

A OFFICIAL TRUSTEE OF WEST BENGAL

v.

STEPHEN COURT LTD.

DECEMBER 14, 2006

B [S.B. SINHA AND MARKANDEY KATJU, JJ.]

C *Succession Act, 1925—Section 302—Official Trustees Act, 1913 -Section 26—Official Trustee appointed as Executor and Trustee under a Will executed by owner of immovable property—Lease of that property—On being asked by to extend lease period. Official Trustee telling lessee to approach High Court—Application by lessee to High Court for direction under Section 302 of Act of 1925 read with Section 26 of Act of 1913 for extension of lease period—In response thereto, Official Trustee asking for increase in rent and same allowed by High Court—Maintainability of application—Held—*
D *Application of lessee to High Court was maintainable—Official Trustee could have extended period of lease or entered into a new arrangement with lessee, and dealt with property in any manner it thought fit, subject to direction which could be issued by High Court—It being a statutory authority, was presumed to be aware and understand provisions of Act of 1913—Instead of*
E *dealing with matter itself, it asked lessee to file an appropriate application and in response thereto, without questioning maintainability thereof, it asked enhancement in quantum of rent—It was more so as it allowed order of High Court enhancing rent to attain finality and took benefit thereof.*

F *Calcutta High Court Original Side Rules—Chapter XIII—Originating Summons—Maintainability and scope of—Held—High Court in exercise of said jurisdiction cannot adjudicate as to whether an earlier order passed by it was null and void and was, thus, liable to be set aside.*

G *Estoppel, waiver, acquiescence and res judicata—Application of—Increase in rent ordered by Court acted upon by lessor by accepting it—Over a decade thereafter, lessor taking out Originating Summons before High Court for determination of their relation with lessee and other issues—Correctness of—Held—This was not permissible—Lessor questioned not only the earlier order of Court but also its own act which had attained finality, raising contentions which had not been raised in the earlier proceeding—*

H

lessor could not alter its position and prevaricate its stand from time to time—They were estopped and precluded from doing so—In Originating Summons they could not say that in earlier proceeding, they had raised other contentions which were not considered by Court as their remedy was to move the said court itself for appropriate directions—Principles of res judicata and constructive res judicata were applicable in aforementioned fact situation—Chapter XIII of Calcutta High Court Original side Rules.

Transfer of property—Lease—Owner of immovable property executing registered lease deed in favour of L for 99 years and also executing a Will appointing Official Trustee as Executor and Trustee in respect of said property—L executing registered deed of assignment in favour AS, Managing Director of a company—He and thereafter the company acquired leasehold rights of said premises for balance unexpired period, whereupon registered Debenture Trust Deed executed by AS, company and Trustees referred to therein—Company continuing to pay rent to Official Trustee who issued rent receipts in respect thereof—Relationship between Official Trustee and Company—Determination of—Held—Defect in agreement of sale between AS and company was cured by registered Debenture Trust Deed—As Official Trustee had all along received monthly rent from Company, and also allowed it to raise a huge structure, it acknowledged Company to be lessee in respect of leasehold— Company for all intent and purport became a lessee under Official Trustee and it was entitled to protect its possession either as an assignee of leasehold or as a monthly tenant—Section 53-A of Transfer of Property Act.

Order—Reasons in support thereof not assigned—Setting aside of order—Held—It could be set aside only by an appellate court—However, when an order had attained finality, it cannot be set aside on the premise that no reason had therefor been assigned.

Words and phrases—"Beneficiary under a trust" and "person beneficially interested in any trust property"—In context of Official Trustees Act, 1913.

One PP, owning an immovable property, executed a registered deed of lease in respect thereof in favour of L for 99 years. He also executed a Will appointing appellant- Official Trustee as Executor and Trustee in respect of the said property. L executed a registered deed of assignment in favour AS who was shareholder and managing Director of respondent-company. AS and thereafter respondent purchased leasehold rights of said premises for balance unexpired period. A registered Debenture Trust Deed was executed by AS,

- A** respondent and three Trustees referred to in that Deed, stating that respondent as entitled to said property for balance unexpired period. Respondent continued to pay rent to appellant who issued rent receipts in respect thereof. When they requested appellant for extension of period of lease for a further period of sixty years, the latter suggested that they should apply to High Court.
- B** Accordingly, respondent preferred an application before High Court under section 302 of Succession Act, 1925 read with Section 26 of Official Trustees Act, 1913. In response thereto, appellant asked for increase in rent. High Court directed the same to be paid for residuary period of existing lease. The order of the High Court was accepted and acted upon by appellant, whereby they executed a deed of lease in favour of respondent for a period of sixty years.
- C** Thereafter, appellant took out Originating Summons before High Court for determination of their relation with respondent and other issues.

D High Court held that (i) it had jurisdiction to entertain the application for extension of lease (ii) respondent had locus standi to maintain that application (iii) appellant having accepted judgment of High Court increasing the rent and the deed of lease having been executed in favour of respondent, they were estopped and precluded from raising the question of its jurisdiction in subsequent proceedings (iv) appellant having received rent from respondent, its possession was protected under Section 53-A of the Transfer of Property Act. Hence the present appeal.

E On the contentions of parties, following issues arose for determination of Court as to whether (a) application of respondent for extension of lease was maintainable (b) the Originating Summons filed by the appellant was maintainable (c) the defect of unregistered document assigning lease of immovable property stood cured by registration of Debenture Trust Deed.

