

IN THE HIGH COURT OF JUDICATURE AT PATNA

Miscellaneous Appeal No.420 of 2013

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SHAMBHU DEVI W/O KULPATI SINGH RESIDENT OF VILLAGE- KAFEN,
P.S- HATHAURI, DISTRICT- MUZAFFARPUR, PRESENTLY RESIDING AT
A/B, KRISHNAPURI SHEIKHPURA, ZEROMILE, P.S- AHYAPUR, P.O-
AHYAPUR, DISTRICT- MUZAFFARPUR.

.... APPELLANT/S

VERSUS

1. AAYUSHI ALINGAN D/O SUJATA KUMARI (MOTHER) AND AJAY SHARMA (FATHER) RESIDENT OF KARAE, P.O- CHHAP, P.S- PAROO, DISTRICT- MUZAFFARPUR.
2. AJAY SHARMA S/O MAHINDRA OJHA RESIDENT OF KATAREE, P.O- CHHAP, P.S- PAROO, DISTRICT- MUZAFFARPUR.

.... RESPONDENT/S

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Appearance:

For the Appellant/s : Mr. Suraj Narayan Yadav, Adv.
Mr. Upendra Kumar Choubey, Adv.
Miss. Annu Shree, Adv.

For the Respondent/s : Mr. Navendu Kumar, Adv.

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
CAV JUDGMENT

Date: 28-07-2016

Appellant/applicant filed instant appeal against judgment and order dated 07.02.2013 passed by IXth Additional District Judge, Muzaffarpur (wrongly mentioned as IXth Additional Sessions Judge) in Guardianship Case No.3 of 2011/ 01 of 2012 whereby and whereunder the learned lower court had dismissed the petition.

2. Considering pendency of instant petition for admission since 2013 and as presence of respondent had already procured, on account thereof, with the consent of the parties the matter has been heard on merit at the present stage itself and is being decided, accordingly.

3. Shorn of unnecessary details, it is evident that appellant /applicant filed petition for her appointment as a guardian of person and properties of the minor, namely, Aayushi Alingan who happens to be daughter's daughter (Natini) of the applicant. To substantiated such plea, it has been submitted that applicant's



daughter Sujata Kumari was married with respondent/opposite party Ajay Sharma on 25.06.2006 and during continuation of the marriage, Aayushi Alingan begotten on 22.08.2008 at the Nursing Home of Dr. Ranjana Mishra, Juran Chapra in the town of Muzaffarpur. Sujata Kumari along with daughter Aayushi Alingan came at her place and while she was staying there, respondent/opposite party insisted for *Bidai* but her daughter did not show inclination to go to her Sasural however, at the intervention of well-wishers differences were shorted out and she along with Aayushi Alingan gone to her Sasural where during course of stay she was subjected to torture at the hands of respondent/opposite party for fulfillment of demand of dowry to a tune of Rs.1 lac and as, the same was not fulfilled, she ultimately met with dowry death and for that, criminal case was instituted whereupon Sessions Trial No.872 of 2009 is going on before the court of Fast Track Court No.2, Muzaffarpur. It has also been narrated that since after death of her daughter, Aayushi Alingan is under her care as well as guardianship. However, for having proper acceptance in the eye of law, applicant's appointment as a guardian of person as well as property of Aayushi Alingan became necessary and for that, the said petition has been filed. It has also been disclosed that no other petition at an earlier occasion consisting aforesaid prayer had ever been filed at the end of applicant nor there happens to be any sort of impediment in granting the relief.

4. Aforesaid petition was filed before the District Judge, Muzaffarpur whereupon Guardianship Case No.3 of 2011 was registered. Respondent/opposite party was noticed followed with his appearance. Subsequently thereof, instead of filing WS compromise petition was filed though not at all affidavited. Then thereafter applicant as well as opposite party were examined and by the judgment and order impugned said petition has been dismissed hence, this appeal.



