Balvant N. Viswamitra And Ors vs Yadav Sadashiv Mule (D) Through Lrs. And ... on 13 August, 2004

Equivalent citations: AIR 2004 SUPREME COURT 4377, 2004 (8) SCC 706, 2004 AIR SCW 5051, 2004 (8) SRJ 39, (2004) 22 ALLINDCAS 441 (SC), 2004 (22) ALLINDCAS 441, 2005 (1) ALL CJ 550, 2004 (5) SLT 136, (2004) 6 JT 403 (SC), 2005 ALL CJ 1 550, 2004 (6) JT 403, 2004 (2) HRR 637, 2004 (6) ACE 585, 2004 SCFBRC 386, 2004 (6) SCALE 636, (2004) 2 CLR 454 (SC), 2004 HRR 2 637, 2004 (2) UJ (SC) 1440, (2005) ILR (KANT) 1001, (2004) 4 RECCIVR 230, (2005) 2 KCCR 155, (2004) 57 ALL LR 108, (2004) 3 ALL WC 2689, (2005) 2 CIVLJ 405, (2004) 3 LANDLR 522, (2005) 3 MAD LW 20, (2004) 97 REVDEC 571, (2004) 6 SUPREME 194, (2004) 4 ICC 508, (2004) 6 SCALE 636, (2004) 2 WLC(SC)CVL 504, (2004) 2 UC 1263, (2005) 1 GCD 245 (SC), (2004) 3 CIVILCOURTC 485, (2004) 21 INDLD 398, (2004) 3 CURCC 192, (2005) 1 BLJ 107, (2005) 2 BOM CR 259

Bench: G.P. Mathur, C.K. Thakker

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           CASE NO.:
Appeal (civil)  5617 of 1999

PETITIONER:
BALVANT N. VISWAMITRA AND ORS.

RESPONDENT:
YADAV SADASHIV MULE (D) THROUGH LRS. AND ORS.

DATE OF JUDGMENT: 13/08/2004

BENCH:
R.C. LAHOTI CJ & G.P. MATHUR & C.K. THAKKER

JUDGMENT:
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JUDGMENT 2004 Supp(3) SCR 519 The Judgment of the Court was delivered by THAKKER, J.: The present appeal is directed against the Judgment and order passed by the High Court of Bombay on January 14, 1998 in Civil Writ Petition No. 3384 of 1986. By the said order, a single Judge of the High Court, while exercising supervisory jurisdiction under Article 227 of the Constitution, held the decree sought to be executed against the petitioners - respondents herein - as void ab initio.

To appreciate the controversy raised in this appeal, few relevant facts may be stated:

There was piece of land bearing Survey No. 888 admeasuring 85 x 35 sq. feet at village Kanjur, Bombay. The land was let out by Nagendra Vishwamitra, father of the appellants to one Papamiya. The said Papamiya constructed hut over the land and was paying rent to the landlord. It was the case of the landlord that the tenant did not pay rent regularly and was in arrears of rent from November 01, 1963 to October 31, 1976 i.e. for 13 years. Since Papamiya died, proceedings were initiated against heirs of deceased Papamiya. According to the appellants, a notice was issued to heirs and legal representatives of Papamiya terminating the tenancy by a registered post but the heirs could not be served and the notice came back. Again, a notice was sent under certificate of posting which h d not come back. Thus, there was a presumption of service of notice. It was also the case of the appellants that on the outer-door of the suit premises, a copy of the notice was affixed. On 4th April, 1977, a suit for possession was filed by the plaintiffs-appellants against heirs and legal representatives of deceased Papamiya in the Court of Small Causes, Bombay, being RAE Suit No. 1992 of 1977. On 25th March, 1980, the case was listed for recording evidence. One Mr. G.R. Singh, advocate was appearing for the defendants. On that day, evidence of plaintiff No. 2 was recorded. He stated that deceased Nagendra Vishwamitra was his father and the plaintiffs were owners of the property. It was also stated by him that Papamiya had a son by name Ahmed and a notice was sent to him by registered post. However, the notice packet came back with remark 'expired'. Deceased Ahmed had legal heirs, but plaintiff No. 2 did not know their names. They were residing at Bhandup on Bombay-Agra road and not in the suit premises. He further stated that he made enquiries as to heirs and legal representatives of deceased Ahmed both at Kanjur and Bhandup addresses, but could not get sufficient information. He, therefore, filed a suit against heirs and legal representatives of Papamiya. He also produced a packet containing the notice which was returned with remark "not known". He tendered the certificate by which notice was sent under certificate of posting. According to him, that letter was not returned. A certificate and packet were produced by him in his evidence. He also stated that a notice was pasted outside the suit premises.