F Dismissing the appeal, the Court

HELD 1.1. The application under Section 302 of the Succession Act by the Company was maintainable and, thus, the High Court was competent to entertain the same. [1018-D]

G 1.2. Rightly or wrongly, the question of renewal of the said lease for a further period of sixty years came to be mooted. The offer of the company was that at the end of the period of lease, the property would vest in the Official Trustee. It is again beyond any doubt or dispute that the Official Trustee could have granted a lease. It could have also extended the period of lease. It could

H have furthermore entered into a new arrangement with the lessee in

possession. It was, therefore, within the province of the Official Trustee to deal with the property in any manner, he thought it fit, subject, of course, to any direction which could be issued by the High Court in exercise of its jurisdiction under Section 302 of the Succession Act and Section 13 of the 1913 Act. The Official Trustee being a statutory authority would be presumed to be aware and understand the provisions of the said Act. It, therefore, instead of dealing with the matter itself asked the Company to file an appropriate application, pursuant whereto the application was filed, no jurisdictional question could be raised. [1012-F-H; 1013-A-B]

1.3. The Company's locus to maintain the application was not questioned. True an affidavit in opposition had been filed, but it is equally true that therein certain suggestions were made; one of them being enhancement in the quantum of rent. The High Court passed an order enhancing the quantum of rent, which was beneficial to the Official Trustee. It accepted the same without any demur. Benefit of the order was, thus, taken. It was only at its suggestion, a valuer was appointed. The recommendations of the valuer as regards the quantum of monthly rent which would be payable at the end of the period of lease was not questioned. The High Court also accepted the same. The order of the High Court dated 17.04.1984 must be judged in the aforementioned factual backdrop. The High Court for all intent and purport accepted the suggestions of the Official Trustee. [1013-C-D]

1.4. Indisputably, again no appeal was preferred therefrom. Even if it is accepted that the said order being not a judgment within the meaning of Clause 15 of the Letters patent of the Calcutta High Court was not appealable, an application before this Court under Article 136 of the Constitution of India would lie. No such application was also filed. It was, thus, allowed to attain finality. The parties acted thereupon. The Official Trustee accepted the said judgment and executed a deed of lease strictly in terms thereof. [1013-E-F]

2.1. An Originating Summons is maintainable under certain situations, as provided for in Chapter XIII of the Calcutta High Court Original Side Rules. The High Court in exercise of the said jurisdiction could not adjudicate as to whether an earlier order passed by it was null and void and was, thus, liable to be set aside. What was questioned by the Official Trustee by taking out an Originating Summons was in effect and substance not only the order passed by the High Court itself but also its own act which had attained finality.

2.2. In the Originating Summons which was filed after 17 years of passing of the said order, the Official Trustee sought to raise contentions

A which had not been raised before it in the earlier proceeding. A plea of fraud was raised, but the same was not pressed. The only contention, which had been raised therein was that the application under Section 26 of the 1913 Act being not maintainable, the said order dated 30.05.1984 was a nullity.

B *Committee of Management of Pachaiyappa's Trust v. Official Trustee of Madras and Anr.*, [1994] 1 SCC 475, distinguished

2.3. Even otherwise the Official Trustee could not have altered its position. It could not have prevaricated its stand from time to time. It was estopped and precluded from filing a fresh application. [1019-D]

C *Jai Narain Parasrampura (Dead) and Ors. v. Pushpa Devi Saraf and Ors.*, [2006] 7 SCC 756, relied on

Cooke v. Rickman, (1911) 2 KB 1125, *Humphries v. Humphries*, (1910) 2 KB 53, referred to

D 2.4. It was also not a case where the parties were at issue in strict sense of the term. The Official Trustee in his affidavit in opposition filed before the High Court of Calcutta might have raised several contentions. Presumption, however, would be that those contentions which had been accepted by the High Court were put forward by it. If that be so, it does not lie in the mouth of the Official Trustee now to contend that it had raised other contentions also. If it had raised any other contention, which had not been considered by the High Court, the remedy of the Official Trustee was to move the said court itself for appropriate directions. [1020-D-E]

F 2.5. Not only no such contention was raised, the order has been acted upon. The principles of *res judicata* and in particular that of constructive *res judicata* shall apply in the aforementioned fact situation. [1020-F]

Pawan Kumar Gupta v. Rochi Ram Nag Deo, [1999] 4 SCC 243, relied on

G *Ferro Alloys Corporation Limited and Anr. v. Union of India and Ors.*, [1999] 4 SCC 149, referred to

H 2.6. The principles of estoppel, waiver, acquiescence or *res judicata* provide to procedural matter. The said provisions are applied to put an end to a subsequent litigation. If the 1984 order of the High Court was not a nullity, the same would apply. [1017-D]

2.7. The Official Trustee dealt with the property in exercise of its jurisdiction to administer the trust property, in respect whereof the High Court could issue directions from time to time. Once it is held that the Official Trustee either on its own or under the directions of the High Court could grant extension of lease, its action can be subjected to challenge only in an appropriate proceeding. The Official Trustee no doubt holds a position of trust but no finding of fact has been arrived that it had misused its position. The High Court in passing its order took all precautions, which were required of it. The High Court accepted all the contentions of the Official Trustee not only by enhancing the quantum of rent payable by the Company, but also appointing a valuer for the purpose of arriving at a reasonable quantum of rent, which might become payable on the expiry of the period of lease.

2.8. It has not been suggested that the Official Trustee was not bound by the said order. It could only take a different stand in the said proceeding.

3.1. PP owned merely a piece of land. It executed a deed of lease for a period of 99 years. The lessor, therefore, was entitled to the only rent payable in terms of the said 1919 deed of lease.

3.2. It may be true that a registered deed of assignment was executed in favour of the said AS, but the defect in the said agreement of sale between AS and the respondents stood cured by reasons of the Supplementary Agreement, namely, Debenture Trust Deed which was duly registered. In the Debenture Trust Deed AS was referred to as "The Transferor", respondent was referred to as "The Company" and the three others referred to as "the Present Trustees".

3.3. Broadly speaking the Supplementary deed provided for the issuance of debentures by the appellant in favour of AS. Until and unless the appellant had paid off the debentures the scheme of trust was to continue.

Mitchell v. Mathura Dass and Anr., 12 Indian Appeals 150, relied on

Jamna Bai and Anr. v. Dharsey Takersey, (1902) IV Bombay Law Reporter 893 approved

3.4. Even the assignment was required to be made by reason of a registered document, it is beyond any cavil of doubt that as the Official Trustee had all along been receiving stipulated monthly rent from the Company, it was, thus, admitted and acknowledged to be the lessee in respect of the

A leasehold. The Official Trustee not only accepted the rent, but also allowed the Company to raise a huge structure. It, therefore, accepted the Company as the lessee in respect of the said property. The Company, therefore, for all intent and purport became a lessee under the Official Trustee.

