

A

GOVERNMENT OF ORISSA

v.

M/S. ASHOK TRANSPORT AGENCY AND ORS.

APRIL 30, 2002

B

[M.B. SHAH AND B.N. AGRAWAL, JJ.]

Code of Civil Procedure, 1908/Orissa Mining Corporation (Acquisition and Transfer of Charge Chrome Division) Ordinance, 1991—Order XXII Rule 10/Clause 1(5)—Continuation of suit on devolution of interest during pendency of suit—Whether an ex-parte decree against a company taken over by State Government can be executed against the government even though the same was not brought on record before passing of the decree—Difference of opinion among the Judges on the question—Hence, case referred to larger Bench.

C *10/Clause 1(5)—Continuation of suit on devolution of interest during pendency of suit—Whether an ex-parte decree against a company taken over by State Government can be executed against the government even though the same was not brought on record before passing of the decree—Difference of opinion among the Judges on the question—Hence, case referred to larger Bench.*

D *The question for consideration in the present appeal was whether an ex-parte decree against a company taken over by State Government can be executed against the Government even though the same was not brought on record before passing of the decree.*

E *Appellant-State contended that the decree passed against the defendant-company a division of Orissa Mining Corporation was not binding on the State, as it was not brought on record as party-defendant; it was duty of the plaintiff-respondent to bring the appellant-State on record in view of its taking over the company and on failure to do so, the decree against the original defendant would not be binding and cannot be executed*
F *against a person in whom the interest has devolved.*

G *Respondent contended that decree was binding on the State as it is a successor-in-interest of the original defendant as the State had not moved any application to set aside the ex-parte decree or filed appeal against the same or applied for declaration that the decree was binding on it; and that successors are bound by the result of the litigation even if such successors are not brought on record.*

Referring the matter to the larger Bench, the Court

HELD : (*Per Shah, J.*)

A

1.1. Though it is true that whatever steps have already taken place in pending suit will continue to operate against and be binding on the transferee and in the present case on the State of Orissa. But as ex-parte decree was not passed prior to taking over by the State Government, therefore, such decree would not be binding on the State Government as it was not impleaded in the suit and the plaintiff has not taken steps for continuing the suit against it. [643-D-E]

B

1.2. For continuance of the suit, the person who is affected has to file an application and normally such application is to be filed by the plaintiff. In the present case, plaintiff has not discharged such duty to apply for leave for bringing the State of Orissa on record as party defendant.

C

[643-H; 644-A; 644-B]

1.3. The party who wants to continue the suit or other proceeding has to apply to the Court to grant leave to continue suit or proceedings in such cases. To expect the party in whose favour an assignment, creation or devolution of interest has taken place during the pendency of the suit, to file application for continuing the suit against him, would be totally unreasonable. Such party may not be knowing about such proceedings. May be that, in cases where principle of *lis pendente* is applicable, such party may apply to the court for grant of leave to continue the proceeding. Similarly, if the decree is passed against the defendant, before assignment, creation or devolution of interest, such party with the leave of court can continue the appeal or file such appeal. It is also true that Rule 10 of Order XXII CPC nowhere provides that suit would abate in cases of assignment, creation or devolution of any interest. The apparent reason may be that suit would not abate against the original defendant and Court may pass a decree against such defendant. [639-D-F]

D

E

F

1.4. Clause 1(5) of Orissa Mining Corporation (Acquisition and Transfer of Charge Chrome Division) Ordinance, 1991 is in consonance with the provisions of Order XXII Rule 10 and other provisions of the CPC. For continuing the suit against the State Government the State Government is required to be brought on record. Not that, automatically the State Government is deemed to be party to the suit or proceedings. For continuing the suit the plaintiff has to file application as contemplated under Order XXII Rule 10 for bringing the State Government on record as a

G

H

A successor-in-interest. [642-C-E]

Bhagwan Dass Chopra v. United Bank of India and Ors., [1987] Supp. 536 and *State of Orissa v. Klockner and Company and Ors.*, [1996] 8 SCC, distinguished.

B 2. It cannot be said that the decree passed against the original defendant is binding on the State, as it is a successor-in-interest of the original defendant since the State Government has not taken steps, such as (a) moved an application under Order IX Rule 13 CPC for setting aside the ex-parte decree, (b) preferred an appeal with the leave of the Court against the original judgment and decree and (c) filed an independent suit

C for declaration that the ex-parte judgment and decree was not binding on the State Government. Even if it was open to the appellant to file application for setting aside the ex-parte decree or to prefer an appeal, that would not mean that the ex-parte decree which is passed against the original defendant is binding on it as the decree was passed after devolution of interest and not prior to it. [644-B-D]

3. It cannot be said that successors are bound by the result of the litigation even if such successors are not brought on record. [644-E]

Mandal v. Biswanath Mandal, AIR (1915) Calcutta 103 and *Mahanth*

E *Harihar Gir v. Karu Lal and Ors.*, AIR (1935) Patna 488, referred to.

Per B.N. Agrawal, J.

F 1. Under Rule 10, Order 22 CPC, when there has been a devolution of interest during the pendency of a suit, the suit may, by leave of the Court, be continued by or against persons upon whom such interest has devolved and this entitles the person, who has acquired an interest in the subject matter of the litigation by an assignment or creation or devolution of interest pendente lite or suitor or any other person interested, to apply to the Court for leave to continue the suit. But it does not follow that it is obligatory upon them to do so. If a party does not ask for leave, he takes the obvious risk that the suit may not be properly conducted by the plaintiff on record. [649-G, H]

Smt. Saila Bala Dassi v. Smt. Nirmala Sundari Dasi and Anr., AIR (1958) Supreme Court 2159, followed.

H *Rikhu Dev v. Chela Bawa Hariug Das v. Som Dass (deceased) through*

his *Chela Shiama Das*, AIR (1975) Supreme Court 2159, relied on. A

State of Orissa v. Klockner and Company and Ors., [1996] 8 SCC 377, distinguished.

Moti Lal v. Karab-ud-Din, (1898) 25 Cal. 179; *Prannath v. Rookea Begum*, (1851-59) 7 M.I.A. 323; *Rai Charan Mandal and Anr. v. Biswanath Mandal and Ors.*, AIR (1915) Calcutta 103 and *Mahanth Harihar Gir v. Karu Lal and Ors.*, AIR (1995) Patna 488, referred to. B

2.1. Executing Court can allow objection under Section 47 CPC to the executability of the decree if it is found that the same is void ab initio and nullity, apart from the ground that decree is not capable of execution under law either because the same was passed in ignorance of such a provision of law or the law was promulgated making a decree inexecutable after its passing. [662-E-G] C

2.2. In the case on hand, the decree was passed against the defendant without seeking leave of the Court to continue the suit against the Government of Orissa upon whom interest of the defendant devolved and impleading it. Such an omission would not make the decree void ab initio so as to invoke Section 47 CPC and entail dismissal of execution. The validity or otherwise of a decree may be challenged by filing a properly constituted suit or taking any other remedy available under law on the ground that original defendant absented himself from the proceeding of the suit after appearance as it had no longer any interest in the subject of dispute or did not purposely take interest in the proceeding or colluded with the adversary or any other ground permissible under law. [662-E-G] D

Dhurandhar Prasad Singh v. Jai Prakash University and Ors., [2001] 6 SCC 534, relied on. E

Kiran Singh and Ors. v. Chaman Paswan and Ors., AIR (1954) S.C. 340; *Ittyavira Mathai v. Varkey Varkey and Anr.*, AIR (1964) SC 907; *Vasudev Dhanjibhai Modi v. Rajabhai Abdul Rehman and Ors.*, AIR (1970) SC 1475; *Everest Coal Company (P) Ltd. v. State of Bihar and Ors.*, [1978] 1 SCC 12; *Haji S.K. Subhan v. Madho Rao*, AIR (1962) SC 1230 and *Vidya Sagar v. Smt. Sudesh Kumari and Ors.*, AIR (1975) SC 2295, referred to. G

Durayappah v. Fernando and Ors., (1967) 2 All England Law Reports 152; *In re McC. (A minor)* (1985) 1 Appeal Cases 528: *Director of Public* H

A *Prosecution v. Head, (1959) Appeal Cases 83 and Paddington Valuation Officer and Anr. v. Ex parte Peachey Property Corporation Ltd, (1965) 2 All England Law Reports 836*, referred to.