The plaintiff No. 2 was partly cross-examined by Mr. Singh. In the cross-examination, he stated that the notice was pasted at both the addresses i.e. Kanjur as well as Bhandup. The notice was also affixed on the property let out to the defendant. The case was therefore adjourned. On 18th June, 1980, when the matter was called out for further hearing, Mr. Singh stated that he had 'no instruction' from the defendants in the matter who had remained absent though intimated about the date by registered post as also by certificate of posting. He, therefore, requested the court to permit his withdrawal from appearance which was granted by the court. Since the plaintiff had adduced evidence and the defendants had remained absent, according to the court, the evidence of the plaintiff had gone unchallenged. In the plaint also, it was specif cally stated by the plaintiff that the defendant was in arrears of rent for more than six months and that had remained uncontroverted and unchallenged. In the circumstances, the trial court held that the plaintiffs were entitled to decree, as

prayed for. The suit was, therefore, decreed and the defendants were ordered to quit and vacate the premises and handover the possession of the suit premises to the plaintiffs on or before 31st July, 1980. On the basis of the decree execution proceedings were taken out by the plaintiffs, but there were obstructions by the third party, i.e. respondents herein. An application was, therefore, filed by the plaintiffs-decree holders for removal of obstructions. The executing court, by an order dated 13th July, 1986, held that the decree holders were entitled to execute the decree and they were allowed to recover the possession of the property. The obstructionists were ordered to pay an amount of Rs. 5,000 towards costs.

It may be stated that the obstructionists-respondents herein, filed an appeal against the decree passed by the trial court being Appeal No. 830 of 1984 as also against the order passed in the Obstruction Notice No. 293 of 1980. The appellate bench of the Small Causes Court, Bombay, by a judgment and order dated 14th July, 1986, dismissed the appeal with no order as to costs. At the request of obstructionists, the execution of warrant of possession was stayed for a period of one month.

Aggrieved by the said order, the obstructionists approached the High Court by filing Civil Writ Petition No. 3384 of 1986, which was allowed by the learned single Judge holding the decree to be void ab initio. The said order is challenged by the appellants in the present appeal. On September 27, 1999, Special Leave Petition was granted and status-quo was ordered.

We have heard the learned counsel for the parties. The learned counsel for the appellants strenuously urged that the High Court has committed an error of law as well as of jurisdiction in holding the decree nullity. It was submitted that Papamiya to whom the property was let out died and hence proceedings were initiated against his heirs and legal representatives. The counsel urged that in spite of best efforts by the appellants, necessary Information as to heirs and legal representatives of deceased Papamiya could not be obtained. The appellants, therefore, were constrained to initiate proceedings against the heirs and legal representatives of deceased Papamiya. The heirs and legal representatives of Papamiya were aware of the proceedings and had engaged an advocate Mr. G.R. Singh who appeared in the trial court i.e. Small Causes Court, Bombay. The evidence of plaintiff No. 2 was recorded in presence of Mr. Singh. The examination- in-chief of plaintiff No. 2 was over on 25th March, 1980. He was partly cross-examined by Mr. Singh and the matter was adjourned. On the next date of hearing, Mr. Singh informed the court that he had "no instructions" from the defendants. He had already intimated the defendants about it by registered letter and in the light of that fact, he prayed for withdrawal of appearance which was granted by the court. If, in the light of these facts, a decree was passed by a court of competent jurisdiction, it cannot be said that the decree was nullity. The counsel further submitted that so far as the present respondents are concerned, they were totally strangers inasmuch as they did not claim to be the heirs and legal representatives of deceased Papamiya. They, therefore, cannot challenge legality and

