Bhudev Mallick Alias Bhudeb Mallick vs Ranajit Ghoshal on 17 January, 2025

2025 INSC 175

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.2248 OF 2025
(@ Special Leave to Appeal (C) No.21328 of 2023)

BHUDEV MALLICK ALIAS BHUDEB MALLICK & ANR.

VERSUS

RANAJIT GHOSHAL & ORS.

O R D E R

1. Heard the learned counsel appearing for the parties.

2. Exemption Application is allowed.

3. Leave granted.

4. This appeal arises from the order passed by the High Court of Judicature at Calcutta dated 23.09.2019 in CO. No. 3283 of 2019 by which the High Court rejected the CO filed by the appellants herein (judgment debtors) and thereby affirmed the order passed by the Executing Court dated 4.9.2019 in Title Execution Case No. 1 of 2017 arising out of Title Suit No. 25 of 1965.

5. For the sake of convenience, the appellants herein shall be referred to as the judgment debtors and the respondents herein shall be referred to as the decree holders.

6. The facts giving rise to this appeal may be summarised as under:

> i. In 1965, the predecessor-in-interest of the decree VISHAL ANAND Date: 2025.02.10 16:54:13 IST Reason:
>
> holders herein instituted a Title Suit No. 25 of 1965 for confirmation of possession and in the alternative for recovery of possession based on title to the suit land and for permanent injunction. The respondents herein are the legal heirs of the original plaintiffs of the Title Suit No. 25 of 1965 referred to above. The Subordinate Judge 2nd Court, Hooghly decreed the suit vide the judgment and decree dated 26.06.1976. The operative part of the decree reads thus:

"Considering the facts, circumstances and evidence on record I, therefore, hold that the plaintiff has been able to establish his title to the suit properties and possession follows title and the defendant has failed to prove his alleged title. So he had no occasion to disturb plaintiffs possession of the suit properties. The plaintiff is therefore, entitled to have a declaration of title and confirmation of possession and injunction with respect to peaceful possession of the suit properties against the defendants. The suit is also maintainable, issue nos.2 to 5 are thus disposed of with a remarks that there is no need for consideration of alternative prayer for recovery of possession in the aforesaid context.

Issue No.6:-

In the result the suit succeeds.

Court fees paid upon the plaint sufficient. Hence, ORDERED That the suit is decreed on contest with costs against defendant no. 1 Ka to Jha and 2 and without contest and without cost against the rest. Plaintiff's title with respect to Ka and Kha schedule is hereby declared and his possession thereof is hereby confirmed. The defendants are permanently restrained from disturbing possession of the plaintiff of the suit properties. The prayer for damage etc. is rejected under the present frame of the suit." ii. Thus, the appellants herein were permanently restrained from disturbing the peaceful possession of the respondents herein in so far as the suit property is concerned.

iii. The appellants herein being dissatisfied with the judgment and decree dated 20.06.1976 referred to above, challenged the same by filing Title Appeal No. 214 of 1976.

The record does not reveal in what manner the Title Appeal came to be disposed of, however, according to the appellants, the same was disposed of by the Appellate Court vide order dated 10.06.1980.

iv. Sometime in the year 2017, i.e., after a period of almost 40 years, the respondents herein filed an Execution Case seeking to execute the decree dated 26.06.1976 referred to above on the ground that the appellants herein were disturbing & creating trouble in their peaceful enjoyment of the property and thereby alleged that the appellants have committed breach of the decree of permanent injunction. The same came to be registered as Title Execution Case No. 1 of 2017. The appellants were served with the summons of the suit execution case.

v. The application filed by the respondents herein (decree holders) which came to be registered as Execution Case No. 1 of 2017 concerning title Suit No. 25/1965 reads thus:

“IN THE COURT OF THE LD. CIVIL JUDGE SENIOR DIVISON AT ARAMBAGH, HOOGHLY Executive Case No. 2017 concerning Title Suit No. Heirs of Late Choto Chandi Charan Ghosal and heirs of the said property 1 : Shri Ajit Kumar Ghoshal 2: Sri Ranjit Ghoshal father of 1 and 2 Late Choto Chandi Charan Ghoshal 3: Anup Kumar Ghoshal son of Shri Swapan Ghoshal 4: Sri Arup Kumar Ghoshal 5: Sri Guru Charan Ghoshal father of 4 & 5 Sri Dilip Kumar Ghoshal 6: Sri Rabindra Nath Ghoshal son of Shri Asit Kurriar Ghoshal all residents of Harihar Post Debkhand PS Goghat District Hooghly 1/ Jaidev Mallick 2/ Mahadev Mallick 3/ Bhoot Mallick aka Bhudev Mallick aka Sahadev Mallick 4/ Laxman Chandra Mallick all S/o Late Nagendranath Mallick all resident of Harlhar, Post Debkhand PS Goghat, District Hooghly.

26/06/1976 AD Settlement 10/06/1980

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1/Shri Jaydev Mallick 2/ Mahadev Mallick 3(Bhoot Mallick aka Bhudev Mallick aka Sahadev Mallick 4/ Laxman Chandra Mallick all S/o Nagendranath Mallick all resident of Harihar, Post Debkhand PS Go ghat, District Hooghly.

The defendants/debtors wilfully defying the Permanent Restraining order of the Court and creating obstacles to the peaceful possession of the plaintiff decree holder's property by the heirs of the plaintiff decree holder. Therefore, the instant petition is being field with the prayer that the Defendants/Debtors must be stopped from creating obstacles to the peaceful possession of the property by the heirs of the decree holders and the order/direction may also kindly be issued for sending the Defendants/Debtors to Civil Jail and their property should also be attached and auctioned so that the debtors cannot create obstacles on possession of the property of plaintiff 'decree holder's heirs by breaking the perpetual restraining order of the trial court and court assistance is required to attack and auction their property and to send them to Civil Jail.” vi. It is the case of the appellants that although the summons was received by them yet due to non-availability of old records they were not in a position to appear before the court concerned and later learned that the execution case was fixed by the court for ex parte disposal. On 12.12.2018, the appellants herein filed their written objections to the execution case along with a petition requesting to accept the written objections & give them an opportunity of hearing.

vii. The written objections lodged in writing by the appellant herein (judgment debtors) read thus:

"Objection against Application for Execution filed by the Decree Holders

1. That the application for Execution flied by the Decree Holders with respect to the original suit Is not maintainable.

2. That the application Is vague and Indistinct. The decree holders in their petition has not stated the schedule of property and hence It 1s ambiguous and since the petition Is handwritten it 1s 1lleglble to a huge extent and should be rejected.

3. That the properties described in the schedule of the plaint of the original suit was purchased by the predecessor of the Judgement debtors and at no point of time was possessed by the decree holders or their predecessors. The decree holders have obtained the judgement and decree on 26.06.1976 but even then they did not possess the suit property. The properties were all along in possession of the judgement debtors which was unaffected and even after procuring the alleged decree from the Ld. Lower Court the decree holders did not possess the same till today. Thus after such a long time the decree holders could not pray for relief for alleged violation of any order of injunction.

4. That after obtaining the alleged judgement and decree on 26.06.1976 the decree holders have filed several cases before the Ld. Executive Magistrate and In almost every case the possession of the Judgement debtors have been confirmed.

5. That the decree holders in order to snatch possession of the suit properties from the judgement debtors have filed the instant petition at this belated stage knowing very well that they never possessed the property. Moreover the decree holders in several applications have stated that they did not have possession over the suit properties.

6. That unless the truth regarding the possession comes before the Ld. Court the Instant execution Is not maintainable.

7. That the decree holders are putting forth claim on the basis of erroneous record of rights whereas the judgement debtors have come to own the suit properties by virtue of purchase. The judgement debtors have much better title than the decree holders which can be ascertained by seeking evidence.

