
(1999) 12 CAL CK 0046

In the Calcutta High Court

Case No : Civil Appellate Jurisdiction Original Side A.P.O.T. No. 16 of 1999,
Appeal No. 474 of 1999, O.S. No. 283 of 1997

Stephen Court Limited

APPELLANT

Vs

The Official Trustees of West Bengal

RESPONDENT

Date of Decision : 21-12-1999

Acts Referred:

Calcutta High Court (Original Side) Rules, 1914 — Rule 13, 3
City Civil Court Act, 1953 — Section 2(5), 22, 5(3)
Civil Procedure Code, 1908 (CPC) — Order 1 Rule 13, Order 6 Rule 4, 11
Constitution of India, 1950 — Article 311(1)
Evidence Act, 1872 — Section 115
Limitation Act, 1963 — Section 17
Official Trustees Act, 1913 — Section 25 , 26
Registration Act, 1908 — Section 49
Specific Relief Act, 1877 — Section 27A
Specific Relief Act, 1963 — Section 10, 13
Succession Act, 1925 — Section 2, 273, 274, 300, 302
Transfer of Property Act, 1882 — Section 53A

Citation : (2000) 2 CALLT 1

Hon'ble Judges : Samarendra Nath Bhattacharjee, J;Ruma Pal, J

Bench : Division Bench

Advocate : Mr. Dipankar Ghosh, Mr. Anil K. Gupta and Mrs. Rani Kapoor, for the Appellant; Mr. Jayanta Mitra and Mr. Abhijit Mitra, for the Respondent

Judgement

R. Pal J.

1. This appeal has been preferred from a decree passed on an Originating Summons filed by the respondent under Chapter XIII of the Rules of the Original Side of the Court. The learned judge declared that the appellant was a monthly tenant in respect of Premises No. 18. Park Street. Calcutta (referred to as the premises) and not a long term lessee. It was also held that a lease executed between the Official Trustee and the appellant in 1984 for a period of 60 years from 2018 was void. Before considering the various issues raised the factual background is required to be set out in some detail.

2. The premises was owned by Peter Charles Earnest Paul (referred to as Paul). On 13th September 1919 Paul leased out the premises to Francis Daniel Augustus Larmour (referred to as Larmour) by a registered deed for 99 years. This registered deed of lease (referred to as the 1919 Lease) was effective from 1.6.1919 and is to expire on 31.5.2018. On 1st August, 1920 Paul died. Prior to his death he had executed a Will appointing the Official Trustee as the executor and trustee in respect of the premises. The Official Trustee obtained probate of Paul's Will on 7th October, 1920 and appears in this case representing the estate of Paul. On 15th February, 1921 Larmour assigned his leasehold right for the unexpired period of the 1919 lease in favour of Aratoon Stephen by a registered deed of assignment.

3. On 4th December 1923 Stephen Court Ltd. (the appellant) was incorporated under the provisions of Indian Companies Act, 1913. Aratoon Stephen was a shareholder and one of the first Directors of the appellant. The Memorandum of Association of the appellant provides as one of its objects the acquisition of the buildings and premises specified in the agreement referred to in Clause 3 of the Company's Articles of Association. Clause 3 of the Articles of Association provides that the appellant company would forthwith enter into an agreement with Aratoon Stephen in respect of the premises. It was also mentioned that the basis on which the appellant company was established was that the company would acquire the premises. An agreement was accordingly entered into on 10th December 1923 between Aratoon Stephen and the appellant company by which the appellant was to purchase the leasehold right of Aratoon Stephen in the premises for the balance unexpired period of the 1919 lease. The agreement, although duly executed by the parties and filed with the Register of Companies, was not registered.

4. A supplementary agreement was entered into between Aratoon Stephen and the appellant company on the same date in connection with the creation of a trust in respect of the leasehold interest in the premises. The supplementary agreement recorded that the appellant company was entitled to the premises for the residue of the term of 99 years from 1.6.1919 and that the premises was vested in Aratoon Stephen as a trustee until the time the appellant company made payment to Aratoon Stephen of the consideration for the transfer of the leasehold interest to it. The supplementary agreement was duly registered.

5. The Appellant Company made payment of the consideration money to Aratoon Stephen and in 1924 constructed a five-storied building at the premises. The appellant company paid rent to the Official Trustee as the superior landlord and was granted rent receipts by the Official Trustee.

6. On 9th February 1984 the appellant wrote to the Official Trustee requesting for extension of the lease period for a further period of 60 years after the expiry of the original lease period on 31.5.2018. The Official Trustee by a letter dated 20th March 1984 wrote to the appellant that the appellant should apply to the High Court for obtaining grant for extension of the 1919 lease in respect of the

premises. The appellant company accordingly made an application to the High Court (Matter No. 432 of 1984) u/s 302 of the Indian Succession Act as well as the Official Trustees Act, 1913 in which the Official Trustee was a party. The appellant set out the entire history of the case and claimed that it had been accepted as a lessee of the premises by the Official Trustee. The appellant company claimed that it was desirous of making further investments in the premises at great expense but would be able to recover the investment unless it were assured of a further term. It accordingly prayed for a direction on the Official Trustee as the executor and trustee to the Estate of Paul to renew the indenture of lease dated 13.9.1919 for a further period of 60 years and to execute and register the indenture in terms of a draft lease which was annexed to the appellant's application.

7. The Official Trustee filed an affidavit-in-opposition to the application in which it admitted the facts stated by the appellant and further stated that the appellant was entitled to remain in possession of the premises for another 34 years.

8. It Was submitted by the Official Trustee in his affidavit that the Court should pass an order allowing a renewal of the head lease subject to certain terms.