validity of the decree passed against the heirs of Papamiya. Their obstructions, therefore, were rejected by the executing court. An appeal filed by the obstructionists was also rightly dismissed by appellate bench of the Small Causes Court, Bombay. A learned single Judge of the High Court ought not to nave set aside those orders. He, therefore, prayed that the appeal deserves to be allowed by reversing the decision of the High Court and restoring the order passed by the Small Causes Court, Bombay and confirmed by the appellate bench of the court.

Learned counsel for the respondents, on the other hand, supported the order of the High Court. According to him, the respondents were never joined as party defendants in the suit before the Small Causes Court, Bombay. No notice was issued to them. They were never made known about the proceedings and hence the decree said to have been passed against the heirs and legal representatives of Papamiya would not bind them. It was also submitted that the notice was not issued by the plaintiffs to named heirs and legal representatives of Papamiya. The notice was issued to the heirs and legal representatives of Papamiya without disclosing the names, addresses and other details which ought to have been mentioned in the notice. The notice was, therefore, not a valid notice and no proceedings could have been legally instituted against the heirs and legal representatives of deceased Papamiya. A decree passed without proper notice and without joining necessary parties would not bind the heirs and legal representatives of deceased Papamiya. In any case, the respondents who are not claiming through heirs and legal representatives of Papamiya, but from Papamiya directly, cannot be made to suffer. The learned single Judge of the High Court, in the circumstances, was right in reversing the order passed by the courts below and no interference is called for.

Having heard the learned counsel for the parties, in our opinion, the appeal deserves to be allowed. From the facts narrated in the plaint as also from the deposition of plaintiff No. 2, as already narrated in the earlier part of the judgment, it is clear that the plaintiffs did their best to serve heirs and legal representatives of deceased Papamiya. They had sent notice by registered post which was returned unserved. Again, a notice was sent under certificate of posting which had not come back. It was, therefore, the case of the plaintiffs that the presumption would be that the notice was received by the defendants. Again, a notice was affixed on the suit premises. All these facts have been stated in the plaint. In the substantive evidence, plaintiff No. 2 had deposed that he had tried to get names of legal heirs of Ahmed, son of deceased Papamiya, but the plaintiffs could not get such information, names and addresses. He also stated that deceased Ahmed was staying at Bhandup on Bombay-Agra Road and, hence, he made enquiries at the Bhandup address but could not get the details about the heirs. The only alternative, thus left to the plaintiffs was to affix the notice on suit premises which was also done. It may be recalled at this stage that on the day of deposition of plaintiff No. 2 recorded on 25th March, 1980, the defendants were representated by an advocate Mr. Singh and plaintiff No. 2 was partly cross-examined. It was only after that date i.e. 25th March, 1980, that Mr. Singh had

no instructions and he made prayer to the court on 18th June, 1980 allowing him to withdraw his appearance which was granted by the court and a decree was passed. In the circumstances, we are satisfied that the plaintiffs had made all attempts at their end to serve the defendants, but they could not be served in view of the facts stated and circumstances mentioned in the plaint as well in the substantive evidence of plaintiff No. 2 and the decree was passed by the trial court.

The main question which arises for our consideration is whether the decree passed by the trial court can be said to be 'null and 'void'. In our opinion, the law on the point is well settled. The distinction between a decree which is void and a decree which is wrong, incorrect, irregular or not in accordance with law cannot be overlooked or ignored. Where a court lacks inherent jurisdiction in passing a decree or making an order, a decree or order passed by such court would be without jurisdiction non est and void ab initio. A defect of jurisdiction of the court goes to the root of the matter and strikes at the very authority of the court to pass a decree or make an order. Such defect has always been treated as basic and fundamental and a decree or order passed by a court or an authority having no jurisdiction is nullity. Validity of such decree or order can be challenged at any stage, even in execution or collateral proceedings.