8. That since the, decree holders did not clalh1 possession over the suit properties the judgement debtors have been openly, as of their own right, uninterruptedly, without any protest from the decree holders have been possessing the suit tank since purchase and later on since 10.06.1980 i.e. from the date of disposal of the appeal

case. The decree holders are thus stopped from putting forth illegal claim over the suit properties. Without taking due process of law the Ld. Court and in absence of due proceeding the Ld. Court could not pass any order in this case.

9. That the Judgement debtors. will be put to Irreparable loss and injury if the execution application filed by the decree holders Is entertained.

10. That since the petition is illegible and since the order in the original suit has been passed more than 40 years ago the judgement debtors crave leave to file additional written objection if found necessary for proper adjudication of this case.

In the above circumstances the judgement debtor pray that the Ld. Court be kind enough to reject the execution application flied oy the decree holder.

AFFIDAVIT I Shri Bhudeb Mallik, s/o Late Nagendranath Mallik, aged about 55 years, by faith Hindu, by occupation cultivation, residing at viii-Harihar, p.o. - Debkhanda, p.s. - Goghat, dist - Hooghly do hereby solemnly affirm and declare that the statements made by me above are true to the best of my knowledge and belief." viii. On 21.01.2019, the Executing Court declined to take the written objections on record saying that the same were not maintainable. The court fixed the matter for final arguments on 25.01.2019. The appellants being aggrieved by the order dated 21.09.2019 referred to above, preferred a Revision Application being C.O. No. 1120 of 2019 before the High Court. The High Court vide order dated 27.03.2019 admitted the Revision Application and stayed all further proceedings of the Title Execution Case No. 1 of 2017.

ix. Later the appellants herein filed an application being CAN 74 of 2019 dated 26.07.2019 in the High Court seeking extension of the interim order dated 27.03.2019 referred to above and accordingly informed the trial court about the pendency of the Revision Application being C.O. No. 1120 of 2019 and the Application being CAN 74 of 2019 filed for extension of the interim order dated 27.03.2019. x. However, on 4.09.2019, the Civil Judge Arambagh proceeded to pass an Order 21 in Title Execution Case against appellants herein by allowing the execution case ex parte. The Civil Judge ordered that the appellants herein (judgment debtors) shall be arrested and detained in civil prison for a period of 30 days and their property be attached in accordance with law.

xi. The order passed by the Civil Judge referred to above reads thus:

"Order No.21 dated 04.09.2019 The plaintiffs file hazira.

The fact of the case in short is that this is a case for execution of permanent injunction passed by the Ld. Second Court of the Subordinate Judge, Hooghly, in T.S. No.25 of 1965. The plaintiffs of the original suit got the decree of permanent injunction in the form of permanent restrainment of the defendant/judgment debtors from disturbing possession of the plaintiffs in the suit property as well as the property over which the execution is prayed for.

The present petitioners are the legal heirs of the deceased Chota Chandicharan Ghoshal i.e. the original plaintiff of the said T.S. 25 of 1965.

The present execution case, prays in made by execution application dated 25.11.2017, praying for execution of contested judgment and decree in T.S. no.25/1965, dated 26.06.1976, of the Ld. Second Court of the. Subordinate Judge, Hoogly. It is averred in the application that the Jdrs. are willfully, in violation of the decree, disturbing the peaceful possession of the Dhrs upon decretal property and thus it is necessary to execute the same by relief of Civil Jail as well as attachment and sale of the properties of Jdrs.

In argument Ld. Counsel for the Dhr Submits that they were granted a contested decree of declaration and permanent injunction, but the Jdrs are willfully violating the same, and which is apparent from the evidence on record and thus the decree maybe put into execution by putting the Jdrs in Civil Jail and by attachment of their properties. In this regard, the Ld. Counsel cited the landmark judgment passed by Ld. Punjab Haryana High court on 9th October, 1979 and which is published in AIR 1980 P and H. The impugned decree filed along with the execution application shows that the present applicants are Dhrs and that the defendants of the suit are Jdrs. The same was decreed on contest on 26.06.1965 declaring the title of the plaintiff/Dhrs in respect of the suit property and confirming their possession. The defendants/Jdrs were restrained by way of permanent injunction from disturbing possession of the plaintiff m the suit property.

It is noted that the Jdrs had appeared in such case and have knowledge of all averments reports. Moreover, the decree was contested decree. The police report shows that despite the decree, the Jdrs are claiming forceful possession. In Iyyam Perumal Vs Chinna Gounder, (1984) it was observed that direction of arrest may be restored to if there is adequate proof of refusal to comply with a decree inspite of Jdrs possessing sufficient means to satisfy the same. Thus, there are enough circumstances to put the decree into execution as prayed for. Hence, it is, ORDER That the execution case is allowed ex-parte and the Judgment Debtors are directed to be arrested and detained in civil prison for a period of thirty days and also to attach judgment Debtors properties as per the provision of law.

Thus this T.Ex.Case is disposed of." xii. The appellants herein being dissatisfied with the order passed by the Civil Judge referred to above, challenged the same by filing Revision Application No. COC 283 of 2019 before the High Court invoking its supervisory jurisdiction under Article 227 of the Constitution.

xiii. The High Court vide its impugned order dated 23.09.2019 rejected the revision application and thereby affirmed the order passed by the Civil Judge referred to above.

xiv. The High Court in its impugned order observed thus:

"The present challenge is directed at the behest of the judgment-debtors of a decree for permanent injunction.

Learned counsel appearing for the petitioners argues that in view of the application filed for arrest and detention in civil prison of the petitioners, the same ought to have been - governed under Order XXI Rule 11A of the Code of Civil Procedure, which, it is argued, contemplates an affidavit being filed, stating the ground on which arrest is applied for. In the absence of such an affidavit in the present case, the executing court acted without jurisdiction in allowing the execution case.

The next contention of learned counsel for the petitioners is that the petitioners' written objection to the application for execution was not accepted due to delay, which was challenged in a civil revisional application before this Court.

Although the petitioners prayed for stay of the execution case in view of pendency of an application for extension of stay granted in the previous revisional application, the executing court acted in hot haste in passing the impugned order, which was thus vitiated on such ground as well.

Learned counsel appearing for the decree-Holders, on the other hand, points out that the previous revisional application challenging the non-acceptance of written objection by the present petitioners was dismissed by a co-ordinate bench on the ground that the same had become infructuous in view of passing of the order impugned herein. As such, there is no challenge existing at present to the order refusing to accept the written objection of the petitioner.

In such view of the matter, the argument, that the petitioner did not get any opportunity to file written 'objection, has been rendered academic since there is no existing challenge pending against the same.

Moreover, a plain reading of Rule 11A of Order XXI of the Code suggests that the same envisages an application being made for the arrest and detention in prison of the judgment-debtors, stating the grounds on which arrest is applied for, or be accompanied by an affidavit stating such grounds.

The language of Order XXI Rule 11A of the Code suggests clearly that the grounds for arrest and detention may be contained either in the application or in the accompanying affidavit.

In the present case, the execution application itself contained the ground, sufficient to entitle the executing court to pass an order of execution of the· decree for permanent injunction.

> As such, no jurisdictional error was committed by the executing court in passing the impugned order.
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> Accordingly, C.O. No. 3283 of 2019 is dismissed on contest.
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> There will be no order as to costs.
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> At this juncture, learned counsel for the petitioners prays for stay of the instant order for a limited period.
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> However, since, in the opinion of this Court, no question of law of substantial importance is involved in this case, the prayer for such stay is refused."

7. In such circumstances referred to above, the appellants herein (judgment debtors) are here before this Court with the present appeal.

SUBMISSIONS ON BEHALF OF THE APPELLANTS(JUDGMENT DEBTORS)

8. Mr. Joydeep Mukherjee, the learned counsel appearing for the appellants vehemently submitted that the High Court committed an egregious error in passing the impugned order. He submitted that the execution petition itself was not maintainable at the instance of the respondents after a lapse of almost 40 years from the date of passing of the decree of declaration and permanent injunction.

9. He submitted that the Civil Judge committed a serious error in directing arrest of the appellants herein and their detention in civil prison for a period of 30 days with further order to attach their property.