B 4. Although in a case of this nature, applicability of Section 53-A of the Transfer of Property Act may not be of much significance, but whether as an assignee of the leasehold or as a monthly tenant, the Company was entitled to protect its possession.

C 5. Even a suit for setting aside an order passed by a court having competent jurisdiction would be maintainable on limited grounds. Only because the order passed by a court is otherwise erroneous or causes a hardship, the same by itself may not be a ground to set aside an order that was validly passed by a court of competent jurisdiction.

D 6. Even if Single Judge of High Court did not assign any reason in support of its order, it could have been set aside only by an appellate court. When an order attained finality, it cannot be set aside on the premise that no reason had therefor been assigned.

E 7. A distinction indisputably exists between an order which is wrong or void on the one hand, and which having been passed by a court lacking inherent jurisdiction and, thus, being a nullity on the other. [1017-E]

Chief Justice of Andhra Pradesh and Anr etc. v. L.V.A. Dilshitulu and Ors. etc., AIR (1979) SC 193, relied on

F *Balvant N. Viswamitra and Ors. v. Yadav Sadashiv Mule (Dead) Through L Rs.*, [2004] 8 SCC 706, *Refique Bibi v. Sayed Waliuddin*, (2004) 1 SCC 287, *Harshad Chimam Lal Modi v. DLF Universal Ltd. and Anr.*, [2005] 7 SCC 791, referred to

G 8. In the 1913 Act two different expressions, namely, "beneficiary under a trust" and person beneficially interested in any trust property" have been used. A distinction has, thus, been made in the statute itself between a "beneficiary" and a "person beneficially interested. [1015-D]

H '*Advanced Law Lexicon*' 3rd Edn 2005 by P. Ramanatha Aiyar, '*Bouvier's Law Dictionary Concise Encyclopedia*' Third Revision by John Bouvier, *Stroud's Judicial Dictionary*, 4th Edn. referred to.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 5042 of 2000. A

From the Final Judgment and Order dated 2.12.1999 of the High Court at Calcutta in APD/T No. 16/99 in Appeal No. 474 of 1999.

Tapash Ch. Ray, Tara Chandra Sharma and Miss Neelam Sharma for the Appellant. B

Jaideep Gupta, Anil Agarwalla, Jagdeep Anand. K.V. Vijaykumar for the Respondents.

The Judgment of the Court was delivered by

S.B. SINHA, J : Interpretation and application of the provisions of Sections 25 and 26 of the Official Trustees Act, 1913 (for short, 'the 1913 Act') as also Section 302 of the Indian Succession Act, 1925 (for short, 'the Succession Act') falls for consideration in this appeal, which arises out of a judgment and order dated 21.12.1999 passed by a Division Bench of the Calcutta High Court in APD/T No.16 of 1999 in Appeal No. 474 of 1999. C D

The said judgment was rendered in the following fact situation :

One Peter Charles Earnest Paul also known as 'Peter Paul' was the owner of a piece of land, measuring 3 bighas 17 kottahs 8 chittackas 21 sq. ft. equivalent to 5408.93 sq. metre located on the junction of Park Street and Midleton Row, Kolkata having wide frontage on both the roads. He executed a registered deed of lease in favour of one Francis Daniel Augustus Larmour (for short, 'Larmour') in respect of the said premises for a period of 99 years with effect from 01.06.1919 to 31.05.2018. He executed a Will on 16.06.1920 appointing the Official Trustee as its Executor and Trustee in respect of the said property. Beneficiaries of the said Will were his wife and sister. He died on 01.08.1920. A probate was obtained by the Official Trustee on 07.10.1920. Larmour executed a registered deed of assignment in favour of one Arathoon Stephen, Stephen Court Limited (hereinafter referred to as 'the Company') was constituted and incorporated under the provisions of the Companies Act, 1913 on or about 04.12.1923. Arathoon Stephen, who was a shareholder and first Managing Director of the said Company entered into an agreement for acquiring the leasehold rights of Arathoon Stephen. Arathoon Stephen and the Company thereafter agreed to purchase the leasehold rights of the said premises for the balance unexpired period under the said lease on 10.12.1923. On the same day a registered Debenture Trust Deed was executed by Arathoon E F G H

A Stephen and the Company and the three Trustees referred to in the said Deed, stating that the Company was entitled to the said property for all the residue of the term of 1919 lease. As far back as in 1924, the Company constructed a five-storied building. It continued to pay the rent to the Official Trustee who had issued rent receipts to it. Sister of Peter Paul, Mrs. Hemingway, died leaving behind a Will in terms whereof the public trustee of the Public Trust of London took over her estate and started receiving her share of income. On 10.10.1965, widow of Peter Paul died, whereafter half share of the income of the trust property was remitted to the Public Trustee of the Public Trust, London by the Official Trustee till 18.05.1993. Permission of the Reserve Bank of India for the later period is said to be awaited.

B

C The Company by a letter dated 09.02.1984 requested the Official Trustee for extension of the period of lease for a further period of sixty years to which the Official Trustee by a letter dated 20.03.1984 suggested that it should apply to the High Court for obtaining grant of extension of the said lease. An application was thereafter filed before the Calcutta High Court by the said

D Company under Section 302 of the Succession Act read with Section 26 of the 1913 Act. The said application was entertained. The Official Trustee filed an affidavit in opposition wherein, inter alia, it was stated :

E “The Official Trustee as such Trustee can neither consent nor object to grant by any lease or modification of the terms and condition thereof. The Official Trustee, however, in the ends of justice is duty bound to produce all the facts and circumstances relating to the said property before this Hon’ble Court. The Official Trustee states and submits that the following proposal would be beneficial to the Estate:

F (a) Upon the lessee agreeing to enhance the current monthly rent payable for the lease by at least 400% the head lease can be rectified by giving the lease the option of renewal the lease on such terms and condition as this Hon’ble Court may deem fit and proper after expiry of the head lease on May 31, 2018 by efflux of time.

