

Chiranjilal Shrilal Goenka (Deceased) ... vs Jasjit Singh And Ors on 18 March, 1993

Equivalent citations: 1993 SCR (2) 454, 1993 SCC (2) 507, 1993 AIR SCW 1439, 1993 (2) SCC 507, (1993) 2 RRR 411, (1993) 1 ARBILR 443, 1993 BBCJ 160, (1993) 2 CIVLJ 421, (1993) 1 HINDULR 502, 1993 ALL CJ 2 880, (1993) 2 ANDH LT 13, 1993 REVLR 1 426, (1993) 2 SCR 454 (SC), 1993 BLJR 2 1193, (1993) 1 CURCC 749, (1993) 27 DRJ 103, (1993) 50 DLT 266, (1993) 2 JT 341 (SC)

Author: K. Ramaswamy

Bench: K. Ramaswamy, R.M. Sahai

PETITIONER:

CHIRANJILAL SHRILAL GOENKA (DECEASED) THROUGH L RS.

Vs.

RESPONDENT:

JASJIT SINGH AND ORS.

DATE OF JUDGMENT 18/03/1993

BENCH:

RAMASWAMY, K.

BENCH:

RAMASWAMY, K.

SAHAI, R.M. (J)

CITATION:

1993 SCR (2) 454

1993 SCC (2) 507

JT 1993 (2) 341

1993 SCALE (2) 146

ACT:

Arbitration Act :

Sections 8, 14, 17, 20, 30 and 33-Arbitrator-Whether entitled to enquire into execution and genuineness of will.

Indian Succession Act, 1925. Sections 213, 217, 222, 223 and 276-Will-Probate of jurisdiction of probate court to enquire into execution and genuineness of will-Whether Arbitrator can enquire into such issues under Arbitration Act.

HEADNOTE:

The appellant Shri Chiranjilal Shri Lal Goenka was involved in several suits, one of which was the present appeal. He died on November 25, 1985 leaving behind his last Will dated October 29, 1982 in which he appointed his younger daughter Mrs. Sushila N. Rungta as the sole executrix Radhey Shyam, the natural son of Shri Mangal Chand Kedia and Mrs. Sita daughter of Shri C.S. Goenka; claimed to be the adopted son of Shri C.S. Goenka.

The applicant, executrix; Radhey Shyam and his wife filed substitution applications under Order 22 Rule 3 CPC setting up rival claims. When the dispute arose as to who should represent the estate of Shri C.S. Goenka by order dated October 7, 1991 this Court brought all the three on record as legal representatives; and by a further order dated November 1, 1991 by consent of parties appointed a retired Chief Justice of the Bombay High Court as an Arbitrator to settle the dispute as to who would be the legal heirs to the estate of late Chiranjilal Shri Lal Goenka. The arbitrator entered upon the reference and on the riling of pleadings by the parties framed diverse issues.

Issues No. 1 and 2 related to the two Wills and were : (1) Does the claimant No. 1 prove. execution of the Will dated 29th Oct. 1982 and prove the same to be the last and genuine Will of Shri G.S. Goenka. (2) If not does she prove the execution of the Will dated 4.7.78 and prove the same

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to be the last and genuine Will of the late Shri G.S. Goenka. Simultaneous proceedings in the probate suit were being pursued in Bombay High Court, and a Single Judge expressed doubt whether the arbitrator had jurisdiction to decide the probate suit. Similarly, on an application made before the arbitrator seeking clarification, he too stated that with his appointment as arbitrator all the pending suits in the schedule should be assumed to have been referred for arbitration and that includes the probate suit as well, but that he cannot give any clarification in that behalf.

An Interlocutory Application was, therefore, moved in this Court for clarification, and it was contended on behalf of the applicant that the probate court had exclusive jurisdiction to grant probate of the Will to the applicant for due implementation of the directions contained in the Will as the executrix, and that this issue cannot be referred to arbitration and the arbitrator thereby is devoid of jurisdiction to decide Issue Nos. 1 and 2 that had been framed by him, and that the applicant had not consented to refer the probate suit for arbitration.

The application was contested on behalf of the respondents by contending that proceeding the order of the Court dated November 1, 1991 the counsel for the respondents addressed a letter to the counsel for the petitioner including the probate suit for reference to arbitration, and this was to obviate the litigation pending in all the courts as to who

were the legal heirs of Shri C.S.Goenka, and thereafter this court appointed the arbitrator,' that with a view to put an end to the litigation in all the suits pending in different courts, this Court appointed the arbitrator to decide all the disputes in pending suits. It is, therefore, desirable that the arbitrator should decide Issue Nos. 1 and 2 that have been framed.

