

HIGH COURT OF CHHATTISGARH, BILASPURSecond Appeal No.206 of 2005

Bal Krishna Das, age 45 years, S/o. Late Shri Arjun Das, R/o.
Village Bhanpuri, Tah. Dongargarh, Distt.Rajnandgaon (CG)

---- Appellant/Defendant

Versus

1. Bal Govind Das, aged about 40 years, S/o. Late Shri Raghunath Das, resident of village Bhanpuri, Tah. Dongargarh, Distt. Rajnandgaon (CG)
- 2(a) Ganesh Das son of Raghunath Das, aged about 70 years,
(b) Ishwar Das son of Ragunath Das, aged about 62 years,
Both are resident of Village – Bhanpuri, Tahsil-Dongargarh, District Rajandgaon (CG)
- (c) Anusuiya Devi daughter of Raghunath Das, wife of Bharthari Das, aged about 65 years, resident of village – Balouda, Post-Haswa, Via-Kargi, District Raipur (CG)

3. State of C.G. Through Collector, Rajnandgaon

---- Respondents

For Appellants/Defendant:	Mr.Ravindra Sharma, Advocate
For Res.No.1&2/Plaintiffs:	Mr.Parag Kotecha and Mr.Shalvik Tiwari, Advocates
For Respondent No.3:	Mr.Priyank Rathi, Panel Lawyer

Hon'ble Shri Justice Sanjay K. Agrawal

Judgment On Board

25/07/2019

1. The substantial question of law involved, formulated and to be answered in this defendant's (appellant's) second appeal is as under: -

“Whether the presumption to be drawn in accordance with Section 117 of the Chhattisgarh Land Revenue Code can be rebutted by demarcation as well as report submitted by the Commissioner, if so, its effect ?”

(For the sake of convenience, parties would be referred

hereinafter as per their status shown in the plaint before the trial Court.)

2. The dispute mainly relates to 7 teak trees standing and 13 pieces of teak wood which are in possession of the Forest Department. The Sub-Divisional Officer, Dongargarh by order dated 9.6.99 (Ex.P-3) held it to be owned by defendant No.1 and thereafter in appeal taken by the plaintiffs vide Ex.D-13, it was affirmed by the Additional Collector, Rajnandgaon holding it to be owned by defendant No.1. Thereafter, the plaintiff filed a suit for declaration that they are entitled for 9 teak trees and 13 teak woods owned by them and also prayed that order of the Sub-Divisional Officer, Dongargarh dated 9.6.99 be declared void. The trial Court dismissed the suit holding that it is owned by defendant No.1. On appeal being preferred by the plaintiffs, the first appellate Court allowed the appeal and reversed the judgment and decree of the trial Court, against which, this second appeal under Section 100 of the CPC has been filed by the appellant/defendant, in which substantial question of law has been formulated and set-out in the opening paragraph of the judgment.
3. Mr.Ravindra Sharma, learned counsel for the appellant/defendant, would submit that the first appellate Court has committed grave legal error in passing the decree in favour of the plaintiffs ignoring the fact that order of the Sub-Divisional Officer, Dongargarh dated 9.6.99 (Ex.P-3) holding teak trees and teak woods to be owned by defendant No.1, which was affirmed by the Additional Collector, Rajnandgaon vide order dated 31.8.99 (Ex.D-13). He would further

submit that since plaintiff No.1 was party to the order of the Additional Collector, Rajnandgaon dated 31.8.1999 (Ex.D-13) he ought to have sought cancellation of that order, which is binding. In absence of that, the suit itself was not maintainable.

4. Mr.Shalvik Tiwari, learned counsel for the respondents No.1 and 2/plaintiffs, would submit that the defendant has nowhere argued that order of the Additional Collector dated 31.8.1999 (Ex.D-13) was not challenged, therefore, the suit is not maintainable, as such, the appeal deserves to be dismissed.
5. I have heard learned counsel for the parties and considered their rival submissions and went through the records with utmost circumspection.
6. It appears from the record that the Sub-Divisional Officer, Dongargarh in its order dated 9.6.99 held that teak trees and teak wood both belonged to defendant No.1 and that order has only been questioned in suit filed by the plaintiffs, but that order has been affirmed by the Additional Collector, Rajandgaon on 31.8.1999 (Ex.D-13), which the first appellate Court did not deal with and reversed the judgment and decree of the first appellate Court on different grounds. In my considered opinion, once plaintiff No.1 was party to the order of the Additional Collector (Ex.D-13) as he has questioned the order of the SDO dated 9.6.99 in appeal, he ought to have sought cancellation of the order dated 31.8.1999 (Ex.D-13) passed by the Additional Collector in appeal. In absence of challenge to that order, the order of the SDO dated 9.6.99 (Ex.P-3)

could not have questioned as the order of the SDO has already been merged into the order of the Additional Collector, Rajnandgaon. Therefore, it was incumbent on the part of the plaintiffs to question the order dated 31.8.1999 which they have not challenged for the reasons best known to them.