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

H

Pursuant to or in furtherance of the said suggestions of the Official Trustee, the Company was directed to pay rent @ Rs.8,000/- per month to the Official Trustee for the residuary period of the existing lease by the High Court in terms of an order dated 17.04.1984. A valuer was appointed. The valuer submitted its report recommending :

“Having regard to the results obtained under the above two method of calculations, it is perhaps, fair to fix up the proper monthly ground rent payable for a period of 60 years lease after the expiry of present lease as given below :

$$\begin{array}{rcl} \frac{\text{Rs.2,38,056} + \text{Rs.2,21,933}}{2} & = & \text{Rs. 2,29,995 per annum} \\ & = & \text{Rs. 19,166 per month} \\ \text{Say} & & \text{Rs. 19,000 per month} \end{array}$$

Rupees Nineteen thousand Per month”

No objection thereto was field. The court, thus, acting on the basis of the recommendations of the said valuer, by an order dated 30.05.1984, opined:

“After reading the original report of Mr. A.K. De, the valuer and upon hearing the parties it appears to the Court that the rent of the lease is reasonable and beneficial to the Trust Estate. There will be an order in terms of prayer (a). The rent payable under the proposed lease will be Rs.19,000 (Rupees nineteen thousand) per month. Regarding the current lease the petitioner will pay rent at the rate of Rs.8,000 (Rupees eight thousand) per month w.e.f. 01.06.,1984.”

The said order of the Calcutta High Court was accepted and acted upon by the Official Trustee and it executed a deed of lease in favour of the Company for a period of sixty years on a monthly rent of Rs.19,000. The monthly enhanced rent paid by the Company in favour of the Official Trustee @ Rs.8,000/- in terms of the High Court’s order had all along been accepted wherefor the Official Trustee had been issuing due receipts. An Originating Summons was, however, taken out by the Official Trustee before the Calcutta High Court on or about 21.07.1997 for determination of the following questions:

“(a) Determination of the relation between the Official Trustee and M/s Stephen Court Limited prior to 31.5.2018 AD, as the relation between them was not determined.

(b) On the basis of such determination of relation, is M/s Stephen

A. Court Limited entitled to execute any lease deed with any party in respect of premises No. 18 Park Street, Calcutta or any part thereof prior to 31.5.2019 AD. If not then in that event, what will be the fate of such lease, if any made prior to 31.5.2018 AD?

B (c) Is the order dated 30th May, 1984 passed in Matter No. 432 of 1984 null and void?

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

C (e) Whether any leasehold right in respect of the premises No. 18, Park Street, Calcutta has legally vested in Messers Steph Court Limited in the absence of any registered deed conveying, transferring and/or assigning the unexpired period of lease by Mr. Aratoon Stephen in favour of M/s. Stephen Court Limited and whether Messers Stephen Court Limited had any legal right to make application before this Hon'ble Court in 1986 praying for extension of the period of Head Lease of 13.9.1919.

D (f) Whether the High Court at Calcutta had jurisdiction to pass the order 30th May, 1984 in Matter No. 432 of 1984 directing the Official Trustee to execute the Indenture of lease for renewal/extension of the Head Lease dated 13.9.1919 in favour of M/s Stephen Court Limited, who was not the lessee. Besides that, the Head Lease did not contain any covenant for extension/renewal."

E *Inter alia*, a prayer was also made that the said deed of renewal of lease dated 25.07.1984 be directed to be delivered upon cancellation.

F A learned Single Judge of the High Court by an order dated 28.06.1999, opined that the order dated 30.05.1984 was passed without jurisdiction. It also recorded other findings wherewith we are not concerned. An appeal preferred thereagainst in terms of clause 15 of the Letters Patent of the said Court was accepted by reason of the impugned Judgment.

G A large number of issues fell for consideration before the Division Bench of the High Court. It, *inter alia*, opined : (i) the High Court had jurisdiction to entertain the said application under Section 302 of the Succession Act; (ii) The Company had the requisite *locus standi* to maintain the application; (iii) The Official Trustee having accepted the said judgment and H the deed of lease having been executed in favour of the Company, it was

estopped and precluded from raising the question of the Court's jurisdiction in subsequent proceedings; (iv) The jurisdiction of the High Court was not excluded by reason of the provisions of City Civil Court; and (v) The Official Trustee having received rent from the Company, its possession was protected under Section 53-A of the Transfer of Property Act. A

Mr. Tapas Ray, the learned Senior Counsel appearing on behalf of the appellant, in support of this appeal would contend : B

- (i) The company being not a person beneficially interested in the trust property, an application under Section 302 of the Succession Act was not maintainable.
- (ii) The High Court in its order dated 30.05.1984 having not taken into consideration the objections filed by the Official Trustee, the Division Bench of the High Court must be held to have failed/or neglected to apply its mind in regard thereto and, thus, the same being a nullity the impugned judgment cannot be sustained. C D
- (iii) The Division Bench failed to notice that it was obligatory on the part of the High Court while entertaining an application under Section 302 of the Succession Act to satisfy itself : (a) as to who had come with the application for directions; (b) and in what capacity; and (c) what right or interest is claimed in respect of the direction; and (d) whether the court would have jurisdiction to entertain the same. E
- (iv) An application for renewal of lease, 34 years prior to the expiry of the original lease, for a period of sixty years was not bona fide and no directions, thus, could have been issued by the High Court. F
- (v) The judgment of the High Court being wholly without jurisdiction and, thus, being a nullity, the principles of estoppel and res judicata would have no application;
- (vi) If the judgment dated 30.05.1984 was a nullity and *non est* in the eye of law, an appeal thereagainst was not necessary to be filed. G
- (vii) The deed of assignment executed by Larmour in favour of Arathoon Stephen being not a registered document, the same was wholly inadmissible in evidence. H

A Mr. Jaideep Gupta, the learned Senior Counsel appearing on behalf of the respondent, on the other hand, would submit :

B (i) The Official Trustee never raised any objection as regards the purported inherent lack of jurisdiction of the Calcutta High Court under Section 302 of the Succession Act and, thus, at this distant time cannot be permitted to turn around and raise the said question.

(ii) The judgment of the High Court having been acted upon and the Official Trustee being bound thereby, it cannot now be permitted to approbate and reprobate at the same time.

C (iii) The order dated 30.05.1984 being an appellable one and no appeal having been preferred therefrom, it attained finality and, thus, a clear case of estoppel and acquiescence has been made out.

D (iv) Issues raised in the Originating Summons were barred by the principle of constructive *res judicata*.