5. From perusal of the judgment/order impugned, it is evident that learned lower court had taken into account the incompetency of the court in appointing the appellant/applicant guardian relating to person of minor which, rightly been acknowledged to be within the domains of the family court however, proceeded to adjudicate upon relating to another prayer regarding appointment of guardian relating to property and during course thereof, considered ambit and scope of Section 12 of Hindu Minority and Guardianship Act, 1956 whereunder no guardianship would be allowed relating to joint undivided property whereupon.

6. Learned counsel for the appellant resisted the finding recorded by the learned lower court and submitted that same happens to be wrong and illegal because of the fact that (a) once the petition has been entertained for adjudication then in that event, the court was not competent enough to see and hold that guardianship relating to person of minor was not to be within the competence of the court, (b) court should not have dismissed the petition as, there was no joint interest visible and for that misadventured Section 15(a) of the Hindu Succession Act relating to succession of a property left by Hindu women. To substantiate such plea it has been submitted that property detailed under schedule-I was self-acquired property of deceased Sujata Kumari, half portion of which stood in her name while half portion was name of respondent/opposite party which he re-conveyed in her favour. Furthermore, being an accused of causing murder of Sujata Kumari as well as having entered into compromise relinquishing the same acknowledging guardianship of appellant which, he reiterated during course of his evidence as OPW No.1 would not have brushed aside by the learned lower court without any rhyme and reason. Learned lower court had not given any cogent reason for disbelieving the same. That being so, the judgment and order impugned happens to be contrary to the spirit of law and is fit to be set aside.

7. The learned counsel for the respondent while challenging the submission made on behalf of appellant on account of shifting his status from initial stage, has submitted that the judgment and order impugned is just, legal and proper and is fit to be affirmed.

8. After going through the record it is evident that two kinds of prayer have been made by the appellant/applicant before the learned lower court.

(a) Appointment of guardian relating to person of minor Aayushi Alingan.

(b) Appointment of guardian relating to property of minor Aayushi Alingan the aforesaid two prayer could be bifurcated though an option was available before the appellant to withdraw either of them by an amendment which she never done. Having presence of both the prayer, clearly ousted jurisdiction of District Judge in terms of Section 7(g) of the Family Court Act as the same was within the competence of and the jurisdiction on that very score is found excluded under Section 8(a) of the Family Court Act. While, the later part of prayer happens to be beyond the jurisdiction of the family court and would be ad-judicable by a civil court. Objection to jurisdiction in terms of Section 21 of the CPC is to be raised at an initial stage but, as the parties have compromised therefore, such issue was not at all taken up at an initial stage. It is settled principle of law that in case, the objection relating to jurisdiction has not been raised, then in that event, it cannot be raised subsequently but the facts remains that when the court, which decided the matter having no jurisdiction to adjudicate the dispute, the decree passed by such court is

nullity and its validity can be questioned at any time even in an appeal or even during course of the execution proceeding. Consent of the parties or the silence or the inaction of parties in challenge the jurisdiction will not confer jurisdiction on the court to adjudicate the dispute, which otherwise the court has no jurisdiction to decide as it goes to root of the matter.

9. The caption jurisdiction has vast spectrum whereupon, it has been bifurcated in three measure heading for proper appreciation, consideration, adjudication.

- (a) Territorial or local jurisdiction.
- (b) Pecuniary jurisdiction.
- (c) Jurisdiction over the subject matter.

10. The present nature of controversy comes within the category (c), jurisdiction over the subject matter and for proper identification thereof, it can be held that subject matter relates/depends upon the nature of the pleading, cause of action and the relief so sought for. As elaborated above, the relief so sought for happens to be with regard to appointment of guardianship against a minor as well as appointment of guardianship relating to the property of the minor. When, one of the relief so sought for gone beyond the jurisdiction of the civil court and till its presence, it continue to oust the jurisdiction and that being so, the petition before the civil court was not at all entertainable, although the other relief so sought for was entertainable by the civil court. It is settled principle of law that where by reasons of any limitation imposed by statute charter, commission a court is without jurisdiction to entertain any particular action or matter, neither the acquiescence nor the express consent of the parties can confer jurisdiction upon the court nor can consent give a court jurisdiction if a condition which goes to the jurisdiction has not been performed or fulfilled. That means to say, to

entrust the lis to the jurisdiction of the civil court, the parties were expected to have deleted the relief no.1 which they failed to and on account thereof, the petition in its present form gone beyond the jurisdiction of the civil court and was not entertainable.