9. On 17th April 1984 an order was passed by R.N. Pyne J (as His Lordship then was) increasing the rate of rent in respect of the premises for "the rest and residue period of the existing lease". As far as the rental for the extended period was concerned, a valuer was appointed to determine the monthly rent. The valuer submitted a report. After hearing the parties and on the basis of the valuer's report, a final order was passed on 30th May 1984 by R.N. Pyne-J to the following effect :

"After reading the original report of Mr. A.K. De, the valuer and upon hearing the parties it appears to the Court that the rent of the lease is reasonable and beneficial to the Trust Estate. There will be an order in terms of prayer (a). The rent payable under the proposed lease will be Rs. 19,000/- (Rupees nineteen thousand) per month. Regarding the current lease the petitioner will pay rent at the rate of Rs. 8,000/-(Rupees eight thousand) per month with effect from 1st June, 1984."

10. The parties acted on the basis of the orders passed by R.N. Pyne J. The lease was duly executed and registered on 25th July 1984 between the Official Trustee and the appellant for a further period of 60 years with effect from 1.6.2018 at a monthly rental of Rs. 19,000/- and the Official Trustee accepted rent at the enhanced rate from the appellant.

11. More than 12 years later a letter was written by the Official Trustee on 7th April 1997 to the appellant asking for a Xerox copy of the agreement of the sale dated 10.12.1923 together with the registered deed of transfer of Aratoon's leasehold interest in favour of the appellant and the supplementary agreement appointing Aratoon Stephen as trustee. It is not clear as to what prompted this sudden enquiry by the Official Trustee. According to the appellant the Official

Trustee was acting at the behest of a tenant, viz. M/s. Flurys against whom the appellant had successfully filed a suit for eviction.

12. The application by way of originating summons was taken out on 21st July 1997 in which the Official Trustee sought to raise the following questions for determination.

(a) Determination of the relation between the Official Trustee and Messers Stephen Court Limited prior to 31.5.2018 A.D. as the relation between them was not determined;

(b) On the basis of such determination of relation is M/s. Stephen Court Limited entitled to execute any lease deed with any party in respect of premises No. 18, Park Street, Calcutta or any part thereof prior to 31.5,2019 A.D. if not, then in that event, what will be the fate of such leases, if any made prior to 31.5.2018;

(c) Is the order dated 13th May. 1984 passed in Matter No. 432 of 1984 null and void?

(d) Is the Deed of Lease executed by the Official Trustee on 25th July, 1984 is valid and binding;

(e) Whether any leasehold right in respect of the premises No. 18, Park Street, Calcutta has legally vested in Messers Stephen Court Limited in the absence of any registered deed conveying, transferring and/ or assigning the unexpired period of lease by Mr. Aratoon Stephen in favour of Messers Stephen Court Limited had any legal right to make application before this Hon"ble Court in 1984 praying for extension of the head lease of 13.9.1919;

(f) Whether the High Court at Calcutta had Jurisdiction to pass the order dated 13th May, 1984 in Matter No. 432 of 1984 directing the Official Trustee to execute the indenture of lease for renewal/extension of the head lease dated 13.9.1919 in favour of Messers Stephen Court Limited, who was not the lessee. Besides that, the head lease did not contain any covenant for extension/renewal.

By Judgment and decree dated 28.06.99 the learned single Judge came to the conclusion that because the agreement dated 10.12.1923 by which Aratoon Stephen has sought to transfer the leasehold interest in the premises in favored of the appellant was an unregistered deed, the appellant became and still was a monthly tenant in respect of the premises and the building and structures thereon under the Official Trustee as the successor in interest to Paul. The learned single Judge also came to the conclusion that the order passed by R.N. Pyne--J allowing the application of the appellant on 30.05.84 was passed without Jurisdiction as the learned Judge could not alter "the term of the head lease which does not contain any option for renewal". It was also held that since not notice had been given by the appellant of the application to the Public Trustee in London who was representing the estate of the deceased beneficiaries and legatees under the Will of Paul, the order dated 30.05.84 and the renewal deed were not binding on the public Trustee. The learned Judge upheld the contention

of the appellant that the Official Trustee could not rise the issue of maintainability of the appellant's earlier application. However the submission of the appellant that the Official Trustee's application was barred by limitation as the order dated 30th April 1984 was negatived on the ground that the order was void and the lease deed dated 25th July 1984 executed by the Official trustee in favour of the appellant pursuant to that order was also void and without any Jurisdiction.

Before us the appellant has contended that the Official Trustee's application was not maintainable in the form in which it was taken out under Chapter XIII of the Original Side Rules. It was also submitted that the issues sought to be raised by the Official Trustee were barred by *res judicata*, acquiescence and estoppel. It was further submitted that the appellant's application was maintainable u/s 302 of the Indian Succession Act, 1925 and the order passed thereon could not be void. On the merits the appellant submitted that even though the agreement for sale between Aratoon Stephen and the appellant was unregistered, since it was referred to and confirmed in the subsequent registered document being the supplementary deed, the defect of nonregistration disappeared. It was then argued that the appellant's possession was in any event protected u/s 53A of the Transfer of Property Act. The finding of the learned Judge that the appellant was a monthly tenant under the Official Trustee was challenged on two bases. First as the transfer of Larmour's leasehold interest to Aratoon was undisputedly valid, during the pendency of the 1919 lease, the Official Trustee had no right to possession or to further transfer the leasehold interest and create a monthly tenancy in favour of any party; second, if the sale agreement between Aratoon and the appellant were void, Aratoon's interest revived and there was no privity of contract or estate between the Official Trustee and the Appellant. It was next submitted by the appellant that even if R.N.Pyne-J was wrong in passing the order dated 30.5.1984, the order could not be termed to be void as it was open to the appellant to ask for renewal or in any event the grant of a fresh lease in respect of the premises after the expiry of the 1919 lease. Finally, it was submitted that the application of the Official Trustee was barred by limitation.

