SUPREME COURT OF INDIA

Bajranglal Shivchandrai Ruia

Vs.

Shashikant N. Ruia

C.A.No.5293 of 1993

(S. Rajendra Babu, B. N. Srikrishna and G. P. Mathur, JJ.)

23.03.2004

JUDGEMENT

SRIKRISHNA, J.:-

1. This appeal is directed against the judgment of the Division Bench of the Bombay High Court granting a decree for the relief of possession of the suit property together with a direction for inquiry into mesne profits, by reversing the judgment of the single Judge who had dismissed the original suit.

Facts

2. Two brothers, Shivchandrai and Ramvallabh, purchased a plot of land measuring 1063 sq. meters at Malviya Road, Ville Parle, Bombay in the year 1928. Haribux was the third brother, whose son was Nand Kishore and who in turn had a son by name Shashikant.

3. The family tree of the contending parties is as under :

4. In 1931, Shivchandrai and Ramvallabh constructed a building known as 'Hari Niwas' on the said land. The building comprised a ground floor, two upper floors and several separate out-houses, sheds and garages. In all, there were five separate structures having 5 different Municipal Ward and Street numbers, namely, 781 (1), (2), (3), (4) and (5). The Bombay Municipal Corporation (hereinafter "BMC") used to issue separate property tax bills in respect of these five demarcated properties. The families of Shivchandrai and Ramvallabh were occupying Hari Niwas as their family house. Shivchandrai's family expanded in due course of time and consisted of his wife Rukmanibai, three daughters and six sons. Ramvallabh's family consisted of his wife Durgabai, one daughter and his son Mahavirprasad. Satyavati, the plaintiff in the suit, which has given rise to the present appeal, is the wife of Ramprasad who is one of the sons of Shivehandrai.

5. Sometime in 1933, Bajranglal, the appellant, was born to ShivChandrai in Hari Niwas itself. In 1939 Ramvallabh died leaving behind his wife Durgabai, one daughter and son Mahavirprasad. In 1962, one of the six sons of Shivchandrai, namely, Chandra Prakash, shifted his residence to Bandra and has been living separately. Shashikant with his father Nandkishore moved out to Madras and settled there.

6. In 1964, Shivchandrai also moved over to Madras to settle with his nephew Nandkishore. Until his departure to Madras, Shivchandrai was carrying on a business in partnership with Mahavir Prasad in a firm known as "Gorakh Ram Golak Chand" in Bombay. The office of the said firm was situated at Choksi Chamber, Zaveri Bazar, Bombay. The partnership employed an employee by name Janardhan Dhuri. The property tax in respect of Hari Niwas building used to be paid by the said partnership firm.

7. After Shivchandrai's going away to Madras, Mahavirprasad and Ramprasad started attending to the management of the property and payment of municipal taxes upon receipt of the municipal bills. Janardan Dhuri being a long standing employee of the firm used to assist them in this work and this was being done under arrangement with Shivchandrai.

8. In 1964 Kailashchand also shifted his residence to Juhu, Ville Parle, Bombay. In 1965, Shyamsundar shifted his residence to Ajmal Road, Bombay. In 1968 Mahavirprasad shifted his residence to Jethwa Niwas, Ville Parle, Bombay. In 1969, Ramprasad shifted his residence to Juhu Scheme, Ville Parle, Bombay.

9. Despite shifting of his residence, Ramprasad continued to be in possession of the portion of the ground floor of Hari Niwas and Bajranglal remained in possession of the second floor and continued to live there. Shashikant, Mahavirprasad, Rukmanibai and two other sons of Shivchandrai continued to retain possession of different portions of Hari Niwas.

10. On 22-11-1968, the Commissioner of the BMC issued a warrant of Attachment in the names of Shivchandrai and Ramvallabh for recovery of a sum of Rs. 5972.52 (total of 5 bills issued in respect of structures of Hari Niwas) as property tax for the period from 1-4-1963 to 31-3-1968. On 23-12-1968, a sum of Rs. 2250/- was paid towards property tax and some dispute was raised with regard to the balance. On 14-7-1969, the Municipal Corporation decided to auction the suit property and fixed a reserve bid for the auction sale at Rs. 30,600/-. It was by this time revealed that one of the persons in whose name the warrant of attachment has been issued, namely, Ramvallabh, had already died. Hence, the warrant of attachment was cancelled on 11-9-1969.

11. In 1969-70, Janardan Dhuri joined the sole proprietorship concern of Ramprasad with trading name "Gorakh Ram Haribux", which had its office on the ground floor of Hari Niwas. As an employee of this concern he continued to attend to the job of payment of municipal taxes in respect of Hari Niwas. The municipal bills were received either by Janardan Dhuri or Mahavirprasad.

12. On 4-10-1969, a warrant of attachment in the names of Shivchandrai and Mahavirprasad was issued for realisation of a sum of Rs. 5996.29 towards municipal taxes for the period 1-10-1965 to 31-3-1969. However, on this occasion no reserve bid was fixed by the Municipal Commissioner.

13. On 17-11-1969, the orders pursuant to the warrant of attachment were sent by the concerned officers of the BMC to Mahavirprasad at his address at Jethwa Niwas, Bombay and also to Shivchandrai at his address both at Madras and Zaveri Bazar, Bombay.

14. On 29th/30th December, 1969 Shivchandrai and Mahavirprasad respectively replied to the BMC objecting to the sums demanded on the ground that their appeals with regard to increase in rateable value to which they had objected were pending. On 6-1-1970, the BMC informed Mahavirprasad that the auction sale would be held on 12-1-1970 if the dues demanded were not paid before 10-1-1970. On 12-1-1970, Shivchandrai and Mahavirprasad paid a sum of Rs. 4073.64 as against Rs. 5996.29 demanded under the warrant of attachment and agreed to pay the balance later. Consequently, the proposed auction sale was cancelled.

15. On 25-6-1970, a letter of demand was sent by the BMC only in the name of Shivchandrai demanding balance amount due under the warrant of attachment (Rs.5996.29 - 4073.64 = Rs.1922.65) and new taxes for the period 1-4-1969 to 31-9-1970 equal to Rs. 2593.56, in all making a total of Rs. 4516.21. No costs were specified, quantified or demanded by this letter-cum-bill.

16. On 3-8-1970, both Shivchandrai and Mahavirprasad sent a reminder to the BMC to send a final statement of account to enable them to make the necessary payment of taxes and requested that the property not be auctioned in the meantime. On 4-8-1970, the auction sale, which was scheduled to

be held, was adjourned sine die on the ground that there was no bidder and a new date of auction was fixed as 26-11-1970.

17. On 19-10-1970, the BMC replied to letters dated 3-8-1970 of Shivchandrai and Mahavirprasad reiterating the old dues under the warrant of attachment as well as the new taxes due, without specifying any amount of costs or giving the final statement of account as demanded by them in their letters. By this letter, the BMC threatened to sell the property in exercise of its power under section 206 of the BMC Act.

18. On 26-11-1970, Shivchandrai and Mahavirprasad paid a lump sum amount of Rs.3500/- towards the dues. Although the balance of taxes due under the earlier warrant of attachment was only Rs.1922.65 (Rs. 5996.29 4073.64), an additional amount of Rs.1577.35 was paid by them. Hence, the auction sale fixed was cancelled.

19. Shivchandrai died in Madras on 7-6-1971. On 9-6-1971 the BMC addressed a letter in the sole name of Shivchandrai (who had already died on 7-6-1971) without addressing any letter to Mahavirprasad or any other person on his behalf. In this letter the Corporation adjusted the amount of Rs.7573.64 paid (Rs. 4073.64 + 3500) as against the amount of Rs. 5996.29 demanded under the warrant of attachment. For the first time, the Corporation specified the costs at Rs. 3299.40, an amount of Rs. 1722.05 towards costs of proceedings and further specified that an amount of fresh tax of Rs.3470.08 for the period 1-4-1969 to 31-3-1971 was due, though it did not form part of the warrant of attachment. In this fashion, the Corporation, for the first time, worked out the dues of Rs.12765.77 and demanded an amount of Rs. 5192 (Rs. 12765 - 7573.64) as still due and payable. Since the notice of the Municipal Corporation dated 9-6-1971 had been addressed in the name of a dead person, it was returned unserved.

20. On 8-9-1971, the concerned officer of the BMC sent a proposal for sanction of auction sale of the suit property towards the demanded sum of Rs. 5192.13 as total dues. This proposal was forwarded to the municipal Commissioner, though at this time no reserve bid was fixed. On 30-9-1971 and 2-10-1971 the concerned officials of the Municipal Corporation were directed by the Assistant Assessor and collector to give notice of the auction sale by pasting Notices on the suit premises in the presence of two independent witnesses, preferably tenants. The Municipal Corporation claims to have pasted such notices without the presence of any independent witness as directed.