10. The main bone of contention canvassed on behalf of the appellants herein is that the respondents had not filed any petition along with an affidavit as the same is a mandatory requirement under Order XXI Rule 11-A of the Code of Civil Procedure, 1908 (for short, "the Code").

11. He further submitted that the aforesaid aspect came to be overlooked even by the High Court while rejecting the revision application.

12. The learned counsel in the last submitted that the High Court should have at least permitted the appellants herein to file their written objections to the execution case.

13. In such circumstances referred to above, the learned counsel prayed that there being merit in his appeal the same may be allowed and the impugned order passed by the High Court and also the one passed by the civil court in execution case be set aside.

SUBMISSIONS ON BEHALF OF THE RESPONDENTS (DECREE HOLDERS)

14. On the other hand, Mrs. Lalita Kaushik, the learned counsel appearing for the respondents vehemently submitted that no error not to speak of any error of law could be said to have been committed by the High Court in passing the impugned order.

15. The learned counsel would submit that the contention on behalf of the appellants that the execution petition could not have been filed after 40 years from the date of the original decree is without any merit. She would submit that once there is a decree of permanent injunction having attained finality; if thereafter at any point of time, the possession of the decree holders is sought to be disturbed then in such circumstances it is always open for the decree holder to seek appropriate relief from the court in accordance with law.

16. In such circumstances referred to above, the learned counsel prayed that there being no merit in this appeal, the same may be dismissed.

ANALYSIS

17. Having heard the learned counsel appearing for the parties and having gone through the materials on record the only question that falls for our consideration is whether the High Court committed any error in passing the impugned order.

18. Before adverting to the rival contentions raised on either side, it is necessary for us to look into few relevant provisions of the Code.

19. Section 51 of the Code prescribes the powers of the court to enforce execution. Section 51 of the Code reads thus:-

> "51. Powers of Court to enforce execution.—Subject to such conditions and limitations as may be prescribed, the Court may, on the application of the decree-holder, order execution of the decree—
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> (a) by delivery of any property specifically decreed;
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> (b) by attachment and sale or by the sale without attachment of any property;
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> (c) by arrest and detention in prison for such period not exceeding the period specified in section 58, where arrest and detention is permissible under that section;
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> (d) by appointing a receiver; or
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> (e) in such other manner as the nature of the relief granted may require:
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> Provided that, where the decree is for the payment of money, execution by detention in prison shall not be ordered unless, after giving the judgment- debtor an opportunity of showing cause why he should not be committed to prison, the Court,

for reasons recorded in writing, is satisfied—

(a) that the judgment-debtor, with the object or effect of obstructing or delaying the execution of the decree,—

(i) is likely to abscond or leave the local limits of the jurisdiction of the Court, or

(ii) has, after the institution of the suit in which the decree was passed, dishonestly transferred, concealed, or removed any part of his property, or committed any other act of bad faith in relation to his property, or

(b) that the judgment-debtor has, or has had since the date of the decree, the means to pay the amount of the decree or some substantial part thereof and refuses or neglects or has refused or neglected to pay the same, or

(c) that the decree is for a sum for which the judgment-debtor was bound in a fiduciary capacity to account.

Explanation.—In the calculation of the means of the judgment-debtor for the purposes of clause

(b), there shall be left out of account any property which, by or under any law or custom having the force of law for the time being in force, is exempt from attachment in execution of the decree."

20. There is no substantial change in the above quoted Section by the Amendment Act of 1976 except addition of words "for such period not exceeding the period specified in Section 58 where arrest and detention is permissible under that section" in Clause (c). In the unamended Section, there was no provision as to the period for which a debtor may be detained in a civil prison. That lacuna is now removed by the addition of this clause. The addition seeks to make the provision harmonious with Section 58.

21. Calcutta High Court Amendment : In clause (b) omit the words, "or by sale without attachment" between the words "sale" and "of any". In the proviso, omit the words "for reasons recorded in writing" after the words "the Court" and before the words "is satisfied". Also, add the proviso– "Provided also that the Court of Small Causes of Calcutta shall have no power to order execution of a decree by attachment and sale of immovable property or by appointing a receiver in respect of such property."

22. Section 51 defines the jurisdiction and power of the court to enforce execution. The manner of execution of a decree is laid down in the First Schedule. The Section enumerates in general terms various modes by which the court may order execution of a decree according to the nature of relief granted in favour of a decree-holder.

23. After the decree-holder files an application for execution of a decree, the executing court can enforce execution. A decree may be enforced by delivery of any property specified in the decree, by

attachment and sale or by sale without attachment of any property, or by arrest and detention in a civil prison of the judgment-debtor or by appointing a Receiver, or by effecting partition, or in such other manner as the nature of the relief may require.

24. Sections 51 and 58 respectively should be read together. Section 51 defines the power and jurisdiction of the executing court to enforce execution, Section 58 fixes the period for which the judgment-debtor can be detained in a civil prison.

25. Order XXI Rule 32 of the Code reads thus:-

> "32. Decree for specific performance for restitution of conjugal rights, or for an injunction.— (1) Where the party against whom a decree for the specific performance of a contract, or for restitution of conjugal rights, or for an injunction, has been passed, has had an opportunity of obeying the decree and has wilfully failed to obey it, the decree may be enforced 1 [in the case of a decree for restitution of conjugal rights by the attachment of his property or, in the case of a decree for the specific performance of a contract or for an injunction] by his detention in the civil prison, or by the attachment of his property, or by both.
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> (2) Where the party against whom a decree for specific performance or for an injunction has been passed is a corporation, the decree may be enforced by the attachment of the property of the corporation or, with the leave of the Court, by the detention in the civil prison of the directors or other principal officers thereof, or by both attachment and detention.
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> (3) Where any attachment under sub-rule (1) or sub-rule (2) has remained in force for 2 [six months,] if the judgment-debtor has not obeyed the decree and the decree-holder has applied to have the attached property sold, such property may be sold; and out of the proceeds the Court may award to the decree holder such compensation as it thinks fit, and shall pay the balance (if any) to the judgment-debtor on his application.
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> (4) Where the judgment-debtor has obeyed the decree and paid all costs of executing the same which he is bound to pay, or where, at the end of 2 [six months] from the date of the attachment no application to have the property sold has been made, or if made has been refused, the attachment shall cease.

(5) Where a decree for the specific performance of a contract or for an injunction has not been obeyed, the Court may, in lieu of or in addition to all or any of the processes aforesaid, direct that the act required to be done may be done so far as practicable by the decree-holder or some other person appointed by the Court, at the cost of the judgment-debtor, and upon the act being done the expenses incurred may be ascertained in such manner as the Court may direct and may be recovered as if they were included in the decree."

26. Sub-rule (1) of Rule 32 states that where a decree is for specific performance of a contract, or for an injunction, and the judgment-debtor wilfully disobeys such decree, it may be executed by attachment of property of the judgment-debtor or by his detention, or by both.

27. Sub-rule (2) declares that where in a decree for specific performance or for injunction, the judgment-debtor is a corporation, it may be enforced by attachment of the property of the corporation, or with the leave of the court by detention of the directors or other principal officers or by both, attachment and detention.

28. Sub-rule (3) provides for sale of attached property and payment of the sale-proceeds to the decree-holder where the attachment remains in force for six months and the judgment- debtor fails to obey the decree.

29. Sub-rule (4) deals with cases where the judgment-debtor obeys the decree or the decree-holder commits default.

30. Sub-rule (5) empowers the executing court to take appropriate action for enforcing the decree at the cost of the judgment-debtor who wilfully disobeys such decree.

31. The Explanation clarifies that the expression "the act required to be done" covers prohibitory as also mandatory injunctions.

32. Order XXI Rule 11-A of the Code reads thus:-

> "11-A. Application for arrest to state grounds.— Where an application is made for the arrest and detention in prison of the judgment-debtor, it shall state, or be accompanied by an affidavit stating, the grounds on which arrest is applied for."