15. The Official Trustee apart from reiterating the points held in his favour by the learned Judge, submitted that the appellant's application on which the impugned order was passed was not maintainable and this Court had no Jurisdiction to entertain the application. It was further submitted that the 1984 lease was not beneficial to the estate; nor was it granted on public notice or by auction. It was contended in any event that the appellant's application for grant of a lease effective from 2018 was premature. According to the Official Trustee there was no question of *res Judicata* as neither the issue of nonregistration of the 1923 deed nor the status of the appellant was needed to be raised nor decided in the earlier application. According to the Official Trustee, u/s 302 of the Indian Succession Act read with section 25 of the Official Trustees Act no complicated question of fact or law could have been raised or decided nor was any adjudication of substantive rights possible. The only question before the Court, according to the Official Trustee, was whether the new lease should be granted.

It is contended that the question of the status of the appellant was at the highest only incidental but not directly or substantively in issue. It was further submitted that there could be no estoppel on the question of Jurisdiction.

16. An application under Chapter XIII of the Original Side Rules allows question on specified subjects to be raised for determination by the Court. The proceedings are initiated by Summons in the form specified in Rule 13 which is required to be served on the persons whose rights are sought to be affected (Rule 3). According to Rule 13 the summons must be supported by an affidavit setting forth the facts upon which the relief sought by the summons is founded. These are to be presented to the Registrar/Master who after scrutinizing the same signs and seals the summons. The affidavit is filed and numbered as an Ordinary Suit after which the defendant may enter appearance and file a written statement.

17. In this case the application as originally taken out was defective in that there was no summons at all. However, by an order dated 1st April, 1999, the learned Judge gave leave to the Official Trustee to take out a proper summons and to put in the deficit Court Fee Stamps. The petition of the Official Trustee was allowed to be relied on in support of the summons. In our view the learned Judge could not have given such directions when there was in fact no properly constituted lis before him. The application ought to have been dismissed with liberty to the Official Trustee to file an Originating Summons in proper form. However as no appeal was preferred from this order by the appellant and the matter was decided on merits this issue must be deemed to be closed.

18. The second issue raised by the appellant is more fundamental viz. that the Official Trustee was debarred from reopening the issues on the principles of estoppel and res judicata. There is a distinction between estoppel and res Judicata. The first is a fetter on a party litigant. The second is a fetter on the Court. The underlying parameters of the two principles are also different. The principle of res judicata is based on the determination of "matters in issue" by the Court. Pawan Kumar Gupta Vs. Rochiram Nagdeo, has laid down the principle of res judicaia as :

"The rule of res Judicata incorporated in section 11 of the CPC (CPC) prohibits the Court from trying an issue which has been directly and substantially in issue in a former suit between the same parties", and has been heard and finally decided by that Court, it is the decision on an issue, and not a mere finding on any incidental question to reach such decision, which operates as res judicata."

19. Although explanation IV widens the scope of section 11 by including within it "any matter which might and ought to have been made ground of defence or attack In any former suit", this means that ft must be a matter which could have been in issue.

20. The rule of estoppel is not restricted to a matter in issue and has been expressed in Cooke v. Rickman : (1911) 2 KB 1125 as :

"If the defendant in a second action attempts to put on the record a plea which is inconsistent with any traversable allegation in a former action between the same parties there is an estoppel." (See also *Humphries v. Humphries* : 1910 (2) KB 531)

21. The law on estoppel was authoritatively stand by the Privy Council in *Hoystead & Ors. v. Commissioner of Taxation* : 1926 AC 155:

"In the opinion of their Lordships it is settled, first, that the admission of a fact fundamental to the decision arrived at cannot be withdrawn and a fresh litigation started, with a view of obtaining another judgment upon a different assumption of fact, secondly, the same principle applies not only to an erroneous admission of a fundamental fact, but to an. erroneous assumption as to the legal quality of that fact. Parties are not permitted to begin fresh litigation because of new views they may entertain of the law of the case, or new versions which they present as to what should be a proper apprehension by the Court of the legal result either of the construction of the documents or the weight of certain circumstances. If this were permitted litigation would have no end, except when legal ingenuity is exhausted. It is a principle of law that this cannot be permitted, and there is abundant authority reiterating that principle. Thirdly, the same principle-namely, that of setting to rest rights of litigants, applies to the case where a point, fundamental to the decision, taken or assumed by the plaintiff and traversable by the defendant, has not been traversed."

22. The statement of the law by the Judicial Committee was noted with approval in *M/s. Radhasoami Satsang Saomi Bagh, Agra Vs. Commissioner of Income Tax*, .

23. It would, therefore, appear that the principle of estoppel is that a litigant cannot perform a volte face whether on a question of law or fact.