Disposing of the Application, this Court,

HELD : 1. Section 2(11) of Code of Civil Procedure 1908 defines "legal representatives" to mean a person who in law represents the estate of a deceased person; and includes any person who intermeddles with the estate of the deceased and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued. Order 22 rule 3 says that if one or two or more plaintiffs dies and the right to sue survives, the Court on an application made in this behalf, shall cause the legal representatives of the deceased plaintiff

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to be made a party and shall proceed with the suit. Mutatis Mutandis by operation of Order 22 Rule 11 this rule applies to the appellants at the appeal stage. Similarly, Order 22 Rule 4 applies in the case of death of one of several defendants or of sole defendant and in case of a dispute under Rule 5 such a question shall be determined by the Court. [460H, 461A-B]

2. Inheritance is In some sort a legal and fictitious continuation of the personality of the dead man, for the representation is in some sort identified by the law with him who he represents. The rights which the dead man can no longer own or exercise in propria persona and the obligations which he can no longer in propria persona fulfil, he owns exercises, and fulfils in the person of a living substitute. To this extent, and in this fiction, it may be said that legal personality of a man survives his natural personality, until his obligations being duty performed, and his property duly disposed of, his representation among the living is no longer called for. 1461D]

3. The grant of Probate by a Court of competent jurisdiction is in the nature of a proceeding in rem. So long as the order remains in force it is conclusive as to the due execution and validity of the will unless it is duly revoked as per law. It binds not only upon all the parties made before the Court but also upon all other persons in all proceedings arising out of the Will or claims under or connected therewith. The decision of the Probate Court, therefore, is the judgment in rem. The probate granted by the competent court is conclusive of the validity of the Will until it is revoked and no evidence can be admitted to impeach it except in a proceeding taken for revoking the probate. [465D]

Slieoparsan Singh v. Ramnandan Prasad Singh, (1916) ILR 43

Cal. 694 PC and Narbharam Jivram v. Jayvallabh Harjiwan, AIR 1933 Bom. 469, approved. [465E-F]

4. It is settled law that a decree passed by a court without jurisdiction on the subject matter or on the grounds on which the decree made which goes to the root of its jurisdiction or lacks inherent jurisdiction is a coram non iudice. A decree passed by such a court is a nullity and is nonest. Its invalidity can be set up whenever it is sought to be enforced or is acted upon as a foundation for a right, even at the stage of execution or in collateral proceedings. The defect of jurisdiction strikes at the very authority of the court to pass decree which cannot be cured by consent or

waiver of the party. [467D]

A.R. Antulay v. R.S. Naik, [1988] 2 SCC 602; Bahadur Singh & Anr. v. Muni Subrat Dass & Anr [1969] 2 SCR 432; Smt. Kaushalya Devi and Ors. v. KL. Bansal, AIR 1970 SC 838; Ferozi Lal Jain v. Man Mal & Anr, AIR 1979 SC 794 and Sushil Kumar Mehta v. Gobind Rain Bohra (dead) through his Lrs, JT 1989 (suppl.) SC 329.

In the instant case, the applicant had consented to refer for arbitration the dispute in the pending probate proceedings, but consent cannot confer jurisdiction nor an estoppel against statute. The other legatees in the Will were not parties to it.

5. The Probate Court has been conferred with exclusive jurisdiction to grant probate of the Will of the deceased annexed to the petition (suit); on grant or refusal thereof, it has to preserve the original will produced before it. The grant of probate is final subject to appeal, if any, or revocation if made in terms of the provision of the Succession Act It is a judgment in rem and conclusive and binds not only the parties but also the entire world. The award deprives the parties of statutory right of appeal provided under section 299. Thus the necessary conclusion is that the Probate Court alone has exclusive jurisdiction and the Civil Court on original side or the Arbitrator does not get jurisdiction, even if consented to by the parties, to adjudicate upon the proof or validity of the Will propounded by the executrix, the appellant [468D-F]

6. The executrix was nominated expressly in the Will as a legal representative entitled to represent the Estate of the deceased but the heirs cannot get any probate before the Probate Court. They are entitled only to resist the Claim of the executrix of the execution and genuineness of the Will. The grant of probate gives the executrix the right to represent the estate of the deceased, the subject-matter in other proceedings. This exposition of the law is only for the purpose of finding the jurisdiction of the arbitrator and not an expression of opinion on the merits in the probate suit. [468G]