33. The proviso to Section 51, as inserted by the Code of Civil Procedure (Amendment) Act, 1936 (Act 21 of 1936) limited the grounds on which a judgment-debtor could be arrested or detained.

34. The Law Commission considered the amendment of 1936 and stated:-

> "This is new. Since Section 51, proviso, now limits the grounds on which a judgment-debtor can be arrested (after the 1936 amendment), it is desirable to provide that the application under Order XXI, Rule 11 should state the grounds on which arrest is sought for. This will assist the court in taking action under Order XXI, Rule 37 (notice to show cause), and also further proceedings under Order XXI, Rule 40. It has been held that the existence of the circumstances mentioned in Section 51, proviso
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> (a) to (c) should be alleged either in the execution application or in an accompanying affidavit. Unless such a circumstance is alleged (it was pointed out), the court cannot think of the circumstances and, in its absence, the court cannot take action under

XXI, Rule 37."

35. Rule 11-A states that where an application is made for the arrest and detention of the judgment-debtor, it must state or accompanied by an affidavit - specifying the grounds on which arrest is sought. Rule 11-A of Order 21 is in conformity with the substantive provisions of proviso to Section 51 of the Code. Stating of grounds or filing of affidavit is essential. The provision is thus mandatory and unless it is complied with, no arrest or detention of the judgment-debtor can be ordered. But if the requisite affidavit is not filed by the decree-holder, the court should afford an opportunity to him to file such affidavit.

36. It is well settled that a decree of permanent injunction is executable with the aid of the provisions contained in Order XXI Rule 32 of the Code referred to above, and any act in violation or breach of decree of permanent injunction is a continuing disobedience entailing penal consequences.

37. In Jai Dayal And Others v. Krishan Lal Garg and Another reported in (1996) 11 SCC 588, this Court considered the effect of decree of permanent injunction as well as the scope of provisions of Order 21 Rule 32 of the Code and held as under:-

> "6. It is contended that the High Court has proceeded on the premise that the rights of parties are required to be adjudicated under Section 22 of the Easements Act. The view of the High Court is clearly in error. It is seen that once the decree of perpetual injunction and mandatory injunction has become final, the judgment-debtor is required to obey the decree. In whatever form he obstructs, it is liable to removal for violation and the natural consequence is the execution proceedings under Order XXI, Rule 32, CPC which reads as under:
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> "32.(3) Where any attachment under sub-rule (1) or sub-rule (2) has remained in force for six months if the judgment-debtor has not obeyed the decree, if the decree-holder has applied to have the attached property sold, such property may be sold; out of the proceeds the Court may award to the decree-holder such compensation as it thinks fit, and shall pay the balance, if any, to the judgment-debtor on his application.
>
> (4) Where the judgment-debtor has obeyed the decree and paid all costs of executing the same which he is bound to pay, or where, at the end of six months from the date of the attachment, no application to have the property sold has been made, or if made has been refused, the attachment shall cease."

7. In this case, since the attachment was made for enforcement of the perpetual injunction and mandatory injunction, the decree is required to be complied with. In case he did not obey the injunction under Clause (1) of Order 32, the judgment-debtor is liable to detention in the civil prison and also to proceed against the property under attachment." (Emphasis supplied)

38. The High Court of Rajasthan in Maga Ram And Another v. Kana Ram And Others reported in AIR 1993 Rajasthan 208, held as under :

> "3. A perusal of the decree under execution shows that it was for mandatory as well as for prohibitory injunction. It stood satisfied so far it concerned with mandatory part of the injunction by the removal of the encroachment existing on the disputed land on the date on which it was passed. The decree in respect of prohibitory injunction was subsisting even after the disposal of first and second execution applications. The third execution application has been moved for the execution of the decree in respect of the prohibitory injunction. It is perfectly executable under O. XXI, R. 32, C.P.C.
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> 4. There is also no substance in the second objection relating to limitation. Art. 136, Limitation Act, deals with the limitation for execution of decrees other than a decree granting mandatory injunction.

The limitation is 12 years from the date the decree becomes enforceable. The decree for prohibitory injunction become enforceable when the judgement- debtors made fresh encroachment on the disputed land. The decree under execution itself was passed on September 20, 1983. As such the third execution application was well within limitation." (Emphasis supplied)

39. The High Court of Bombay in the case of Shri Benedito (Betty) Dias v. Armando Benedita Fernandes reported in 2017(4) AIR Bom. R 381, held as under:-

> "12. The decision of the Kerala High Court, in the case of M.G. Simon (supra), cannot take the case of the petitioners any further and in fact, would assist the respondents. In that case also, it has been held that an application for enforcement of the decree granting prohibitory injunction shall not be subject to any period of limitation and where there is a composite decree, granting mandatory and prohibitory injunction, one part is subjected to limitation period of three years, whereas the other is not subjected to any period of limitation. The petitioner can enforce the prohibitory injunction, whenever violation of that part takes place.
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> 13. In the case of Jai Dayal (supra), the Hon'ble Supreme Court has held that once the decree of perpetual and mandatory injunction has become final, the judgment debtor is required to obey the decree and a party cannot and should not, by his action be permitted to drive the decree holder to file a second suit. It has been inter-alia held that non-compliance is a continuing disobedience in respect of which a separate/fresh suit is barred under Section 47 of the CPC. Thus, in my considered view, the contention based on the execution being barred by limitation, cannot be accepted." (Emphasis supplied)

40. The High Court of Punjab and Haryana in the case of Dilbagh Singh and Others v. Harpal Singh Alias Harpal Singh Chela and Others reported in 2020 Supreme (P&H) 944, has held as under:-

> "6. Although learned counsel for the petitioners has laid much stress on the fact that to seek execution of the decree, qua the restoration of the possession in his favour, the decree holder was supposed to plead specifically as to when and in what manner he has been dispossessed. This Court finds this argument to be noted only to be rejected. The provisions of sub Rule (5) Rule 32 of Order 21 CPC do not prescribe any such condition. Rather, Order 21 Rule 32 CPC prescribes that for execution of a decree if any act is required to be done by the judgment debtor, the Executing Court can order that such an act be done by the judgment debtor; as claimed. Sub Rule (5) Rule 32 of Order 21 CPC has been interpreted by the Supreme Court in various judgments viz. "Samee Khan vs. Bindu Khan, 1998(4) RCR(Civil) 125 (SC)" to mean that in an execution proceedings of a decree for injunction, if it is found that the decree holder has been dispossessed after the date of decree, the restoration of possession can also be ordered by the Executing Court. Hence, it is no more res-integra that in execution of a decree for injunction, even restoration of possession can be ordered by the Executing Court. This view has also been taken by this court in 'Kapoor Singh vs. Om Parkash, 2009(4) PLR 178'. Hence, no fault can be found, per-se, with the action of the Executing Court in issuing warrants of possession in the execution proceedings." (Emphasis supplied)

41. Having regard to the dictum of law as laid in the aforesaid decisions, there is no force in the argument of the learned counsel appearing for the appellants that the execution case could not have been instituted by the respondents herein after a period of 40 years from the date of passing of the decree in the original Title Suit. The decree for permanent injunction can be enforced or becomes enforceable when the judgment debtor tries to disturb the peaceful possession of the decree holder or tries to dispossess the decree holder in some manner or the other or creates obstruction in the peaceful enjoyment of the property over which he has a declaration of title from the civil court in the form of a decree.

42. In the aforesaid context, we may refer to Article 136 of the Limitation Act, 1963 which reads thus:-

> When the decree or order becomes enforceable or where the decree or any subsequent order directs any payment of money or the delivery of any property to be made at a For the certain date of at execution of recurring periods, when any decree default in making the (other than a payment or delivery in Twelve
>
> 136. decree granting respect of which years.
>
> | | |
> |---|---|
> | a mandatory injunction) or order of any civil court. | execution is sought, takes place:

Provided that an application for the enforcement or execution of a decree granting a perpetual injunction |

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shall not be subject to
any period of
limitation.
   (Emphasis supplied)
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43. The proviso to Section 136 of the Limitation Act referred to above makes it further clear that for the enforcement or execution of a decree granting a perpetual injunction shall not be subject to any period of limitation.