11. After discussing the relevant provisions of law as envisaged under family court act in *Balram Yadav Vs. Fulamaniya Yadav* reported in *AIR 2016 SC 2161*, it has been held:

“7. Under Section 7(1) Explanation (b), a Suit or a proceeding for a declaration as to the validity of both marriage and matrimonial status of a person is within the exclusive jurisdiction of the Family Court, since under Section 8, all those jurisdictions covered under Section 7 are excluded from the purview of the jurisdiction of the Civil Courts. In case, there is a dispute on the matrimonial status of any person, a declaration in that regard has to be sought only before the Family Court. It makes no difference as to whether it is an affirmative relief or a negative relief. What is important is the declaration regarding the matrimonial status. Section 20 also endorses the view which we have taken, since the Family Courts Act, 1984, has an overriding effect on other laws.”

12. In *Harshad Chiman Lal Modi v. D.L.F., Universal Ltd. and another* reported in *AIR 2005 sc 4446* the Hon'ble Apex Court has held:

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

order passed by a court having no jurisdiction is nullity.

29. In Halsbury's Laws of England, (4th edn.), Reissue, Vol. 10; para 317; it is stated;

317. Consent and waiver. Where, by reason of any limitation imposed by statute, charter or commission, a court is without jurisdiction to entertain any particular claim or matter, neither the acquiescence nor the express consent of the parties can confer jurisdiction upon the court, nor can consent give a court jurisdiction if a condition which goes to the jurisdiction has not been performed or fulfilled. Where the court has jurisdiction over the particular subject matter of the claim or the particular parties and the only objection is whether, in the circumstances of the case, the court ought to exercise jurisdiction, the parties may agree to give jurisdiction in their particular case; or a defendant by entering an appearance without protest, or by taking steps in the proceedings, may waive his right to object to the court taking cognizance of the proceedings. No appearance or answer, however, can give jurisdiction to a limited court, nor can a private individual impose on a judge the jurisdiction or duty to adjudicate on a matter. A statute limiting the jurisdiction of a court may contain provisions enabling the parties to extend the jurisdiction by consent."

30. In Bahrein Petroleum Co., AIR 1966 SC 634 this Court also held that neither consent nor waiver nor acquiescence can confer jurisdiction upon a court, otherwise incompetent to try the suit. It is well-settled and needs no authority that 'where a court takes upon itself to exercise a jurisdiction it does not possess, its decision amounts to nothing.' A decree passed by a court having no jurisdiction is non-est and its validity can be set up whenever it is sought to be enforced as a foundation for a right, even at the stage of execution or in collateral proceedings. A decree passed by a court without jurisdiction is a coram non judice.

31. In Kiran Singh v. Chaman Paswan, (1955) 1 SCR 117 : AIR 1954 SC 340, this Court declared;

"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 it is sought to be enforced or relied upon, even at the stage of execution and even in collateral proceedings. A defect of jurisdiction strikes at the very authority of the court to pass any decree, and such a defect cannot be cured even by consent of parties."

(emphasis supplied)"

13. The aforesaid issue has further been elaborately dealt with in

Mantoo Sarkar v. Oriental Insurance Co. Ltd. & Anr. reported in AIR 2009 SC

1022.