(v) Unregistered deed of assignment having been followed by the registered Debenture Trust Deed, the title to the lessee passed on to the company on the basis thereof.

E (vi) Assuming that the said registered assignment deed was not valid in law, the Official Trustee having accepted rent from the Company from 1923-1924 onwards, a fresh monthly tenancy had come into being and, thus, on that premise, the High Court's judgment cannot be said to be a nullity or void, specially when the same was passed in accordance with law and on the terms and conditions suggested by the Official Trustee.

F (vii) The originating summons for the reliefs claimed was not maintainable in law.

The principal questions which in view of the rival contentions of the parties arise for consideration are :

G (a) Whether the application made by the respondent under the Official Trustee Act, 1925 to the Calcutta High Court was maintainable?

(b) Whether the defect of unregistered document assigning lease of immovable property stood cured by registration of subsequent document i.e. Debenture Trust Deed?

H

(c) Whether the Originating Summons filed by the appellant was maintainable? A

The 1913 Act was enacted to consolidate and amend the law constituting the office of Official Trustee. An Official Trustee is appointed by the Government. Rights, powers, duties and liabilities of the Official Trustee are governed by Part III of the 1913 Act. Under Section 10 of the said Act, the High Court has power to appoint an Official Trustee to be trustee of property. In this case, he was, however, appointed by a Will. B

The accounts of the Official Trustee is liable to be audited once annually. It exercises powers under the Code of Civil Procedure. C

Section 22 of the Act enables every beneficiary under a trust to make inspection and take copies of the accounts. Section 23 provides for transfer to Government of accumulations in the hands of Official Trustee, while any moneys payable to a beneficiary under a trust have been in the hands of any Official Trustee for a period of twelve years or upwards. Section 25 empowers the High Court to make such orders as it thinks fit respecting any trust property vested in the Official Trustee, or the income or produce therefrom. Section 26 authorizes filing of an application for an order under the said Act by any person beneficially interested in any trust property or of any trustee thereof. D

Section 302 of the Succession Act empowers the High Court on an application made to it to give to the executor or administrator any general or special directions in regard to the administration thereof, where probate or letters of administration in respect of any estate has or have been granted thereunder. E

Peter Paul owned merely a piece of land. It executed a deed of lease for a period of 99 years. The lessor, therefore, was entitled to the only rent payable in terms of the said 1919 deed of lease. F

It may be true that a registered deed of assignment was executed in favour of the said Arathoon Stephen, but the defect in the said agreement of sale between Arathoon Stephen and the respondents stood cured by reason of the Supplementary Agreement, namely, Debenture Trust Deed which was duly registered. In the Debenture Trust Deed Arathoon Stephen was referred to as 'The Transferor', Respondent was referred to as 'The Company' and the three others referred to as "the Present Trustees". It was stipulated: H

A “(a) WHEREAS the Company is entitled to the property set forth and
described in the first Schedule hereto for all the residue of the term
of 99 years from the first day of June 1919 granted by an indenture
of lease dated 13rd day of September, 1919 made between Peter Charles
Ernest Paul of the one part and Francis Daniel Larmour of the other
B part and registered at Calcutta in Book I Vol. III being no.; 4493 for
1919 subject to an Indenture dated the 15th day of August 1923 made
between the Official Trustee of Bengal of the one part and as such
the sole executor and Trustee of the will of the said Peter Charles
Ernest Paul of the one part and the Transferor of the other part and
registered at Calcutta in Book I Vol. 102 being No. 9712 for 1923 being
C an Indenture of Rectification of the terms of the said Indenture of
lease regarding payment of the owner’s share of taxes in respect of
the said demised premises AND WHEREAS the said property is at
present vested in the Transferor and Trustee for and on behalf of the
company and he has agreed at the request of the company to join in
these presents in manner hereinafter appearing AND WHEREAS the
D company being duly empowered in that behalf has determine to raise
a sum not exceeding Rs.7,00,000 (Rupees Seven Lacs) by the issue of
Debentures for that amount bearing interest of the rate of 5^{1/2} per cent
per annum and frame in accordance with the form set forth in the
second schedule hereto and has agreed to secure the principal moneys
E together with interest for the time being payable in respect of such
Debentures in manner hereinafter provided AND WHEREAS the present
Trustees have consented to act as Trustees of this Indenture upon
the terms herein contained.

(b) For the purpose of further securing the principal money and
F interest and all costs and other moneys payable under the Debentures
or these presents the Transferor by the direction of the company
hereby transfer and assigns and the company hereby transfers assigns
and confirms unto the Trustees and singular the hereditaments land
and premises specified and referred to in the first Schedule hereto and
all buildings erected on the land or any part thereof and all easements
G privileges and on the tenancies whatsoever to the same and therewith
held used occupied and enjoyed and all the estate right title interest
property claim and demand whatsoever of the Transferor and the
Company and to the same to have and to hold the same unto the
present Trustees as joint tenants with right of survivorship for all the
H residue now to come and unexpired of the term of ninety nine years

granted by the said lease upon and for the trusts intents and purposes hereinafter expressed of land concerning the same.” A

Broadly speaking the Supplementary deed provided for the issuance of debentures by the appellant in favour of Aratoon Stephen. Until and unless the appellant had paid off the debentures the scheme of trust was to continue but :

 B

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

The effect of such an unregistered deed *vis-a-vis* a Supplementary Deed by way of Debenture Trust Deed came up for consideration before the *Privy Council in Mitchell v. Mathura Dass and Anr.*, [12 Indian Appeals 150], wherein it was opined :

 D

“...The Registration Act was not passed to avoid the mischief of allowing a man to be in possession of real property without having a registered deed but as a check against the production of forged documents, and in order that subsequent purchasers, or persons to whom subsequent conveyances of property were made, should not be affected by previous conveyances unless those previous conveyances were registered.....” E

In that case William Mitchell was indebted to Mathura Dass. The latter sought to attach a property on the basis that it belonged to the former. William’s father Alexander, claimed that the property belonged to him. In the proceeding, two documents came to be filed, namely : one purporting to be a deed of conveyance of the property to himself and the other a confirmation bond executed by the same parties as the conveyance in the subsequent deed. F

The Judicial Committee held that the second deed being registered was a valid conveyance of the property to Alexander. G

