

Hasham Abbas Sayyad vs Usman Abbas Sayyad & Ors on 12 December, 2006

Equivalent citations: AIR 2007 SUPREME COURT 1077, 2007 (2) SCC 355, 2007 AIR SCW 1011, 2007 (2) AIR BOM R 611, (2007) 2 ALL RENTCAS 104, (2007) 2 ICC 351, (2007) 1 LANDLR 9, (2007) 3 MAH LJ 56, (2007) 2 MPLJ 294, (2007) 2 RAJ LW 952, (2007) 2 ANDHLD 59, (2006) 14 SCALE 131, 2007 HRR 1 444, MANU/SC/5541/2006, (2007) 3 CIVILCOURTC 793, (2007) 2 JCR 15 (SC), (2007) 50 ALLINDCAS 47 (SC), (2007) 66 ALL LR 637, (2007) 2 ALL WC 1426, (2007) 1 CAL HN 189, (2007) 1 BOM CR 324

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Bench: S.B. Sinha, Markandey Katju

CASE NO.:

Appeal (civil) 5721 of 2006

PETITIONER:

Hasham Abbas Sayyad

RESPONDENT:

Usman Abbas Sayyad & Ors

DATE OF JUDGMENT: 12/12/2006

BENCH:

S.B. Sinha & Markandey Katju

JUDGMENT:

J U D G M E N T [Arising out of SLP (Civil) No.15035 of 2006] S.B. SINHA, J :

Leave granted.

Appellant, Respondent No.1 and Respondent No.2 are brothers. A suit for partition was filed by Respondent No.1. A preliminary decree was passed on 16.03.1999. An application purported to be a Special Darkhast was filed by him on 29.11.1999. An Advocate Commissioner was appointed. He was of the opinion that the property was impartible. A proposal was mooted that the property be put on sale in between the co- sharers. Appellant accepted the Commissioner's report. He however filed an application for putting the said suit property on auction sale and for equal distribution of the proceeds thereof amongst the co-sharers. An objection to the report of the said Advocate Commissioner was filed by the appellant. The court

allowed the appellant to appoint an architect at his own cost. He, however, failed to comply with the said order. A sale proclamation was issued. The appellant expressed his intention to buy the said property at the valuation made by the Government Valuer. A valuation report was filed by the appellant on 04.05.2005 against which Respondent No.1 filed an objection. The appellant was called upon to deposit 2/3rd of the amount stated in the valuation report. He failed to do so. On or about 21.11.2005, he filed an application expressing his willingness to deposit shares of Respondent Nos. 1 and 2. He also sought for permission to deposit an amount of Rs.2.5 lakhs. By an order dated 22.11.2005, the Trial Court held that since the property was put on auction sale, the highest bid would be treated to be the best price of the suit property and there was no need for appointment of any valuer to ascertain the market price thereof. Another objection was filed by the appellant stating that in view of the facts and circumstances of the case, he should be allowed to buy the shares of other so-sharers. The said application was rejected by an order dated 14.12.2005. By an order dated 15.04.2006, the learned Trial Judge held that it was not necessary to initiate a final decree proceeding and the said purported Special Darkhast filed by Respondent No.1 was treated to be an application therefor. A writ petition filed by the appellant was dismissed by the High Court by reason of the impugned order.

The short question which, inter alia, arises for consideration is as to whether the property in suit could be put on auction sale without initiating a formal final decree proceeding.

"Decree" has been defined in Section 2(2) of the Code of Civil Procedure, 1908 to mean :

"Decree" means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final, it shall be deemed to include the rejection of a plaint and the determination of any question within section 144, but shall not include

- (a) any adjudication from which an appeal lies as an appeal from an order, or
- (b) any order of dismissal for default.

Explanation.- A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final;"

We may also notice Section 54 of the Code of Civil Procedure which is in the following terms :

"54. Partition of estate or separation of share.- Where the decree is for the partition of an undivided estate assessed to the payment of revenue to the Government, or for the separate possession of a share of such an estate the partition of the estate or the separation of the share shall be made by the Collector or any gazetted subordinate of the Collector deputed by him in this behalf, in accordance with the law (if any) for the time being in force relating to the partition, or the separate possession of shares, of such estates."

Order XX of the Code of Civil Procedure provides as to when a judgment is said to be pronounced. Rule 7 thereof provides that a decree although prepared at a later date shall relate back to the date of the judgment. A Civil Court, in a suit for partition, may pass a preliminary decree in terms of Order XX Rule 18 of the Civil Procedure Code, which reads as under :

"18. Decree in suit for partition of property or separate possession of a share therein.- Where the Court passes a decree for the partition of property or for the separate possession of a share therein, then, -

(1) if in so far as the decree relates to an estate assessed to the payment of revenue to the Government, the decree shall declare the rights of the several parties interested in the property, but shall direct such partition or separation to be made by the Collector, or any gazetted subordinate of the Collector deputed by him in this behalf, in accordance with such declaration and with the provisions of section 54.

(2) if and in so far as such decree relates to any other immoveable property or to movable property, the Court may, if the partition or separation cannot be conveniently made without further inquiry, pass a preliminary decree declaring the rights of the several parties, interested in the property and giving such further directions as may be required."