24. The distinction between estoppel and *res Judicata* has been recognised in *Ferro Alloys Corpn. Ltd. and Another Vs. U.O.I. and Others*, . The Supreme Court negated a plea that a respondent in an earlier proceeding was barred by the principles of *res judicaia* or constructive *res judicata* from raising an earlier issue in subsequent proceeding filed by it as it was found that the rights of the respondent could not have been either directly or substantially in issue in the first proceeding. However, the subsequent proceeding by the respondent was dismissed on the ground of waiver, acquiescence and estoppel. The factors in support of this finding included an invitation to the Court by the respondent in the earlier proceeding to accept the order sought to be impugned in the subsequent proceeding and its tacit support of the order: and that other parties to the proceeding had relied on and acted on the impugned order:

"Thus, because of the non-contentious attitude adopted by FACOR before this Court in the proceedings culminating in the aforesaid Judgment not only the other three rival claimants but also the Central and State Governments changed their positions and acted upon the representation flowing from the non-

contentions attitude adopted by FACOR in connection with the order of the Central Government dated 17.8.1995. Not only the said order was supported by FACOR before this Court, but it became successful in getting it confirmed by this Court and thereafter the said decision was acted upon by all the contesting respondents. Hence, it is too late for FACOR to turn round and try to get out of the order of this Court. Therefore, even on the principle of estoppel, FACOR must be held to be bound by the assessment of its need as approved by the Expert Committee and accepted by the Central Government and which assessment was got approved by FACOR itself as a supporting respondent before this court. FACOR cannot blow hot and cold in this connection. It cannot now submit to this Court differently from what it submitted in the past when this court decided TISCO case [(1996) 6 SCC 709] and got the assessment of its need approved by this Court. It cannot turn round and say that this Court should not have accepted the said assessment."

25. Applying these principles to the facts of this case we are of the view that the Official Trustee cannot take a stand different from the one taken in the earlier proceedings, being debarred from doing so by the principles of estoppel and acquiescence. The Official Trustee could have impugned the maintainability of the appellant's application before R.N. Pyne J. He did not. On the other hand, it was at the Official Trustee's suggestion that the appellant applied to the High Court for a lease for 60 years from 2018. He could have raised the issue that the application should be dismissed on the ground that the 1923 deed was not registered. He could at least have avoided the execution of the second lease on the ground that it was premature or by asking for auction of the leasehold interest for the period after 2018. He did none of this. The Official Trustee. In answer to the appellant's application in 1984 categorically said in his affidavit that the following proposal would be beneficial to the Estate and that the order should be passed accordingly.

"(a) Upon the lessee agreeing to enhance the current monthly rent payable for the lease by at least 400% the head lease can be rectified by giving the lessee the option of renewal of the lease on such terms and conditions as this Hon''ble Court may deem fit and proper after expiry of the head lease on May 31.2018 by efflux of time.

(b) A competent valuer would be appointed by this Hon''ble Court at the expenses of the petitioner for ascertaining the market value of the property. The probable market value of the property as on June 1, 2018 should be estimated on the basis of the present trend of increase in the value of land in Calcutta as well as the rate of inflation and the amount of rent to be paid by the lessee for the extended period would be determined on the basis of the said valuation."

26. The Court accepted the proposal and the order appointing the valuer, increasing the rental for the remaining period of the 1919 years lease and directing execution of the second lease was passed on the submission of the Official Trustee. After the final order was passed on 30th May, 1984, the

appellant has paid the enhanced rental and the Official Trustee accepted the enhanced rent and has continued to do so for thirteen years. It needs to be emphasised that the payment of the enhanced rental for the existing period of the 1919 lease was in consideration for execution of the second lease. The second lease was finalised, executed by and between the Official Trustee and the appellant and registered in 1984. A clearer case of estoppel and acquiescence would be difficult to envisage. To allow the Official Trustee to affect such a volte face after so many years and reopen all these issues would, in our view, be a travesty of justice.

27. The law on res judicata however is not clear in so far as it relates to questions of law or the Jurisdiction of the Court.

28. In Mathura Prasad Bajoo Jaiswal and Others Vs. Dossibai N.B. Jeejeebhoy, the applicant had asked for determination of rent under the Bombay Rents Hotel and Lodging House Rates (Control) Act, 1947. The application was rejected on the ground that the Act did not apply to open land allotted for construction of buildings. The order was affirmed by the High Court. The applicant filed" a second application for determining standard rent in respect of the demised premises. The application was dismissed on the ground of res Judicata. The Supreme Court said:

"A previous decision of a competent Court on the facts which are the foundation of the right and the relevant law applicable to the determination of the transaction which is the source of the right is res judicata. A previous decision on a matter in issue is a composite decision : the decision on law cannot be dissociated from the decision on facts on which the right is founded. A decision on an issue of law will be as res judicata in a subsequent proceeding between the same parties, if the cause of action of the subsequent proceeding be the same as in the previous proceeding, but not when the cause of action is different, nor when the law has since the earlier decision been altered by a competent authority, nor when the decision relates to the jurisdiction of the Court to try the earlier proceeding, nor when the earlier decision declares valid a transaction which is prohibited by law."

It was further observed :

"If the decision in the previous proceeding be regarded as conclusive it will assume the status of a special rule of law applicable to the parties relating to the jurisdiction of the Court in derogation of the rule declared by the Legislature."

29. The view in Mathura Prasad"s case was followed in Jaisingh Jairam Tyagi and Others Vs. Mamanchand Ratilal Agarwal and Others, and reiterated in Smt. Isabella Johnson Vs. M.A. Susai, .

30. On the other hand in State of U.P. Vs. Nawab Hussain, the Supreme Court allowed a plea of res Judicata to be set up to defeat a claim of infringement of the Constitution. In that case the petitioner was dismissed from service. He filed

a petition for quashing the disciplinary proceedings on the ground that he was not afforded a reasonable opportunity to meet the allegations against him and the action taken against him was mala fide. The petition was dismissed. Thereafter he filed a suit in which he challenged the order of dismissal on the ground, inter alia, that he had been appointed by the I.G.P. and that the Dy. I.G.P. was not competent or dismiss him by virtue of Article 311(1) of the Constitution. The Court said :

"It is not in controversy before us that the respondent did not raise the plea in the writ petition which had been filed in the High Court that by virtue of clause (1) of Article 311 of the Constitution he could not be dismissed by the Deputy Inspector General of Police as he had been appointed by the Inspector General of Police. It is also not in controversy that that was an important plea which was within the knowledge of the respondent and could well have been taken in the writ petition but he contented himself by raising the other pleas that he was not afforded a reasonable opportunity to meet the case against him in the departmental inquiry and that the action taken against him was mala fide. It was therefore not permissible for him to challenge his dismissal in the subsequent suit, on the other ground that he had been dismissed by an authority subordinate to that by which he was appointed. That was clearly barred by the principles of constructive res judicata, and the High Court erred in taking a contrary view."