21. On 5-10-1971, Mahavirprasad learnt about the auction sale and wrote to the Municipal Corporation that as Shivchandrai had died on 7-6-1971, the demand notice should be addressed to all the co-owners of the property and in the meantime the auction sale should not be held. This letter was received by the Superintendent 'K' Ward, S. D. Madiwala, and the Assessment Department of the Municipal Corporation on 6-10-1971 and 7-10-1971 respectively.

22. On 12-7-1972, Bajranglal, Mahavir-prasad and others received a telegram from Satyavati (the plaintiff) for immediate handing over of possession of the suit property to her alleging that she had become sole owner of the property at the auction sale held by the Municipal Corporation on 7-10-1971. On 15-7-1972, Mahavirprasad sent a legal notice to the Municipal Corporation and to Satyavati denying that she had become sole owner of the property in question.

23. On 15-7-1972, Suit No. 118/73 was filed by Satyavati for delivery of the possession of property. The parties to the suit were as under :-

Defendant : No.1 Shashikant Nandkishore Ruia

No. 2 Mahavirprasad Ramvallabh Ruia

No. 3 Kailashchand Shivchandrai Ruia

No. 4 Smt. Rukmanibai Shivchandrai Ruia

No. 5 Shyamsunder Shivchandrai Ruia

No. 6 Ramprasad Shivchandrai Ruia

No. 7 Chandraparkash Shivchandrai Ruia

No. 8 Bajranglal Shivchandrai Ruia

24. In this suit it was claimed that Ramprasad (D-6) had already handed over possession to the plaintiff and it was alleged that he was the only defendant continuing in actual occupation of Hari Niwas while the possession of all other defendants was said to be merely formal.

25. This suit was initially filed in a city civil Court, but was returned by that Court due to under-valuation and refiled on the original side of the Bombay High Court.

26. On 2-10-1972 Suit No. 218/73 was filed on the original side of the Bombay High Court by Mahavirparasad and his mother Durgabai challenging (1) the auction sale alleged to have taken place on 7-10-1971 and (2) the certificate of sale dated 14-1-1972 alleged to have been issued therein to Smt. Satyawati, and seeking a declaration that Smt. Satyavati was not the sole owner of suit property but that Mahavirprasad and Durgabai were also co-owners of the suit property (i.e. Hari Niwas).

27. On 4-9-1973, Mahavirprasad filed his written statement contesting the suit No. 118/73 on various grounds challenging the validity of the sale and the plaintiff's title. He also detailed several particulars of fraud vitiating the sale and pleaded that the suit of the plaintiff Satyavati was bad for non-joinder of the Municipal Corporation and prayed for dismissal thereof. On 18-9-1973 Bajranglal (D-8) Shyamsunder (D-5) and Kailashchand (D-3) filed their respective individual written statements contesting the Suit No. 118/73 filed by the plaintiff Satyavati. Bajranglal, in particular, defended the suit by contending that the sale was a nullity, as it was ultra vires the legal provisions and on the ground of lack of jurisdiction, non-service of demand notice on all the heirs and co-owners, irregularities and breach of law and fraud. Referring to the pleas and particulars of fraud stated by Mahavirprasad in his suit No. 218/73, as well as Mahavirprasad's written statement filed in Suit No. 118/73, Bajranglal adopted the pleas raised therein. He also contended that the Bombay Municipal Corporation was a necessary party and the suit was bad for non-joinder of a necessary party.

28. Sometime in 1973-74, Ramprasad closed his office which was situated in Hari Niwas. Bajranglal continued to have physical occupation of the suit property ever since then and continues to remain in occupation till date.

29. On 15-7-1975, Satyavati filed a written statement contesting Mahavirprasad's suit No. 218/73. On 24-7-1984, the BMC filed its written statement contesting Mahavirprasad's suit No. 218/73. On 9-9-1985, Bajranglal filed this written statement supporting fully Mahavirprasad's Suit No. 218/73 challenging the sale of suit property to Satyavati.

30. On 9-9-1985 Mahavirprasad adduced oral evidence in his suit No. 218/73 before the learned single Judge. His cross-examination, however, remained incomplete and was postponed to the next day. On 10-9-1985, Mahavirprasad suddenly moved the learned single Judge (Pendse, J.) for withdrawal of his suit and this prayer was allowed by the learned single Judge. Counsel for the defendant Bajranglal made a request that he be transposed as plaintiff in suit No. 218/73 to enable him to prosecute the suit, which had originally been filed by Mahavirprasad. This request was, however, rejected and the permission sought was declined by the learned single Judge. In his order the learned single Judge held that this request was hit by laches and that a substantial right had accrued to the plaintiff on account of the property in auction, which could not be defeated by belated transposition of Bajranglal in the place of original plaintiff Mahavirprasad in Suit No. 118/73. Bajranglal filed Appeal No. 842/85 challenging the order of Pendse, J. declining the request for transposition. This appeal was dismissed on 21-1-1987 by a Division Bench of the High Court holding that Bajranglal's right to institute a suit was an independent separate remedy for claiming the same relief against the plaintiff as had been claimed in Suit No. 218/73, and that, since this right was lost, Bajranglal could not be permitted to get over the laches and to subvert the period of limitation by allowing his application for transposition in Mahavirprasad's Suit No. 218/73.

31. On 25-12-1987, Rukmanibai (D-4) died while she was living in Hari Niwas.

32. On 28-6-1988, during the trial of suit No. 118/73, the learned single Judge, (Suresh, J.) proposed to implead the BMC as a party to the suit. This proposal was vehemently opposed by the plaintiff and due to the opposition the learned single Judge did not press the proposal. The learned single Judge, however permitted the parties to lead evidence with regard to the validity of the sale made by the BMC. The counsel for the plaintiff sought and was granted adjournment for putting his client Satyavati in the box as witness for examination on 29-6-1988. However, on that date the plaintiff did not appear as witness and adjournment was sought on medical grounds. Despite two more adjournments granted, the plaintiff did not appear as a witness, nor was any other evidence led by the plaintiff to support the sale. On 14-7-1988 the learned single Judge directed the BMC to produce its records with regard to the auction sale of Hari Niwas. On 28-7-1988 counsel for plaintiff stated that he did not desire to examine the plaintiff as witness. On 3-8-1988 the learned single Judge (Suresh, J.) ordered the Municipal Corporation to produce the complete records connected with the sale. On 9-8-1988, in response to a witness summons issued on behalf of Bajranglal, one S. D. Madiwala, Superintendent 'K' Ward appeared as a witness (DW 2) and stated in his deposition that he had brought the entire records and that there was no other file connected with the sale of Hari Niwas. On 25-8-1988, the learned single Judge (Suresh, J.) delivered judgment dismissing Suit No. 118/73 recording detailed findings that the sale and alleged title claimed by the plaintiff were illegal, null and void and non est on various grounds. The plaintiff Satyavati filed an appeal No. 213/88 against the judgment on 5-10-1988.

33. On 21-1-1991, this Court dismissed Special Leave Petition No. 1154 of 1988 filed by Bajranglal, challenging the order of the Division Bench of the High Court in the matter of transposition in plaintiffs suit No. 218/73.

34. On 2/5-4-1993, a Division Bench of the High Court headed by Pendse, J. allowed plaintiff's appeal No. 213/88, set aside the judgment of Suresh, J. and decreed the plaintiff's suit for possession against Bajranglal and others. The application for Speaking to the Minutes by Bajranglal was not entertained by the Division Bench.

35. On 27-5-1993, S. L. P. No. 8425 of 1993 was moved by Bajranglal against the judgment of the Division Bench and an interim stay was granted by this Court. On 4-10-1993, leave was granted and the S. L. P. was converted into Civil Appeal No. 5293/93. On 17-12-1993, Shyamsunder (D 5) also filed S. L. P. (C) No. 18492/93 against the Judgment of the Division Bench dated 2/5-4-1993. Special leave and interim stay was granted and this Court directed that the said matter be tagged with the present appeal. On 18-8-1998, Bajranglal filed Writ Petition No. 2540/98 before Bombay High Court for quashing the sale made by the BMC in favour of the plaintiff after disclosing the fact of pendency of the present appeal before this Court. The said writ petition was admitted on 24-12-1998 by the High Court and is pending before the High Court.

36. On 15-1-2001 Shyamsunder (D-5)'s appeal No. 7490/93 was dismissed for default in compliance with the office report dated 16-11-2000.