Before five decades, in Kiran Singh & Ors. v. Chaman Paswan & Ors., [1955] l SCR 117 this Court declared;

"It is a fundamental principle well established that a decree passed by a court without jurisdiction is a nullity and that its invalidity could be set up wherever and whenever it is sought to be enforced or relied upon, even at the stage of execution and even in collateral proceedings. A defect of jurisdiction.....strikes at the very authority of the Court to pass any decree and such a defect cannot be cured even by consent of parties. "

(emphasis supplied) The said principle was reiterated by this Court in Seth Hiralal Patni v. Sri Kali Nath, [1962] 2 SCR 747. The Court said : "Competence of a court to try a case goes to the very root of the jurisdiction, and where it is lacking, it is case of inherent lack of jurisdiction."

In Vasudev Dhanjibhai Modi v. Rajabhai Abdul Rehman & Ors., [1871] l SCR 66, a decree for possession was passed by the Court of Small Causes which was confirmed in appeal as well as in revision. In execution proceedings, it was contented that the Small Causes Court had no jurisdiction to pass the decree and, hence, it was a nullity.

Rejecting the contention, this Court stated:

"a Court executing a decree cannot go behind the decree : between the parties or their representatives it must take the decree according to its tenor, and cannot entertain any objection that the decree was incorrect in law or on facts. Until 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. Suffice it to say that recently a bench of two-Judges of this Court has considered the distinction between null and void decree and illegal decree in Rafique Bibi v. Sayed Waliuddin, [2004] l SCC 287. One of us (R.C. Lahoti, J. as his Lordship then was), quoting with approval the law laid down in Vasudev Dhanjibhai Modi, stated:

"What is 'void' has to be clearly understood. A decree can be said to be without jurisdiction, and hence a nullity, if the court passing the decree has usurped a jurisdiction which it did not have; a mere wrong exercise of jurisdiction does not result in a nullity. The lack of jurisdiction in the court passing the decree must be patent on its face in order to enable the executing court to take cognizance of such a nullity based on want of jurisdiction, else the normal rule that an executing court cannot go behind the decree must prevail.

Two things must be clearly borne in mind. Firstly, 'the court will invalidate an order only if the right remedy is sought by the right person in the right proceedings and circumstances. The order may be a 'a nullity' and 'void' but these terms have not absolute sense: their meaning is relative, depending upon the court's willingness to grant relief in any particular situation. If this principle of illegal relativity is borne in mind, the law can be made to operate justly and reasonably in cases where the doctrine of ultra vires, rigidly applied, would produce unacceptable results.' (Administrative Law, Wade and Forsyth, 8th Edn., 2000, p. 308). Secondly, there is a distinction between mere administrative orders and the decrees of courts, especially a superior court. 'The order of a superior court such as the High Court must always be obeyed no matter what flaws it may be thought to contain. Thus, a party who disobeys a High Court injunction in punishable for contempt of court even though it was granted in proceedings deemed to have been irrevocably abandoned owing to the expiry of a time-limit.' (ibid., p. 312) A distinction exists between a decree passed by a court having no jurisdiction and consequently being a nullity and not executable and a decree of the court which is merely illegal or not passed in accordance with the procedure laid down by law. A decree suffering from illegality or irregularity of procedure, cannot be termed inexecutable by the executing court; the remedy of a person aggrieved by such a decree is to have it set aside in a duly constituted legal proceedings or by a superior court failing which he must obey the common of the decree. A decree passed by a court of competent jurisdiction cannot be denuded of its efficacy by any collateral attack or in incidental proceedings."

(emphasis supplied) From the above decisions, it is amply clear that all irregular or wrong decrees or orders are not necessarily null and void. An erroneous or illegal decision, which is not void, cannot be objected in execution or collateral proceedings.

Before more than a century, in Malkarjun Bin Shidramappa Pasare v. Narhari Bin Shivappa & Aur., (1990) 27 IA 216 : ILR 25 Bom 337 (PC), the executing court wrongly held that a particular person represented the estate of the deceased judgment-debtor and put the property for sale in execution.