31. Again in P.K. Vijayan Vs. Kamalakshi Amma and Others, the Supreme Court held that a plea of lack of jurisdiction of the Court was barred by res judicata. The facts in that were that in proceedings before the Rent Controller, a claim was made for ejectment of the appellant on the ground envisaged in section 11 of the Rent Control Act. The plea of entitlement u/s 106 of the Land Reforms Act was available to the appellant in the eviction proceedings viz, that the Rent Controller would have no jurisdiction to proceed further but would have to refer the same to the Land Tribunal for decision u/s 125(3) of the Land Reforms Act. in a subsequent proceeding, the issue of the Rent Controller's Jurisdiction was raised again. The Supreme Court said :

"the appellant merely chose to deny the title of the landlords and did not raise the plea of section 106 of the Land Reforms Act. The rule of "might and ought" envisaged in Explanation IV to section 11, CPC squarely applies to the facts of the case and, therefore, it is no longer open to the appellant to plead that Civil Court has no Jurisdiction to decide the matter and it shall be required to be referred to the Land Tribunal..... It is a sheer abuse of the process of the court to raise at each successive stages different pleas to protract the proceedings. It would be fair and Just that the parties to raise all available relevant pleas in the suits or the proceedings when the action is initiated and the omission thereof does constitute constructive res judicata to prevent raising of the same at a later point of time."

32. However since the decision in Mathura Prasad's case was constituted by a

larger number of the Judges and had not been referred to in the last two decision, it must be held to be good law.

33. The first question is whether the issues now sought to be raised might or ought to have been raised in answer to the first application that the present issues were relevant if not essential to the decision of 30th May, 1984 cannot be disputed by the Official Trustee at least. The reason why the learned Judge held that the second deed was void was that R.N. Pyne J. had passed the order in favour of the appellant "on the basis that the defendant (appellant) had subsisting leasehold interest in the premises and the building and structures thereon". Therefore, the question whether the appellant was a lessee under the 1923 deed was very much in issue in the earlier application. It is also the Official Trustee's case as appearing from his written notes of arguments that "the basis of the order of R.N. Pyne J. was that Stephen Court Limited is the lessee under the deed of lease dated 13.9.1919. The basis of the order is non-existent and void". Therefore, the questions now sought to be raised by the Official Trustee could and should have been raised by the Official Trustee to defeat the application of the applicant for grant of the second lease.

34. In AIR 1949 143 (Privy Council) relied on by the Official Trustee a proceeding was initiated in 1918 for a declaration that the plaintiff had been granted ownership rights in respect of a certain village. The suit was decreed in favour of the plaintiff. A second suit was filed claiming recoveries of taxes levied by the Government from the village on the ground that the plaintiff, was the owner of the village. The Government contested the claim that since survey settlements have not been introduced no agriculture assessment was leviable and the plaintiff could not claim the right to recovery the non-agriculture assessment. The plaintiff claimed that the issue was res-judicata. The Privy Council negatived this. It held that the earlier suit related to the construction of the grant and although had the issue of non-leviability of non-agriculture assessment raised might have resulted in a dismissal of the earlier suit against the Government nevertheless because (i) the fact that the Government chose to admit certain facts for the purpose of getting a decision on an important question of law viz. the nature of the grant and (ii) that the non-agricultural assessment claimed in the later suit was subsequent to the period claimed in the suit of 1918. Explanation IV to section 11 could not be used to preclude the Government from raising the point

35. In this case there was no such issue which required determination and which could call for any admission by the Official Trustee and there was no difference in the factual situation obtaining in 1984 and in 1997. We would, therefore, hold that the issues raised by the Official Trustee in his application are barred by res judicata.

36. But the Official Trustee says that R.N. Pyne J. had no Jurisdiction to entertain the appellant's application either under the Official Trustees Act, 1913 or under the Indian Succession Act, 1925.

37. Section 25 of the Official Trustees Act, 1913 provides :

"25. Power of High Court to make orders in respect of property vested in Official Trustee.--The High Court may make such order's as it thinks fit respecting any trust property vested in the Official Trustee, or the income, or produce thereof."

38. The Official Trustee has relied on the decision in Committee of Management of Pachaiyappa's Trust Vs. Official Trustee of Madras and Another, to contend that the application of the appellant was not maintainable. In that case also a private person directly applied to court for a long term lease of trust property. The Supreme Court said :

"Section 26 of the said Act prescribes that any order under the Act may be made on the application of any person beneficially interested in any trust property or by any trustee thereof. The Act does not envisage an application being moved by any other person. Respondent 2 were neither beneficially interested in the trust property nor were they trustees thereof. The application filed by Respondent 2 was thus clearly not maintainable and the High Court was in error in entertaining the said application. The proper course was that Respondent 2 should have approached the Official Trustee with their proposal for grant of lease and if the Official Trustee, after examining the same, found it to be in interest of the Trust, he could move the court for appropriate directions."

39. The facts of that case are distinguishable. In the case before us, the appellant did approach the Official Trustee by letter dated 9th February, 1984 for extension of the lease period. In answer to this letter the Official Trustee said :

"Apropos of your letter dated 9.2.84 I have to suggest that you may apply to the Hon"ble High Court for obtaining grant for extension of the above mentioned lease."