“18. We, however, while taking that factor into consideration must place on record that we are not oblivious of the fact that a decision rendered without jurisdiction would be coram non juris. Objection in regard to jurisdiction may be taken at any stage. (See Chief Engineer, Hydel Project v. Ravinder Nath , [(2008) 2 SCC 350]) wherein inter alia the decision of this Court in Kiran Singh v. Chaman Paswan, [AIR 1954 SC 340] was followed, stating:

"26. The Court also relied upon the decision in Kiran Singh v. Chaman Pawan [AIR 1954 SC 340] and quoted (in Harshad Chiman Lal case {[(2005) 7 SCC 791], SCC pp. 804-805, para 33} therefrom: {Kiran Singh case (supra), AIR p.342, para 6:

`6....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, ...strikes at the very authority of the court to pass any decree, and such a defect cannot be cured even by consent of parties."

Though in the aforementioned decision these observations were made since the defendants before raising the objection to the territorial jurisdiction had admitted that the court had the jurisdiction, the force of this decision cannot be ignored and it has to be held that such a decree would continue to be a nullity."

19. A distinction, however, must be made between a jurisdiction with regard to subject matter of the suit and that of territorial and pecuniary jurisdiction. Whereas in the case falling within the former category the judgment would be a nullity, in the latter it would not be. It is not a case where the Tribunal had no jurisdiction in relation to the subject matter of claim. As a matter of fact the civil court had no jurisdiction to entertain the suit. If the Tribunal had the jurisdiction to entertain a claim petition under the Motor Vehicles Act, in our opinion, the Court should not have, in absence of any finding of sufferance of any prejudice on the part of the first respondent, entertained the appeal.

In Bikash Bhushan Ghosh v. Novartis India Ltd., [(2007) 5 SCC591], this Court has held :

"17. There is another aspect of the matter which cannot be lost sight of. If the provisions contained in the Code of Civil Procedure are given effect to, even if the Third Industrial Tribunal, West Bengal had no jurisdiction, in view of the provisions contained in Section 21 of the Code of Civil Procedure, unless the respondent suffered any prejudice, they could not have questioned the jurisdiction of the court. In Kiran Singh v. Chaman Paswan this Court held: (AIR p. 342, paras

6-7)

`6. ... If the question now under consideration fell to be determined only on the application of general principles governing the matter, there can be no doubt that the District Court of Monghyr was `coram non judice' and that its judgment and decree would be nullities. The question is what is the effect of Section 11 of the Suits Valuation Act on this position.

7. Section 11 enacts that notwithstanding anything in Section 578 of the Code of Civil Procedure an objection that a court which had no jurisdiction over a suit or appeal had exercised it by reason of overvaluation or undervaluation, should not be entertained by an appellate court, except as provided in the section. Then follow provisions as to when the objections could be entertained, and how they are to be dealt with. The drafting of the section has come in—and deservedly—for considerable criticism; but amidst much that is obscure and confused, there is one principle which stands out clear and conspicuous. It is that a decree passed by a court, which would have had no jurisdiction to hear a suit or appeal but for overvaluation or undervaluation, is not to be treated as, what it would be but for the section, null and void, and that an objection to jurisdiction based on overvaluation or undervaluation, should be dealt with under that section and not otherwise.

The reference to Section 578, now Section 99 CPC, in the opening words of the section is significant. That section, while providing that no decree shall be reversed or varied in appeal on account of the defects mentioned therein when they do not affect the merits of the case, excepts from its operation defects of jurisdiction. Section 99 therefore gives no protection to decrees passed on merits, when the courts which passed them lacked jurisdiction as a result of overvaluation or undervaluation. It is with a view to avoid this result that Section 11 was enacted. It provides that objections to the jurisdiction of a court based on overvaluation or undervaluation shall not be entertained by an appellate court except in the manner and to the extent mentioned in the section. It is a self-contained provision complete in itself, and no objection to jurisdiction based on overvaluation or undervaluation can be raised otherwise than in accordance with it.