A Division Bench of the Bombay High Court followed the said decision in *Jamna Bai and Anr v. Dharsey Takersey*, [1902 (IV) Bombay Law Reporter 893], stating :

 H

A “The settlement between Ruttonbai and Tersey on the terms on
which the plaintiffs base their claim, is dated the 3rd February 1869.
It is a document which was drawn up in Guzerati but I have not
received it in evidence, as it affected immovable property of the value
of more than Rs.100 but was not registered. Mr. Lowndes for the
B plaintiff then rendered two indentures called releases, dated the 13th
and 16th September 1869 respectively, one executed by Ruttonbai in
favour of Tersey and the other by Tersey in favour of Ruttonbai, in
which, after reciting the terms of the agreement of the 3rd February
1869, the parties say that their claims against each other in respect of
the agreement are satisfied. These two indentures, Exs. A and B, are
C registered. But Mr. Raikes for the defendant objected to their
admissibility on the ground that they were merely secondary evidence
of the contents of the agreement on which the plaintiffs sue and that,
if the original agreement was inadmissible, these two indentures could
not supply its place. I have, however, admitted them in evidence on
the authority of the ruling of the Judicial Committee of the Privy
D Council in *Mitchell v. Mathuradas and Anr...*”

Even the assignment was required to be made by reason of a registered
document, it is beyond any cavil of doubt that as the Official Trustee had
all along been receiving stipulated monthly rent from the Company, it was,
E thus, admitted and acknowledged to be the lessee in respect of the leasehold.
The Official Trustee not only accepted the rent, but also allowed the Company
to raise a huge structure. It, therefore, accepted the Company as the lessee
in respect of the said property.

The Company, therefore, for all intent and purport became a lessee
under the Official Trustee. Although in a case of this nature, applicability of
F Section 53-A of the Transfer of Property Act may not be of much significance,
but whether as an assignee of the leasehold or as a monthly tenant, the
Company was entitled to protect its possession. Rightly or wrongly, the
question of renewal of the said lease for a further period of sixty years came
to be mooted. The offer of the Company was that at the end of the period
G of lease, the property would vest in the Official Trustee. It is again beyond
any doubt or dispute that the Official Trustee could have granted a lease.
It could have also extended the period of lease. It could have furthermore
entered into a new arrangement with the lessee in possession. It was,
therefore, within the province of the Official Trustee to deal with the property
H in any manner, he thought it fit, subject, of course, to any direction which

could be issued by the High Court in exercise of its jurisdiction under Section 302 of the Succession Act and Section 13 of the 1913 Act. The Official Trustee being a statutory authority would be presumed to be aware and understand the provisions of the said Act. It, therefore, instead of dealing with the matter itself asked the Company to file an appropriate application, pursuant whereto the application was filed, no jurisdictional question was could be raised. A B

The Company's locus to maintain the application was not questioned. True an affidavit in opposition had been filed, but it is equally true that therein certain suggestions were made; one of them being enhancement in the quantum of rent. The High Court passed an order enhancing the quantum of rent, which was beneficial to the Officer Trustee. It accepted the same without any demur. Benefit of the order was, thus, taken. It was only at its suggestion, a valuer was appointed. The recommendations of the valuer as regards the quantum of monthly rent which would be payable at the end of the period of lease was not questioned. The High Court also accepted the same. The order of the High Court dated 17.04.1984 must be judged in the D
aforementioned factual backdrop. The High Court for all intent and purport accepted the suggestions of the Official Trustee. C

Indisputably, again no appeal was preferred therefrom. Mr. Ray made a faint suggestion that the said order being not a judgment within the meaning of Clause 15 of the Letters Patent of the Calcutta High Court was not appealable. Even that be so, an application before this Court under Article 136 of the Constitution of India would lie. No such application was also filed. It was, thus, allowed to attain finality. The parties acted thereupon. The Official Trustee accepted the said judgment and executed a deed of lease strictly in terms thereof. E F

In the Originating Summons which was filed after 17 years of passing of the said order, the Official Trustee sought to raise contentions which had not been raised before it in the earlier proceeding. A plea of fraud was raised, but the same was not pressed before us. As indicated hereinbefore, the only contention, which had been raised therein was that the application under Section 26 of the 1913 Act being not maintainable, the said order dated 30.05.1984 was a nullity. G

We may immediately notice the judgment of this Court in *Committee of Management of Pachaiyappa's Trust v. Official Trustee of Madras and* H

A *Anr.*, [1994] 1 SCC 475, which is the sheet anchor of the submissions advanced on behalf of the appellant. Therein, an application was filed by a stranger to the property. The jurisdiction of the learned Single Judge as also the Division Bench of the High Court was appealed against before this Court. The High Court had come to the conclusion that it was beneficial and in the best interest of the leasehold property; but no attempt was made to find out as to what would be the best price available therefor. Although the property vested in the Official Trustee, transparency in the transaction was not maintained. The norms for distributing the largess of the estate had not been followed. The fiduciary conduct expected of a trustee was found to have not been maintained. It was in the aforementioned factual background, an objection was filed by a person who was a tenant of the ground floor on the building adjacent to the vacant plot of land. The said objection was rejected by the learned Single Judge stating that he had no locus standi in the matter. This Court disagreed therewith. It was noticed that the learned Single Judge unjustly altered the conditions as suggested by the Official Trustee in money matters. The Division Bench also took no note of the infirmities contained in the said order. It was in the aforementioned fact situation this Court opined:

E “40. Notable among the other modifications which have been permitted are : (i) the period of the lease has been Raised from 30 years to 50 years with an option to renew for another 50 years, and (ii) deletion of the prohibition relating to sub-lease. It would thus appear that on the pretext of modification Respondent 2 has secured substantial alteration in the terms and conditions as contained in the original order dated May 2, 1986 passed by the learned Single Judge which had been upheld in appeal by the Division Bench. In other words under the guise of modification Respondent 2 have obtained review of the order which had become final. This was impermissible in law. The order passed by the Division Bench does not give any indication as to why it became necessary to give these concessions to Respondent 2. It has not been shown that nobody else was prepared to take the lease on the terms and conditions laid down in the order dated May 2, 1986 and that without making those modifications the plot of land could not be given on lease. On the other hand we find that there was another offer by Md. Ummer Sheriff offering to take the lease on the same terms and conditions with a higher rent of Rs. 3000 per month. The order dated October 28, 1987 passed by the Division Bench on the application for modification (CMP No. 14618/87) cannot,

therefore, be upheld and C.A. 4168 of 1988 filed against the said order also deserves to be allowed.” A