44. Imprisonment of a judgment-debtor is no doubt a drastic step and would prevent him from moving anywhere he likes, but once it is proved that he had wilfully and with impunity disobeyed an order of injunction, the court owes it to itself to make the judgment-debtor realise that it does not pay to defy a decree of a court. Failure to exercise this power in appropriate cases might verily undermine the respect for judicial institutions in the eyes of litigants. The court's power under Order 21, Rule 32 is no more than a procedural aid to the harried decree-holder.

45. Where the judgment-debtor disobeys a decree of injunction, he can be dealt with under this rule by his imprisonment or by attachment of his property or by both. But the court has to record a finding that the judgment-debtor wilfully disobeyed or failed to comply with the decree in spite of opportunity afforded to him. Absence of such finding is a serious infirmity vitiating the order.

46. Each breach of injunction is independent and actionable in law making the judgment-debtor answerable. Where there are successive breaches of decree, the judgment-debtor can be dealt with on every such breach and the doctrine of res judicata has no application. The court is expected to take strict view and stern action. (See : Code of Civil Procedure, 1908 by Justice C.K. Thakker, 2009 Edn.)

47. However, the point for our consideration in the present appeal is whether the executing court adopted the correct procedure before passing the order directing that the appellants herein be arrested and detained in civil prison for a period of 30 days and that their property be attached.

48. Sub-rule (1) of Rule 32 of Order XXI of the Code, in so far it is material for the present discussion, reads thus:-

"Where the party against whom a decree ..... for an injunction has been passed, has had an opportunity of obeying the decree and has wilfully failed to obey it, the decree may be enforced .. in the case of a decree .. for an injunction by his detention in the civil prison ....."

> 49. The sub-rule, as seen from its clear and explicit language, provides that a decree for injunction passed against a party could be enforced by his detention in a civil prison, if he has wilfully failed to obey such decree despite having had an opportunity of obeying it. In other words, the sub-rule, no doubt, enables a holder of a decree for injunction to seek its execution from the executing Court by requiring it to order the detention of the person bound by the decree, in a civil prison.

But, the Court should not, according to the same sub-rule, make an order for detention of the person unless it is satisfied that that person has had an Opportunity of obeying the decree and yet has wilfully disobeyed it.

50. If regard is had to the above scope and ambit of the sub- rule, it follows that the executing Court required to execute the decree for injunction against the person bound by that decree, by ordering his detention, cannot do so without recording a finding on the basis of the materials to be produced by the person seeking the execution of the decree that the person bound by the decree, though has had an opportunity of obeying the decree, has wilfully failed to obey it, as a condition precedent. Hence, what is required of the person seeking execution of the decree for injunction under the sub-rule is to place materials before the executing Court as would enable it to conclude (i) that the person bound by the decree, was fully aware of the terms of the decree and its binding nature upon him; and (ii) that that person has had an opportunity of obeying such decree, but has wilfully, i.e., consciously and deliberately, disobeyed such decree, so that it can make an order of his detention as sought for. Thus, the onus of placing materials before the executing Court for enabling it to record a finding that the person against whom the order of detention is sought, has had an opportunity of obeying the decree for injunction, but has wilfully disobeyed it, lies on the person seeking such order of detention, lest the person seeking deprivation of the liberty of another cannot do so without fully satisfying the Court about its need. (See :

> Shivamurthy Mahalingappa Kuchanaur v. Dannammadevi Cycle Mart, Rabakavi, AIR 1987 Karnataka 26).

51. In the instant case, the executing court has proceeded to make the order of arrest, detention in a civil prison for a period of 30 days and attachment of property against the appellants herein when there was absolutely no material placed by the respondents herein to satisfy it that the appellants have had an opportunity of obeying the decree for injunction, but have wilfully disobeyed it. In fact, the order of arrest and detention made by the executing court is based on a surmise that the respondents (decree-holders) have levelled allegations that the appellants herein are interfering with their peaceful possession of the property in question and in this regard, few complaints of breaches made to the police were placed before the executing court.

52. The executing court proceeded merely on the basis of the assertions made by the respondents that the appellants herein are trying to interfere with their peaceful possession of the suit property without any further inquiry into the matter. We do not propose to go into the question whether a separate affidavit should have been filed by the respondents herein along with the application preferred before the executing court levelling allegations of breach of the permanent injunction.

JURISDICTIONAL ERROR

53. We are a bit disappointed with the manner in which the High Court dealt with the present litigation, more particularly while deciding the revision application filed by the appellants herein against the order passed by the executing court. All that the High Court has said in one line is that it did not find any jurisdictional error in the order passed by the executing court ordering arrest, detention in a civil prison and attachment of the property of the appellants. We fail to understand, why the High Court was not able to see the gross error in the order passed by the executing court, be it called an error of law or a jurisdictional error. Undoubtedly, the High Court in exercise of its supervisory jurisdiction under Article 227 of the Constitution must ascertain before interfering with any order passed by a subordinate court or tribunal whether the same suffers from any jurisdictional error. At times in litigation like the one on hand, the court should be guided by its conscience, more particularly keeping in mind the peculiar facts and circumstances of the case and not strictly go by the term "jurisdictional error". It is very easy for the High Court to say that there is no jurisdictional error and, therefore, no interference is warranted but before saying so, the High Court should be mindful of the consequences that would follow like arrest, detention in civil prison and attachment of property.

54. What is a jurisdictional error has been the subject of a legion of illuminating judicial decisions. In this case, however, we need concern ourselves with only one aspect of that matter and it is enough for us to refer in this connection to the decision of the Privy Council in the case of Joy Chand Lal Babu v. Kamalaksha Chaudhury, AIR 1949 PC 239, where Sir John Beaumont, delivering the judgment of the Board, observed inter alia as follows:-

> "although error in a decision of a Subordinate Court does not by itself involve that the subordinate Court has acted illegally or with material irregularity so as to justify interference in revision under Subsection (c). nevertheless if the erroneous decision results in the subordinate Court exercising a jurisdiction, not vested in it by law or failing to exercise a jurisdiction so vested, a case for revision arises under Sub-section (a) or Sub-section (b) and Sub section (c) can be ignored."

55. If, therefore, an error, be it an error of fact or of law, is such that the erroneous decision has resulted in the subordinate Court or tribunal exercising jurisdiction, not vested in it by law, or in its having failed to exercise jurisdiction, vested in it by law, that will come within the scope of Section 115 of the Code or, for the matter of that, of Article 227 of the Constitution, as the case may be. This error may have resulted from a violation of rules of natural justice, by taking into consideration matters which are extraneous and irrelevant, or by substituting judicial consideration by bias, based on suspicion, arising from those extraneous matters or from any other cause whatsoever but if it has affected the assumption or exercise of jurisdiction, as envisaged above, it will be a jurisdictional error for purposes of the above Article.

56. There is no exhaustive list of jurisdictional errors, but case law has identified such an error exists when a decision- maker has:

identified a wrong issue;

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asked a wrong question;
ignored relevant material;
relied on irrelevant material;
failed to observe a requirement of procedural

fairness;
made a decision involving fraud;
made a decision in bad faith;
made a decision without evidence;
applied a policy inflexibly.
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57. The concept of jurisdiction has been drastically expanded after the decision of the House of Lords in Anisminic v. The Foreign Compensation Commission, 1967(2) AER 986. Now, every error of law is a jurisdictional error. If a decisive fact is wrongly understood, even then, the decision will be outside jurisdiction. This concept is best explained by K.S. Paripoornan, J., in His Lordship's separate Judgment in Mafatal Industries Ltd. v. Union of India, (1997) 5 SCC 536. The relevant portion of the said judgment reads as follows:-

> "334. Opinions may differ as to when it can be said that in the "public law" domain, the entire proceeding before the appropriate authority is illegal and without jurisdiction or the defect or infirmity in the order goes to the root of the matter and makes it in law invalid or void (referred to in Illuri Subbayya Chetty case [(1964) 1 SCR 752 :
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> AIR 1964 SC 322 : (1963) 14 STC 680 : (1963) 50 ITR 93] and approved in Dhulabhai case [(1968) 3 SCR 662 : AIR 1969 SC 78 : (1968) 22 STC 416]). The matter may have to be considered in the light of the provisions of the particular statute in question and the fact-situation obtaining in each case. It is difficult to visualise all situations hypothetically and provide an answer. Be that as it may, the question that frequently arises for consideration, is, in what situation/cases the non-compliance or error or mistake, committed by the statutory authority or tribunal, makes the decision rendered ultra vires or a nullity or one without jurisdiction?