7. The Arbitrator cannot therefore proceed with the probate suit to decide the dispute in Issue Nos. 1 and 2

framed by him. The High Court is to proceed with the Probate suit, the Judge to fix the date and proceed day-to-day till it is concluded and decide the matter within six months. Till

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then the Arbitrator is not to decide Issue Nos. 1 and 2, but at liberty to proceed with the other issues, to await the decision of the probate Court and depending upon the result thereon, conclude the findings on issue Nos.1 and 2 and then make the award and take the proceedings according to law. [469H, 470A-B]

JUDGMENT:

CIVIL APPELLATE JURISDICTION: I.A. No. 3 of 1992.

IN Civil Appeal No. 732 of 1973.

From the Judgment and Order dated 29.9.79 of the Delhi High Court in Civil Writ 734 of 1971.

Satish Chandra, Pramod B. Agarwala and Mohinder Rupral for the Appellants.

V.R. Reddy Additional Solicitor General, P. Chidambaram, Syed Akhtar, C.L. Sahu, R.C. Bhalla, P. Parmeshwaran, C.V.S. Rao, K. Swamy and E.C. Agarwala for the Respondents. The Judgment of the Court was delivered by K. RAMASWAMY. J. Shri Chiranjilal Shrilal Goenka was involved in several suits and one of which is the pending appeal at his behest. He died on November 25, 1985 leaving behind last Will dated October 29., 1982 said to have been executed in which he appointed his younger daughter Mrs. Sushila N. Rungta as sole executrix of his Will. Radhey Shyam claims to be the adopted son of Shri C.S. Goenka. Radhey Shyam is the natural son of Shri Mangal Chand Kedia and Mrs. Sita another daughter of Sri C.S. Goenka. The applicant executrix; Radhey Shyam and his wife filed substitution applications under order 22 Rule 3 CPC setting up rival claims. When the dispute arose as to who would represent the estate of Shri C.S. Goenka, by order dated October 7, 1991 this Court brought all the three on record as legal representatives. By further order dated November 1, 1991 this Court passed the following order .lm15 " By consent of parties Justice V.S. Deshpande, retired Chief Justice of the Bombay High Court is appointed as arbitrator to settle the dispute as to who would be the legal heirs to the estate of the late Chiranjilal Shrilal Goenka."

The rest of the order is not necessary for the purpose of this case, hence omitted. Pursuant thereto Shri Justice V.S. Deshpande entered upon the arbitration. Preceding the order counsel for Sri Radhey Shyam had enclosed a letter giving details of all the pending suits and item No. 19, Suit No. 65 of 1985, titled S.N. Rungta v. R. C Goenka, was one such case. The schedule of the suits was annexed to the order of appointment of the arbitrator. On filing the respective pleadings, the arbitrator framed diverse issues. Issues No. 1 and 2 relate to two Wills and are as under:

"1. Does Claimant No.1 prove execution of the Will dated 29th (28th) October, 1982 and prove the same to be the last and genuine Will of late Shri G.S. Goenka.

2. If not does she prove the execution of the Will dated 4.7.1978 and prove the same to be the last and genuine Will of the late Shri G.S. Goenka".

Simultaneously proceedings in the probate suit is being pursued in Bombay High Court where in the learned Judge, on application, expressed doubt, whether arbitrator has jurisdiction to decide probate suit. Similarly, on application made before the arbitrator seeking clarification, he too had stated that when the appointment of him as arbitrator was made and all the pending proceedings were referred to in the schedule, it would be assumed that this Court applied its mind and referred to him the probate suit as well but he cannot give any clarification in that behalf. It would be expedient to the applicant to seek clarification from this Court. Thus the prayers in the application are :

"A. That this Hon'ble Court may be pleased to allow the applicant to proceed with the Probate Suit No. 65 of 1987 pending before the Hon'ble High Court of Bombay in accordance with law; and B. to pass such order and other orders as this Hon'ble Court may deem fit and proper in the circumstances".