37. These are the material facts culled out from the record of the present appeal.

38. The following chart will indicate the array of parties in this appeal:-

In Present Appeal As Before Division Bench in appeal No. 213/89 In suit No. 218/73

Bajranglal Shivchandrai Ruia Appellant R-8 D-8

R-1 R-1 D-1

R-2 R-2 D-2

R-3 R-3 D-3

R-4 R-4 D-4

R-5 R-5 D-5

R-6 R-6 D-6

R-7 R-7 D-7

R-8 Appellant Plantiff

Maintainability of the present appeal

(A) Res Judicata

39. At the outset, the respondents contend that the present appeal is not maintainable and that, if maintainable, propriety demands that it should be dismissed as otherwise it may give rise to conflicting decrees in the same cause of action.

40. The present appeal is only at the instance of the sole appellant Bajranglal, who was Defendant No. 8 in the original suit filed by the Respondent No. 8 (original plaintiff). The decree made by the High Court qua other respondents (original defendants) has attained finality since defendants 1-4, 6 and 7 in that suit did not challenge the judgment dated 2/5-4-1993 made by the Division Bench of the Bombay High Court and the consequent decree. The original defendants 1, 2 and 7 did not participate in the proceedings before the High Court and the suit was contested only by defendant No.5 Shyamsunder and defendant No. 8 Bajaranglal (the present appellant). Respondents contend that inasmuch as the appeal filed by Shyamsunder, original defendant No.5, being C. A. No. 7490/93 was dismissed by this Court on 15th January, 2001 for non prosecution, the judgment of the Division Bench of the Bombay High Court operates as res judicata. It is urged that the judgment and decree has become final as against Bajaranglal and all other defendants in the original suit. Even otherwise, it is urged that the present appeal must be dismissed as otherwise it may give rise to conflicting decrees.

41. It is not possible to accept that the principle of res judicata will apply to bar the appeal. Section 11 of the CPC would bar the Court from trying any suit or issue in which the matter "directly and substantially in issue" between the same parties or between the parties under whom they or any of them claim, litigating under the same title in a Court competent to try such subsequent suit or suit in which such issue has been subsequently raised, has been "heard and finally decided by such Court". In the present case, Bajaranglal and Shyamsunder were defendants in the Original Suit No. 118 of 1973. The suit was dismissed and the plaintiff Satyavati carried an appeal to the Division Bench. In the appeal, both Bajranglal and Shyamsunder were respondents. The Division Bench, reversed the single Judge's judgment and decreed the suit by its judgment. As the respondents in the appeal before the Division Bench both Bajranglal and Shyamsunder were aggrieved by the decree against them. The present appellant Bajranglal filed SLP No. 8425/93 on 27-5-1993, while Shyamsundar filed his appeal No. SLP 18492/93 on 17-12-1993.

42. Leave was granted in Bajranglal's appeal on 4-10-1993 while leave was granted in Shyamsundar's case on 17-12-1993. Subsequently, Bajranglal's appeal was numbered as Civil Appeal No. 5293 while Shyamsundar's appeal was numbered as Civil Appeal No. 7490/93. Shyamsundar's appeal was dismissed for default for non-removal of office objections on 15-1-2000. Thus, it is obvious that both in the matter of filing the SLP and granting of leave, Bajrangalal's appeal was earlier and Shamsundar's was later in time. In these circumstances, we are unable to accept the contention that an order dismissing a subsequent appeal for default can operate as res judicata in respect of an earlier appeal. Neither Section 11 of the CPC, nor any principle derivable therefrom, would bar the appeal as contended by the respondents. The contention is misconceived and we see no merit in the contention. In our judgment, the appeal is perfectly maintainable.

B. Conflict of decrees

43. The respondents then contend that, even if the appeal is not liable to be dismissed on the

principle of res judicata, even otherwise the appeal should be dismissed as it may result in conflicting decrees. Upon dismissal for default of Civil Appeal No. 7490/93, the decree made by the High Court became final as against Shyamsundar. If the present appeal is allowed, resulting in setting aside the decree or making any modification thereof, it would result in the anomalous situation of there being conflicting decrees between the same parties, arising out of same cause of action, is the contention.

44. In our view, this contention has no merit. Where there are several defendants, who are equally aggrieved by a decree on a ground common to all of them, and only one of them challenges the decree by an appeal in his own right, the fact that the other defendants do not choose to challenge the decree or that they have lost their right to challenge the decree, cannot render the appeal of the appealing defendant infructuous on this ground. In fact, Rule 4 and Rule 33 of Order XLI of the CPC are enacted to deal with such a situation.

45. A number of judgments were cited before us in support of the argument that the present appeal should not be entertained as otherwise it may be likely to produce conflicting decrees.

46. In Narhari and others v. Shankar and others, 1950 SCR 754, A instituted a suit for possession of two-thirds share in an estate against B and C who claimed a one third share each in it. The suit was decreed by the trial Court. B and C filed separate appeals. These appeals were heard together and disposed of by the same judgment. Two separate decrees were prepared. A preferred an appeal from one of these decrees in time paying the full court fee. After the period of limitation had expired, A preferred an appeal from the other decree also. The High Court held that inasmuch as one of the appeals was time barred, the first appeal was barred by res judicata. This Court rejected this contention and, approving the observations of Tek Chand, J. , in Mt. Lachhmi v. Mt. Bhulli, AIR 1927 Lahore 289, pointed out that the determining factor is not the decree, but the matter in controversy. The estoppel is not created by the decree, but can only be created by the judgment and that there was no question of application of principle of res judicata. It was therefore, held that the appeal of A was competent. AIR 1953 SC 419

47. In Karam Singh Sobti and anr. v. Shri Pratap Chand and another, (1964) 4 SCR 647, a proceeding under the Delhi Rent Control Act for eviction had been filed against the tenant and sub-tenant on the ground that the tenant had, without the consent of the landlord, sublet, assigned or otherwise parted with the rented premises. One decree of eviction was passed by the trial judge against both tenant and sub-tenant who were defendants. Both the defendants were aggrieved by the decree of eviction and each had his own right to appeal from that decree. While the tenant failed to move an appeal, the sub-tenant filed an appeal against the decree. This Court held that there was one decree and therefore the appellant was entitled to have it set aside "although thereby the tenant who had not appealed would also be freed from the decree". It was open to the sub-tenant to contend that the decree was wrong as it was passed on an erroneous finding and the sub-tenant could challenge the decree on any available ground. Thus, it was held that the appeal of one of the defendants was

competent, even though the other defendant who was equally situated had filed no appeal. AIR 1964 SC 1305

48. In Pandit Sri Chand and ors. v. M/s Jagdish Prashad Kishan Chand and others (1966) 3 SCR 451, the plaintiff had commenced AIR 1966 SC 1427 his suit against three sureties who were defendants in a suit. The said defendants objected to the execution of the decree against them on several grounds. The trial Court rejected the objections raised by the sureties and this order was confirmed by a single Judge of the High Court. An appeal under the letters patent was dismissed in limine. The three sureties moved this Court by special leave petition in which leave was granted to them. One of the sureties died even before the record of the appeal was transmitted to this Court. The application made for bringing the legal heirs on record came to be rejected. It was contended before this Court that the appeal had abated in its entirety because the heirs of one of the sureties had not been brought on record, as the ground on which the judgment of the High Court proceeded was common to all the sureties. This contention was upheld for the reason that the appeal filed in this Court was a single appeal by all the three sureties, and one of them having died and his legal representatives not having been brought on record, the decree became final as against such a surety. It was also held that Order XLI Rule 4 of the CPC would not apply here. This judgment is distinguishable on its facts as there was only one appeal filed by all three sureties.

49. In Ratanlal Shah v. Firm Lalmandas Chhadammalal and another, (1969) 2 SCC 70, this Court had occasion to examine the scope of application of Order XLI Rule 4 of the CPC in a situation like the present one. In this case there was a joint decree against two defendants R and M. R alone appealed to the High Court by impleading M as second respondent in the appeal. M was not served with notice as a result of which the appeal came to an end as far as M was concerned. The High Court dismissed the appeal on the ground that the decree was jointly against both R and M, in a suit on a joint cause of action, the decree against M having become final, R could not be heard alone in the appeal. This Court reversed the judgment of the High Court by taking the view that the appeal could not be dismissed on the ground that M was not served, nor could the appeal be dismissed on the ground that there was a possibility of two conflicting decrees. Delineating the provisions of Order XLI Rule 4 of the CPC this Court said: AIR 1970 SC 108

"The object of the rule is to enable one of the parties to a suit to obtain relief in appeal when the decree appealed from proceeds on a ground common to him and others. The Court in such an appeal may reverse or vary the decree in favour of all the parties who are in the same interest as the appellant."