If the decision is without jurisdiction, notwithstanding the provisions for obtaining reliefs contained in the Act and the "ouster clauses", the jurisdiction of the ordinary court is not excluded. So, the matter assumes significance. Since the landmark decision in Anisminic Ltd. v. Foreign Compensation Commission [(1969) 2 AC 147 : (1969) 1 All ER 208 : (1969) 2 WLR 163, HL] the legal world seems to have accepted that any "jurisdictional error" as understood in the liberal or modern approach, laid down therein, makes a decision ultra vires or a nullity or without jurisdiction and the "ouster clauses" are construed restrictively, and such provisions whatever their stringent language be, have been held, not to prevent challenge on the ground that the decision is ultra vires and being a complete nullity, it is not a decision within the meaning of the Act. The concept of jurisdiction has acquired "new dimensions". The original or pure theory of jurisdiction means "the authority to decide" and it is determinable at the commencement and not at the conclusion of the enquiry. The said approach has been given a go-by in Anisminic case [(1969) 2 AC 147 : (1969) 1 All ER 208 :

(1969) 2 WLR 163, HL] as we shall see from the discussion hereinafter [see De Smith, Woolf and Jowell —Judicial Review of Administrative Action (1995 Edn.) p. 238; Halsbury's Laws of England (4th Edn.) p. 114, para 67, footnote (9)]. As Sir William Wade observes in his book, Administrative Law (7th Edn.), 1994, at p. 299:

"The tribunal must not only have jurisdiction at the outset, but must retain it unimpaired until it has discharged its task." The decision in Anisminic case [(1949) 76 IA 244 :

> AIR 1949 PC 297] [(1949) 76 IA 244 : AIR 1949 PC 297] has been cited with approval in a number of cases by this Court: citation of a few such cases — Union of India v. Tarachand Gupta & Bros. [(1971) 1 SCC 486 :
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> AIR 1971 SC 1558] (AIR at p. 1565), A.R. Antulay v. R.S. Nayak [(1988) 2 SCC 602 : 1988 SCC (Cri) 372] (SCC at p. 650), R.B. Shreeram Durga Prasad and Fatehchand Nursing Das v. Settlement Commission (IT & WT) [(1989) 1 SCC 628 : 1989 SCC (Tax) 124] (SCC at p. 634), N. Parthasarathy v. Controller of Capital Issues [(1991)

3 SCC 153] (SCC at p. 195), Associated Engineering Co. v. Govt. of A.P. [(1991) 4 SCC 93 : AIR 1992 SC 232] , Shiv Kumar Chadha v. Municipal Corpn. of Delhi [(1993) 3 SCC 161] (SCC at p. 173). Delivering the judgment of a two-Member Bench in M.L. Sethi v. R.P. Kapur [(1972) 2 SCC 427 : AIR 1972 SC 2379] Mathew, J. in paras 10 and 11 of the judgment explained the legal position after Anisminic case [(1949) 76 IA 244 : AIR 1949 PC 297] [(1949) 76 IA 244 : AIR 1949 PC 297] to the following effect:

> "10. The word 'jurisdiction' is a verbal cast of many colours. Jurisdiction originally seems to have had the meaning which Lord Baid ascribed to it in Anisminic Ltd. v. Foreign Compensation Commission [(1949) 76 IA 244 :
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> AIR 1949 PC 297] [(1949) 76 IA 244 : AIR 1949 PC 297] , namely, the entitlement 'to enter upon the enquiry in question'. If there was an entitlement to enter upon an enquiry into the question, then any subsequent error could only be regarded as an error within the jurisdiction. The best known formulation of this theory is that made by Lord Dennan in R. v. Bolton [(1841) 1 QB 66 : 10 LJMC 49] . He said that the question of jurisdiction is determinable at the commencement, not at the conclusion of the enquiry. In Anisminic Ltd. [(1949) 76 IA 244 : AIR 1949 PC 297] [(1949) 76 IA 244 : AIR 1949 PC 297], Lord Reid said:
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> 'But there are many cases where, although the tribunal had jurisdiction to enter on the enquiry, it has done or failed to do something in the course of the enquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the enquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which

was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive.' In the same case, Lord Pearce said:

'Lack of jurisdiction may arise in various ways. There may be an absence of those formalities or things which are conditions precedent to the tribunal having any jurisdiction to embark on an enquiry. Or the tribunal may at the end make an order that it has no jurisdiction to make. Or in the intervening stage while engaged on a proper enquiry, the tribunal may depart from the rules of natural justice; or it may ask itself the wrong questions; or it may take into account matters which it was not directed to take into account. Thereby it would step outside its jurisdiction. It would turn its enquiry into something not directed by Parliament and fail to make the enquiry which Parliament did direct. Any of these things would cause its purported decision to be a nullity.'

11. The dicta of the majority of the House of Lords, in the above case would show the extent to which 'lack' and 'excess' of jurisdiction have been assimilated or, in other words, the extent to which we have moved away from the traditional concept of 'jurisdiction'. The effect of the dicta in that case is to reduce the difference between jurisdictional error and error of law within jurisdiction almost to vanishing point. The practical effect of the decision is that any error of law can be reckoned as jurisdictional. This comes perilously close to saying that there is jurisdiction if the decision is right in law but none if it is wrong. Almost any misconstruction of a statute can be represented as 'basing their decision on a matter with which they have no right to deal', 'imposing an unwarranted condition' or 'addressing themselves to a wrong question'. The majority opinion in the case leaves a court or tribunal with virtually no margin of legal error. Whether there is excess of jurisdiction or merely error within jurisdiction can be determined only by construing the empowering statute, which will give little guidance. It is really a question of how much latitude the court is prepared to allow...." In a subsequent Constitution Bench decision, Hari Prasad Mulshanker Trivedi v. V.B. Raju [(1974) 3 SCC 415 : AIR 1973 SC 2602] delivering the judgment of the Bench, Mathew, J., in para 27 at page 2608 of the judgment, stated thus: (SCC pp. 423-24, para 28) "... Though the dividing line between lack of jurisdiction or power and erroneous exercise of it has become thin with the decision of the House of Lords in the Anisminic case [Anisminic Ltd. v. Foreign Compensation Commission, (1967) 3 WLR 382 : (1967) 2 All ER 986] , we do not think that the distinction between the two has been completely wiped out. We are aware of the difficulty in formulating an exhaustive rule to tell when there is lack of power and when there is an erroneous exercise of it. The difficulty has arisen because the word 'jurisdiction' is an expression which is used in a variety of senses and takes its colour from its context, (see per Diplock, J. at p. 394 in the Anisminic case [Anisminic Ltd. v. Foreign Compensation Commission, (1967) 3 WLR 382 : (1967) 2 All ER 986]).