B *Judicial Review of Administrative Action, Fifth Edition by De Smith, Woolf and Jowell; Judicial Remedies in Public Law by Clive Lewis*, referred to.

C 2.3. The question whether a decree can be executed against successor-in-interest of the defendant upon whom interest has devolved during the pendency of the suit without bringing him on record and seeking leave to continue the suit against him, cannot be decided under Section 47 CPC by

C Executing Court, such a decree being not a nullity, and only voidable which can be avoided by challenging the same effectively in a properly constituted suit in a court of competent jurisdiction on the ground permitted by law and in such a case the bar created by Section 47(1) CPC to the institution of separate suit shall not operate. The provisions of Section 50 and Section 52 CPC can be of no avail for deciding the point in issue as the same can

D apply in cases of death of a person covered by Order 22 Rules 3 and 4 CPC, as the case may be, and not in cases of assignment, creation or devolution of interest which is governed exclusively by Rule 10 of Order 22. [644-F-H; 665-A]

E 3.1. From a bare perusal of Sections 2(c)(3), 4(5) and 5 of the Ordinance, it would be plain that liability of the Charge Chrome Division in the suit upon its being taken over became liability of the Government of Orissa and is enforceable against it. Such a provisions that the suit shall not abate, be discontinued or in any manner prejudicially affected by reason of devolution of interest during its pendency has not been explicitly made

F in Order 22 rule 10 CPC like Section 4(5) of the Ordinance but the same is implicit therein. Both the provisions lay down that in case there is devolution in interest during the pendency of a suit under Order 22 Rule 10 CPC as well as Section 4(5) of the Ordinance, the suit may be continued by or against the person upon whom the interest has devolved. A successor-in-interest may challenge validity or otherwise of a decree passed against

G the predecessor-in-interest without impleading the successor-in-interest upon whom the interest has devolved during the pendency of the suit, by filing a properly constituted suit or taking any other remedy available under law on the ground that the original defendant absented himself from the proceeding of the suit after appearance and filing written statement as

H he had no longer any interest in the subject of dispute or did not purposely

**take interest in the proceeding or colluded with the adversary or any other A
ground permissible under law as such a challenge would make the decree
voidable and not void much less ab initio so as to make it nullity.**

[665-H; 666-A-D]

**3.2. In the present case, it cannot be said that the decree is even B
voidable much less void or void ab initio. Therefore , the Government of
Orissa is precluded from challenging its validity or otherwise even by filing
a separate suit much less taking objection under Section 47 CPC.**

[666-G-H]

**CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3209 of C
2002.**

From the Judgment and Order dated 19.7.2000 of the Orissa High D
Court in C.R. No. 117 of 1998.

Altaf Ahmed, Additional Solicitor General and Kirti Renu Mishra for D
the Appellant.

B.A. Mohanty, Ashok Mathur, Ms. Mamta Tripathi, Harshvardhan Jha, Anukul Chandra Pradhan and Shiv Sagar Tiwari for the Respondents.

The Judgments of the Court were delivered by E

SHAH, J. Heard the learned counsel for the parties.

Leave granted.

Short question involved in this matter is—whether an ex parte decree F
passed against a Company which was taken over by the Orissa Ordinance No.8 of 1991 by the State Government can be executed against the State Government even though the Government of Orissa was not brought on record before passing of the decree? Admittedly, the Ordinance taking over the assets of the Charge Chrome Division of the Orissa Mining Corporation Ltd. was promulgated on 24th September, 1991 and the suit filed by the respondents was decreed against the Charge Chrome Division on 12th November 1991 without bringing the State Government on record as party defendant.

Thereafter, the judgment creditor filed an Execution Application on 24th October, 1994 for recovering the amount decreed from the Government G H

A of Orissa as well as other respondents. The State Government contended that the decree is not executable against it as it was not brought on record and there is no decree against it. The trial court rejected the objection raised by the appellant on the basis of decision rendered by this Court in *State of Orissa v. Klockner and Company and Ors.*, [1996] 8 SCC 377. Against that judgment and order, the appellant preferred C.R. No. 117 of 1998 before the High Court of Orissa, Cuttack. The Orissa Mining Corporation Limited also filed C.R. No. 64 of 1998 against the said order by contending that decree against it is not executable. The High Court allowed the revision filed by the Orissa Mining Corporation on the ground that Execution Application against it would not survive as no liability accrued against it. However the revision filed by the State Government was dismissed. Hence this appeal.

Mr. Altaf Ahmad, Additional Solicitor General appearing for the appellant submitted that the judgment and decree passed against the defendant—Charge Chrome Division of the Orissa Mining Corporation is not binding on the appellant as the appellant was not brought on record as party defendant. After the Ordinance which was promulgated on 24th September, 1991, it was the duty of the plaintiff respondent to bring the appellant on record as party defendant in view of its taking over the company, if at all plaintiff wanted a decree executable against it. He submitted that in such cases, procedure prescribed under Order XXII Rule 10 of the CPC which enables the plaintiff to continue the suit is required to be followed. It is his contention that it is the choice of the plaintiff to bring the person on record in whose favour an assignment, creation or devolution of any interest during the pendency of the suit has taken place for continuing the suit and if he does not bring them as party defendants, then the decree passed against the original defendant would not be binding and cannot be executed against the person in whom the interest has devolved.

As against this, learned counsel for the respondent submitted that the judgment and order passed by the High Court is in accordance with law and does not call for any interference.

G For appreciating the contentions raised by the learned counsel for the parties, we would only refer to relevant part of Rule 10 of Order XXII of the CPC which reads as under:-

H “10(1) In other cases of an assignment, creation or devolution of any interest during the pendency of a suit, the suit may, by leave of the Court, be continued by or against the person to or upon whom such

interest has come or devolved."

A

Order XXII provides the procedure for bringing the legal representatives of parties on record in case of death, marriage or insolvency of parties. It also provides in which cases the proceeding would abate where legal representatives are not brought on record.

B

As against that, Rule 10 only provides for continuing the suit where there is an assignment, creation or devolution of any interest during the pendency of the suit. It is an enabling provision to the affected party to continue the suit by or against the person to or upon whom such interest has come or devolved. Normally, if the plaintiff's interest has come to or devolved, say in Y, then Y has to approach the Court for enabling him to continue the suit with the leave of the court. This provision also applies at the appellate stage. Further, defendant would not approach the Court by filing an application that leave may be granted to continue the suit against him. It is for the plaintiff to approach the Court when there is assignment, creation or devolution of interest during the pendency of the suit and Court may permit to continue the said suit against the person upon whom such interest has come or devolved. That means, the party who wants to continue the suit or other proceeding has to apply to the Court to grant leave to continue suit or proceedings in such cases. To expect the party in whose favour an assignment, creation or devolution of interest has taken place during the pendency of the suit, to file application for continuing the suit against him, would be totally unreasonable. Such party may not be knowing about such proceedings. May be that, in cases where principle of *lis pendente* is applicable, such party may apply to the court for grant of leave to continue the proceeding. Similarly, if the decree is passed against the defendant before assignment, creation or devolution of interest, such party with the leave of court can continue the appeal or file such appeal. It is also true that Rule 10 nowhere provides that suit would abate in cases of assignment, creation or devolution of any interest. The apparent reason may be that suit would not abate against the original defendant and Court may pass a decree against such defendant.