Preliminary decree declares the rights and liabilities of the parties. However, in a given case a decree may be both preliminary and final.

There can be more than one final decrees. A decree may be partly preliminary and partly final. [See *Rachakonda Venkat Rao and Others v. R. Satya Bai (Dead)* by L.Rs. and Another (2003) 7 SCC 452] A final decree proceeding may be initiated at any point of time. No limitation is provided therefor. However, what can be executed is a final decree, and not a preliminary decree, unless and until final decree is a part of the preliminary decree.

Order XXI of the Code of Civil Procedure, inter alia, provides that a property can be put to sale only in execution of a decree.

Rules 13 and 14 of Order XXVI, which are also relevant for the purpose, read as under :

"13. Commission to make partition of immovable property.- Where a preliminary decree for partition has been passed, the Court may, in any case not provided for by section 54, issue a commission to such person as it thinks fit to make the partition or separation according to the rights as declared in such decree.

14. Procedure of Commissioner.- (1) The Commissioner shall, after such inquiry as may be necessary, divide the property into as many shares as may be directed by the order under which the commission was issued, and shall allot such shares to the parties, and may, if authorized thereto by the said order, award sums to be paid for the purpose of equalizing the value of the shares.

(2) The Commissioner shall then prepare and sign a report or the Commissioners (where the commission was issued to more than one person and they cannot agree) shall prepare and sign separate reports appointing the share of each party and distinguishing each share (if so directed by the said order) by metes and bounds. Such report or reports shall be annexed to the commission and transmitted to the Court; and the Court, after hearing any objections which the parties may make to the report or reports, shall confirm, vary or set aside the same.

(3) Where the Court confirms or varies the report it shall pass a decree in accordance with the same as confirmed or varied; but where the Court sets aside the report or reports it shall either issue a new commission or make such other order as it shall think it."

The question came up for consideration before this Court in *Shankar Balwant Lokhande (Dead) v. Chandrakant Shankar Lokhande and Another* (1995) 3 SCC 413], wherein it was opined :

" Both the decrees are in the same suit. Final decree may be said to become final in two ways: (i) when the time for appeal has expired without any appeal being filed against the preliminary decree or the matter has been decided by the highest court; (ii) when, as regards the court passing the decree, the same stands completely disposed of. It is in the latter sense the word "decree" is used in Section 2(2) of CPC. The appealability of the decree will, therefore, not affect its character as a final decree. The final decree merely carries into fulfilment the preliminary decree."

Taking note of the fact that a final decree proceeding is required to be drawn upon a stamped paper, it was observed :

"The crucial question for consideration is as to when the limitation begins to run for filing an application to pass final decree on stamped papers. There is no direct decision of this Court on this point. Therefore, after hearing counsel at length, we reserve the judgment in the appeal and independently made detailed examination. There is divergence of opinion in the High Courts on this question."

We are not oblivious of the fact that a somewhat different view as regards period of limitation provided under Article 136 of the Limitation Act, 1963 was taken in *W.B. Essential Commodities Supply Corpn. v. Swadesh Agro Farming & Storage Pvt. Ltd. and Another* [(1999) 8 SCC 315], wherein, inter alia, it was held that the aforementioned observations do not apply to a money decree.

In *Hameed Joharan (Dead) and Others v. Abdul Salam (Dead) by Lrs. and Others* [(2001) 7 SCC 573], *Shankar Balwant Lokhande (supra)* was distinguished, inter alia, stating :

"23. Significantly, the contextual facts itself in Lokhande's case (supra) has prompted this Court to pass the order as it has (noticed above) and as would appear from the recording in the order to wit: "Therefore, executing court cannot receive the preliminary decree unless final decree is passed as envisaged under Order 20 Rule 18 (2)."

24. In that view of the matter, reliance on the decision of Lokhande's case (supra) by Mr. Mani appearing for the appellants herein cannot thus but be said to be totally misplaced more so by reason of the fact that the issue pertaining to furnishing of stamp paper and subsequent engrossment of the final decree thereon did not fall for consideration neither the observations contained in the judgment could be said to be germane to the issue involved therein. The factual score as noticed in paragraph 10 of the Report makes the situation clear enough to indicate that the Court was not called upon to adjudicate the issue as raised presently. The observations thus cannot, with due deference to the learned Judge, but be termed to be an obiter dictum."

Yet again in *Mool Chand and Others v. Dy. Director, Consolidation and Others* [(1995) 5 SCC 631], a distinction was drawn between a case where an appeal against a preliminary decree was filed and a case where a preliminary decree had not been appealed against.

Recently in *Dr. Chiranji Lal (D) by LRs. v. Hari Das (D) by LRs.* [(2005) 10 SCC 746], it was held that the period of limitation for execution of a partition decree would not be made contingent upon the engrossment of the decree on the stamp paper.

We have referred to the aforementioned decisions to clear the air in relation to one aspect of the matter, namely, although final decree may be required to be duly stamped, or the same may not have anything to do for the purpose of computing the period of limitation, the preliminary decree as such cannot be put to execution.