50. This Court reiterated its view in Karam Singh Sobti (supra) and held that even if it be assumed that R was negligent, on that ground he could not be deprived of his legal right to prosecute the appeal and to claim relief under Order XLI Rule 4 of the Code of Civil Procedure, if the circumstances of the case warrant it. The decree of the Trial Court proceeded on a ground common to M and R. In the appeal filed by R, he was denying liability for the claim of the plaintiffs in its

entirety. Thus, it was held that this was essentially a case in which the Court's jurisdiction under Order XLI, Rule 4, Code of Civil Procedure could be exercised.

51. This view was reiterated by this Court in Mahabir Prasad v. Jage Ram and others, (1971) 1 SCC 265. It was a case in which the plaintiff Mahabir Prasad, his mother and his wife obtained a decree against the defendant Jage Ram and two others for a certain amount. Their application for execution was dismissed by executing Court. Mahabir Prasad alone preferred an appeal to the High Court and impleaded his mother Gunwanti Devi, and his wife Saroj Devi as party respondents. Saroj Devi died and the legal representatives were not brought on record within the period of limitation and her name was struck off from the array of respondents. The High Court dismissed the appeal on the ground that it abated in its entirety. Mahabir Prasad appealed to this Court. Allowing the appeal it was held by this Court : (vide para 4) AIR 1971 SC 742

"Order XLI Rule 4 Code of Civil Procedure, invests the Appellate Court with power to reverse or vary the decree in favour of all the plaintiffs or defendants even though they had not joined in the appeal if the decree proceeds upon a ground common to all the plaintiffs or defendants".

52. This Court in Mahabir Prasad (supra) distinguished the judgment in Rameshwar Prasad (1964) 1 SCR 549 as a case in AIR 1963 SC 1901 which all the plaintiffs whose suits had been dismissed had filed an appeal and thereafter one of them being dead and his heirs were not brought on record. While in the case before this Court, there was an order against all the decree holders but all of them had not appealed. The previous judgment in Ratanlal Shah (supra) was followed approvingly. Commenting on the judgment in Ratanlal Shah (supra) in the light of Order XLI Rule 4 of the CPC, this Court observed : (vide para 6)

"Competence of the Appellate Court to pass a decree appropriate to the nature of the dispute in an appeal filed by one of several persons against whom a decree is made on a ground which is common to him and others is not lost merely because of the person who was jointly interested in the claim has been made a party-respondent and on his death his heirs have not been brought on the record. Power of the Appellate Court under Order XLI, Rule 4, to vary or modify the decree of a Subordinate Court arises when one of the persons out of many against whom a decree or an order had been made on a ground which was common to him and others has appealed. That power, may be exercised when other persons who were parties to the proceeding before the Subordinate Court and against whom a decree proceeded on a ground which was common to the appellant and to those other persons are either not impleaded as parties to the appeal or are impleaded as respondents".

53. The same principle was reiterated in Govindan v. Subramaniam, (2000) 9 SCC 510 , where it was held that Order XLI Rule 4 of the CPC would apply in such a case. 2000 AIR SCW 1948

54. In Harihar Prasad Singh and others v. Balmiki Prasad Singh and ors. (1975) 1 SCC 212, a similar contention was urged. After analysing Ratanlal (supra), Karam Singh (supra) and Mahabir Prasad (supra), and distinguishing the judgments in State of Punjab v. Nathu Ram (1962) 2 SCR 636, and Rameshwar Prasad v. Shyam Biharilal (1964) 3 SCR 549 it was held that normally Order XLI Rule 41 would apply to a situation like the one before us. AIR 1975 SC 733

AIR 1962 SC 89

AIR 1963 SC 1901

55. This principle has also been reiterated in the recent judgment in Banarsi and others v. Ramphal, (2003) 9 SCC 606, which holds that Order XLI, Rule 4 and Rule 33 are to be read together. This Court observed (vide para 15) AIR 2003 SC 1989 : 2003 AIR SCW 1494 : 2003 All LJ 1141

"Rule 4 seeks to achieve one of the several objects sought to be achieved by Rule 33, that is, avoiding a situation of conflicting decrees coming into existence in the same suit. The abovesaid provisions confer power of the widest amplitude on the appellate Court so as to do complete justice between the parties and such power is unfettered by consideration of facts like what is the subject-matter of the appeal, who has filed the appeal and whether the appeal is being dismissed, allowed or disposed of by modifying the judgment appealed against. While dismissing an appeal and though confirming the impugned decree, the appellate Court may still direct passing of such decree or making of such order which ought to have been passed or made by the Court below in accordance with the findings of fact and law arrived at by the Court below and which it would have done had it been conscious of the error committed by it and noticed by the appellate Court. While allowing the appeal or otherwise interfering with the decree or order appealed against, the appellate Court may pass or make such further or other decree or order, as the case would require being done, consistently with the findings arrived at by the appellate Court. The object sought to be achieved by conferment of such power on the appellate Court is to avoid inconsistency, inequity, inequality in reliefs granted to similarly placed parties and unworkable decree or order coming into existence. The overriding consideration is achieving the ends of justice. Wider the power, higher the need for caution and care while exercising the power. Usually the power under Rule 33 is exercised when the portion of the decree appealed against or the portion of the decree held liable to be set aside or interfered by the appellate Court is so inseparably connected with the portion not appealed against or left untouched that for the reason of the latter portion being left untouched either injustice would result or inconsistent decrees would follow. The power is subject to at least three limitations : firstly, the power cannot be exercised to the prejudice or disadvantage of a person not a party before the Court; secondly, a claim given up or lost cannot be revived; and thirdly, such part of the decree which essentially ought to have been appealed against or objected to by a party and which that party has permitted to achieve a finality cannot be reversed to the advantage of such party. A case where there are two reliefs prayed for and one is refused while the other one is granted and the former is not inseparably connected with or necessarily depending on the other, in an appeal against the latter, the former cannot be granted in favour of the respondent by the appellate Court exercising power under Rule 33 of Order 41."

56. This judgment considers the observations made in Pannalal v. State of Bombay, (1964) 1 SCR 980; Harihar Prasad Singh (supra) and Nirmala Bala Ghose and another v. Balai Chand Ghose and others, (1965) 3 SCR 550, and holds that Order XLI, Rule 4 of the CPC would take care of a situation as the one before us. AIR 1963 SC 1516, AIR 1965 SC 1874

57. In Chandramohan Ram-chandra Patil v. Bapu Koyappa Patil (dead) through LRs. and others, (2003) 3 SCC 552 a suit for partition was filed in which the right of partition was recognised and upheld by the Court. In the opinion of the Court, the fact that one of the plaintiffs had appealed, and not all, did not render the appellate Court powerless for it could invoke the provisions of Order XLI, Rule 4 read with Order XLI, Rule 33 of the CPC. It was held that the object of Order XLI, Rule 4 is to enable one of the parties to a suit to obtain relief in appeal when the decree appealed from proceeds on a ground common to him and others. The Court in such an appeal may vary the decree in favour of all the parties who are in the same interest as the appellant. The Court observed (vide paras 14, 15) : AIR 2003 SC 1754 : 2003 AIR SCW 1135

"Order 41, Rule 4 of the Code enables reversal of the decree by the Court in appeal at the instance of one or some of the plaintiffs appealing and it can do so in favour of even non-appealing plaintiffs. As a necessary consequence such reversal of the decree can be against the interest of the defendants vis-a-vis non-appealing plaintiffs. Order 41, Rule 4 has to be read with Order 41, Rule 33. Order 41, Rule 33 empowers the appellate Court to do complete justice between the parties by passing such order or decree which ought to have been passed or made although not all the parties affected by the decree had appealed.

In our opinion, therefore, the appellate Court by invoking Order 41, Rule 4 read with Order 41, Rule 33 of the Code could grant relief even to the non-appealing plaintiffs and make an adverse order against all the defendants and in favour of all the plaintiffs. In such a situation, it is not open to urge on behalf of the defendants that the decree of dismissal of suit passed by the trial Court had become final inter se between the non-appealing plaintiffs and the defendants."

58. In K. Muthuswami Gounder v. N. Palaniappa Gounder, (1998) 7 SCC 327, dealing with the powers of the appellate Court under Order XLI, Rule 33 of the CPC, this Court observed (vide para 12) : AIR 1998 SC 3118 : 1998 AIR SCW 3031

"Order 41, Rule 33 enables the appellate Court to pass any decree or order which ought to have been made and to make such further order or decree as the case may be in favour of all or any of the parties even though (i) the appeal is as to part only of the decree; and (ii) such party or parties may not have filed an appeal. The necessary condition for exercising the power under the Rule is that the parties to the proceeding are before the Court and the question raised properly arises (sic out of) one of the judgments of the lower Court and in that event, the appellate Court could consider any objection to any part of the order or decree of the Court and set it right. We are fortified in this view

by the decision of this Court in Mahant Dhangir v. Madan Mohan, 1987 Supp SCC 528. No hard and fast rule can be laid down as to the circumstances under which the power can be exercised under Order 41, Rule 33, CPC and each case must depend upon its own facts. The Rule enables the appellate Court to pass any order/decree which ought to have been passed. The general principle is that a decree is binding on the parties to it until it is set aside in appropriate proceedings. Ordinarily the appellate Court must not vary or reverse a decree/order in favour of a party who has not preferred any appeal and this Rule holds good notwithstanding Order 41, Rule 33, CPC. However, in exceptional cases, the Rule enables the appellate Court to pass such decree or order as ought to have been passed AIR 1988 SC 54 even if such decree would be in favour of parties who have not filed any appeal."