It is true, as was submitted by Mr. Ray, that this Court therein observed that the Official Trustees Act does not envisage any application moved by a person other than the one who was beneficially interested in any trust property or any trustee thereof, but no occasion arose therein for consideration as to what would be the true meaning and purport of the expression “beneficially interested” in the trust property. B

We have noticed hereinbefore that this Court opined that an objector who was a tenant on the ground floor of the said building adjacent to the vacant plot of land of appellants had *locus standi* to raise an objection. C

In the 1913 Act two different expressions, namely, “beneficiary under a trust” and “person beneficially interested in any trust property” have been used. A distinction has, thus, been made in the statute itself between a “beneficiary” and a “person beneficially interested.” D

In ‘Advanced Law Lexicon’ 3rd Edn 2005 - by P. Ramanatha Aiyar, the two expressions have been defined in the following terms :

“Beneficiary” Beneficiaries are persons for whose benefit property is held by trustees, executors, etc.” persons named in insurance policies to whom the insurance is payable upon the happening of the event insured against (Bouvier). E

“Beneficiary” is one who is beneficially entitled to, or interested in property; that is, entitled to it for his own benefit, and not merely as trustee or executor holding it for others. The word is nearly equivalent to the term *cestui que trust*. Where property is dedicated to an idol, it would be a “beneficiary”, (Ranjit Singh v. Jaganath Prosad, 12 Cal 375. But See 16 CWN 798” F

“Beneficiary”, defined, Indian Trusts Act (2 of 1882), S. 3 as ‘the person for whose benefit the confidence of the author of the trust is accepted by the trustee.’ G

“Beneficial interest” has been defined to mean :

“Beneficial interest” of the beneficiary is his right against the trustee as owner of the trust property [Indian Trust Act (2 of 1882), H

A S. 3] Interest of a beneficial owner or a beneficiary the interest in an unadministered estate, of a person who dies before taking possession or applying for a grant of administration, is not a 'beneficial interest' within the meaning of S. 4 of the Succession and Probate Duties Act 1892 to 1955 (Queensland) *Commissioner of Stamp Duties (Queensland) v. Lingston* (1965) AC 694."

B In 'Bouvier's Law Dictionary And Concise Encyclopedia' Third Revision by John Bouvier, the expressions "Beneficiary" and "Beneficial Interest" have been defined as under :

C "Beneficiary".- A term suggested by Judge Story as a substitute for *cestui que trust*, and adopted to some extent. 1 Story, Eq. Jur. ' 321.

The person named in a policy of insurance to whom the insurance is payable upon the happening of the event insured against.

D The beneficiary of a contract is not a *cestui que trust*; 12 Harv. L. Rev. 564"

"Beneficial Interest".-Profit, benefit, or advantage resulting from a contract, or the ownership of an estate as distinct from the legal ownership or control.

E A *cestui que trust* has the beneficial interest in trust estate while the trustee has the legal estate. If A makes a contract with B to pay C a sum of money, C has the beneficial interest in the contract."

In Stroud's Judicial Dictionary, 4th Edn., the terms "Beneficiary" and "Beneficially Interested" have been defined in the following terms :

F "Beneficiary" .(1) A beneficiary is "one who is beneficially entitled to, or interested in, property; i.e. entitled to it for his own benefit, and not merely as *TRUSTEE*, or executor, holding it for others. The word is nearly equivalent to '*CESTUI QUE TRUST*', which, on account of its cumbersomeness and inexpressiveness, 'beneficiary' has begun to supersede in modern law' (2 Ency. 58).

G (2) "Beneficiary entitled in possession" is one who is entitled to the actual receipt of the income under the terms of a trust (*Doady v. Commissioner of Taxes* (1941) N.Z.L.R. 452)."

H "Beneficially Interested". - A person having a contingent interest

in real estate (Re Sheppard, 4 D.G.F. & J. 423) is a person 'beneficially interested' within Trustee Act 1850 (c. 60), s. 37; and so is a creditor who has obtained a decree for administration and sale of real estate (Re Wragg, 1 D.G.J. & S. 356); and also it seems, a purchaser under a decree who has paid his purchase money into Court (*Ayles v. Cox*, 17 Bea. 584). The committee of lunatic *cestui que trust* is not a person 'beneficially interested' within this section (Re Bourke, 2 D.G.J. & S. 426)"; Dan. Ch. Pr. 1787." A B

The decision in *Committee of Management of Pachaiyappa's Trust* (supra) therefore, in our opinion, does not assist the appellant. In that case, the order of the High Court did not attain finality and had not been accepted. C

The principles of *estoppel, waiver, acquiescence or res judicata* provide to procedural matter. The said provisions are applied to put an end to a subsequent litigation. As would appear from the decisions made thereafter, if the order of the 1984 order of the High Court was not a nullity, the same would apply. D

A distinction indisputably exists between an order which is wrong or void on the one hand, and which having been passed by a court lacking inherent jurisdiction and, thus, being a nullity on the other.