Although in regard to the period of limitation in execution of the final decree proceeding there are somewhat different views, but all decisions of this Court clearly state that it is the final decree proceeding which would be executable in nature. Without drawing a final decree proceeding, the court could not have put the property on auction sale.

It is true that the house property was found to be an impartible one; but a preliminary decree having been passed, the valuation thereof and final allotment of the property could have been done only in

a final decree proceeding. Only when final allotments were made or a determination is made that the property should be put on auction sale, a final decree in respect thereof should have been passed. It is appealable. Only a final decree could be put to execution.

A contention was raised that having regard to the conduct of the appellant, we should not interfere, but the appellant herein has raised a jurisdictional question. However, the appellant can be put to terms.

The core question is as to whether an order passed by a person lacking inherent jurisdiction would be a nullity. It will be so. The principles of estoppel, waiver and acquiescence or even *res judicata* which are procedural in nature would have no application in a case where an order has been passed by the Tribunal/Court which has no authority in that behalf. Any order passed by a court without jurisdiction would be *coram non jure* being a nullity, the same ordinarily should not be given effect to. [See Chief Justice of Andhra Pradesh and Another v. L.V.A. Dikshitulu and Others - AIR 1979 SC 193 & MD Army Welfare Housing Organisation v. Sumangal Services (P) Ltd. (2004) 8 SCC 619].

This aspect of the matter has recently been considered by this Court in *Harshad Chiman Lal Modi v. DLF Universal Ltd. and Another* [(2005) 7 SCC 791], in the following terms :

"We are unable to uphold the contention. The jurisdiction of a court may be classified into several categories. The important categories are (i) Territorial or local jurisdiction; (ii) Pecuniary jurisdiction; and (iii) Jurisdiction over the subject matter. So far as territorial and pecuniary jurisdictions are concerned, objection to such jurisdiction has to be taken at the earliest possible opportunity and in any case at or before settlement of issues. The law is well settled on the point that if such objection is not taken at the earliest, it cannot be allowed to be taken at a subsequent stage. Jurisdiction as to subject matter, however, is totally distinct and stands on a different footing. Where a court has no jurisdiction over the subject matter of the suit by reason of any limitation imposed by statute, charter or commission, it cannot take up the cause or matter. An order passed by a court having no jurisdiction is nullity."

[See also *Zila Sahakari Kendrya Bank Maryadit v. Shahjadi Begum & Ors.* 2006 (9) SCALE 675 and *Shahbad Co-op. Sugar Mills Ltd. v. Special Secretary to Govt. of Haryana & Ors.* 2006 (11) SCALE 674 para 29] We may, however hasten to add that a distinction must be made between a decree passed by a court which has no territorial or pecuniary jurisdiction in the light of Section 21 of the Code of Civil Procedure; and a decree passed by a court having no jurisdiction in regard to the subject matter of the suit. Whereas in the former case, the appellate court may not interfere with the decree unless prejudice is shown, ordinarily the second category of the cases would be interfered with.

We are also not oblivious of some decisions of this Court where a property that had been put to auction and despite setting aside of the decree, the court had not interfered with. [See *Bombay Dyeing and Mfg. Co. Ltd. v. Bombay Environmental Action Group and Others* (2006) 3 SCC

459 para 329].

But in this case possession of the property has not been delivered to the auction purchaser.

The suit property is a residential house. The auction sale was wholly illegal. The auction purchaser can otherwise be compensated on monetary terms.

We, therefore, are of the opinion that in the peculiar facts and circumstances of the case, and with a view to do complete justice to the parties, the appellant should be directed to deposit a sum of Rs.18 lakhs within four weeks from date before the learned Trial Judge, who shall immediately allow Respondent Nos.1 and 2 to withdraw a sum of Rs.9 lakhs each towards their shares in the property.

The appellant furthermore shall deposit such amount in the court within the aforementioned period towards payment of interest by way of compensation @ 9% p.a. from the date of deposit till the actual payment is made, which would be payable to the auction purchaser, which in our opinion is just and reasonable.

The principle that such direction can be issued by this Court in exercise of its jurisdiction under Article 142 of the Constitution of India would appear from a decision of this Court in *Kishori Lal v. Sales Officer, District Land Development Bank and Ors.* [2006 (8) SCALE 521], wherein it was directed :

"However, with a view to do complete justice between the parties, in our considered opinion, the appellant should be directed to deposit the entire auction money with interest thereupon @6% per annum. This order is being passed by us under Article 142 of the Constitution of India. Such amount should be deposited within eight weeks from this date before respondent No.1, Sales Officer. On such deposit being made, the auction shall stand set aside and the possession of the property shall be restored to the appellant herein. However, in the event the appellant fails and/or neglects to deposit the said amount within the aforementioned period, these appeals shall stand dismissed."

Following the said decision, herein also we would direct that in the event of compliance of the aforementioned directions, the auction shall stand set aside and the decree for partition shall stand satisfied. The appeal is allowed subject to the aforementioned observations and directions. However, in the facts and circumstances of the case, there shall be no order as to costs.