Drawing the distinction between absence of jurisdiction and wrong exercise thereof, the Privy Council observed:

> "He contended that he was not the right person, but the Court, having received his protest, decided that he was the right person, and so proceeded with the execution. In so doing the court was exercising its jurisdiction. It made a sad mistake, it is true; but a court has jurisdiction to decide wrong as well as right. If it decides wrong, the wronged party can only take the course prescribed by law for setting matters right; and if that course is not taken, the decision however wrong, cannot be disturbed."

In Ittavira Mathai v. Varkey Varkey & Anr., [1964] l SCR 495, this Court stated :

> "If the suit was barred by time and yet the court decreed it, the court would be committing an illegality and therefore the aggrived party would be entitled to have the decree set aside by preferring an appeal against it. But it is well settled that a court having jurisdiction over the subject- matter of the suit and over parties thereto, though bound to decide right may decide wrong; and that even though it decided wrong it would not be doing something which it had no jurisdiction to do .....If the party aggrieved does not take appropriate steps to have that error corrected, the erroneous decree will hold good and will not be open to challenge on the basis of being a nullity.
>
> (emphasis supplied) Again, in Bhawarlal v. Universal Heavy Mechanical Lifting Enterprises, [1999] l SCC 558, this Court held that "even if the decree was passed beyond the period of limitation, it would be an error of law, or at the highest, a wrong decision which can be corrected in appellate proceedings and not by the executing court which was bound by such decree."

As already stated hereinabove, proceedings were initiated against the heirs and legal representatives of deceased Papamiya and a decree was passed by competent court having jurisdiction over the subject-matter of the suit.' From the record, it is clear that the plaintiffs tried their best to get the names, addresses and other Information regarding heirs and legal representatives of Papamiya. For the said purpose, notices were sent to heirs and legal representative of the deceased by registered post which had come back. A notice under certificate of posting did not come back. A notice was, therefore, affixed on the suit premises. An attempt was also made to get names and addresses of heirs of the deceased Ahmed who was said to be staying at Bhandup, but no such Information was received by the plaintiffs. From the record, it is also clear that defendants were aware of the proceedings and they had engaged Mr. G.R. Singh, advocate who was appearing in the matter. On 25th March, 1980, he was present when plaintiff No. 2 was examined on oath and was partly cross-examined by Mr. Singh. Thereafter, with the permission of the court, Mr. Singh withdrew his appearance because he had no instructions in the matter from the defendants and a decree was passed.

In our considered opinion, such a decree, by no stretch of imagination, can be described nullity. If the decree is not null and void, as per settled law, appropriate proceedings will have to be taken by the persons aggrieved by such decree. The learned counsel for the appellants, in this connection, rightly invited our attention to a decision of the High Court of Bombay in Special Civil Application No. 1360 of 1973 decided on November 15/16, 1977. In that case, property was let by the landlord to one Narayan. Narayan died and thereafter the landlord terminated the tenancy by issuing notice to "the heirs and legal representatives" of deceased Narayan. A suit was thereafter filed against heirs and legal representatives of deceased Narayan on the grounds of arrears of rent and unlawful sub-letting of suit premises. The person in possession of the property (sub-tenant) made an application to be joined as party defendant which was granted. The suit was not contested by the heirs and legal representatives of deceased Narayan and it was contested by the sub-tenant and the decree was passed by the Trial Court and confirmed by the appellate court.

The sub-tenant approached the High Court. It was contended that the notice addressed to "the heirs and legal representatives" of deceased Narayan could not be said to be in accordance with law and tenancy was thus not validly terminated. No suit, hence, could have been filed and no decree could have been passed.

Negativing the contention, the court held that the persons who could make grievance were the heirs and legal representatives of deceased Narayan and the petitioner had no right to make such grievance. The court further observed that since the petitioner was claiming through the tenant, he was bound by the decree passed in the suit. The petition was, therefore, dismissed.

Now, it may be stated that in the case on hand, proceedings were initiated by S.K. Shaikh Ahmad and six others claiming to be heirs of deceased Papamiya by filing Writ Petition No. 456 of 1996 challenging the decree dated 18th June, 1980, but the petition came to be dismissed. In the circumstances, it cannot be said that the decree which was passed by a competent court could not be executed against the respondents herein.