C

D

E

F

G

The next question would be—whether a decree can be executed against a person in whom interest has devolved pending suit, if such person is not brought on record.

Section 47 inter alia provides that all questions arising between parties to the suit in which decree was passed or their representatives and relating to the execution are required to be determined by the Court executing the

H

A decree and not by a separate suit. Explanation I provides that who are considered to be parties to the suit. Therefore, whether decree is executable against the appellant is required to be decided in the execution application and not by the separate suit. Sections 50 and 52 deal with cases when the decree could be executed against legal representatives. The said sections read thus:

B

"50. Legal Representative. (1) Where a judgment-debtor dies before the decree has been fully satisfied, the holder of the decree may apply to the Court which passed it to execute the same against the legal representative of the deceased.

C

(2) Where the decree is executed against such legal representative, he shall be liable only to the extent of the property of the deceased which has come to his hands and has not been duly disposed of; and, for the purpose of ascertaining such liability, the Court executing the decree may, of its own motion or on the application of the decree-holder, compel such legal representative to produce such accounts as it thinks fit.

D

52. Enforcement of decree against legal representative. (1) *Where a decree is passed against a party as the legal representative of a deceased person, and the decree is for the payment of money out of the property of the deceased, it may be executed by the attachment and sale of any such property.*

E

(2) *Where no such property remains in the possession of the judgment-debtor and he fails to satisfy the Court that he has duly applied such property of the deceased as is proved to have come into his possession, the decree may be executed against the judgment-debtor to the extent of the property in respect of which he has failed so to satisfy the Court in the same manner as if the decree had been against him personally."*

F

Section 50 therefore only provides that in case where judgment debtor

G dies before decree has been fully satisfied, the said decree can be executed against the legal representatives of the deceased only to the extent of the property of the deceased which has come to his hands and has not been duly disposed of. This Section contemplates a situation where decree has been passed and thereafter judgment-debtor dies before the decree has been fully satisfied. But it does not provide that a decree passed against a person who

H is not brought on record in a pending suit can be executed against him. No

provision is made that in case of assignment, creation or devolution of interest in a pending suit, decree can be executed against the legal representatives without bringing them on record as party defendants. As against this, Section 52 provides for a situation where a decree is passed against the legal representative of a deceased person. In such cases, the legal representative is a judgment debtor. If the decree is for payment of money out of the property of the deceased, the section permits the decree to be executed against the property of the deceased in the hands of the legal representatives and the legal representatives are liable to satisfy the decree only out of the assets of the deceased in their hands. However, there is no provision which contemplates a situation where a decree can be executed against the legal representative who is not brought on record in case of death of the original defendant or in case where there is assignment, creation or devolution of an interest during the pendency of the suit by the defendant.

The High Court relied upon the decision of this Court in *Klockner & Co.*'s case (supra), wherein this Court considered the take-over Ordinance, namely, Ordinance No.8 of 1991. In that case, after the merger of Chrome Division with the State Government, the dispute arose on the basis of previous contract between the Charge Chrome Division and the respondent-Klockner and Co. When the State of Orissa received notice of the arbitration proceedings, it filed suit for a declaration that it was not the successor-in-interest. It also prayed for permanent injunction against the Company from prosecuting the arbitration proceedings. In that context, the Court considered clauses 4, 5, 6, 7 and 9 of the takeover Ordinance. After considering the aforesaid clauses, the Court held that the State of Orissa is a successor-in-interest of the Charge Chrome Division of Orissa Mining Corporation and, therefore, the contention of the State that it has nothing to do with the contract entered into between Klockner and Co. and OMC in respect of which the former has initiated arbitration proceedings invoking Section 3 of the Foreign Awards Act was not acceptable. This decision nowhere deals with the contention which is raised in these proceedings. The Court held that proceedings on the basis of the contract executed by the transferee company could be implemented in view of various clauses of take over Ordinance. There is no dispute in the present proceedings that State Government is successor-in-interest of Charge Chrome Division.

For our purpose, relevant clause 1(5) of the Orissa Mining Corporation (Acquisition and Transfer of Charge Chrome Division) Ordinance, 1991 is as under: -

A "1(5) If, on the appointed day, any suit, appeal or other proceeding of whatever nature in relation to any property; which has vested in the State Government under Section 3 or instituted or preferred by or against the Charge Chrome Division is pending, the same shall not abate, be discontinued or be, in any way prejudicially affected by reason of the vesting and transfer of the Charge Chrome Division of the Company but the suit, appeal or other proceeding may be continued or enforced by or against the State Government or, where the Charge Chrome Division of the Company is vested under Section 6 in any other company, by or against the other company."

B

C The aforesaid Sub-clause (5) is in consonance with the provisions of Order XXII Rule 10 and other provisions of the CPC. It inter alia provides that if on the appointed day, any suit in relation to any property which is vested in the State Government under section 3 is pending, the same shall not abate or be discontinued or be in any way prejudicially affected by reason of the vesting and transfer of the Charge Chrome Division of the Company but

D the suit may be continued against the State Government. This would impliedly mean that for continuing the suit against the State Government, the State Government is required to be brought on record. Not that, automatically the State Government is deemed to be party to the suit or proceedings. For continuing the suit, the plaintiff has to file application as contemplated under

E Order XXII Rule 10 for bringing the State Government on record as a successor-in-interest.

F

G The High Court has also relied upon the decision of this Court in *Bhagwan Dass Chopra v. United Bank of India and Ors.*, [1987] Supp SCC 536] for holding that the appellant would become a judgment debtor and the decree passed against the Chrome Division would be binding on the appellant and the decree could be executed against it. In that case, the Court was dealing with the Industrial Disputes Act, 1947 and held that there is no express provision corresponding to Order XXII Rule 10 of CPC under the Industrial Disputes Act. However, it was necessary to evolve a reasonable procedure to deal with cases where a devolution of interest takes place during the pendency of a proceeding arising under the Industrial Disputes Act. In that context, the Court held as under: -

H "It follows that subject to such terms it becomes liable to be impleaded or becomes entitled to be impleaded in the place of or in addition to the transferor company or corporation in any action, suit

or proceeding filed against the transferor company or corporation by a third party or filed by the transferor company or corporation against a third party and that whatever steps have already taken place in those proceedings will continue to operate against and be binding on the transferee company or corporation in the same way in which they operate against a person on whom any interest has devolved in any of the ways mentioned in Rule 10 of Order 22 of the Code of Civil Procedure, 1908 subject of course to any terms in the contract of transfer or merger, scheme of amalgamation or other relevant legal provisions governing the transaction under which the transferee company or corporation has become the successor-in-interest of the transferor company or corporation.”

The aforesaid observations would mean that in such cases it was open to the respondent (plaintiff in the original suit) to implead State Government as party defendant as successor-in-interest, but if there is failure to do so on the part of the plaintiff, it would not mean that the decree against the original defendant whose interest has already devolved in the State Government would be binding to it. It is true that whatever steps have already taken place in pending suit will continue to operate against and be binding on the transferee and in the present case on the State of Orissa. But as stated above, ex parte decree was not passed prior to taking over by the State Government, therefore, such decree would not be binding on the State Government as it was not impleaded in the suit and the plaintiff has not taken steps for continuing the suit against it.

This Court in *Dhurandhar Prasad Singh v. Jai Prakash University and Ors.*, [2001] 6 SCC 534 while dealing with the provisions of Rule 10 of Order XXII *inter alia* observed as under (page 549 para 26): -

“It simply says that the suit may be continued by the person upon whom such an interest has devolved and this applies in a case where the interest of the plaintiff has devolved. Likewise, in a case where interest of the defendant has devolved, the suit may be continued against such a person upon whom interest has devolved, but in either eventuality, for continuance of the suit against the persons upon whom the interest has devolved during the pendency of the suit, leave of the court has to be obtained.”