59. In Pannalal v. State of Bombay and others, (1964) 1 SCR 980, this Court said (vide page 987) : AIR 1963 SC 1516 Para 12, Page 1519

"Even a bare reading or Order 41, Rule 33 is sufficient to convince any one that the wide wording was intended to empower the appellate Court to make whatever order it thinks fit, not only as between the appellant and the respondent but also as between a respondent and a respondent. It empowers the appellate Court not only to give or refuse relief to the appellant by allowing or dismissing the appeal but also to give such other relief to any of the respondent as 'the case may require'."

60. The respondents however, strongly rely on certain observations made in the judgment of the Constitution Bench of this Court in Badri Narayan Singh v. Kamdeo Prasad Singh and another, (1962) 3 SCR 759, and contended that the observations made in Narhari's case (supra) had been distinguished by the Constitution Bench. The case before the Constitution Bench was one where the Election Tribunal, on the petition of the first respondent, had set aside the election of the appellant on certain grounds. The Election Tribunal, however, did not entertain the first respondent's prayer to declare him as duly elected. Both the appellant and the first respondent being aggrieved went up in appeal to the High Court. Appellant's Appeal No. 7 was against the order setting aside his election, while first respondent's Appeal No. 8 was against not declaring him elected. Both were disposed of by the common judgment by the High Court which dismissed Appeal No. 7 but allowed respondent's Appeal No. 8 and declared him to be duly elected. A preliminary objection was taken on behalf of the first respondent that the appeal was incompetent as barred by the principle of res judicata as the appellant did not appeal against the order of the High Court in his own Appeal No. 7, the dismissal of which by the High Court confirmed the order of the Election Tribunal setting aside the election of the appellant. Hence, it was contended that the appellant could not question the correctness of the finding that he held an office of profit which was the basis of the dismissal of Appeal No. 7. The Constitution Bench of this Court was of the view that two appeals arose out of one proceeding, the subject-matter of each appeal being different. While the subject-matter of Appeal No. 7 related to his election being good or bad, the subject-matter of Appeal No. 8 had no relation to the validity or otherwise of the election of the appellant, but was related to the further action to be taken in case the election of the appellant was bad on the ground that he holds an office of profit. It was in this situation that the judgment in Narhari (supra) was distinguished by the

Constitution Bench, which pointed out that the observations in Narhari (supra) did not apply to cases which are governed by the general principle of res judicata which rests on the principle that a judgment is conclusive regarding the points decided between the same parties and that the parties should not be vexed twice over in the same case. In our view, the judgment of the Constitution Bench has no application to the facts before us. AIR 1962 SC 338, AIR 1953 SC 419

61. The effort of the respondent to rely on Shivdhan Singh (supra) in support of the objection is also in vain for the observations in Shivdhan Singh have been considered and distinguished in Managing Director v. K. Ramachandra Naidu and another, (1994) 6 SCC 339. AIR 1966 SC 1332

AIR 1995 SC 316

62. Reliance by the respondents in Nirmala Bala Ghose, (1965) 3 SCR 550 is also of little use. A three Judge Bench of this Court considered the applicability and the ambit of Order XLI, Rule 33, CPC in such a situation, and observed : AIR 1965 SC 1874 Para 23

"When a party allows a decree of the Court of First Instance to become final, by not appealing against the decree, it would not be open to another party to the litigation, whose rights are otherwise not affected by the decree, to invoke the powers of the appellate Court under O. 41, R. 33, to pass a decree in favour of the party not appealing so as to give the latter a benefit which he has not claimed. Order 41, Rule 33 is primarily intended to confer power upon the appellate Court to do justice by granting relief to a party who has not appealed, when refusing to do so, would result in making inconsistent, contradictory or unworkable orders. We do not think that power under Order 41, Rule 33 of the Code of Civil Procedure can be exercised in this case in favour of the deities."

63. In our view, in Nirmala Bala Ghose (supra) this Court has not made any observations contrary to what had been laid down earlier.

64. We do not think that the judgment in Premier Tyres Limited v. Kerala State Road Transport Corporation, (1993) Supp (2) SCC 146, cited by the respondents has any relevance for it is entirely distinguishable on facts. It was a case where two suits were tried together and decided by a common judgment, each of them being partly decreed. One of the parties did not appeal against dismissal of part of his claim, but appealed against the part decree in the other suit. It was in these circumstances that it was held that his appeal was barred by res judicata. AIR 1993 SC 1202 : 1992 AIR SCW 3365

65. In State of Punjab v. Nathu Ram, (1962) 2 SCR 636 this Court considered a situation of such conflicting decrees and made the following observations (vide p. 639) : AIR 1962 SC 89 at page 90

Para 6

"The question whether a Court can deal with such matters or not, will depend on the facts of each case and therefore no exhaustive statement can be made about the circumstances when this is possible or is not possible. It may, however, be stated that ordinarily the considerations which weight with the Court in deciding upon this question are whether the appeal between the appellants and the respondents other than the deceased can be said to be properly constituted or can be said to have all the necessary parties for the decision of the controversy before the Court. The test to determine this has been described in diverse forms. Courts will not proceed with an appeal (a) when the success of the appeal may lead to the Court's coming to a decision which be in conflict with the decision between the appellant and the deceased respondent and therefore which would lead to the Court's passing a decree which will be contradictory to the decree which had become final with respect to the same subject-matter between the appellant and the deceased respondent; (b) when the appellant could not have brought the action for the necessary relief against those respondents alone who are still before the Court and (c) when the decree against the surviving respondents, if the appeal succeeds, be ineffective, that is to say, it could not be successfully executed."

66. The rationale behind the principle was explained by the Court thus (vide p. 641) at page 91 of AIR

"The reason is plain. It is that in the absence of the legal representatives of the deceased respondents, the appellate Court cannot determine anything between the appellant and the legal representatives which may affect the rights of the legal representatives under the decree. It is immaterial that the modification which the Court will do is one to which exception can or cannot be taken."

67. In our view, this is the litmus test to decide whether an appeal should be dismissed for possible conflict of decrees or not. Applying this test, it appears to us that the appeal before us cannot be dismissed. Shyamsunder is the 5th respondent before us, who has been served, but has chosen to remain absent. The fact that Shyamsunder's own appeal failed for non-compliance with the office objections cannot have the consequence of defeating the appeal of the present appellant Bajaranglal. Order XLI, Rule 4 read with Rule 33 invests this Court with sufficient power to entertain the appeal of Bajranglal before us and to make any appropriate order thereupon consonant with justice, equity and good conscience. In the result, we overrule the preliminary objections and hold that the appeal is maintainable.

Merits of the Appeal.

68. The learned single Judge raised the following issues and answered them as under :

Sl.No.	Issues	Remarks
1	Whether the suit is bad for misjoinder of parties and/or causes of action for reasons alleged in the respective written-statements of Defendants Nos. 5 and 8 ?	In the negative
2	Whether the suit is bad for non-joinder of necessary parties for the reasons alleged in their respective written statements ?	In the negative
3	Whether the Plaintiff is the owner of the suit property ?	In the negative. Plantiff has not proved her title relied on is invalid in law, and, therefore, a nullity.
4	Whether the Plaintiff has not acquired title to the suit property for the reasons alleged in their respective written-statements ?	In the affirmative
5	Whether each of the Defendants is a trespasser as alleged in para 4 of the plaint ?	In the negative
6	Whether the Defendant is the tenant in respect of the premises in his occupation as alleged in their respective written-statements ?	In the negative
7	Whether the said auction sale was subject to the right of the defendants? tenancy and subject to the defendants? right of possession was and occupation and enjoyment as alleged in their respective written statements ?	In the negative
8	Whether the Plaintiff is entitled to mesne profits as alleged in para 6 of the plaint	In the negative

9	Whether the Plaintiff is entitled to any relief and if so, what ?	In the negative

69. The single Judge's finding is that the certificate of sale issued by the BMC was invalid and the sale was liable to be declared null and void for contravening the provisions of Section 206 of the BMC Act, 1888 and the Regulations made thereunder. After examining the evidence before him, the learned single Judge came to the conclusion that there was clear contravention of the provisions of the BMC Act and the Regulations dealing with the auction sale. He also came to the conclusion that the sale had taken place without any reserved bid, that Janardhan Dhuri had never disclosed that he was bidding as agent of R-8; the plaintiff never entered the box, nor did Janardhan Dhuri, to prove that Janardhan Dhuri has bid as her agent, consequently, R-8 being nowhere in the picture, the certificate of sale could not have been issued in her name.