Whereas the 'pure' theory of jurisdiction would reduce jurisdictional control to a vanishing point, the adoption of a narrower meaning might result in a more useful legal concept even though the formal structure of law may lose something of its logical symmetry. 'At bottom the problem of defining the concept of jurisdiction for purpose of judicial review has been one of public policy rather than one of logic'. [S.A. Smith, 'Judicial Review of Administrative Action, 2nd Edn., p. 98. (1968 Edn.)]" The observation of the learned author, (S.A. De Smith) was continued in its 3rd Edn. (1973) at p. 98 and in its 4th Edn. (1980) at p. 112 of the book. The observation aforesaid was based on the then prevailing academic opinion only as is seen from the footnotes. It should be stated that the said observation is omitted from the latest edition of the book De Smith, Woolf and Jowell — Judicial Review of Administrative Action — 5th Edn. (1995) as is evident from p. 229; probably due to later developments in the law and the academic opinion that has emerged due to the change in the perspective.

335. After 1980, the decision in Anisminic case [(1969) 2 AC 147 : (1969) 1 All ER 208 : (1969) 2 WLR 163, HL] came up for further consideration before the House of Lords, Privy Council and other courts. The three leading decisions of the House of Lords wherein Anisminic principle was followed and explained, are the following: Racal Communications Ltd., In re [1981 AC 374 : (1980) 2 All ER 634 :

> (1980) 3 WLR 181, HL] , O'Reilly v. Mackman [(1983) 2 AC 237 : (1982) 3 All ER 1124 : (1982) 3 WLR 1096, HL] , Re. v. Hull University Visitor [1993 AC 682 :
>
> (1993) 1 All ER 97 : (1992) 3 WLR 1112, HL] . It should be noted that Racal, In re case [(1968) 3 SCR 662 : AIR 1969 SC 78 : (1968) 22 STC 416] [(1964) 6 SCR 261 : AIR 1964 SC 1006 : (1964) 15 STC 450] the Anisminic principle was held to be inapplicable in the case of (superior) court where the decision of the court is made final and conclusive by the statute. (The superior court referred to in this decision is the High Court) [1981 AC 374 (383, 384, 386, 391)]. In the meanwhile, the House of Lords in Council of Civil Service Unions v. Minister for the Civil Service [1985 AC 374 : (1984) 3 All ER 935 : (1984) 3 WLR 1174, HL] enunciated three broad grounds for judicial review, as "legality", "procedural propriety" and "rationality" and this decision had its impact on the development of the law in post-Anisminic period. In the light of the above four important decisions of the House of Lords, other decisions of the court of appeal, Privy Council etc. and the later academic opinion in the matter the entire case-law on the subject has been reviewed in leading textbooks. In the latest edition of De Smith on Judicial Review of Administrative Action — edited by Lord Woolf and Jowell, Q.C. [Professor of Public Law, 5 Edn. — 1995], in Chapter 5, titled as "Jurisdiction, Vires, Law and Fact" (pp. 223-294), there is exhaustive analysis about the concept "Jurisdiction" and its ramifications. The authors have discussed the pure theory of jurisdiction, the innovative decision in Anisminic case [(1969) 2 AC 147 : (1969) 1 All ER 208 : (1969) 2 WLR 163, HL] , the development of the law in the post-

Anisminic period, the scope of the "finality" clauses (exclusion of jurisdiction of courts) in the statutes, and have laid down a few propositions at pp. 250-256 which could be advanced on the subject. The authors have concluded the discussion thus at p. 256:

> "After Anisminic virtually every error of law is a jurisdictional error, and the only place left for non-jurisdictional error is where the components of the decision made by the inferior body included matters of fact and policy as well as law, or where the error was evidential (concerning for example the burden of proof or admission of evidence). Perhaps the most precise indication of jurisdictional error is that advanced by Lord Diplock in Racal Communications [1981 AC 374 : (1980) 2 All ER 634 : (1980) 3 WLR 181, HL] , when he suggested that a tribunal is entitled to make an error when the matter 'involves, as many do interrelated questions of law, fact and degree'. Thus it was for the county court judge in Pearlman [Pearlman v. Keepers and Governors of Harrow School, (1979) 1 All ER 365 : (1978) 3 WLR 736] to decide whether the installation of central heating in a dwelling amounted to a 'structural alteration, exten-

sion or addition'. This was a 'typical ques- tion of mixed law, fact and degree which only a scholiast would think it appropriate to dissect into two separate questions, one for decision by the superior court, viz., the meaning of these words, a question which must entail considerations of degree, and the other for decision by a county court, viz., the application of words to the particular installation, a question which also entails considerations of degree.

It is, however, doubtful whether any test of jurisdictional error will prove satisfact- ory. The distinction between jurisdictional and non-jurisdictional error is ultimately based upon foundations of sand. Much of the superstructure has already crumbled. What re- mains is likely quickly to fall away as the courts rightly insist that all administrative action should be, simply, lawful, whether or not jurisdictionally lawful."

336. The jurisdictional control exercised by superior courts over subordinate courts, tribunals or other statutory bodies and the scope and content of such power has been pithily stated in Halsbury's Laws of England — 4th Edn. (Reissue), 1989 Vol. 1(1), p. 113 to the following effect:

> "The inferior court or tribunal lacks jur- isdiction if it has no power to enter upon an enquiry into a matter at all; and it exceeds jurisdiction if it nevertheless enters upon such an enquiry or, having jurisdiction in the first place, it proceeds to arrogate an authority withheld from it by perpetrating a major error of substance, form or proced- ure, or by making an order or taking action outside its limited area of competence. Not every error committed by an inferior court or tribunal or other body, however, goes to jur- isdiction. Jurisdiction to decide a matter imports a limited power to decide that matter incorrectly.
>
> A tribunal lacks jurisdiction if (1) it is improperly constituted, or (2) the proceed- ings have been improperly instituted, or (3) authority to decide has been delegated to it

unlawfully, or (4) it is without competence to deal with a matter by reason of the parties, the area in which the issue arose, the nature of the subject-matter, the value of that subject-matter, or the non-existence of any other prerequisite of a valid adjudic- ation. Excess of jurisdiction is not materi- ally distinguishable from lack of jurisdic- tion and the expressions may be used inter- changeably.

Where the jurisdiction of a tribunal is dependent on the existence of a particular state of affairs, that state of affairs may be described as preliminary to, or collateral to the merits of, the issue, or as jurisdic- tional.(p. 114) There is a presumption in construing stat- utes which confer jurisdiction or discretion- ary powers on a body, that if that body makes an error of law while purporting to act within that jurisdiction or in exercising those powers, its decision or action will ex- ceed the jurisdiction conferred and will be quashed. The error must be one on which the decision or action depends. An error of law going to jurisdiction may be committed by a body which fails to follow the proper proced- ure required by law, which takes legally ir- relevant considerations into account, or which fails to take relevant considerations into account, or which asks itself and an- swers the wrong question. (pp. 119-120) The presumption that error of law goes to jurisdiction may be rebutted on the construc- tion of a particular statute, so that the relevant body will not exceed its jurisdic-

tion by going wrong in law. Previously, the courts were more likely to find that errors of law were within jurisdiction; but with the modern approach errors of law will be held to fall within a body's jurisdiction only in ex- ceptional cases. The courts will generally assume that their expertise in determining the principles of law applicable in any case has not been excluded by Parliament.(p. 120) Errors of law include misinterpretation of a statute or any other legal document or a rule of common law; asking oneself and an- swering the wrong question, taking irrelevant considerations into account or failing to take relevant considerations into account when purporting to apply the law to the facts; admitting inadmissible evidence or re- jecting admissible and relevant evidence; ex- ercising a discretion on the basis of incor- rect legal principles; giving reasons which disclose faulty legal reasoning or which are inadequate to fulfil an express duty to give reasons, and misdirecting oneself as to the burden of proof." (pp. 121-122)

337. H.W.R. Wade and C.F. Forsyth in their book —Ad- ministrative Law, 7th Edn., (1994) — discuss the sub- ject regarding the jurisdiction of superior courts over subordinate courts and tribunals under the head "Jurisdiction over Fact and Law" in Chapter 9, pp. 284 to 320. The decisions before Anisminic and those in the post-Anisminic period have been discussed in detail. At pp. 319-320, the authors give the Summary of Rules thus:

"Jurisdiction over fact and law: Summary At the end of a chapter which is top-heavy with obsolescent material it may be useful to summar- ise the position as shortly as possible. The overall picture is of an expanding system strug- gling to free itself from the trammels of clas- sical doctrines laid down in the past. It is not safe to say that the

> classical doctrines are wholly obsolete and that the broad and simple principles of review, which clearly now commend themselves to the judiciary, will entirely sup- plant them. A summary can therefore only state the long-established rules together with the sim- pler and broader rules which have now superseded them, much for the benefit of the law. Together they are as follows:
>
> Errors of fact Old rule: The court would quash only if the erroneous fact was jurisdictional.
>
> New rule: The court will quash if an erroneous and decisive fact was —
>
> (a) jurisdictional
>
> (b) found on the basis of no evidence; or
>
> (c) wrong, misunderstood or ignored.