This would clearly mean that for continuance of the suit, the person who is affected has to file an application and normally such application is to

A be filed by the plaintiff. The Court has further observed as under: -

"As a rule of prudence, initial duty lies upon the plaintiff to apply for leave in case the factum of devolution was within his knowledge or with due diligence could have been known by him."

B In the present case, plaintiff has not discharged such duty to apply for leave for bringing the State of Orissa on record as party defendant. Learned counsel for the respondent, however, submitted that as the State Government has not taken steps, such as, (a) moved an application under Order IX Rule 13 CPC for setting aside the ex parte decree, (b) preferred an appeal with the leave of the Court against the original judgment and decree and (c) filed an independent suit for declaration that the ex parte judgment and decree was not binding on the State Government, the decree passed against the original defendant is binding on it as it is a successor-in-interest of the original defendant. In our view, the aforesaid submission cannot be accepted. Even if it was open to the appellant to file application for setting aside the ex parte decree or to prefer an appeal, that would not mean that the ex parte decree which is passed against the original defendant is binding on it as the decree was passed after devolution of interest and not prior to it.

E Learned counsel for the respondents contended that successors are bound by the result of the litigation even if such successors are not brought on record and in support of his contention he relied upon the decision rendered by the High Court of Calcutta in *Rai Charan Mandal v. Biswanath Mandal*, AIR (1915) Calcutta 103. In our view, this submission is totally misconceived. In the said case, the Court dealt with a situation where interest of the plaintiff devolved on the successors and the successors did not file any application for leave to continue the suit. The Court held that the plaintiff is entitled to continue the suit and his successors will be bound by the result of the litigation. This would not mean that if plaintiff fails to bring the successors of defendant on record, the decree would be binding to the successors.

G The aforesaid decision was followed by Patna High Court in *Mahanth Harihar Gir v. Karu Lal and Ors.*, AIR (1935) Patna 488. In that case, after passing of the preliminary decree in the mortgage suit against the defendant-mortgagee and before the final decree, one of the mortgagee had relinquished his right of mananthship in favour of a third party, appellants of that case, without informing the Court or the decree holder, and the Court held that in such cases Order XXII Rule 10 CPC would be applicable and it was for the defendant or the assignee to file an application for bringing him on record.

It is true that after passing of the decree, it was for the defendant or the assignee to take appropriate steps for setting aside the decree but that would not mean that prior to the decree assignee or the person on whom the property has devolved has to apply. A

In view of the aforesaid discussion, the impugned order passed by the High Court in CR No. 117 of 1998 confirming the order passed by the trial court in Execution Case No. 50 of 1994 rejecting the objection application filed by the appellant, is set aside. It is held that the decree passed against the original defendant Charge Chrome Division is not binding to the appellant and, therefore, it is inexecutable against the appellant. B

The appeal is allowed accordingly with no order as to costs. C

B.N. AGRAWAL, J. I have perused the lucid judgment prepared by my learned Brother Shah, J., for whom I have all due regard, but in spite of best efforts, I am not about to persuade myself to agree with him. In order to appreciate the controversy, it would be necessary to enumerate the facts hereunder in somewhat more detail. D

M/s Ashok Transport Agency-respondent No. 1 (hereinafter referred to as the plaintiff') instituted a suit bearing Money Suit No. 491 of 1986 against M/s. Orissa Mining Corporation (Alloys) Ltd. respondent No. 2 (hereinafter referred to as 'the defendant' for realisation of a sum of Rs. 3,90,210 with interest thereon. In the said suit, on 14th October, 1987, written statement was filed on behalf of the defendant contesting claim of the plaintiff. During pendency of the suit. Government of India in the Ministry of Law & Justice by its order dated 30th August, 1991 permitted merger of the defendant with the Orissa Mining Corporation Ltd., (hereinafter referred to as 'the Corporation') of which it was subsidiary and after merger the same became Charge Chrome Division of the Corporation. Thereupon, Government of Orissa promulgated Orissa Mining Corporation (Acquisition and Transfer of Charge Chrome Division) Ordinance, 1991 notified in the Orissa Gazette on 24th September, 1991 (hereinafter referred to as 'the Ordinance') by which Charge Chrome Division of the Corporation and right, title and interest of the Corporation in relation to the Charge Chrome Division stood transferred and vested in the Government of Orissa w.e.f. the date of Ordinance. According to the Ordinance, every liability of the Charge Chrome Division would be liability of the Government of Orissa in which its property had vested and shall be enforceable against it. In the said suit, no steps were taken to continue the suit against the Government of Orissa either by the plaintiff or the defendant E

F

G

H

A or the Corporation inasmuch as the Government of Orissa upon whom the interest devolved did not apply to the trial court for being impleaded as party defendant. That apart, the defendant though filed written statement but as it did not take any further step, the suit was set ex parte on 31st October, 1991 in which ex parte evidence was recorded and the matter was posted for judgment on 12th November, 1991 on which date, the unit was decreed ex parte and the defendant was directed to pay Rs. 3,90,210 to the plaintiff together with interest thereon. Thereafter, as the decretal amount was not paid by the defendant, the plaintiff sent a notice on 4th January, 1992 calling upon it to pay the same whereupon the plaintiff, for the first time, having learnt that the defendant which was subsidiary of the Corporation merged

B into it by virtue of aforesaid order passed by the Central Government on 30 August, 1991, from which date, the same became a Charge-chrome Division of the Corporation and 24th September, 1991, the right, title and interest of the Corporation in relation to its Charge-chrome Division stood transferred to and vested in the Government of Orissa, sent a registered notice on 8 April, 1993 to the Secretary, Department of Steel and Mines, Government of Orissa, demanding payment of the aforesaid decretal dues inasmuch as another notice was sent to the Corporation and its Chairman-cum-Managing Director to the same effect. As the decretal dues were not paid, the same necessitated filing of execution case by the plaintiff-decree-holder on 24 October, 1994 which was registered as Execution Case No. 50 of 1994 impleading therein

C apart from the defendant who was the judgment-debtor, the Corporation with which the defendant company merged as its Charge Chrome Division and Government of Orissa in whom the right, title and interest of the said Division stood transferred and vested seeking execution of the decree against all the three.

D

E

F In the said execution case, the Corporation filed objection under Section 47 of the Code of Civil Procedure (hereinafter referred to as 'the Code') objecting to execution of the decree against it on grounds, *inter alia*, that assets and liabilities of said Division of the Corporation having been taken over by the Government of Orissa by virtue of the aforesaid Ordinance, the decree could not be executed against the Corporation more so when it was not impleaded as a party to the suit. The Government of Orissa filed separate objection under Section 47 of the Code objecting to the executability of the decree against it on grounds, *inter alia*, that it was not a party to the suit, it was not having any record of the aforesaid money suit and no intimation was given by the plaintiff to Secretary, Government of Orissa in the Department

G of Steel and Mines, about the claim of the plaintiff as such the decree passed

H

against the defendant after the promulgation of the Ordinance without seeking leave to continue the suit against the Government of Orissa being nullity cannot be enforced against it. The executing court after taking into consideration all the pros and cons of the matter rejected both the objections aforesaid whereupon two revisions were filed before the High Court of Orissa, one by the Government of Orissa and another the Corporation out of which revision filed by the Corporation was allowed and objection filed by it sustained whereas that by the Government of Orissa dismissed leading to filing of the present appeal on Special Leave by it.