40. Again in his affidavit in opposition, after setting out the proposal quoted earlier the Official Trustee said :

"I submit that this Hon"ble Court will pass an order as indicated tn paragraph 27 above."

41. The application having been made at the suggestion and supported by the Official Trustee was in effect by the Official Trustee.

42. Besides this is not a case where the High Court inherently lacked the Jurisdiction to pass the order that it did although the Court may have been "in error" by entertaining the application filed by the appellant. In such a case the principle of res judicata will apply. As stated in Rajendra Jha Vs. Presiding Officer, Labour Court, Bokaro Steel City, District Dhanbad and Another, in which the Supreme Court said :

"In so far as the question of res judicata is concerned. If an erroneous decision on a question of law is rendered by a court by assuming jurisdiction which it does not possess, it may be possible to argue that the decision cannot operate as res

was not maintainable, but came to the conclusion that the order dated 30th May 1984 was void because it had granted renewal of the 1919 lease which did not contain a clause for renewal. Now the Official Trustee knew that the 1919 Lease did not contain for a covenant for renewal. In his proposal quoted earlier he said that the 1919 Lease could be rectified by giving the appellant the option of renewal on such terms and conditions as the court would deem fit. Apart from the fact that the issue is barred by acquiescence and res judicata and that this court cannot allow the Official Trustee who had deliberately chosen a position in the earlier application "to reprobate and to blow hot now when he was blowing cold before" [Ferro Alloys Corpn. Ltd. and Another Vs. U.O.I. and Others,], This is not a ground on which the order could be held to be void.

47. Besides, the Court had the jurisdiction to direct the execution of a fresh lease in respect of the period after 2018. Merely because the 1919 lease did not contain a clause for renewal is thus not material. In Delhi Development Authority Vs. Durga Chand Kaushish, a lease had been granted for 90 years in favour of Durga Chand. The lease contained a clause by which the rent could be increased "subject to the renewal of the lease". The Supreme Court said :

"A renewal of a lease is really the grant of a fresh lease. It is called a "renewal" simply because it postulates the existence of a prior lease which generally provides for renewals as of right. In all other respects, it is really a fresh lease."

48. The earlier decision no doubt proceeded on the basis that the appellant was entitled to continue in possession of the premises till the expiry of the period mentioned in the 1919 lease. The learned single Judge in the order impugned before us did not hold otherwise- But according to the Official Trustee, the 1923 being unregistered, the appellant was merely a monthly tenant under him.

49. Even though the 1923 agreement was not registered, the question whether Aratoon had validly assigned his interest or not in favour of the appellant in 1923 is not an issue which could be or should have been decided on Aratoon's absence. The explanation given by the Official Trustee that Aratoon was not made a party to his application because he was not a party to the earlier proceedings is unacceptable. In the appellant's application Aratoon's presence was not necessary because no one challenged the fact that Aratoon had validly vested all his interest in the premises in favour of the appellant. He was a part of the historical background in the appellant's application but brought into the present, as it were, in the Official Trustee's application.

50. In any event merely because the 1923 was not registered, it is not as if the appellant were occupying the premises without any right or that it could not continue in possession until the period the 1919 lease expired.

51. There appears to be substance in the submission of the appellant that the defect in the agreement of sale between Aratoon and the appellant dated 10th December 1923 was cured by virtue of the registration of the supplementary agreement. The supplementary agreement was executed between Aratoon

Stephen, referred to therein as "the transferor", the appellant, referred to as "the company", and three others referred to as "the present Trustees". The supplementary agreement recites :

"WHEREAS the Company is entitled to the property set forth and described in the First School hereto for all the residue of the term of 99 years from the first day of June 1919 granted by an indenture of Lease dated the thirteenth day of September 1919 made between Peter Charls Ernest Paul of the one part and Francis Daniel Larmour of the other part and registered at Calcutta in Book 1 Volume 111 being No. 4493 for 1919 subject to an indenture dated the fifteenth day of August 1923 made between the Official Trustee of of the one part and as such the sole Executor and Trustee of the Will of the said Peter Charles Ernest Paul of the one part and the Transferor of the other part and registered at Calcutta in Book No. 1 Vol. 102 being No. 3712 for 1923 being an indenture of Rectification of the terms of the said indenture of Lease regarding payment of the owner's share of taxes in respect of the said demised premises AND WHEREAS the said property is at present vested in the Transferor as Trustee for and on behalf of the company and he has agreed at the request of the Company to join in these presents in manner hereinafter appearing AND WHEREAS the company being duly empowered in that behalf has determined to raise a sum not exceeding Rs. 70,00,00 (Rupees Seven lacs) (sic) by the issue of Debentures for that amount bearing interest of the rate of 5 1/2 per cent per annum and framed in accordance with the form set forth in the Second Schedule hereto and has agreed to secure the principal moneys together with interest for the time being payable in respect of such Debentures in manner hereinafter provided AND WHEREAS the present Trustees have consented to act as Trustees of this indenture upon the terms herein contained."

52. Broadly speaking the Supplementary deed provides for the issuance of debentures by the appellant in favour of Aratoon Stephen. Until and" unless the appellant paid off the debentures the scheme of trust would continue but :

"Upon proof being given to the reasonable satisfaction of the Trustees that all the Debentures entitled to the benefit of the trusts herein contained have been paid off or satisfied and upon payment of all costs charges and expenses incurred by the Trustees in relation to those presents the Trustees shall at the request and cost of the Company release the charged premises from this security."

53. In clause 44 of the supplementary deed it has been reaffirmed :

"44. And the Transferror and the Company hereby covenant with the present Trustees that the Transferror and the company now having good right to assign and transfer the mortgaged premises unto the present trustees in manner aforesaid."