70. The Division Bench came to the conclusion that the withdrawal of Suit No. O.S. 218/73 and the rejection of the application moved by Bajranglal for transposition as plaintiff, which was upheld by the Division Bench, and the summary dismissal of the special leave petition there-against, conclusively precluded the contention urged by the appellant in this regard. The Division Bench held, "the result of rejection of application for transposition is that the cause of action against the Corporation and the auction purchaser came to an end" and based its finding upon the fact that, on the date when Bajranglal made the application for transposition as plaintiff (10-9-1985), Bajranglal had lost the right to file a suit for avoiding the auction sale, as it was barred by time. This led the Division Bench to hold, "the result of withdrawal of the suit and the rejection of application for transposition is that the auction sale in favour of plaintiff had become final and Bajaranglal cannot raise any objection in the present suit and avoid auction sale."

71. In our view, this reasoning of the Division Bench is erroneous. Although the period of limitation prescribed in the Limitation Act, 1963, precludes a plaintiff bringing a suit which is barred by limitation, as far as any defence is concerned, there is no such limitation. In reply to the plaintiffs suit that she had derived title to the suit property by virtue of the auction sale and the certificate of sale issued by the BMC, it was perfectly open to the defendants, including Bajrangalal, to contend to the contrary. The burden of proving the facts alleged in the plaint was squarely upon the plaintiff. After recording evidence on both sides, if the evidence showed that the auction sale held by the BMC was contrary to the provisions of the BMC Act and the Regulations made thereunder, the defendants were entitled to urge upon the learned single Judge to come to the conclusion recorded by the learned single Judge.

72. The respondents, however, contend that the sale proceedings could be challenged only by way of a substantive suit. Inasmuch as the suit had become time barred on the date of the application for transposition, there was no scope for the sale of Hari Niwas to the plaintiff being challenged by a suit. They urged that the Division Bench is right in characterising the challenge to the suit by Bajranglal as a 'backdoor method'.

73. It appears to us that the contention of the respondent is misplaced. If the title claimed by the plaintiff was a nullity and wholly void, there was no need for any of the defendants including Bajranglal to challenge it by way of a substantive suit. They could always set up nullity of title as a defence in any proceeding taken against them based upon such title. If, in fact, the sale was a nullity, it was non est in the eye of law and all that defendant had to do was point this out. (See in this connection : Ajudh Raz and others v. Moti s/o. Mussadi, (1991) 3 SCC 136 and the opinion of the Full Bench of the Bombay High Court in Abdulla Mian v. Government of Bombay, (1942) 44 Bom LR 577. AIR 1991 SC 1600 : 1991 AIR SCW 1576

AIR 1942 Bombay 257

74. In Vidyadhar v. Manikrao and another, (1999) 3 SCC 573, the plaintiff had filed a suit on the basis of a sale deed executed by D-2 in his favour and sought the relief of possession of the property from defendant No. 1 who was an absolute stranger to the sale deed. The question which arose was whether defendant No. 1, who was in possession, could justify his possession by urging the nullity of sale transaction between the plaintiff and defendant No. 2. In these circumstances, this Court held (vide para 21) : AIR 1999 SC 1441 : 1999 AIR SCW 1129 Para 20

"The above decisions appear to be based on the principle that a person in his capacity as a defendant can raise any legitimate plea available to him under law to defeat the suit of the plaintiff. This would also include the plea that the sale deed by which the title to the property was intended to be conveyed to the plaintiff was void or fictitious or, for that matter, collusive and not intended to be acted upon. Thus, the whole question would depend upon the pleadings of the parties, the nature of the suit, the nature of the deed, the evidence led by the parties in the suit and other attending circumstances."

75. Here, the plaintiff's suit is for ejection of the defendant and for possession of the suit property. She must succeed or fail on the title that she establishes. If she cannot succeed in proving her title, the suit must fail notwithstanding that the defendant in possession may or may not have title to the property. (See in this connection : Brahma Nand Puri v. Neki Puri, (1965) 2 SCR 233 at p. 237). AIR 1965 SC 1506 at page 1508

76. Appellant Bajranglal had sufficiently pleaded in his written statement the defects in the title of the plaintiff and it was, therefore, open for the learned single Judge to go into this question and decide if the plaintiff had good title or not. The Division Bench, therefore, erred in interfering with the finding of the learned single Judge on this ground. On the facts, the learned single Judge has elaborately discussed the evidence and come to a finding with which it is difficult to disagree. We are unable to share the view of the Division Bench that the defects in title pleaded and found by the learned single Judge were mere irregularities in conducting the sale which could not have been challenged collaterally. In our view, the finding of the learned single Judge that the plaintiff's title was invalid and non est for contravention of the provisions of Section 206 of the BMC Act and the Regulations made thereunder, is fully justified and brooked no interference in appeal.

77. The Privy Council's observations in Nawab Umjad Ally Khan v. Mohumdee Begum and another, 1868 Sutherland WR Vol. X 25, on which the respondents rely, have to be understood in the context of the case before it. As a rule, it may be that an act of the State can be questioned in a Municipal Court by way of a duly constituted suit. However, if another person claims a title from a so-called act of the State, we see no reason why the defendant cannot plead the nullity of title. In our view, the principle in Vidyadhar's case clearly applies to the case on hand.

Failure to implead BMC

78. The respondent then raised a contention that the validity of the title derived by the plaintiff Satyavati could not have been considered in the suit without the Bombay Municipal Corporation being impleaded as a necessary party. In our view, this is an argument of post hoc ergo proptor hoc. If we accede to argument that the Municipal Corporation was a necessary party, then by reason of Order 1, Rule 9 of CPC, the consequence would be the dismissal of the plaintiff Satyavati's suit for non-joinder of BMC, which according to her is a necessary party. In fact, the learned single Judge was desirous of adjudicating the issues fully and completely, and therefore, proposed to add the BMC as a party to the suit. The plaintiff as a dominus litis vigorously opposed and successfully persuaded the learned single Judge not to add the Corporation as a necessary party. It was in these circumstances that the suit proceed without the Corporation being made a party to the suit. For the plaintiff (R-8) to now plead before us that the BMC was a necessary party, without whose presence the adjudication of the issues could not have proceeded, appears to us to be an argument of desperation. Vidyadhar's case (supra) is a complete answer to this argument. In any event, the only interest that the Corporation had in the matter was towards its tax arrears as it was not interested in the title of the property being transferred to it.

79. In the written statement filed by Bajranglal, he had relied upon and reiterated all contentions which had been urged by Mahavirprasad in his suit No. 218/73. He had also reiterated and repeated all contentions urged by Mahavirprasad both in his own suit No. 218/73 and in his written statement in Suit No. 118/73. We are satisfied that the defence raised by Bajranglal was quite comprehensive. He had challenged the plaintiffs title on the basis of the alleged auction sale as a nullity on the ground of ultra vires, lack of jurisdiction , non service of demand notice on all heirs/co-owners, breach of mandatory provisions of law and also perpetration of fraud the particulars of which were reiterated and adopted from the suit of Mahavirprasad. No.218/73, as well as Mahavirprasad's written statement in Suit No. 118/73.

80. The reliance placed by the respondent on the judgment in Narhari Mohanty, AIR 1963 Ors. 186; Chitti Perumal Pillai v. Deva-sahayam, 1956 TC 181 (FB); Kishore Singh v. Tej, AIR 1967 MP 120 is misplaced. These were all cases where a substantive suit was filed for setting aside a revenue sale for realisation of Government's arrears. In these circumstances, the view taken was that the Government ought to have been made a party along with the auction purchaser. AIR 1956 Trav Co 181

81. In Mohan Wahi v. Commissioner Income-tax, Varanasi (2001) 4 SCC 362, there was a recovery certificate issued by the tax officer under the Income-tax Act, 1961 without the required service of notice of demand on the assessee as mandated by Section 156 of the Act, prior to issue of the recovery certificate. Setting aside the sale of the property this Court observed (vide para 21); AIR 2001 SC 3906 : 2001 AIR SCW 3871 : 2002 Tax LR 84 : 2001 All LJ 2376

" A little more sensitive approach is required to be adopted in the process of dispensing justice when it is found that valuable property of a person was sought to be sold away for recovery of such arrears as did not exist at all."