7. The doctrine of merger is based on the principle that there cannot be more than one decree or operative orders governing the same subject-matter at a given point of time. When a decree or order passed by inferior Court, tribunal or authority was subjected to a remedy available under the law before a superior forum then, though the decree or order under challenge continues to be effective and binding nevertheless its finality is put in jeopardy. Once the superior Court has disposed of the lis before it either way – whether the decree or order under appeal is set aside or modified or simply confirmed, it is the decree or order of the superior Court, tribunal or authority which is the final, binding and operative decree or order wherein merges the decree or order passed by the Court, tribunal or the authority below. (See Kunhayammed and others v. State of Kerala and another¹.)
8. The Constitution Bench of the Supreme Court in the matter of Collector of Customs, Calcutta v. East India Commercial Co. Ltd., Calcutta and others² has held that after the disposal of appeal, the operative order is the order of the appellate authority whether it has reversed the original order or modified it or

1 AIR 2000 SC 2587

2 AIR 1963 SC 1124

confirmed it. Relevant extracts from paragraphs 4 and 5 of the report state as under: -

“(4) The question therefore turns on whether the order of the original authority becomes merged in the order of the appellate authority even where the appellate authority merely dismisses the appeal without any modification of the order of the original authority. It is obvious that when an appeal is made, the appellate authority can do one of three things, namely, (i) it may reverse the order under appeal, (ii) it may modify that order, and (iii) it may merely dismiss the appeal and thus confirm the order without any modification. It is not disputed that in the first two cases where the order of the original authority is either reversed or modified it is the order of the appellate authority which is the operative order and if the High Court has no jurisdiction to issue a writ to the appellate authority it cannot issue a writ to the original authority. The question therefore is whether there is any difference between these two cases and the third case where the appellate authority dismisses the appeal and thus confirms the order of the original authority. It seems to us that on principle it is difficult to draw a distinction between the first two kinds of orders passed by the appellate authority and the third kind of order passed by it. In all these three cases after the appellate authority has disposed of the appeal, the operative order is the order of the appellate authority whether it has reversed the original order or modified it or confirmed it. ...

(5) It is this principle, viz., that the appellate order is the operative order after the appeal is disposed of, which is in our opinion the basis of the rule that the decree of the lower court merges in the decree of the appellate court, and on the same principle it would not be incorrect to say that the order of the original authority is merged in the order of the appellate authority whatsoever its decision – whether of reversal or modification or mere confirmation. ...”

9. The Supreme Court has also carved out an exception to the aforesaid principle of merger in the matter of Chandi Prasad v. Jagdish Prasad³ in following terms: -

“28. ... when an appeal is dismissed on the ground that

3 (2004) 8 SCC 724

delay in filing the same is not condoned, the doctrine of merger shall not apply.”

10. The principle of law laid down by the Supreme Court in **Chandi Prasad** (supra) has been followed with approval in the matter of State of **Kerala and another v. Kondottyparambanmoosa and others**⁴ holding that when a higher forum entertains an appeal or revision and passes an order on merit, the doctrine of merger would apply and it would not apply when the appeal or revision is dismissed on the ground that delay in filing the same is not condoned.
11. The Constitution Bench of the Supreme Court in the matter of **S.S. Rathore v. State of Madhya Pradesh**⁵ has held that the distinction made between courts and tribunals as regards the applicability of doctrine of merger is without any legal justification and observed as under: -

“14. The distinction adopted in *Mohammad Nooh* case⁶ between a court and a tribunal being the appellate or the revisional authority is one without any legal justification. Powers of adjudication ordinarily vested in courts are being exercised under the law by tribunals and other constituted authorities. In fact, in respect of many disputes the jurisdiction of the court is now barred and there is a vesting of jurisdiction in tribunals and authorities. That being the position, we see no justification for the distinction between courts and tribunals in regard to the principle of merger. ...”