Shri Altaf Ahmed, learned Additional Solicitor General appearing in support of the appeal, submitted that although the defendant company had merged into the Corporation as its Charge Chrome Division which was taken over by virtue of the Ordinance and its assets and liabilities stood transferred and vested in the Government of Orissa, under Order 22 Rule 10 of the Code it was duty of the plaintiff who was prosecuting the suit to ensure by seeking leave of the Court that effective relief be granted to it by bringing the Government of Orissa on record which was a necessary party. It was further submitted that decree passed against the defendant, which had ceased to exist, is akin to decree passed against a dead person without bringing his legal representatives on the record, which being a nullity, cannot be enforced against the Government of Orissa. Shri B.A. Mohanty, learned senior counsel appearing on behalf of respondent no. 1 decree-holder, on the other hand, submitted that although the defendant company merged into the Corporation as its Charge-chrome Division which was taken over by virtue of the Ordinance and its assets and liabilities stood transferred and vested in the Government of Orissa and thereby it was a case of devolution of interest during the pendency of the suit within the meaning of Order 22 Rule 10 of the Code, the High Court was quite justified in upholding order of the executing court rejecting objection under Section 47 of the Code as even if the Government of Orissa was not made party in the suit, the decree could have been passed against the defendant and the Government of Orissa was bound by it even though no step whatsoever was taken by it to intervene in the matter by seeking leave to continue nor any such stamp was taken either by the plaintiff or the defendant or the Corporation. Thus, in view of the rival submissions, the following question arises for consideration of this Court.

“Whether in a case of devolution of interest during the pendency of a suit as postulated under Order 22 Rule 10 of the Code, decree passed against the predecessor-in-interest without bringing the

A successor-in-interest on the record world make the decree nullity and the same can be executed against such a person who was not impleaded as party?"

In my view, the question posed is no longer *res integra* as the same is concluded by a two Judge Bench decision of this Court in the case of **B** *Dhurandhar Prasad Singh v. Jai Prakash University and Ors.*, [2001] 6 SCC 534, which sitting with G.B. Pattanaik, J., I have delivered the judgment laying down law that in such an eventuality, decree would not be nullity and can be executed against the successor-in-interest of the defendant-judgment debtor even though it was not impleaded party to the suit. As I see, the **C** decision in the case of *Dhurandhar Prasad Singh* (supra) answers the question against the appellant whereas it appears that in the opinion of my learned Brother, the ratio laid down in the said case supports the contention of learned counsel appearing on behalf of the appellant. Ordinarily, in such an eventuality, the case should be referred to a larger bench but in view of the detailed judgment prepared by my learned Brother, I have no option but to record **D** note of dissent enumerating therein my reasoning therefor. According to me, for a comprehensive judgment and to clarify the point in issue, it would be useful to refer to various paragraphs from the judgment of this Court delivered by me in the case of *Dhurandhar Prasad Singh* (supra) which may be stated hereinafter.

E In order to appreciate the point involved, it would be necessary to consider the provisions of Order 22 of the Code. Rules 3 and 4 whereof prescribe procedure in case of devolution of interest on the death of party to a suit. Under theses Rules, if a party dies and right to sue survives, the Court on an application made in that behalf is required to substitute legal

F representatives of the deceased party for proceeding with a suit but if such an application is not filed within the time prescribed by law, the suit shall abate so far as the deceased party is concerned. Rule 7 deals with the case of creation of an interest in husband on marriage and Rule 8 deals with the case of assignment on the insolvency of a plaintiff. Rule 10 provides for cases of assignment, creation and devolution of interest during the pendency

G of a suit other than those referred to in the foregoing Rules and is based on the principle that the trial of a suit cannot be brought to an end merely because the interest of a party in the subject matter of suit has devolved upon another during its pendency but such a suit may be continued with the leave of the Court by or against the person upon whom such interest has devolved.

H But, if no such a step is taken, the suit may be continued with the original

Party and the person upon whom the interest has devolved will be bound by A and can have the benefit of the decree, as the case may be, unless it is shown in a properly constituted proceeding that the original Party being no longer interested in the proceeding did not vigorously prosecute or colluded with the adversary resulting in decision adverse to the party upon whom interest had devolved. The Legislature while enacting Rules 3, 4 and 10 has made clear-cut distinction. In cases covered by Rules 3 and 4, if right to sue survives and no application for bringing legal representatives of a deceased party is filed within the time prescribed, there is automatic abatement of the suit and procedure has been prescribed for setting aside abatement under Rule 9 on the grounds postulated therein. In cases covered by Rule 10, the Legislature has not prescribed any such procedure in the event of failure to apply for leave of the court to continue the proceeding by or against the person upon whom interest has devolved during the pendency of a suit which shows that the Legislature was conscious of this eventuality and yet has not prescribed that failure would entail dismissal of the suit as it was intended that the proceeding would continue by or against the original party although he ceased to have any interest in the subject of dispute in the event of failure to apply for leave to continue by or against the person upon whom the interest has devolved for bringing him on the record. For better appreciation, I may usefully refer to the provisions of Order 22 Rule 10 of the Code which run thus : B C D

“10. *Procedure in case of assignment before final order in suit.*—(1) other cases of an assignment, creation or devolution of any interest during the pendency of a suit, the suit may, by leave of the Court, be continued by or against the person to or upon whom such interest has come or devolved. E

(2) the attachment of a decree pending an appeal therefrom shall be deemed to be an interest entitling the persons who procured such attachment to the benefit of sub-rule (1).” F

Under Rule 10, Order 22 of the Code, when there has been a devolution of interest during the pendency of a suit, the suit may, by leave of the Court, be continued by or against persons upon whom such interest has devolved and this entities the person, who has acquired an interest in the subject matter of the litigation by an assignment or creation or devolution of interest pendente lite or suitor or any other person interested, to apply to the Court for leave to continue the suit. But it does not follow that it is obligatory upon them to do so. If a party does not ask for leave, he takes the obvious risk that the suit G H

- A may not be properly conducted by the plaintiff on record, and yet, as pointed out by their Lordships of the Judicial Committee in *Moti Lal v. Karab-ud-Din*, (1898) 25 Cal. 179, he will be bound by the result of the litigation though he is not represented at the hearing unless it is shown that the litigation was not properly conducted by the original party or he colluded with the adversary. It is also plain that if the person who has acquired an interest by devolution, obtains leave to carry on the suit, the suit in his hands is not a new suit, for, as Lord Kingsdown of the Judicial Committee said in *Prannath v. Rookea Begum*, (1851-59) 7 M.I.A. 323, a cause of action is not prolonged by mere transfer of the title. It is the old suit carried on at his instance and he is bound by all proceedings up to the stage when he obtains leave to carry
- B on the proceedings.

In the case of *Rai Charan Mandal and Anr. v. Biswanath Mandal and Ors.*, AIR (1915) Calcutta 103, this question fell for consideration before a Division Bench of the Calcutta High Court where plaintiff filed a suit for declaration of title and recovery of possession of land with mesne profits and

- D during pendency of the suit, there was devolution of interest of plaintiff upon a third person but no steps were taken to bring on record the successor-in-interest in as much as no leave to continue the suit was sought for as required under Order 22 Rule 10 of the Code and the suit was dismissed. The appellate court, however, reversed the trial court's decree and decreed the suit.
- E Thereafter, when the matter was taken to the High Court, the appellate court decree was challenged on the ground that at the time. Decree was passed by that court in favour of the plaintiff in view of devolution of interest of the plaintiff in a third party, the plaintiff had lost all the interest in the property as such the suit was fit to be dismissed on this ground alone. In that case, the Division Bench presided over by Sir Ashutosh Mookerjee, J., repelled the contention and following the decisions of Judicial Committee in the cases of *Moti Lal* (supra) and *Prannath* (supra), succinctly laid down the law that in the event of devolution of interest pendente lite, the successor-in-interest of the plaintiff may, if he so chooses, come on the record with leave of the Court under Order 22 rule 10 but if he does not, the plaintiff is entitled to continue the suit and his successor will be bound by the result of the litigation.
- G The Court observed at pages 104 and 105 which run thus:

"Under Rule 10, Order 22, Civil Procedure Code, 1908, when there has been a devolution of interest during the pendency of a suit, the suit may, by leave of the Court, be continued by or against persons to or upon whom such interest has come or devolved. This entitles the

person who has acquired an interest in the subject-matter of the A
litigation by an assignment or creation or devolution of interest
pendente lite, to apply to the Court for leave to continue the suit.