82. Even in the present case, the appellant was not invited to the auction sale as required by the BMC Act under Section 209. Further, the sale was held for recovery of arrears which were not even included in the warrant of attachment pursuant to which the sale was held.

83. M.N. Datar v. S.K. Limaye, AIR 1921 Bom 257, was a case of sale in execution by a Revenue Court and an attempt to execute the decree.The plaintiffs who were purchaser in the auction sale contended that they were purchasers without notice, and therefore, their title was good as against the judgment debtor. This argument was sought to be buttressed by an analogical reference to a sale in execution under the decree of a civil Court. This argument was categorically rejected by Macleod, C.J., who observed (Vide p 258) :

"It appears to me that there is a very great distinction between sales in execution of civil Court decrees and sales by the revenue Courts for arrears of assessment. I think that if it were found, as it has been found in this case, that as a matter of fact the defendant in the revenue proceedings was entitled to hold his lands free of assessment, any sale which took place on the footing that he was bound to pay assessment would be invalid and that the purchaser in such a sale would not acquire a good title except by adverse possession. In this case the purchaser did not even get possession. The judgment debtor remained in possession of the property and ten years after the sale the vendor who had bought the property for Rs. 8, subject to various mortgages, sold it to the present plaintiffs. In my opinion , the defendants were entitled to raise the question, whether or not the sale in 1904 was valid, and on the facts of this case I think that they succeeded in showing that the sale was invalid."

84. V. D. Deshpande v. K.D. Kulkarni, AIR 1976 Bom 190, was also a case of a suit to set aside the auction sale held by the revenue authorities. It was contended for the defendant that such relief could not be given in the absence of the State Government which was a necessary party to the suit. This contention was rejected by the Division Bench of the Bombay High Court by observing that where the plaintiffs can obtain complete and effective relief from the Court in respect of the subject matter in dispute against a party, it is not necessary to join any other party whether it is the

Government or others. As long as no relief was claimed against the State Government, which the plaintiff was not bound to, the suit was competent. It was observed (vide para 48) :

"It is well established that where a Revenue Officer purports to do an act or pass an order which is not valid and without jurisdiction, the purported order is a mere nullity, and it is not necessary for anybody, who objected to that order to apply to set it aside. It can rely on its invalidity when it is put up against him, although he has not taken steps to set it aside. Such an order do not give any right whatsoever, not even right of appeal.

85. Since this is the legal position with regard to a substantive suit challenging the title of the purchaser in a revenue sale, we do not think that the situation of the appellant before us who merely pleaded nullity and invalidity of the plaintiffs title can be any different. It is significant that, unlike the provisions in some other statutes, viz. Section 39 of the Companies Act, 1956 which provides that the certificate of incorporation would be conclusive evidence that all requirements of registration under the Act have been complied with, significantly, the Bombay Municipal Corporation Act, does not have any similar provision making the certificate of sale issued by it conclusive evidence of compliance with all requirements of the BMC Act and Regulations thereunder.

86. We are, therefore, of the view that the finding of the Division Bench in the impugned judgment that the action of the Bombay Municipal Corporation in holding the auction sale could not have been challenged by Bajaranglal after withdrawal of the suit by Mahavirprasad and that the right to challenge the auction sale would not subsist in Bajaranglal by way of defence in the suit filed by the plaintiff auction purchaser for recovery of possession, is erroneous.

86A. The Division Bench has also taken note of the fact that Mahavir-prasad , who was a co-owner of the property, had filed suit No. 218/73 (to which other co-owners including Bajaranglal were parties) for setting aside the auction sale and thereafter withdrew the suit. This according to the Division Bench, precluded all other co-owners from challenging the auction sale on the same ground or by way of a defence in a suit instituted by auction purchaser to recover possession. The reasoning of the Division Bench appears to be that, as Bajaranglal could not have instituted a suit for challenging the auction sale and the sale certificate, equally, he could not raise a defence to the suit and plead that the auction sale was invalid. This reasoning in our view, is wholly erroneous in the light of the authoritative pronouncements of this Court to which we have already referred.

Fraud

87. The Division Bench of the High Court took the view that in the written statement filed by

Bajaranglal in the suit there was no complaint of fraud and no particulars whatsoever of fraud were pleaded. It further held that not only was the fraud not pleaded, but no issue in connection with fraud had been framed by the trial judge and yet he proceeded to make the finding that the auction sale was vitiated by fraud.

88. We have already noticed that, in the written statement filed by Bajaranglal in suit No. 118/73, as defendant No. 8 he specifically relied upon the defence taken by Mahavirprasad and he had also adopted and reiterated the contentions urged by Mahavirprasad in his suit No. 218/73. Thus, there were enough pleadings with regard, to the fraudulent manner in which the property was sought to be grabbed by Ramprasad through his wife Satyavati, who was plaintiff in suit No. 118/73. The single Judge after a detailed analysis of the evidence pointed out as to how Ramprasad had connived with the officers of the BMC to grab the suit property, which was worth lakhs of Rupees, for a paltry sum of Rs. 16,000/-. The conduct of Ramprasad and the plaintiff Satyavati, was found from the facts adduced before the trial Judge, fully justify the conclusions of the single Judge as to the fraud perpetrated.

89. It is necessary to recall some of the findings made by the single Judge which appears to be borne out by the evidence on record. In the first place, the property tax in respect of Hari Niwas was being paid by the firm M/s. Gorakh Gokalchand in which Shivchandrai and Mahavirprasad were partners. After Shivchandrai shifted to Madras in 1964, it was Mahavirprasad and Ramprasad who were attending to the work of payment of taxes in respect of the said property. Janardan Dhuri was assisting them in the management of property as an employee of the said firm till about 1969-70. Thereafter he joined as an employee of the firm of Gorakhram Haribux which was owned by Ramprasad. The firm had its office on the ground floor of Hari Niwas. The Municipal bills were being received by Mahavirprasad and sometime by Janardan Dhuri. At an earlier stage a warrant of attachment had been issued and the property was sought to be put up for auction by the BMC. At that time, the reserved bid fixed by the BMC was Rs. 30,600/- as on 14-7-1969. That the value of the property was Rs. 2,00,000/-, even at the time of filing of the suit, was not challenged. The learned single Judge traced the events which had transpired and took the view that there was a clear attempt by Ramprasad to get the property knocked down in the sale for a paltry sum of Rs. 16,000/-. After the death of Shivchandrai on 7-6-1971, all the heirs of Shivchandrai were entitled to claim ownership of the property, and Ramprasad had a duty to inform the BMC that Shivchandrai had died on 7-6-1971 and that the property should be shown in the joint names of all the heirs and legal representatives of Shivchandrai together with Ramprasad. For obvious reasons, no such thing was done by Ramprasad . The learned single Judge, therefore, rightly concluded on the facts that this was a deliberate failure on the part of Ramprasad in order to cause wrongful gain to himself and a wrongful loss to his brothers.

90. The evidence on record unmistakeably shows that Mahavirprasad and Bajaranglal were not aware of the date of auction sale having been fixed as 7-10-1971. There was neither a notice from the BMC in their names, nor did Ramprasad who was in management of the property, let them know of the same.

91. Mahavirprasad in his evidence in Suit No. 218/73 stated that he had vaguely learnt from Janardhan Dhuri about the auction sale. Therefore, he had written a letter on 5-10-1971 to the BMC pointing out that Shivchandrai had already died on 7-6-1971 and that no notice had been served on the co-owners. He also pointed out that the Corporation had still not accounted for the amounts already paid, and, therefore, no action could be taken which would bind the co-owners. This letter was personally delivered by him in the office of the BMC with an acknowledgement given by Superintendent 'K' Ward on 6-10-1971, and by the Assessment Department on 7-10-1971.

