question depends, and the objection does not appear on the face of the record, the executing Court cannot enter upon an enquiry into those facts. It is seen that on the facts in that case it is for the first time the executing Court is to adjudicate upon the terms of the lease whether the Court of Small Causes had jurisdiction to enter- tain that suit. It is not a case of interpretation of the statutory provisions or inherent lack of jurisdiction. It is already seen that in fact for the first time this Court in Chandrika Misir's case (supra) had to go into the statutory provisions though no case in that regard had been set up in the courts below and held that the Civil Court lacked inher- ent jurisdiction to pass the decree. Therefore, the ratio in this case is not in conflict with the view taken by this Court.

It is no doubt true that in Seth Hiralal Patni v. Sri Kali Nath, [1962] 2 SCR 747 the facts were that the suit was instituted on the original side of the Bombay High Court against the appellant for recovery of certain arrears out of transactions taking place at Agra. The dispute was referred to arbitration. The arbitrator gave his award in favour of the respondent which was upheld on appeal by the High Court. In execution proceedings an objection was raised by the appellant that the Bombay High Court has no jurisdiction to entertain the suit to make the award a decree of the Court as no part of the cause of action had arisen within its territorial jurisdiction. Therefore, the decree was without jurisdiction. It was held that since the parties had agreed to refer the matter to arbitration through Court, which had jurisdiction, he would be deemed to have waived the objec- tion as to the territorial jurisdiction of the Court. There- fore, it is not a nullity and the appellant was held to be estopped from challenging the jurisdiction of the Bombay High Court. The ratio therein does not apply to the facts of this case.

The case of Phool Chand Sharma & Ors. v. Chandra Shanker Pathak & Ors., [1963] SCR Suppl. 2 828 also does not help the respondent. It was a case where the suit was decreed and possession was taken thereunder. On appeal by the respondent it was dismissed. On Second Appeal before the Board of Revenue the matter was com-

promised, whereunder Ramprasad was recognised as a tenant of the land in dispute and the order of eviction was thus nullified. When he made an application under Sec. 144 C.P.C. for restitution it was resisted by the tenants subsequently inducted on the ground that the respondent was inducted as tenant by the decreeholder, and the decree does not bind them. This was upheld by the trial court and on appeal. A writ petition was also dismissed on merits. The decree became final. The order of the High Court under Art. 227 became final. Then against the order of the Board of Revenue an appeal under Art. 136 was filed in this Court. A prelimi- nary objection was raised that the decision of the High Court under Art. 227 operated as res judicata. In that context it was held by this Court that the appeal was barred by res judicata as the decision of the High Court was on merits and would bind the parties unless it was modified or reversed in appeal or by other appropriate proceedings. The facts are clearly distinguishable.

The case of Mohanlal Goenka v. Benoy Krishna Mukherjee & Ors., [1953] SCR 377 is also of little assistance to the respondent. The decree passed by the Calcutta High Court on its original side was transferred for execution to the Court of Subordinate Judge of Asansol with proper certified copy of the decree and order of transmission. The execution application was dismissed for default and a certificate was sent under Sec. 41 C.P.C. stating that the execution case was dismissed for default without transmitting the decree or the covering letter sent by the High Court. The decree- holder again applied for execution. It was accordingly executed. Then an application to set aside the sale was made under Order 21 Rule 90 C.P.C. on the ground that the decree is a nullity and the Court had no jurisdiction to execute the decree. While negating the contention it was held that since the decree sent was not transmitted it would be re- garded as a fresh application for execution and, therefore, the executing Court had jurisdiction and the decree was not a nullity. That case also is not one of inherent lack of jurisdiction.