Errors of law Old rule: The court would quash only if the error was —

(a) jurisdictional; or

(b) on the face of the record.

New rule: The court will quash for any decisive error, because all errors of law are now jurisdictional."

58. For the benefit of the High Courts across the country, we may refer to a very erudite article authored by Krystal Cunning- ham-Foran, a legal expert working as a senior associate in Colin Biggers & Paisley's Planning Government Infrastructure & Envi- ronment group, on the topic "Jurisdictional Error". The learned author has discussed a judgment rendered by the High Court of Australia setting out practical guidance for establishing juris- dictional error in the context of judicial review proceedings in respect of a decision about the revocation of a decision to can- cel a visa. Article reads thus:-

> "The case of LPDT v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs reported in [2024] HCA 12 concerned judicial review proceedings in the High Court of Australia (High Court) in which the High Court provided practical guidance about the threshold of materiality in the context of jurisdictional error.
>
> The test for establishing jurisdictional error is two-fold. Firstly, it must be established that an error occurred and secondly, the error must be material such that the decision affected by error could realistically have been different if there was no error. The practical guidance provided by the High Court in respect of this test is set out in this

article.

The judicial review proceedings relevantly concerned an allegation that the decision of the Administrative Appeals Tribunal (Tribunal) in respect of a decision made under section 501CA(4) of the Migration Act 1958 (Cth) (Migration Act) about the revocation of a decision to cancel the Appellant's visa (Cancellation Decision) was affected by jurisdictional error.

There was no dispute that the Tribunal's decision involved an error because the Tribunal did not comply with a direction of the Minister in relation to the revocation of a mandatory cancellation of a visa under section 501CA (Direction) in breach of section 499(2A) of the Migration Act.

In respect of the materiality of the error, the High Court held that the decision reached by the Tribunal could have been different if there was no error and thus the threshold of materiality was met.

The High Court allowed the appeal, set aside the decision of the Full Court of the Federal Court of Australia, and ordered the issue of a writ of certiorari quashing the Tribunal's decision and a writ of mandamus directing the Tribunal to determine the Appellant's request for revocation of the Cancellation Decision according to law.

What is jurisdictional error?

Jurisdictional error arises where a decision-maker with authority to make a decision under statute is in breach of an express or implied condition of the decision-making authority, such that the decision made lacks legal force and is "in law…no decision at all".

The High Court observed that the following categories of jurisdictional error often arise, but that the categories are not closed:

A breach by a third-party of a condition of a statutory process before a decision is made. A breach by a decision-maker given authority under statute of a condition of making a decision.

Common errors in this context include: the decision- maker misunderstands the applicable law, asks the wrong question, identifies a wrong issue, ignores relevant material, relies on irrelevant material, ex- ceeds the bounds of what is reasonable, denies a re- quirement of procedural fairness, or makes an erro- neous finding or reaches a mistaken conclusion.

Two-part test for jurisdictional error Not every breach of an express or implied condition of making a decision will render the decision no decision at all.

The limits imposed by the relevant statute on the making of a decision must be understood to determine the following:

"...Whether an error has occurred (that is, whether there has been a breach of an express or im- plied condition of the statutory conferral of deci- sion-making authority)..."

"...Whether any such error is jurisdictional (that is, whether the error has resulted in the deci- sion made lacking legal force)."

Practical guidance for considering jurisdictional error The High Court stated the following practical guidance in respect of the test for jurisdictional error:

Both parts of the test start with a considera- tion of the statute to understand the nature of the alleged error in its statutory context.

Both parts of the test are backward-looking in that they are answered having regard to the decision that was made, and if necessary, how that decision was made.

Whilst the applicant has the onus of proof on the balance of probabilities, proving the facts ought not be difficult or contentious. In some cases the tendering of the decision-maker's reasons is suffi-

cient, whereas in others, for example those involving an allegation of a denial of procedural fairness, may require evidence of the content or information re- quired to be provided to the decision-maker.

To establish materiality, it is not necessary that absent the error a different decision "would" have been made, rather it is whether a different de- cision "could realistically" have been made. The High Court observed that "realistic" is used to distin- guish a possible different outcome from an outcome that is fanciful or improbable.

The threshold of materiality is not onerous or demanding. What must be demonstrated to meet the threshold depends upon the error. A Court in deter- mining whether the threshold is met must not assume the function of the decision-maker and fall into a merits review of the decision made.

Once the applicant establishes an error and that there is a realistic possibility of a different outcome if the error had not been made, the threshold of materiality is met and relief is justified subject to any utility and discretion.

The High Court also observed that in some cases, such as those involving apprehended or actual bias, the alleged error will be jurisdictional regardless of any

> effect on the decision made, whilst in others, such as those involving unreasonableness, the potential for the decision to be effected is inherent in the nature of the error. In both of these examples, the error satisfies the requirement of materiality.
>
> The practical guidance from the High Court set out above overrides any previous guidance of the Courts.
>
> Jurisdictional error established in this case The High Court was satisfied that the threshold of materiality was satisfied in this case because the Appellant established on the balance of probabilities that a different decision realistically could have been made if the Tribunal followed the process of reasoning required by the Direction in deciding whether the Cancellation Decision should be revoked.
>
> Conclusion The High Court allowed the appeal, set aside the decision of the Full Court of the Federal Court of Australia, and ordered the issue of a writ of certiorari quashing the Tribunal's decision and a writ of mandamus directing the Tribunal to determine the Appellant's request for revocation of the Cancellation Decision according to law." (Emphasis supplied)

59. Before we close this matter, we would like to put a question to the executing court as to why it did not deem fit to afford one opportunity of hearing to the appellants herein? What would have happened if the executing court would have permitted the appellants herein to place their written objections on record? It is true that there was some delay on the part of the appel- lants herein in responding to the summons issued by it, but at the same time, having regard to the severe consequences, the ex- ecuting court should have been a little more considerate while declining even to take the objections on record and give one op- portunity of hearing to the appellants before passing the order of arrest, detention in a civil prison and attachment of the property. This aspect unfortunately has been overlooked even by the High Court while affirming the order passed by the executing court. The High Court itself could have remanded the matter to the executing court with a view to give an opportunity of hear- ing to the appellants herein. The supervisory jurisdiction vested in the High Court under Article 227 of the Constitution is meant to take care of such situations like the one on hand.

60. In the overall view of the matter, we are convinced that the impugned order passed by the High Court is unsustainable in law. In such circumstances, we set aside the order passed by the High Court and also that of the executing court.

61. However, we clarify that it shall be open for the respon- dents herein (decree-holders) to file a fresh application if at all there is any interference at the instance of the appellants herein (judgment-debtors) in so far as their possession of the property in question is concerned. If any such fresh application is filed, the executing court shall look into the same strictly keeping in mind the observations made by this Court in this or- der and decide the same on its own merits.

62. The appeal is allowed in the aforesaid terms.

63. Pending application, if any, shall stand disposed of accord- ingly.

64. The Registry is directed to circulate one copy each of this judgment to each of the High Courts with a further request that each of the High Courts shall circulate one copy of this judg- ment in their respective District Courts.

……..J (J.B. PARDIWALA) ……..J (R. MAHADEVAN) NEW DELHI:

JANUARY 17th, 2025.