Shri Satish Chandra, learned Senior counsel for the applicant contended, placing reliance on Gopi Rai v. B.N. Rai, AIR 1930 Allahabad 840 Chellan Bhai v. Nandu Bhai, ILR 21 Bombay, 337 and Manmohini Guha v. Banga Chandra Das, ILR 31 Cal. 357 that probate court has exclusive jurisdiction to grant probate of the Will to the applicant for due implementation of the directions contained in the Will as the executrix. That issue cannot be referred to arbitration and the arbitrator thereby is devoid of jurisdiction to decide issues Nos.1 and 2. He also further contended that the applicant had not consented to refer the probate suit for arbitration. Shri P. Chidambaram, learned Senior counsel for the respondents contended that preceding the order of this Court dated November 1, 1991, the counsel for the respondents addressed a letter to the counsel for the petitioner including the probate suit for reference to arbitration. This was to obviate the litigation pending in all the courts as to who are the leg heirs of Shri C.S. Goenka. Thereafter this Court appointed Shri Justice S.V. Deshpande. The contention, therefore, of the applicant that she did not consent to refer the probate suit for arbitration is an after thought and cannot be accepted. He further contended that this Court, with a view to put an end to the litigation in all the suits pending 'in different courts, appointed the arbitrator to decide all the disputes in pending suits go that it would bind them. The arbitrator had accordingly framed Issues Nos. 1 and 2, referred to herein before which pertinently relate to the Wills 'in' the probate suit alongwith other suits. Therefore, the arbitrator alone has got jurisdiction. The award of the arbitrator would be subject to approval or disapproval by this Hon'ble Court and on putting its seal it would bind all the parties and the courts including the probate court. Therefore, it is expedient that instead of parallel proceedings before the probate court and the arbitrator to be permitted to continue, it is desirable that the arbitrator should decide issues Nos.1 and 2 with other issues and determine as to who would be the legal heirs and his decision would be binding in the probate suit. If any clarification is necessary it may be indicated accordingly.

Having given our anxious consideration we will proceed further in deciding the scope and effect of the order passed by this Court. As seen the order of reference to the arbitrator relates "to settle dispute as to who would be the legal heirs to the estate of Shri C.S. Goenka". Section 2(11) of CPC Act 5 of 1908 defines legal representatives means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased and where a party sues or is sued in a representatives character the person on whom the estate devolves on the death of the party so suing or sued. Order 22 rule 3 says that if one or two or more plaintiffs die and the right to sue does not survive to the surviving plaintiff or plaintiff, -, alone, or a sole plaintiff or sole surviving plaintiffs dies and the right to sue survives, the Court on an application made in this behalf, shall cause the legal representatives of the deceased plaintiff to be made a party and shall proceed with the suit. Mutatis-Mutandis by operation of Order 22 Rule 11 this rule applies to the appellants at the appeal stage. Similarly, Order 22 Rule 4 applies in the case of death of one of several defendants or of sole defendant and in case of a dispute under Rule 5 such a question shall be determined by the court. Inheritance is in some sort a legal and fictitious continuation of the personality of the dead man, for the presentation is in some sort identified by the law with him who he represents. The rights which the dead man can no longer own or exercise in propria persona and the obligations which he can no longer in propria person a fulfil, he owns, exercise and fulfils in the persons of a living substitute. To this extent, and in this fiction, it may be said that legal personality of a man survives his natural personality until his, obligation being duty performed, and his property duly disposed of, his representation among the living is no longer called for. In Black's Law Dictionary the meaning of the word 'Legal Representative' is : The term in its broadest sense means one who stands in place of, and represents the interests of another. A person who overseas the legal affairs of another. Examples include the executors or administrator of an estate and a court appointed guardian of a minor or incompetent person.

Term "Legal representative" which is almost always held to be synonymous with term "personal representative", means in accident cases, member of family entitled to benefits under Wrongful death statute. Unsatisfied claim and judgment fund. In *The Andhra Bank Ltd. v. R. Srinivasan and Ors.*, 1963 (1) and. W.R.(S.C.) 14 this Court considered the question whether the legatee under the Will is the legal representative within the meaning of Section 2(11) of the Code. It was held that it is well known that the expression "Legal Representative" had not been defined in the Code of 1882 and that led to a difference of judicial opinion as to its denotation. Considering the case law developed in that behalf it was held that respondents 2 to 12, the legatees under the Will of the estate are legal representatives of the deceased Raja Bahadur and so it follows that the estate of the deceased was sufficiently represented by them when the judgment were pronounced. In *The Official Liquidator v. Parthasarathi Sinha and Ors.*, AIR 1983 SC 188 this Court considered whether the legal representative would be bound by the liability for misfeasance proceeding against the deceased. While considering that question under section 50 CPC this Court held that the legal representative, of course, would not be liable for any sum beyond the value of the estate of the deceased in his hands. Mulla on CPC 14th Ed., Vol. I at P.27 stated that a person on whom the estate of the deceased devolves would be his legal representative- even if he is not in actual possession of the estate. It includes heirs and also persons who without title either as executors, administrators were in possession of the estate of the deceased. It is, therefore, clear that the term legal representative is wide and inclusive of not only the heirs but also intermeddlers of the estate of the deceased as well

as a person who in law represents the estate of the deceased. It is not necessarily confined 'to heirs alone. The executor, administrators, assigns or persons acquired interest by devolution under Order 22 Rule 10 or legatee under a Will, are legal representatives.