It was contended by learned counsel for the respondents that the respondents were not made party defendants in the suit and hence no decree could have been passed nor could be executed against them. We are afraid we cannot uphold the contention. It is the case of the plaintiffs that the property was let to Papamiya. It is not even the case of the respondents that they were the tenants of the plaintiffs. They are claiming through Papamiya, At the most, therefore, they can be said to be sub-tenants i.e. tenants of Papamiya. There was no privity of contract between the landlord and the respondents. In our opinion therefore, it was not necessary for the plaintiffs to join respondents as defendants in the suit nor to give notice to them before initiation of the proceedings. The respondents cannot be said to be "necessary party" to the proceedings.

As held by this Court in Udit Narain Singh Malpaharia v. Addl Member, Board of Revenue, Bihar, [1963] Supp l SCR 676, there is a distinction between "necessary party" and "proper party" In that case, the Court said:

> "The law on the subject is well settled: it is enough if we state the principle. A necessary party is one without whom no order can be mode effectively; a proper party is one in whose absence an effective order can be made but whose presence is necessary for a complete and final decision on the question involved in the proceeding."

(emphasis supplied) In M/s.Importers and Manufacturers Ltd. v. Pheroze Framroze Taraporewala and Ors., AIR (1953) SC 73 this Court held that in a suit for possession by a landlord against a tenant, sub-tenant is merely a proper party and not a necessary party.

In Rupchand Gupta v. Raghvanshi (Pvt.) Ltd. and Another, AIR (1964) SC 1889 an ex parte decree was passed in favour of the landlord and against the tenant. An application for setting aside the decree was made by the sub- tenant by invoking the provisions of Order IX, Rule 13 of the Code of Civil Procedure, 1908, inter alia contending that the decree was collusive inasmuch as the sub-tenant was not joined as party defendant. The decree was, therefore, liable to be set aside. Repelling the contention, this Court observed:

> "(I)t is quite clear that the law does not require that the sub-lessee need be made a party. It has been rightly pointed out by the High Court that in all cases where the landlord institutes a suit against the lessee for possession of the land on the basis of a valid notice to quit served on the lessee and does not implead the sub-lessee as a party to the suit, the object of the landlord is to eject the sub-lessee from the land in execution of the decree and such an object is quite legitimate. The decree in such a suit would bind the sub-lessee. This may act harshly on the sub-

lessee; but this is a position well understood by him when he took the sub- lease. The law allows this and so the omission cannot be said to be an improper act."

(emphasis supplied) In our considered opinion, the present respondents could not be said to be "necessary party" to the suit. Non-joinder of respondents, hence, would not make a decree passed by the Court of Small Causes, Bombay nullity or inexecutable. The High Court erroneously proceeded against the well settled principle of law by observing in the impugned judgment that since the respondents (petitioners before the High Court) were claiming through Papamiya and as they were not joined as 'party' in the suit, the orders passed by the court "would in no way affect or bind them". The above observation, in our opinion, did not lay down the law correctly.

Since the respondents were not necessary parties, it was not incumbent on the plaintiffs to join them in the suit. The defendants appeased through an advocate and the decree was passed as their advocate withdraw his appearance. Even thereafter, S.K. Shaikh Ahmed and others claiming to be heirs of Papamiya filed a Writ Petition against the decree passed in RAE Suit No. 1992 of 1977, and even that petition was dismissed. In the circumstances, in our opinion, the High Court was wrong in interfering with the decree passed by Small Causes Court, Bombay and confirmed by the appellate bench of that court. The order passed by the High Court, therefore, deserves to be set aside.

For the reasons aforesaid the appeal deserves to be allowed and is accordingly allowed. The judgment and order passed by the High Court in Civil Writ Petition No. 3384 of 1986 is set aside and the decree passed by the courts below is hereby restored. Interim stay granted earlier stands vacated. In the facts and circumstances of the case, however, there shall be no order as to costs.