With reference to objections relating to territorial jurisdiction, Section 21 of the Civil Procedure Code enacts that no objection to the place of suing should be allowed by an appellate or revisional court, unless there was a consequent failure of justice. It is the same principle that has been adopted in Section 11 of the Suits Valuation Act with reference to pecuniary jurisdiction. The policy underlying Sections 21 and 99 CPC and Section 11 of the Suits Valuation Act is the same, namely, that when a case had been tried

by a court on the merits and judgment rendered, it should not be liable to be reversed purely on technical grounds, unless it had resulted in failure of justice, and the policy of the legislature has been to treat objections to jurisdiction both territorial and pecuniary as technical and not open to consideration by an appellate court, unless there has been a prejudice on the merits. The contention of the appellants, therefore, that the decree and judgment of the District Court, Monghyr, should be treated as a nullity cannot be sustained under Section 11 of the Suits Valuation Act.' "

Furthermore in determining as to whether a part of cause of action has arisen within the territorial jurisdiction of the court vis-à-vis an appellate court a large number of factors may have to be taken in consideration. [See *Ambica Industries v. CCE*, (2007) 6 SCC 769].

We cannot also lose sight of the fact that the appellant herein was a labourer. The justness or otherwise of the amount of compensation has not been disputed before us. If the High Court judgment is to be complied with, appellant would again have to initiate another proceeding either at Bareilly or Gurgaon or at Delhi or at Jabalpur. The same evidence would have to be rendered once again. The question of fact which was required to be determined in the proceeding before the Tribunal, namely whether the driver of the truck or the driver of the bus had been driving their respective vehicles rashly and negligently would have to be determined afresh. The factual finding recorded in this case is that the driver of the truck was driving the truck rashly and negligently. In our opinion, in a case of this nature, we may even exercise our extra ordinary jurisdiction under Article 142 of the Constitution of India. In *New India Insurance Company v. Darshana Devi and others*, [(2008) 7 SCC 416], this Court held:

"20. Having said so, we must take notice of the fact that the deceased Baldev Singh was labourer. The Tribunal has found that besides being a labourer, he also used to deal in Safeda wood. He was the owner of the 'Safeda' wood which was being transported to the market for its sale. The first respondent, Darshana Devi, in her deposition, stated that the deceased used to purchase wood from the State of Himachal Pradesh on contract basis. Only Gurdial Singh and Ravinder Singh were accompanying him as labourer. His income was assessed only at Rs. 2,400 per month."

21. In this view of the matter, we are of the opinion that it is not a fit case where this Court should exercise its discretionary jurisdiction under Article 136 of the Constitution of India. Even in *Brij Mohan* this Court held: (SCC p. 64, paras 13-14)

"13. However, Respondent 1 is a poor labourer. He had suffered grievous injuries. He had become



disabled to a great extent. The amount of compensation awarded in his favour appears to be on a lower side. In the aforementioned situation, although we reject the other contentions of Ms Indu Malhotra, we are inclined to exercise our extraordinary jurisdiction under Article 142 of the Constitution of India so as to direct that the award may be satisfied by the appellant but it would be entitled to realise the same from the owner of the tractor and the trolley wherefor it would not be necessary for it to initiate any separate proceedings for recovery of the amount as provided for under the Motor Vehicles Act.

14. It is well settled that in a situation of this nature this Court in exercise of its jurisdiction under Article 142 of the Constitution of India read with Article 136 thereof can issue suit directions for doing complete justice to the parties."

14. Because of the fact that having presence of relief no.(a) which, till today has not been prayed for its deletion, survives, which ousted the jurisdiction of the civil court and further, the court on its own could not found competent to bifurcate the relief for the purpose of assuming the jurisdiction. On account thereof, the proceeding in its present form would not have been allowed by the learned lower court. However, as the petition has been dismissed by the learned lower court on one pretext or other, needs no further adjudication on account of deficiency on the point of jurisdiction. Consequent thereupon, instant appeal sans merit and is accordingly dismissed. However, in the facts and circumstances of the case parties will bear their own cost.

(Aditya Kumar Trivedi, J.)

PN/-

AFR/NAFR	AFR
CAV DATE	01.07.2016
Uploading Date	29.07.2016
Transmission Date	N.A.