Section 3(f) of the Hindu Succession Act, 1956 defines "heirs" means any person, male or female who is entitled to succeed to the property of an intestate under this Act. Section 8 thereof provides that the property of a male Hindu dying intestate shall devolve according to the provisions of this Chapter 'Chapter 11' (Intestate succession) firstly upon the heirs, being the relatives specified in Class 1 of the Schedule..... Schedule provides Class 1 heirs are Son, daughter, widow, mother..... Thus under the personal law of Hindu Succession Act, if a Hindu dies intestate, the heirs either male or female specified in Schedule 1 Class 1, are heirs and succeed to the estate as per law. In' their absence, the next class or classes are entitled to succeed to the property of an intestate under the Act. In Sudama Devi and Ors. v. Jogendra Choudhary and Ors., AIR. 1987 Patna 239, (Full Bench) considered the question whether father of the minor in possession of his property and who himself was a party to the suit alongwith the minor is legal representative. The minor died. The father was held per majority to be legal representatives under section 2(11) of the Code as an intermeddler. It must therefore be held that not only that Class I heirs under Section 8 read with Schedule of the Hindu Succession Act but also the executor of the Will of the deceased Goenka are legal representatives within the meaning of Section 2(11) of the Code.

Section 213 of the Indian Succession Act (Act 39) of 1925 for short 'the Succession Act' provides right to the executor to obtain probate of the Will thus "(1) No right as executor.... can be established in an), Court of Justice, unless court of competent jurisdiction in (India) has granted probate of the will under which the right is claimed with a copy of the Will annexed. By operation of sub-section 2(i) only in the case of wills made by any Hindu where such wills are of the classes specified in Cls. (a) and (b) of Sec. 57...

Section 57 provides that the provisions of part which are set out in Schedule 111, shall, subject to the restrictions and modifications specified therein apply (a) to all wills made by any Hindu, on or after the first day of September, 1870, within the local limits of the ordinary original civil jurisdiction of the High Court of Judicature at Madras and Bombay... (c) to all wills and codicils made by any Hindu on or after the first day of January, 1927, to which those provisions are not applied by Cls. (a) and (b). In other places the Dist. Court or Court to whom the power is delegated alone are entitled to grant probate.

Section 276 provides the procedure to obtain probate, namely (1) application for probate with the Will annexed, shall be made by a distinctly written in English.... the will as the case may be, the particulars are the details mentioned in' Cls.(a) to' (e) and further details provided in sub-sections (2) and (3), the mention of the details whereof are not material for the purpose of this case. The petition shall be verified in the manner prescribed under section 280 and also further to be verified by at least one of the witnesses to the will in the manner and to the affect specified therein. The Caveator is entitled to object to its grant by operation of Section 284 When it is contested Section 295 directs that probate proceedings shall take, as nearly as may be, the form of a regular suit, according to the provisions of C.P.C. and the petitioner for probate shall be the plaintiff and the

person who had appeared to oppose the grant shall be the defendant. Section 217 expressly provides that save as otherwise provided by this Act or by any other law for the time being in force, all grants or probate with the will annexed shall be made or carried out, as the case may be, in accordance with the provisions of Part IX. Section 222 declares that (1) Probate shall be granted only to an executor appointed by the will. (2) The appointment may be expressed or by necessary implication Section 223 prohibits grant of probates to the persons specified therein. Section 224 gives power to appoint several executors. Section 227 declares the effect of probate thus:- Probate of a will when granted establishes the will from the death of the testator, and renders valid all intermediate acts of the executor as such. Section 248 envisages grant of probate for special purposes, namely, if an executor is appointed for any limited purpose specified in the will, the probate shall be limited to that purpose, and if he should appoint an attorney..... with the will annexed, shall be limited accordingly.