54. The Privy Council in *Mitcheli v. Mathura Das* : 12 Indian Appeals 150 noted :

"The Registration Act was not passed to avoid the mischief of allowing a man to

be in possession of real property without having a registered deed, but as a check against the production of forged documents, and in order that subsequent purchasers, or persons to whom subsequent conveyances of property were made, should not be affected by previous conveyances unless those previous conveyances were registered."

55. In that case William Mitchell was indebted to Mathura Das. Mathura Dass sought to attach a property on the basis it belonged to William. William's father, Alexander, claimed the property belonged to him. He produced two documents namely, (1) one purporting to be a deed of conveyance of the property to himself and the other a confirmation bond executed by the same parties as the conveyance in the subsequent deed. The Judicial Committee held that the second deed being registered was a valid conveyance of the property to Alexander.

56. The Bombay High Court in *Jamuna Bai v. Dharsey Takersay* : 1902 (4) Bom LR 893 extended the principle. In that case the first document was a settlement by which certain properties were sought to be conveyed between two claimants to an estate. The settlement was not registered. An objection was taken as to the admissibility of the deeds of release as proof of the contents of the settlement. The Court however noted that the two deeds of release recited and confirmed the terms of settlement and purported to release the claim of one party against the other and therefore they fell within the principle in *Mitchell v. Mathura Dass*. In this case the supplementary agreement reiterated and confirmed the 1923 agreement and on that basis created the trust of the leasehold interest.

57. Incidentally, in answer to the earlier application the Official Trustee had said :

"This being a lease for more than 21 years, the West Bengal Premises Tenancy Act does not have any application thereto and none of the occupants in the said premises who has derived title from or through the head lease would not be entitled to any protection against eviction under the West Bengal Premises Tenancy Act, 1956."

58. If on the other hand the transfer of the leasehold interest between Aratoon and the appellant were void as now contended by the Official Trustee, then Aratoon continued to retain the leasehold interest for the balance period, as the last valid assignee. The Official Trustee would therefore not have any connection with the appellant nor could the appellant be a monthly tenant under the Official Trustee. If at all, the appellant might have been a monthly tenant under Aratoon in which case there would be no privity of contract or estate between the Official Trustee and the appellant in respect of the 1919 lease. The principle is stated in Mulla's *The "Transfer of Property Act (Eighth Edition)*, at page 871 on the basis of a wealth of authority :

"There is neither privity of estate nor privity of contract between the head lessor and the sub-lessee or mortgagee and therefore the sub-lessee or mortgagee is not liable for rent nor on covenants in the head lease to the head lessor".

59. The principle enunciated in *Biswabant Put. Ltd. v. Santosh Kumar Dutta* : AIR 1980 SC 228 (relied on by the Official Trustee) that a tenant put into possession under a void lease was deemed to be a tenant from month to month would not apply as far as this case is concerned to make the appellant a tenant under the Official Trustee, as the 1923 Lease was not executed between the Official Trustee and the appellant

60. Even between Aratoon and the appellant, the relationship is not of tenant and landlord but of transferor and transferee u/s 53A of the Transfer of Property Act.

61. Section 53A has its origin in what has come to be known as the rule in *Welsh v. Lonsdale* [(1882) 21 Ch. D.9]. It was laid down there that if a person had taken possession on the basis of an agreement of which he could ask for specific performance, he would be in the same position as between himself and the other, as if the grant had in fact been made and would have "an estate in equity" under the agreement. The law was applied in India by a Division Bench of this Court in *Btbi Jawahir Kumari v. Chatterput Singh* [1905] II CLJ 343. However in *Ariff v. Jadunath* [1931] 58 IA 91 it was held that unless the right to sue for specific performance were available (i.e. was not for example, time barred), the rule would have no application. This brought about legislative changes. Section 53A was introduced in the Transfer of Property Act, 1882; section 49 of the registration Act, 1908 was amended and section 27A incorporated in the Specific Relief Act, 1877 (since replaced by sections 10 and 13 of the Specific Relief Act, 1963). The law now allows the rule in *Walsh v. Lonsdale* to operate without the fetter imposed by *Ariff v. Jadunath*.

62. Aratoon is the only person whose interest was affected by the 1923 Deed. After the enactment of section 53A he could not claim any right in respect of the premises otherwise than a right expressly provided by the terms of the 1923 deed. The appellant, therefore, has "an estate in equity" under the 1923 agreement to continue in possession of the premises till 2018. Thus is *Technicians Studio Private Ltd. Vs. Smt. Lila Ghosh and Another*, where a compromise petition provided for a tenancy of 16 years, it was held :

"The petition of compromise required registration, and this not having been done it could not create any interest in favour of the appellant in the premises though he was entitled to protect his possession for a period of sixteen years u/s 53A of the Transfer of Property Act."

63. It must also be remembered that the appellant has been openly in possession of the premises since 1923 qua assignee of Aratoon's interest and had been accepted by the Official Trustee as such. The building now standing on the premises was constructed by the appellant thereafter. The appellant applied for an extension of the period of 1919 lease on the ground that it was undertaking extensive repairs and modernization of the building including installation of four new lifts and that it did not want to invest the amount

involved when it could not recoup such investment out of the returns during the remaining tenure of the lease. Whether the lease for the remaining period beyond 2018 was granted by way of renewal or as a fresh lease is immaterial in the circumstances of the case as the same considerations must have applied. The learned Judge's conclusion that the direction to execute the second lease was void was, therefore, erroneous.