But it does not follow that it is obligatory upon him to do so. If he B
does not ask for leave, he takes the obvious risk that the suit may not
be properly conducted by the plaintiff on record and yet, as pointed C
out by their Lordships of the Judicial Committee in *Moti Lal v. Karab-ud-Din*, (1898) 25 Calcutta 179, he will be bound by the result of the
litigation even though he is not represented at the hearing. But the D
legislature has not further provided that in the event of devolution of
interest during the pendency of suit, if the person who has acquired
title does not obtain leave of the Court to carry on the suit, the suit
would stand dismissed. It is also plain that if the person who has E
acquired an interest by devolution, obtains leave to carry on the suit,
the suit in his hands is not a new suit, for, as Lord Kingsdown said F
in *Prannath v. Rookea Begum*, [1851-59] 7 M.I.A. 323, a cause of
action is not prolonged by mere transfer of the title. It is the old suit
carried on at his instance and he is bound by all proceedings up to G
the stage when he obtains leave to carry on the proceedings.....If
this view were not maintained, what would be the result? The suit
commenced by the plaintiff stands dismissed. The person who has
acquired the right, title and interest of the plaintiff commences a fresh
suit. His cause of action is the original cause of action upon which
plaintiff 1 commenced his suit. It may consequently happen that while
the plea of limitation would have been of no avail in answer to the
claim of the original plaintiff, it may be very effective as an answer
to the subsequent suit. It may also be asked, if the contention of the
appellants were to prevail, what would happen in the event of a
devolution of the interest of the defendants. Would the suit be heard
ex parte, because the interest of the defendants had passed to a stranger
to the litigation, or would the suit stand dismissed because it was at
that stage a suit against a person who had no interest in the litigation?"

[Emphasis added] G

The Court further observed at page 105 which runs thus:-

"If the contention of the appellant were upheld, there would obviously H
be endless litigation and the substantial rights of litigants might be
completely defeated. It is also worthy of note that at the stage when

A the objection is taken, neither the Court nor the parties may be in a position to decide that there has been a final and operative devolution of interest. For instance if the devolution of interest is due to an execution sale of the right, title and interest of the plaintiff, the validity of that sale may be challenged and the proceedings consequent thereon may be protracted. Would the original suit be dismissed on the assumption that the sale was valid and operative? If this course were pursued, what would happen if it ultimately transpired that the sale was inoperative and that there had been no effective devolution of interest? No doubt cases are conceivable, where the Court may have to stay the trial of the suit by reason of a devolution of the interest of one of the parties in favour of his opponent. For instance, if the interest claimed by the plaintiffs have been purchased by the defendants, the latter may fairly ask that the suit be stayed till the question of the validity of the sale in their favour has been finally determined. But except in cases of this peculiar character, it is plain that the trial of the suit should not be arrested merely by reason of the devolution of the interest of the plaintiffs. *The successor-in-interest may, if he chooses, obtain leave of the Court under Order 22 Rule 10, but if he does not do so, the original plaintiffs are entitled to continue the suit and their successors will be bound by the result of the litigation.*"

E

[Emphasis added]

F In the case *Mahanth Harihar Gir v. Karu Lal and Ors.*, AIR 1935 Patna 488, a Division Bench of the Patna High Court was considering a case where after passing of a preliminary decree in a mortgage suit against the defendant-mortgagee and before the final decree, one of the mortgagee had relinquished his right of *mahanthship* and duly installed one Harihar Gir as his successor and *gadina* in respect of the Math presided over by him. The successor *mahanth* was not brought on the record and no prayer was made before passing of the final decree for grant of leave to continue the litigation against the successor *mahanth* inasmuch as final decree was passed against the previous *mahanth*. When the decree was put into execution, objection was filed by the successor-in-office that the final decree passed against the previous *mahanth* is incapable of execution against the successor *mahanth*, who was not impleaded as party to the suit. The objection was overruled by the executing court and on appeal being preferred before the High Court, the order of rejection was upheld. Fazal Ali, J., as he then was, who later was elevated as a Judge of Federal Court and became a founder

Judge of this Court, speaking for the Court, following the high authority of A Sir Ashutosh Mookerjee, J., in the case of *Rai Charan Mandal* (supra) and after referring to the same observed thus in relation thereto laying down the law at page 489:

"It is conceded by the learned advocate for the appellant that this decision has not been dissented from so far and in my opinion, its authority cannot be questioned. It is clear from the language used in Order 22 Rule 10 that this provision is merely an enabling one and it is also to be noticed that no penalty is prescribed under this rule for failure to substitute the person upon whom the interest of a plaintiff or a defendant devolves while a suit is pending. This rule merely provides that should the interest of the plaintiff devolve upon another person by assignment or otherwise while the litigation is still proceeding such other person may obtain the permission of the Court to continue the litigation as if he were the plaintiff in the suit. It similarly provides that in those cases where the interest of the defendant devolves on another person during the pendency of the litigation may be continued as against such other person with the permission of the Court. The language of this provision does not suggest that in the latter case the person upon whom the interest of the defendant has devolved cannot himself come forward and ask the Court to allow the suit to be continued against him, nor does it suggest that if the plaintiff fails to substitute the assigned or the person upon whom the interest of the defendant otherwise devolves, such a person would not be bound by the decree passed against the original defendant. It is interesting to compare this provision with the provisions relating to abatement which are more or less of a mandatory character and which also state clearly that in case the legal representative of a deceased party is not substituted, the suit or appeal shall abate against the party who is dead and whose legal representative has not been substituted. Thus the intention of Order 22 Rule 10 seems to be that though it is desirable that the party having a present interest in the litigation should be before the Court, yet the litigation is not to become infructuous, if such a party is not brought before the Court. Indeed the provision that such a party can be brought before the Court only by the leave of the Court seems to suggest that there may be cases in which leave may be refused and the case allowed to proceed in the name of the original plaintiff or defendant. In the present case it is not denied that a preliminary H

A decree had been passed against Mahant Krishna Dayal Gir by a Court of competent jurisdiction. I cannot conceive of any principle of law under which such a decree should be regarded as a nullity merely because Mahant Krishna Dayal Gir chose to relinquish his rights in favour of the appellants without informing the Court or the decree-holder."

B

[Emphasis added]

The effect of failure to seek leave or bring on record the person upon whom the interest has devolved during the pendency of the suit was subject matter of consideration before this Court in various decisions.

C

In the case of *Smt. Saila Bala Dassi v. Smt. Nirmala Sundari Dassi and Anr.*, AIR (1958) Supreme Court 394, T.L. Venkatarama Aiyar, J. speaking for himself and on behalf of S.R. Das, C.J. and A.K. Sarkar and Vivian Bose, JJ. laid down the law that if a suit is pending when the transfer in favour of a party was made, that would not affect the result when no application had been made to be brought on the record in the original court during the pendency of the suit.

D

In the case of *Rikhu Dev, Chela Bawa Harjug Dass v. Som Dass (deceased) through his Chella Shiama Dass*, AIR (1975) Supreme Court 2159, while considering the effect of devolution of interest within the meaning of Order 22 Rule 10 of the Code, on the trial of a suit during its pendency, this Court has laid down the law at page 2160 which runs thus:

E

"This rule is based on the principle that trial of a suit cannot be brought to an end merely because the interest of a party in the subject matter of the suit has devolved upon another during the pendency of the suit but that suit may be continued against the person acquiring the interest with the leave of the Court. When a suit is brought by or against a person in a representative capacity and there is a devolution of the interest of the representative, the rule that has to be applied is Order 22, Rule 10 and not Rule 3 or 4, whether the devolution takes place as a consequence of death or for any other reason. Order 22, Rule 10, is not confined to devolution of interest of a party by death; it also applies if the head of the mutt or manager of the temple resigns his office or is removed from office. In such a case the successor to the head of the mutt or to the manager of the temple may be substituted as a party under this rule."