Section 273 declares conclusiveness of probate thus :-

Probate shall have the effect over all the property and estate moveable or immovable, of the deceased, throughout the State in which the same is or are granted, and shall be conclusive as to the representative title against the debtors of the deceased and all persons holding property which belongs to him, and shall afford full indemnity to all debtors, paying their debts and all persons delivering up such property to the person to whom such probate have been granted. The further details are not necessary for the purpose of this case. Under section 294 it shall be the duty of the court to preserve original Wills. Section 299 gives right of appeals against an order or the decree of the court of probate. By operation of Section 211(1) the executor of a deceased person is his legal representative for all purposes, and all the property of the deceased person vests in him as such.

In *Inswardeo Narain Singh v. Smt. Kanta Devi & Ors.*, AIR 1954 SC 280 this court held that the court of probate is only concerned with the question as to whether the document put forward as the last will and testament of a deceased person was duly executed and attested in accordance with law and whether at the time of such execution the testator had sound disposing mind. The question whether a particular bequest is good or bad is not within the purview of the Probate Court. Therefore the only issue in a probate proceeding relates to the genuineness and due execution of the Will and the court itself is under duty to determine it and preserve the original Will in its custody. The Succession Act is a self contained code in so far as the question of making an application for probate, grant or refusal of probate or an appeal carried against the decision of the probate court. This is clearly manifested in the fascicle of the provision of Act. The probate proceedings shall be conducted by the probate court in the manner prescribed in the Act and in no other ways. The grant of probate with a copy of the Will annexed establishes conclusively as to the appointment of the executor and the valid execution of the will. Thus it does no more than establish the factum of the will and the legal character of the executor. Probate court does not decide any question, of title or of the existence of the property itself.

The grant of a Probate by Court of competent jurisdiction is in the nature of a proceeding in rem. So long as the order remains in force it is conclusive as to the due execution and validity of the will unless it is duly revoked as per law. It binds not only upon all the parties made before the court but also upon all other persons in all proceedings arising out of the Will or claims under or connected therewith. The decision of the Probate Court, therefore, is the judgment in rem. The probate granted by the competent court is conclusive of the validity of the Will until it is revoked and no evidence can be admitted to impeach it except in a proceeding taken for revoking the probate. In *Sheoparsan Singh v. Ramnandan Prasad Singh*, (1916) ILR 43 Cal., 694 PC the judicial committee was to consider, whether the Will which had been affirmed by a Court of competent jurisdiction, would not be impugned in a court exercising original jurisdiction (Civil Court) in suit to declare the grant of probate illegal etc. The privy council held that the Civil Court has no jurisdiction to impugn the grant of probate by the court of competent jurisdiction. In that case the subordinate court of Muzafarbad was held to be had no jurisdiction to question the validity of the probate granted by the Calcutta High Court. In *Narbheram Jivram v. Jevallabh Harjivan*, AIR 1933 Bombay, 469 probate was granted by the High Court exercising probate jurisdiction. A civil suit on the Original Side was filed seeking apart from questioning the probate, also other reliefs. The High Court held that when a probate was granted., it operates upon the whole estate and establishes the Will from the death of the testator. Probate is conclusive evidence not only of the factum, but also of the validity of the Will and after the probate has been granted, in is incumbent on a person who wants to have the Will declared null and void, to have the probate revoked before proceeding further. That could be done only before the Probate Court and not on the original side of the High Court. When a request was made to transfer the suit to the Probate Court, the learned Judge declined to grant the relief and stayed the proceeding on the original side. Thus it is conclusive that the court of probate alone had jurisdiction and is competent to grant probate to the will annexed to the petition in the manner prescribed under the Succession Act. That court alone is competent to deal with the probate proceedings and to grant or refuse probate of the annexed will. It should keep the original will in its custody. The probate thus granted is conclusive unless it is revoked. It is a judgment in rem. We agree with Mr. Chidambaram that the applicant had consented to refer the dispute for arbitration of dispute in the pending probate proceedings, but consent cannot confer jurisdiction nor an estoppel against statute. The other legatees in the will were not parties to it. In *A.R. Antulay VI R.S. Naik*, [1988] 2 SCC 602 when a Constitution Bench directed the High Court Judge to try the offences under the Prevention of Corruption Act with which the petitioner therein was charged and the trial was being proceeded with, he 'questioned by way of writ petition the jurisdiction of this Court to give such a direction. A Bench of seven judges per majority construed meaning of the word 'jurisdiction', Mukerjee, J. as he then was, speaking per himself. Oza and Natarajan, JJ. held that the power to create or enlarge jurisdiction is legislative in character. So also the power to confer a right of appeal or to take away a right of appeal. The Parliament alone can do it, by law and not Court, whether interior or