92. Curiously, the plaintiff Satyavati, who claimed title to the property, led no evidence whatsoever, in her support except relying upon the certificate of sale. In the first place, the certificate of sale was not in her name. The learned single Judge rightly pointed out that there was no material whatsoever on record to come to the conclusion that Janardan Dhuri had paid the sum of Rs. 16,000/- on behalf of the plaintiff Satyavati. It is rightly pointed out by the learned single Judge that, under the Municipal Regulations applicable to such auction sales, if a person is purchasing as an agent for another he is required to file papers giving full name, address and description both of himself and his principal. The note book maintained under the Regulations and the record produced did not show that Janardhan Dhuri had disclosed that he was bidding as an agent for the plaintiff Satyavati. Though Dhuri was still under the employment of Ramprasad, and used to attend the hearing during the trial when the evidence was recorded, he was not examined by the plaintiff. The plaintiff also led no evidence in support of her case. The BMC official, Madiwala, of the office of Deputy Assessment and Collector, produced two files containing relevant papers of the matter. The learned single Judge carefully examined all the documents produced and arrived at the conclusion that no reserve bid had been fixed for the auction sale which took place on 7-10-1971, contrary to the Regulations. At the earlier auction sale on 14-7-1969 the resolved bid fixed was Rs. 30,600/-.The auction sale is alleged to have taken place on 7-10-1971, therefore, the value of the property on the date of sale could not have been less than Rs. 30,600/-. Upon scanning the records of Municipal Corporation the learned single Judge noted that there was a proposal for sanction of sale (Ex. 27 dated 8-9-1971) which only said that it was proposed to sell the property without a reserve bid. There was no explanation whatsoever, in the file as to why this deviation from the Regulations was being made nor was the witness Madiwala in a position to give any satisfactory explanation therefor. The learned single Judge concluded that in fact, if at all, any sale had taken place on 7-10-1971, it was clearly contrary to Regulation 12 and 12A, of the BMC Regulations pertaining to immovable property framed by the Standing Committee of the BMC. The witness, Madiwala, had admitted that apart from two files produced, there were no other papers connected with the alleged sale, which took place on 7-10-1971. It was in these circumstances that the learned single Judge came to the finding that the alleged sale was engineered by Ramprasad in collusion with BMC officials, keeping the other heirs in the dark to get the valuable property to himself at a throw away price. These were inferences which were clearly justified and correctly raised by the learned single Judge to hold that the transaction was unconscionable, be it called fraud, collusion or whatever else. In our view, the conclusions of the single Judge were warranted by the evidence on record. The reasons given by the Division Bench to set aside this conclusion can hardly be upheld.

93. An appraisal of the facts of the record show that the learned Single Judge was justified in

permitting Bajaranglal (defendant) to rely on the evidence of Mahavirprasad recorded in Suit No. 218/73. The facts on record show that on 28-7-1988 counsel for the plaintiff stated that the witness of the plaintiff would be the plaintiff herself as well as her husband Ramprasad (D6). The learned Single Judge recorded the above statement of the counsel. Thereafter, the plaintiff examined only Yashwant Shankar Pawar, Managing Clerk, Legal Department of the BMC for producing the certificate of the sale dated 14-1-1972. This witness categorically admitted that the certificate of sale had been prepared by the Assessment Department after which it came to him and he knew nothing else in respect of the said document. Thereafter, the plaintiff neither examined any other witness nor himself. On behalf of the Defendant No. 8 (Bajranglal) and defendant No. 5 (Shyamsunder), they were both examined and cross-examined. They also examined one Shrikrishna Dhondu Madiwale, Deputy Assessor and Collector, Assessment Department of the Western Suburb of the Municipal Corporation. As a matter of fact, the persons who were aware of the facts and circumstances under which the alleged sale certificate had been issued could have been the plaintiff (Satyavati) herself, Ramprasad (D6), Mahavirprasad (D2) and Janardhan Dhuri who was an employee of the firm Ramprasad and Mahavirprasad, and who was actually present when the auction sale took place.

94. When Mahavirprasad (D2) filed his Suit No. 218/73 challenging the validity of the sale certificate relied upon by the plaintiffs, he had given evidence in the said suit. Though Bajranglal was a defendant in the said suit, he was only a pro forma defendant and did not contest the suit. On the contrary, he supported fully the stand which had been taken by Mahavirprasad in the said Suit No. 218/73. Bajranglal, in his evidence recorded in Suit No. 118/73, stated that Mahavirprasad had told him that he withdraw his Suit No. 218/73 because he had got some amount from Ramprasad and he was not likely to get anything from Bajaranglal. He had also said that he and Mahavirprasad were not on talking terms after the withdrawal of the suit. This evidence of Bajaranglal (D8) was not challenged at all in his cross-examination. The learned Single Judge was therefore, justified in drawing the inference that Mahavirprasad suddenly withdrew his suit half way through because he had been won over. There was also evidence on record which was unchallenged that Janardan Dhuri was attending the Court proceedings and watching the proceedings both in Suit Nos. 218/73 and 118/73. The evidence on record also shows that Ramprasad was also throughout present during the Court proceedings in Suit No. 118/73. Both Ramprasad and Satyavati (plaintiff) had opportunity of cross-examination of Mahavirprasad when he tendered evidence in Suit No. 118/73. In these circumstances, the learned Single Judge was justified in drawing the conclusion that Mahavirprasad (D2) was being kept away by Ramprasad (D6) and /or the plaintiff as far as the proceedings, in suit No. 118/73 were concerned. Hence, the learned Single Judge was justified in permitting Bajranglal (D8) to produce certified copy of the evidence given by Mahavirprasad in his own Suit No. 218/73 and to rely thereupon.

95. Bajaranglal stated in his written statement, as also in his evidence, that after receipt of a telegram he had contacted Mahavirprasad and Ramprasad. While Ramprasad did not say anything, Mahavirprasad had offered to take up the matter for the purpose of having the sale set aside. Accordingly, Mahavirprasad filed Suit No. 218/73. Since Mahavirprasad had taken the lead, Bajaranglal was supporting him. He was advised not to file a written statement in Suit No. 218/73, because he accepted whatever Mahavirprasad had said in examination-in-chief. In Bajaranglal's written statement in the Suit No. 118/73, he pleaded that he was adopting whatever had been said by Mahavirprasad in the Suit No. 218/73 filed by him and also in Mahavirprasad's written statement in

Suit No. 118/73 "to the extent of showing and proving that the plaintiff had no title and interest in respect of suit property". All this material was correctly analysed by the learned single Judge who drew justified conclusion therefrom. Unfortunately, the Division Bench without proper appreciation, has interfered by misdirecting itself.

Illegality of Sale

96. The sale certificate has been issued under Section 206 of the BMC Act. Sub-section (6) thereof provides that, after the sale of the immovable property as aforesaid, the Commissioner shall put the person declared to be the purchaser in possession and shall grant him a certificate to the effect that he has purchased the property to which the certificate refers. The evidence led by the plaintiff merely shows that Janardhan Dhuri was the highest bidder. The records produced by BMC show that Janardhan Dhuri was the highest bidder. If that be so, there is no acceptable explanation as to how the sale certificate could have been issued in the name of plaintiff Satyavati for she did not participate in the bid at the auction sale, much less was she the highest bidder. The Division Bench has made a very curious finding that "the sale certificate was issued in favour of the plaintiff by the Corporation and was duly registered." We must say that this finding is totally without basis. The sale certificate ex facie shows that it was given in the name of plaintiff Satyavati and there is no record in the BMC books that the plaintiff was registered as the highest bidder nor as a purchaser in the auction sale. Neither the plaintiff Satyavati, Janardan Dhuri, nor any competent officer of the BMC entered the witness box to explain this discrepancy as to how the sale certificate was issued in the name of Satyavati when the highest bidder was Janardhan Dhuri, who did not even claim to have bid as an agent of Satyavati. It is only in the plaint that the plaintiff for the first time claimed that she had paid the entire price of the auction sale. This was an averment in the plaint which was not substantiated by any evidence. Nonetheless, the Division Bench facilely accepted this averment and held that the sale certificate was issued in favour of the plaintiff as Janardan Dhuri was the highest bidder and because he was in the employment of Ramprasad, the certificate of the sale could be in the name of Satyavati and it conveyed her good title. To say the least the reasoning appears to be faulty.

97. We are also unable to accept the reasoning of the Division Bench that merely because the certificate of sale had been issued in the name of the plaintiff, it was conclusive of the title of the plaintiff and could not be impeached and that it was for the defendants to defend their possession. In the first place, there is no provision in the BMC Act or Regulations for conclusiveness of the certificate of sale. Secondly, the analogy drawn by the Division Bench with a Court sale is wholly misconceived. Thirdly, even assuming that such a conclusiveness or presumption of sale is there, it can only arise if it is shown that the certificate is issued strictly in accordance with Section 206 and the Regulations, which was not the case here. In these circumstances, where there is no compliance with the law, we are unable to appreciate the reasoning of the Division Bench, nor its conclusion, that the certificate of sale conveyed good title to Satyavati. We are in agreement with the view expressed by the learned single Judge that the sale was ab initio void and that the certificate of title was bad and null and void for complete violation of the provisions of the BMC Act and Regulations made thereunder.

98. In the circumstances of the case, and upon overall evaluation of the evidence on record, we are satisfied that the conclusions drawn by the learned single Judge were perfectly justified and in accordance with law. The Division Bench erred on all counts in interfering with and setting aside the judgment of the learned single Judge.

99. In the result, we allow this appeal, set aside the judgment of the Division Bench and affirm the judgment of the learned single Judge.

100. In the circumstances of the case the 8th respondent shall pay a sum of Rs. 50,000/- as costs to the appellant.

Appeal allowed.