Thus it is settled law that normally a decree passed by a Court of competent jurisdiction, after adjudication on merits of the rights of the parties, operates as res judica- ta in a subsequent suit or proceedings and binds the parties or the persons claiming right, title or interest from the parties. Its validity should be assailed only in an appeal or revision as the case may be. In subsequent proceedings its validity cannot be questioned. A decree passed by a Court without jurisdiction over the subject matter or on other grounds which goes to the root of its exercise or jurisdiction, lacks inherent jurisdiction. It is a corum non judice. A decree passed by such a Court is a nullity and is non est. Its validity can be set up whenever it is sought to be enforced or is acted upon as a foundation for a right, even at the stage of execution or in collateral proceedings. The defect of jurisdiction strikes at the authority of the Court to pass a decree which cannot be cured by consent or waiver of the party. If the Court has jurisdiction but there is defect in its exercise which does not go to the root of its authority, such a defect like pecuniary or territorial could be waived by the party. They could be corrected by way of appropriate plea at its inception or in appellate or revisional forums, provided law permits. The doctrine of res judicata under Sec. 11 C.P.C. is founded on public

policy. An issue of fact or law or mixed question of fact and law, which are in issue in an earlier suit or might and ought to be raised between the same parties or persons claiming under them and was adjudicated or allowed uncontested becomes final and binds the parties or persons claiming under them. Thus the decision of a competent Court over the matter in issue may operate as res judicata in subsequent suit or proceedings or in other proceedings between the same parties and those claiming under them. But the question relating to the interpretation of a statute touching the jurisdiction of a Court unrelated to questions of fact or law or mixed questions does not operate as res judicata even between the parties or persons claiming under them. The reason is obvi- ous; a pure question of a law unrelated to facts which are the basis or foundation of a right, cannot be deemed to be a matter in issue. The principle of res judicata is a facet of procedure but not of substantive law. The decision on an issue of law founded on fact in issue would operate as res judicata. But when the law has since the earlier decision been altered by a competent authority or when the earlier decision declares a transaction to be valid despite prohibi- tion by law it does not operate as res judicata. Thus a question of jurisdiction of a Court or of a procedure or a pure question of law unrelated to the right of the parties founded purely on question of fact in the previous suit, is not res judicata in the subsequent suit. A question relating to jurisdiction of a Court or interpretation of provisions of a statute cannot be deemed to have been finally deter- mined by an erroneous decision of a Court. Therefore, the doctrine of res judicata does not apply to a case of decree of nullity. If the Court inherently lacks jurisdiction consent cannot confer jurisdiction. Where certain statutory rights in a welfare legislation are created, the doctrine of waiver also does not apply to a case of decree where the Court inherently lacks jurisdiction.

In the light of this position in law the question for determination is whether the impugned decree of the Civil Court can be assailed by the appellant in execution. It is already held that it is the Controller under the Act that has exclusive jurisdiction to order ejectment of a tenant from a building in the urban area leased out by the landlord. Thereby the Civil Court inherently lacks jurisdiction to entertain the suit and pass a decree of ejectment. Therefore, though the decree was passed and the jurisdiction of the Court was gone into in issue Nos. 4 and 5 at the ex-parte trial, the decree there- under is a nullity, and does not bind the appellant. There- fore, it does not operate as a res judicata. The Courts below have committed grave error of law in holding that the decree in the suit operated as res judicata and the appel- lant cannot raise the same point once again at the execu- tion.

It is seen from the dates mentioned that there is no delay in filing the leave application. The leave application was filed within the limitation from the date of original order of dismissal of the revision or on a later date dis- missing the review application. It is true that the writ petition was filed against the order in revision, but it does not preclude the appellant to contest its invalidity in the appeal under Art. 136. The decree was executed pending the special leave petition. This Court would relieve the party from injustice in exercise of power under Art. 136 of the Constitution when this Court notice grave miscarriage of justice. It is always open to the appellant to take aid of Sec. 144 C.P.C. for restitution. Therefore, merely because the decree has been executed, on the facts when we find that decree is a nullity, we cannot decline to exercise our power under Art. 136 to set at nought illegal orders under a decree of nullity. The appeal is accordingly allowed. But in the circumstances parties are directed to bear their own costs.

Y. Lal Appeal allowed.