64. It appears that the learned Judge was moved by the fact that no notice had been to the heirs of Paul. If this were indeed the case, then we fail to understand how the learned Judge entertained and allowed the Official Trustee's application in the absence of and without notice to the beneficiaries and legatees of Paul. Be that as it may, where the Official Trustee is still representing the estate of Paul it was unnecessary to give notice to the beneficiaries of Paul. In the appellant's application it had said:

"12. The Official Trustee of West Bengal as the executor is in charge, management and control of the estate of said Testator which includes the said premises."

In answer to this the Official Trustee said :

"11. The averments made in paragraph 12 of the petition are substantially correct."

65. Furthermore the view that the order dated 30th May 1984 was void because of non joinder of the heirs of Paul is contrary to the CPC hereunder Order 1 Rule 13:

"All objections on the ground of non-joinder or misjoinder of parties shall be taken at the earliest possible opportunity and, in all cases where issues are settled, at or before such settlement, unless the ground of objection has subsequently arisen, and any such objection not so taken shall be deemed to have been waived."

66. Indeed the conduct of the Official Trustee with regard to the Estate of Paul is curious. The Official Trustee was granted probate of the will of Paul on 7th October, 1920. In terms of the probate he was required to file a full and true inventory of the estate within six months and to submit true accounts of the property within one year. The Registrar, Original Side, pursuant to an inquiry by this Court, has submitted that neither any inventory nor any accounts had been filed by the Official Trustee till date. There is also no explanation why the Official Trustee did not assent to the legacies in favour of the beneficiaries and legatees to the estate of Paul although 79 years have passed since the obtaining of probate. On the other hand, the Official Trustee does not even know the whereabouts of one of the heirs of Paul. This what he had said in his earlier affidavit:

"Under and in terms of the will of the said Late P.C.E. Paul after the death of his widow the said property would develop in his two sisters viz. Mrs. Zoe

Hemmingray and Mrs. Gophie De Beurdrille absolutely. Both the said two sisters of the testator have now left India and are resident in foreign (sic). The said Mrs. Zoe Hemmingray has been died (sic) and her 1 /2 share with the Income of the said property are being paid to the Administrator of her estate in England. The Official Trustee in spite of his best efforts, could not trace the whereabouts of the said Mrs. De Bourdrille. It is also not known to the Official Trustee whether she is aware about her share in 1 /2 Income of the said estate of Late P.C.E. Paul are being accumulated from month to month."

67. This brings us to the last issue, namely, limitation. The learned Judge acted on the principle that limitation did not apply because according to him the order of R.N. Pyne J. was void. The Official Trustee has submitted on the basis of the decision of the Supreme Court in *Kiran Singh and Others Vs. Chaman Paswan and Others*, to the effect that:

"it is a fundamental principle well-established that a decree passed by a court without jurisdiction is a nullity, and that its invalidity could be set up whenever and wherever it is sought to be enforced or relied upon, even at the stage of execution and even in collateral proceedings. A defect of jurisdiction, whether it is pecuniary or territorial, or whether it is in respect of the subject matter of the action, strikes at the very authority of the Court to pass any decree, and such a defect cannot be cured even by consent of parties and that as such limitation would not be a bar."

68. We have already held that the order dated 30.5.1984 was not void. It is not in dispute that if the order is not void, the application of the Official Trustee would be barred by limitation. Assuming that the order is void it would be doubtful whether the principle in *Kiran Singh v. Chaman Prasad* (supra) would apply when the nullity is not sought to be enforced but challenged. The Supreme Court in *State of Punjab and Others Vs. Gurdev Singh*, in no uncertain terms held that in such a case the bar of limitation would apply. It said:

"For the purposes of the present cases, it may be assumed that the order of dismissal was void, inoperative and ultra vires, and, not voidable. But nonetheless the impugned dismissal order has at least a de facto operation unless and until it is declared to be void or nullity by a competent body or court. If an act is void or ultra vires it is enough for the Court to declare it so and it collapses automatically. It need not be set aside. The aggrieved party can simply seek a declaration that it is void and not binding upon him. A declaration merely declares the existing state of affairs and does not "quash" so as to produce a new state of affairs. Therefore, the party aggrieved by the invalidity of the order has to approach the Court for relief of declaration that the order against him is inoperative and not binding upon him. He must approach the Court within the prescribed period of limitation. If the statutory time limit expires the court cannot give the declaration sought for."

69. The Official Trustee then sought to take recourse of section 17 of the

Limitation Act, 1963 by alleging that the appellant had acted fraudulently. The pleading of fraud is wholly inadequate. Order 6 Rule 4 of the CPC requires particulars of fraud to be given with date and items if necessary. Therefore, a person seeking to avoid limitation on the ground of fraud must specifically state the particulars thereof (see: AIR 1934 208 (Privy Council) . All that the Official Trustee said In his application was :

It was said :

"I submit that the said lease deed was caused to be executed by practising fraud on the process of law upon projection of a false Impression to the effect that a leasehold interest had already been vested unto the opposite party/defendant."

70. This will not do. Apart from this section 17 of the Limitation Act provides inter alia that

"the period of limitation shall not begin to run until the plaintiff or the applicant has discovered the fraud or the mistake or could with reasonable diligence, have discovered it; or in the case of a concealed document, until the plaintiff or applicant first had the means of producing the concealed document or compelling its production;"

71. There is no pleading to this effect nor any shred of evidence in support of this at all.

72. Having held in favour of the appellant on all points we set aside the decree of the learned single Judge and allow the appeal with costs.

Stay prayed for and the same is refused.

Let a xerox copy of this Judgment duly signed by the Assistant Registrar of this court be made available to the parties upon their undertaking to apply for and obtain certified copy thereof on payment of usual charges.

S.N. Bhattacharjee, J.

73. I agree.

74. Appeal allowed with costs