F

G

H

The two decisions of this Court relied upon by the High Court in the cases of *State of Orissa v. Klockner and Company and Ors.*, [1996] 8 SCC 377, and *Bhagwan Dass Chopra v. United Bank of India and Ors.*, [1987] Suppl. SCC 536 do not answer the issue involved in the present case as such I need not dilate thereon. A

At this stage, it may not be out of place to consider as to who can file application under Order 22 Rule 10 of the Code seeking leave of the Court to continue the suit. The plain language of Rule 10 referred to above does not suggest that leave can be sought by that person alone upon whom the interest has devolved. It simply says that the suit may be continued by the person upon whom such an interest has devolved and this applies in a case where the interest of plaintiff has devolved. Likewise, in a case where interest of defendant has devolved, the suit may be continued against such a person upon whom interest has devolved, and in both the eventualities leave may be obtained for continuance of the suit by or against the persons upon whom the interest has devolved during the pendency of the suit. If it is laid down that leave can be obtained by that person alone upon whom interest of party to the suit has devolved during its pendency, then there may be preposterous results as such a party might not be knowing about the litigation and consequently not feasible for him to apply for leave and if a duty is cast upon him then in such an eventuality he would be bound by the decree even in cases of failure to apply for leave. As a rule of prudence, initial duty lies upon the plaintiff to apply for leave in case the factum of devolution was within his knowledge or with due diligence could have been known by him. The person upon whom the interest has devolved may also apply for such a leave so that his interest may be properly represented as the original party, if it is ceased to have an interest in the subject matter of dispute by virtue of devolution of interest upon another person, may not take interest therein, in ordinary course, which is but natural, or by colluding with the other side. If it is laid down that leave can be sought by that person alone upon whom the interest has devolved, a party upon whom interest has devolved, upon his failure to apply for leave, even though he had no knowledge of the litigation, would be deprived from challenging correctness of the decree even by filing a properly constituted suit on the ground that the original party having lost interest in the subject of dispute, did not properly prosecute or defend the litigation or, in doing so, colluded with the adversary. Any other party, in our view, may also seek leave as, for example, where plaintiff filed a suit for partition and during its pendency he gifted away his undivided interest in the Mitakshara Coparcernary in favour of the contesting defendant, in that event B C D E F G H

- A the contesting defendant upon whom the interest of the original plaintiff has devolved has no cause of action to prosecute the suit, but if there is any other so-sharer who is supporting the plaintiff, may have a cause of action to continue with the suit by getting himself impleaded or transposed to the category of plaintiff from that of the defendant as it is well settled that in a partition suit every defendant is plaintiff, provided he has cause of action for seeking partition. In my view prayer for leave can be made not only by the person upon whom interest has devolved, but also by the plaintiff or any other party or person interested.

In the case of *Kiran Singh and Ors. v. Chaman Paswan and Ors.*, AIR

- C (1954) SC 340, question was raised, when decree passed by a Court is nullity and whether execution of such a decree can be resisted at the execution stage which would obviously mean by taking an objection under Section 47 of the Code. Venkatarama Ayyar, J. speaking for himself and on behalf of B.K. Mukherjea, Vivian Bose, Ghulam Hasan, JJ. observed at page 352 thus:

- D "It is a fundamental principle well-established that a decree passed by a Court without jurisdiction is a nullity, & 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."

- E In the case of *Ittyavira Mathai v. Varkey Varkey and Anr.*, AIR (1964) SC 907, the question which fell for consideration before this Court was if a Court, having jurisdiction over the parties to the suit and subject matter thereof passes a decree in a suit which was barred by time, such a decree would come within the realm of nullity and the Court answered the question in the negative holding that such a decree cannot be treated to be nullity but at the highest be treated to be an illegal decree. While laying down the law, the Court stated at page 910 thus:

"If the suit was barred by time and yet, the court decreed it, the court would be committing an illegality and therefore the aggrieved party

- G would be entitled to have the decree set aside by preferring an appeal against it. But it is well settled that a court having jurisdiction over the subject matter of the suit and over the parties thereto, though bound to decide right may decide wrong and that even though it decided wrong it would not be doing something which it had no jurisdiction to do. It had the jurisdiction over the subject matter and it had the jurisdiction over the party and, therefore, merely because
- H

it made an error in deciding a vital issue in the suit, it cannot be said that it has acted beyond its jurisdiction. As has often been said, courts have jurisdiction to decide right or to decide wrong and even though they decide wrong, the decrees rendered by them cannot be treated as nullities.” A

Again, in the case of *Vasudev Dhanjibhai Modi v. Rajabhai Abdul Rehman and Ors.*, AIR (1970) SC 1475, the Court was considering scope of objection under Section 47 of the Code in relation to the executability of a decree and it was laid down that only such a decree can be subject matter of objection which is nullity and not a decree which is erroneous either in law or on facts. J.C. Shah, speaking for himself and on behalf of K.S. Hegde and A.N. Grover, JJ. laid down the law at pages 1476-77 which runs thus :- B

“A Court executing a decree cannot go behind the decree between the parties or their representatives; it must take the decree according to its tenor, and cannot entertain any objection that the decree was incorrect in law or on facts. Until it is set aside by an appropriate proceeding in appeal or revision, a decree even if it be erroneous is still binding between the parties. C

When a decree which is a nullity, for instance, where it is passed without bringing the legal representatives on the record of a person who was dead at the date of the decree, or against a ruling prince without a certificate, is sought to be executed an objection in that behalf may be raised in a proceeding for execution. Again, when the decree is made by a Court which has no inherent jurisdiction to make it, objection as to its validity may be raised in an execution proceeding if the objection appears on the face of the record: where the objection as to the jurisdiction of the Court to pass the decree does not appear on the face of the record and requires examination of the questions raised and decided at the trial or which could have been but have not been raised, the executing Court will have no jurisdiction to entertain an objection as to the validity of the decree even on the ground of absence of jurisdiction”. D

In the case of *Everest Coal Company (P) Ltd. v. State of Bihar and Ors.*, [1978] 1 SCC 12, this Court held that the leave for suing the receiver can be granted even after filing of the suit and held that the infirmity of not obtaining the leave does not bear upon the jurisdiction of the trial court or the cause of action but it is peripheral. It also held that if a suit prosecuted E

H

A without such leave culminates in a decree, the same is liable to be set aside. These observations do not mean that the decree is nullity. On the other hand, the observation of the Court at page 15 that "any litigative disturbance of the Court's possession without its permission amounts to contempt of its authority; and the wages of contempt of Court in this jurisdiction may well be voidability of the whole proceeding" would lend support to the view and such decree is voidable but not void.

In the case of *Haji S.K. Subhan v. Madhavrao*, AIR (1962) SC 1230, the question which fell for consideration of this Court was as to whether an executing Court can refuse to execute a decree on the ground that the same

C has become inexecutable on account of the change in law in Madhya Pradesh by promulgation of M.P. Abolition of Proprietary Rights (Estates, Mahals, Alienated Lands) Act, 1950 and a decree was passed in ignorance of the same. While answering the question in the affirmative, the Court observed at page 1287 thus:-

D "The contention that the Executing Court cannot question the decree and has to execute it as it stands, is correct, but this principle has no operation in the facts of the present case. The objection of the appellant is not with respect to the invalidity of the decree or with respect to the decree being wrong. His objection is based on the effect of the provisions of the Act which has deprived the respondent of his proprietary rights including the right to recover possession over the land in suit and under whose provisions the respondent has obtained the right to remain in possession of it. In these circumstances, we are of opinion that the executing Court can refuse to execute the decree holding that it has become inexecutable on account of the change in law and its effect."