The law in this behalf has succinctly been stated by this Court in *Chief Justice of Andhra Pradesh and Anr etc. v. L.V.A. Dilshitulu and Ors etc.*, AIR (1979) SC 193, observing : E

"If the argument holds good, it will make the decision of the Tribunal as having been given by an authority suffering from inherent lack of jurisdiction. Such a decision cannot be sustained merely by the doctrine of *res judicata* or *estoppel* as urged in this case." F

Mr. Ray placed strong reliance in *Balvant N. Viswamitra and Ors v. Yadav Sadashiv Mule (Dead) Through LRs.*, [2004] 8 SCC 706, Therein, this Court stated the law in the following terms : G

"9. The main question which arises for our consideration is whether the decree passed by the trial court can be said to be 'null' and 'void'. In our opinion, the law on the point is well settled. The distinction between a decree which is void and a decree which is wrong, incorrect irregular or not in accordance with law cannot be overlooked or H

- A ignored. Where a court lacks inherent jurisdiction in passing a decree or making an order, a decree or order passed by such court would be without jurisdiction, non est and *void ab initio*. A defect of jurisdiction of the court goes to the root of the matter and strikes at the very authority of the court to pass a decree or make an order. Such defect has always been treated as basic and fundamental and a decree or order passed by a court or an authority having no jurisdiction is nullity. Validity of such decree or order can be challenged at any stage, even in execution or collateral proceedings.”
- B

- C This Court referred to its earlier decision in *Rafique Bibi v. Sayed Waliuddin* [2004] 1 SCC 287, wherein it was held :

“...A decree passed by a court of competent jurisdiction cannot be denuded of its efficacy by any collateral attack or in incidental proceedings.”

- D To the said effect is a decision of this Court in *Harshad Chiman Lal Modi v. DLF Universal Ltd. and Anr.*, [2005] 7 SCC 791.

In our opinion, the application under Section 302 of the Succession Act by the Company was maintainable and, thus, the High Court was competent to entertain the same.

- E An Originating Summons is maintainable under certain situations, as provided for in Chapter XIII of the Calcutta High Court Original Side Rules. The High Court in exercise of the said jurisdiction could not adjudicate as to whether an earlier order passed by it was null and void and was, thus, liable to be set aside. What was questioned by the Official Trustee by taking out
- F an Originating Summons was in effect and substance not only the order passed by the High Court itself but also its own act which had attained finality.

- G We have noticed hereinbefore that the Official Trustee dealt with the property in exercise of its jurisdiction to administer the trust property, in respect whereof the High Court could issue directions from time to time. Once it is held that the Official Trustee either on its own or under the directions of the High Court could grant extension of lease, its action can be subjected to challenge only in an appropriate proceeding. The Official Trustee no doubt holds a position of trust but no finding of fact has been arrived
- H that it had misused its position. The High Court in passing its order took

all precautions, which were required of it. The High Court accepted all the contentions of the Official Trustee not only by enhancing the quantum of rent payable by the Company, but also appointing a valuer for the purpose of arriving at a reasonable quantum of rent, which might become payable on the expiry of the period of lease. A

It has not been suggested that the Official Trustee was not bound by the said order. It could only take a different stand in the said proceeding. It could not initiate a fresh proceeding provided it was maintainable. Such proceedings would have been maintainable, *inter alia*, if the dealings by and between the Company and the Official Trustee was founded on or otherwise vitiated by fraud. Even a suit for setting aside an order passed by a court having competent jurisdiction would be maintainable on limited grounds. Only because the order passed by a court is otherwise erroneous or causes a hardship, the same by itself may not be a ground to set aside an order that was validly passed by a court of competent jurisdiction. B C

Even otherwise the Official Trustee could not have altered its position. It could not have prevaricated its stand from time to time. It was estopped and precluded from filing a fresh application. D

In *Cooke v. Rickman* [(1911) 2 KB 1125], it was held that the rule of estoppel could not be restricted to a matter in issue, stating :

“.....The rule laid down in *Hawlett v. Tarte* (10 C.B. (N.S.) 813) was that if the defendant in a second action attempts to put on the record a plea which is inconsistent with any traversable allegation in a former action between the same parties there is an estoppel...” E

[See also *Humphries v. Humphries* 1910 (2) KB 531] F

In *Jai Narain Parasrampura (Dead) and Ors v. Pushpa Devi Saraf and Ors.*, [2006] 7 SCC 756, this Court held :

“While applying the procedural law like principle of estoppel or acquiescence, the court would be concerned with the conduct of a party for determination as to whether he can be permitted to take a different stand in a subsequent proceeding, unless there exists a statutory interdict.” G

It was further held :

H

A “The doctrine of estoppel by acquiescence was not restricted to cases where the representor was aware both of what his strict rights were and that the representee was acting on the belief that those rights would not be enforced against him. Instead, the court was required to ascertain whether in the particular circumstances, it would be unconscionable for a party to be permitted to deny that which, knowingly or unknowingly, he had allowed or encouraged another to assume to his detriment. Accordingly, the principle would apply if at the time the expectation was encouraged. [See also *Taylor Fashions Ltd. v. Liverpool Victoria Trustees Co. Ltd.* (1981) 1 All ER 897.]”

C Mr. Ray contended that the learned Single Judge did not assign any reason in support of its order. Even if no reason has been assigned, it could have been set aside only by an appellate court. When an order attained finality, it cannot be set aside on the premise that no reason had therefor been assigned.

D It was also not a case where the parties were at issue in strict sense of the term. The Official Trustee in his affidavit in opposition filed before the High Court of Calcutta might have raised several contentions. Presumption, however, would be that those contentions which had been accepted by the High Court were put forward by it. If that be so, it does not lie in the mouth of the Official Trustee now to contend that it had raised other contentions also. If it had raised any other contention, which had not been considered by the High Court, the remedy of the Official Trustee was to move the said court itself for appropriate directions.

F Not only no such contention was raised, it will bear repetition to state, that the order has been acted upon. The principles of *res judicata* and in particular that of constructive *res judicata* shall apply in the aforementioned fact situation.

In *Pawan Kumar Gupta v. Rochi Ram Nag Deo* [1999] 4 SCC 243, it is stated :

G “The rule of *res judicata* incorporated in Section 11 of the Code of Civil Procedure (CPC) prohibits the court from trying an issue which “has been directly and substantially in issue in a former suit between the same parties”, and has been heard and finally decided by that court. It is the decision on an issue, and not a mere finding on any incidental question to reach such decision, which operates as *res*

H

judicata.”

A

[See also *Ferro Alloys Corporation Limited and Anr v. Union of India and Ors.*, [1999] 4 SCC 149].

It has not been seriously disputed before us that the High Court, despite City Civil Courts Act, could exercise its jurisdiction under Section 302 of the Succession Act read with Section 25 of the 1913 Act.

B

For the reasons aforementioned, we do not find any merit in this appeal. It is dismissed accordingly with costs. Counsel’s fee is quantified at Rs.25,000

VS.

Appeal dismissed.

C