both combine, can enlarge the jurisdiction of a Court and divest a person of his rights of appeal or revision. Ranganath Misra, J. as he then was, held that jurisdiction comes solely from the law of the land and cannot be exercised otherwise. In this country, jurisdiction can be exercised only when provided for either in the Constitution or in the laws made by the Legislature. Jurisdiction is thus the authority or power of the Court to deal with a matter and make an order carrying binding force in the facts. Oza, J. supplementing the question held that the jurisdiction to try a case could only be conferred by law enacted by the legislature. The Supreme Court could not confer jurisdiction if it does not exist in law. Ray, J. held that the Court cannot confer a jurisdiction on itself which is not provided in the law. In the dissenting opinion Venkatachaliah, J., as he then was to lay down that the expression jurisdiction or prior determination is a "verbal coat of many colours". In the case of a Tribunal an error of law might become not merely an error in jurisdiction but might partake of the character of an error of jurisdiction. But, otherwise, jurisdiction is a 'legal shelter' and a power to bind despite a possible error in the decision. The existence of jurisdiction does not depend on the correctness of its exercise. The authority to decide embodies a privilege to bind despite error, a privilege which is inherent in and indispensable to every judicial function. The characteristic attribute of a judicial act is that it binds whether it be right or it be wrong. Thus this Court laid down as an authoritative proposition of law that the jurisdiction could be conferred by statute and this Court cannot confer jurisdiction or an authority on a tribunal. In that case this Court held that Constitution Bench has no power to give direction contrary to Criminal Law Amendment Act, 1952. The direction per majority was held to be void. It is settled law that a decree passed by a court without jurisdiction on the subject matter or on the grounds on which the decree made which goes to the root to its jurisdiction of lacks inherent jurisdiction is a *corum non judice*. A decree passed by such a court in a nullity and is nonest. Its invalidity can be set up whenever it is sought to be enforced or is acted upon as a foundation for a right, even at the stage of execution or in collateral proceedings. The defect of jurisdiction strikes at the very authority of the court to pass decree which cannot be cured by consent or waiver of the party. In *Bahadur Singh & Anr. v. Muni Subrat Dass & Anr.*, [1969] 2 SCR 432 an eviction petition was filed under the Rent Control Act on the ground of nuisance. The dispute was referred to the arbitration. An award was made directing the tenant to run the workshop upto a specified time and thereafter to remove the machinery and to deliver vacant possession to the landlord. The award was signed by the arbitrators, the tenant and the landlord. It was filed in the court. A judgment and decree were passed in terms of the award. On expiry of the time and when the tenant did not remove the machinery nor delivered vacant possession, execution was levied under Delhi and Ajmer Rent Control Act. It was held that a decree passed in contravention of Delhi and Ajmer Rent Control Act was void and the landlord could not execute the decree. The same view was reiterated in *Smt. Kaushalya Devi and Ors. v. KL. Bansal*, AIR 1970 SC

838. In *Ferozi Lal Jain v. Man Mal & Anr.*, AIR 1979 SC 794 a compromise dehore grounds for eviction was arrived at between the parties under section 13 of the Delhi and Ajmer Rent Control Act. A decree in terms thereof was passed.

The possession was not delivered and execution was laid. It was held that the decree was nullity and, therefore, the tenant could not be evicted. In *Sushil Kumar Mehta v. Gobind Ram Bohra (dead) through his Lrs.* JT 1989 (SUPPL.) SC.329 the Civil Court decreed eviction but the building was governed by Haryana Urban (Control of Rent & Eviction) Act 11 of 1973. It was held that the decree was without jurisdiction and its nullity can be raised in execution. In *Union of India v. M/s. Ajit Mehta and Associates.* Pune and Ors., AIR 1990 Bombay 45 a Division Bench to which Sawant, J. as he then was, a member was to consider whether the validity of the award could be questioned on jurisdictional issue under section 30 of the Arbitration Act. The Division Bench held that Clause 70 of the, Contract provided that the Chief Engineer shall appoint an engineer officer to be sole arbitrator and unless both. parties agree in writing such a reference shall not take place until after completion of the works or termination or determination of the Contract. Pursuant to this contract under section 8 of the Act, an Arbitrator was appointed and award was made, Its validity was questioned under section 30 thereof. The Division Bench considering the scope of Sections 8 and 20(4) of the Act and on review of the case law held that Section 8 cannot be invoked for appointment of an Arbitrator unilaterally but be available only. under section 20(4) of the Act. Therefore, the very appointment of the Arbitrator without consent of both parties was held void being without jurisdiction. The Arbitrator so appointed inherently lacked jurisdiction and hence the award made by such Arbitrator is nonest. In *Chellan Bhai's case* Sir C. Farran, Kt., C.J. of Bombay High Court held that the Probate Court alone is to determine whether probate of an alleged will shall issue to the executor named in it and that the executor has no power to refer the question of execution of Will to arbitration. It was also held that the executor having propounded a Will, and applied for probate, a caveat was filed denying the execution of the alleged Will, and the matter was duly registered as a suit, the executor and the caveatrix subsequently cannot refer the dispute to arbitration, signing a submission paper, but such an award made pursuant thereto was held to be without jurisdiction.