12. It is well settled law that even a void order or decision rendered between parties cannot be said to be non-existent in all cases and in all situations. Ordinarily, such an order will, in fact, be effective

4 (2008) 8 SCC 65

5 (1989) 4 SCC 582

6 State of Uttar Pradesh v. Mohammad Nooh, 1958 SCR 595: AIR 1958 SC 86

inter partes until it is successfully avoided or challenged in a higher forum.

13. The Supreme Court in the matter of State of Kerala v. M.K. Kunhikannan Nambiar Manjeri Manikoth, Naduvil (Dead) and others⁷ has clearly held that even a void order or decision rendered between parties will be effective inter partes until it is successfully avoided by observing as under: -

“7. ... even a void order or decision rendered between parties cannot be said to be non-existent in all cases and in all situations. Ordinarily, such an order will, in fact, be effective inter partes until it is successfully avoided or challenged in a higher forum. Mere use of the word 'void' is not determinative of its legal impact. The word 'void' has a relative rather than an absolute meaning. It only conveys the idea that the order is invalid or illegal. It can be avoided. ...”

14. The Supreme Court following the principle of law laid down in M.K. Kunhikannan Nambiar's case (supra), in the matter of Krishnadevi Malchand Kamathia and others v. Bombay Environmental Action Group and others⁸ again held that whether an order is valid or void, cannot be determined by the parties. For setting aside such an order, even if void, the party has to approach the appropriate forum. Their Lordships of the Supreme Court observed in paragraphs 17, 18 and 19 as under: -

“17. In *State of Punjab v. Gurdev Singh*⁹ this Court held that a party aggrieved by the invalidity of an order has to approach the court for relief of declaration that the order against him is inoperative and therefore, not binding upon him. While deciding the said case, this Court placed reliance upon the judgment in *Smith v. East Elloe*

7 (1996) 1 SCC 435

8 (2011) 3 SCC 363

9 (1991) 4 SCC 1

*RDC*¹⁰, wherein Lord Radcliffe observed: (AC pp. 769-70)

"... An order, even if not made in good faith, is still an act capable of legal consequences. It bears no brand of invalidity [on] its forehead. Unless the necessary proceedings are taken at law to establish the cause of invalidity and to get it quashed or otherwise upset, it will remain as effective for its ostensible purpose as the most impeccable of orders."

18. In *Sultan Sadik v. Sanjay Raj Subba*¹¹, this Court took a similar view observing that once an order is declared non est by the court only then the judgment of nullity would operate *erga omnes* i.e. for and against everyone concerned. Such a declaration is permissible if the court comes to the conclusion that the author of the order lacks inherent jurisdiction/competence and therefore, it comes to the conclusion that the order suffers from patent and latent invalidity.

19. Thus, from the above it emerges that even if the order/notification is void/voidable, the party aggrieved by the same cannot decide that the said order/notification is not binding upon it. It has to approach the court for seeking such declaration. The order may be hypothetically a nullity and even if its invalidity is challenged before the court in a given circumstance, the court may refuse to quash the same on various grounds including the standing of the petitioner or on the ground of delay or on the doctrine of waiver or any other legal reason. The order may be void for one purpose or for one person, it may not be so for another purpose or another person."

15. Reverting to the facts of the present case, it is quite vivid that though the order of the SDO dated 9.6.99 (Ex.P-3) was seriously questioned by the plaintiffs in appeal and it was duly affirmed holding teak trees and teak woods to be owned by defendant No.1. Plaintiff No.1 being party to */is*, that order of the Additional Collector ought to have questioned in higher forum and as such, the suit as framed and filed was not maintainable in absence of challenge to the order of the Additional Collector dated 31.8.1999 (Ex.D-13). The

¹⁰ 1956 AC 736 : (1956) 2 WLR 888 : (1956) 1 All ER 855

¹¹ (2004) 2 SCC 377

submission of learned counsel for the plaintiffs deserves to be rejected. In absence of challenge to the order of the Additional Collector dated 31.8.1999 (Ex.D-13), the suit itself was not maintainable for want of challenge to that order.

16. In the light of aforesaid legal position, the judgment and decree passed by the first appellate Court is set aside and that of the trial Court is hereby restored.

17. The second appeal is allowed to the extent indicated herein-above leaving the parties to bear their own cost(s).

18. Decree be drawn-up accordingly.

Sd/-
(Sanjay K. Agrawal)
Judge

B/-