In *Gopi Rai's case*, Sulaiman, J. as he then was, speaking for the Division Bench held that the Civil Court has no jurisdiction to allow the dispute relating to the genuineness of a Will in a probate proceedings pending before him to be referred to the arbitration of an arbitrator. He has got to be specified that the Will is a genuine document before the order of granting probate is passed. He cannot delegate those functions to a private individual and decide the point through him. Similar was the view laid in *Manmohini Guha's case*, *Sarda Kanta Das v. Gobinda Das* 6 Indian. Cases 912 and *Khelawati v. Chet. Ram Khub Rain*, AIR 1952 Punjab 67. When the plea of estoppel was raised, Sulaiman. J. in *Gopi Rai's case* held that "We cannot hold that there is any estoppel against Gopi Rai on this question of jurisdiction. That is a matter which we can take into account only when ordering costs.'" The decision in *Nalla Ramudamma v. Nalla Kasi Naidu*, AIR 1945 Madras 269 relied on by *Shri Chidambaram* does not help his clients. Therein the question was the matrimonial dispute. The Arbitrator had decided at the request of the parties and a decree was passed. It was held that the dispute would come under section 21 of the Arbitration Act. The question of jurisdiction was not raised therein. Equal- ly the decision in *Mt. Mahasunader Kuer and Anr. v. Ram Ratan Prasad Sahi*.

AIR 1916 Patna 382 is also of little assistance. The question of adoption, it was held, cannot be decided in the probate proceedings.

On a conspectus of the above legal scenario we conclude that the Probate Court has been conferred with exclusive jurisdiction to grant probate of the Will of the deceased annexed to the petition (suit); on grant or refusal thereof, it has to preserve the original Will produced before it. The grant of probate is final subject to appeal, if any, or revocation if made in terms of the provisions of the Succession Act. It is a judgment in rely and conclusive and binds not only the parties but also the entire world. The award deprives the parties of statutory right of appeal provided under section 299. Thus the necessary conclusion is that the Probate Court alone has exclusive jurisdiction and the Civil Court on original side or the Arbitrator does not get jurisdiction even if consented to by the parties, to adjudicate upon the proof or validity of the Will propounded by the executrix, the applicant. It is already seen that the executrix was nominated expressly in the will as a legal representative entitled to represent the Estate of the deceased but the heirs cannot get any probate before the Probate Court. They are entitled only to resist the claim of the executrix of the execution and genuineness of the Will. The grant of probate gives the executrix the right to represent the estate of the deceased, the subject-matter in other proceedings. We make it clear that our exposition of law is only for the purpose of finding the jurisdiction of the arbitrator and not an expression of opinion on merits in the probate suit.

From this perspective we are constrained to conclude that the Ar.

bitrator cannot proceed with the probate suit to decide the dispute in issues Nos.1 and 2 framed by him. Under these circumstances the only course open in the case is that the High Court is requested to proceed with the probate suit No.65/85 pending on the probate jurisdiction of the High Court of Bombay and decide the same as expeditiously as possible. The learned Judge is requested to fix the date and proceed day-to-day at his convenience till it is concluded and decide the matter according to law preferably within six months. Till then the Arbitrator is requested not to decide issue Nos.1 and 2. He may be at liberty to proceed with the other issues. He is requested to await the decision of the Probate Court; depending upon the result thereon, he would conclude his findings on Issues Nos.1 and 2 and then make the award and take the proceedings according to law. The application is accordingly ordered but without cost.

N.V.K

Application disposed of.