F In the case of *Vidya Sagar v. Smt. Sudesh Kumari and Ors.*, AIR (1975) SC 2295, an objection was taken under Section 47 of the Code to the effect that decree passed was incapable of execution after passing of U.P. Zamindari Abolition and Land Reforms Act, 1950 and the objection was allowed by the High Court and when the matter was brought to this Court, G the order was upheld holding that decree was incapable of execution by subsequent promulgation of legislation by State Legislature.

H The expressions 'void and voidable' have been subject matter of consideration before English Courts times without number. In the case of *Duravappah v. Fernando and Ors.*, (1967) 2 All England Law Reports 152, the dissolution of municipal council by the minister was challenged. Question

had arisen before the Privy Council as to whether a third party could challenge such a decision. It was held that if the decision was complete nullity, it could be challenged by anyone, anywhere. The Court observed at page 158 thus:-

A

B

C

D

E

F

G

H

"The answer must depend essentially on whether the order of the Minister was a complete nullity or whether it was an order voidable only at the election of the council. If the former, it must follow that the council is still in office and that, if any councillor, ratepayer or other person having a legitimate interest in the conduct of the council likes to take the point, they are entitled to ask the court to declare that the council is still the duly elected council with all the powers and duties conferred on it by the Municipal Ordinance."

In the case of *In re McC. (A minor)* (1985) 1 Appeal Cases 528, the House of Lords followed the dictum of Lord Coke in the *Marshalsea* case quoting a passage from the said judgment which was rendered in 1613 where it was laid down that where the whole proceeding is *coram non judice* which means void ab initio, the action will lie without any regard to the precept or process. The Court laid down at page 536 thus:-

D

E

F

G

H

"Consider two extremes of a very wide spectrum. Jurisdiction meant one thing to Coke in 1613 when he said in the *Marshalsea* Case (1613) 10 Co. Rep. 68b, at p. 76a:

E

F

G

H

'when a court has jurisdiction of the cause, and, proceeds inverso ordine or erroneously, there the party who sues, or the officer or minister of the court who executes the precept of process of the court, no action lies against them. But when the court has not jurisdiction of the cause, there the whole proceeding is *coram non judice*, and actions will lie against them without any regard of the precept or process.....'

The Court of the *Marshalsea* in that case acted without jurisdiction because, being limited to members of the King's household, it entertained a suit between two citizens neither of whom was a member of the King's household. Arising out of those proceedings a party arrested "by process of the *Marashalsea*" could maintain an action for false imprisonment against, *inter alios*, "the Marshal who directed the execution of the process." This is but an early and perhaps the most quoted example of the application of a principle illustrated by many later cases where the question whether a court or other tribunal of limited jurisdiction has acted without jurisdiction (*coram non judice*) can be

A determined by considering whether at the outset of the proceedings that court had jurisdiction to entertain the proceedings at all. So much is implicit in the Lord Coke's phrase "jurisdiction of the cause".

In another decision, in the case of Director of Public *Prosecutions v. Head* (1959) Appeal Cases 83, House of Lords was considering validity of B an order passed by Secretary of the State in appeal preferred against judgment of acquittal passed in a criminal case. The Court of Criminal Appeal quashed the conviction on the ground that the aforesaid order of Secretary was null and void and while upholding the decision of the Court of Criminal Appeal, the House of Lords observed at page 111 thus:-

C "This contention seems to me to raise the whole question of void or voidable: for if the original order was void, it would in law be a nullity. There would be no need for an order to quash it. It would be automatically null and void without more ado. The continuation orders would be nullities too, because you cannot continue a nullity. The D licence to Miss Henderson would be a nullity. So would all the dealings with her property under Section 64 of the Act of 1913. None of the orders would be admissible in evidence. The Secretary of State would, I fancy, be liable in damages for all of the 10 years during which she was unlawfully detained, since it could all be said to flow from his negligent act; see section 16 of the Mental Treatment Act, 1930.

E But if the original order was only voidable, then it would not be automatically void. Something would have to be done to avoid it. There would have to be an application to the High Court for certiorari to quash it."

F This question was examined by Court of Appeal in the case of *R. v. Paddington Valuation Officer and Anr., Ex parte Peachey Property Corporation, Ltd.* (1965) 2 All England Law Reports 836 where the valuation list was challenged on the ground that the same was void altogether. On these facts, Lord Denning, M.R. laid down the law observing at page 841 thus:-

G "It is necessary to distinguish between two kinds of invalidity. The one kind is where the invalidity is so grave that the list is a nullity altogether. In which case there is no need for an order to quash it. It is automatically null a void without more ado. The other kind is when the invalidity does not make the list void altogether, but only voidable. In that case it stands unless and until it is set aside. In the present case

H

the valuation list is not, and never has been, a nullity. At most the first respondent-acting within his jurisdiction-exercised that jurisdiction erroneously. That makes the list voidable and not void. It remains good until it is set aside." A

De Smith Woolf and Jowell in their treatise *Judicial Review of Administrative Action*. Fifth Edition, paragraph 5-044, has summarised the concept of void and voidable as follows: B

"Behind the simple dichotomy of void and voidable acts (invalid and valid until declared to be invalid) lurk terminological and conceptual problems of excruciating complexity. The problems arose from the premise that if an act, order or decision is *ultra vires* in the sense of outside jurisdiction, it was said to be invalid, or null and void. If it is *intra vires* it was, of course valid. If it is flawed by an error perpetrated within the area of authority of jurisdiction, it was usually said to be voidable; that is, valid till set aside on appeal or in the past quashed by certiorari for error of law on the face of the record." C

Clive Lewis in his works *Judicial Remedies in Public Law* at page 131 has explained the expressions "void and voidable" as follows:- D

A challenge to the validity of an act may be by direct action or by way of collateral or indirect challenge. A direct action is one where the principal purpose of the action is to establish the invalidity. This will usually be by way of an application for judicial review or by use of any statutory mechanism for appeal or review. Collateral challenges arise when the invalidity is raised in the course of some other proceedings, the purpose of which is not to establish invalidity but where questions of validity become relevant." E

Thus the expressions "void and voidable" have been subject matter of consideration on innumerable occasions by courts. The expression "void" has several facets. One type of void acts, transactions, decrees are those which are wholly without jurisdiction, ab initio void and for avoiding the same no declaration is necessary, law does not take any notice of the same and it can be disregarded in collateral proceeding or otherwise. The other type of void act, e.g. may be transaction against a minor without being represented by a next friend. Such a transaction is good transaction against the whole world. So far the minor is concerned, if he decides to avoid the same and succeeds in avoiding it by taking recourse to appropriate proceeding the transaction becomes void from the very beginning. Another type of void act may be F

G

H

A which is not a nullity but for avoiding the same a declaration has to be made. Voidable act is that which is a good act unless avoided, e.g., if a suit is filed for a declaration that a document is fraudulent and/or forged and fabricated, it is voidable as apparent state of affairs is real state of affairs and a party who alleges otherwise is obliged to prove it. If it is proved that the document is forged and fabricated and a declarations to that effect is given a transaction becomes void from the very beginning. There may be a voidable transaction which is required to be set aside and the same is avoided from the day it is so set aside and not any day prior to it. In cases, where legal effect of a document cannot be taken away without setting aside the same, it cannot be treated to be void but would be obviously voidable.

C Under Section 47 of the Code, all questions arising between the parties to the suit in which the decree was passed or their representatives relating to the execution, discharge or satisfaction of decree have got to be determined by the court executing the decree and not by a separate suit. The powers of Court under Section 47 are quite different and much narrower than its powers of appeal, revision or review. The exercise of powers under Section 47 of the Code is microscopic and lies in a very narrow inspection hole. Thus it is plain that executing Court can allow objection under Section 47 of the Code to the executability of the decree if it is found that the same is void ab initio and nullity, apart from the ground that decree is not capable of execution

E under law either because the same was passed in ignorance of such a provision of law or the law was promulgated making a decree inexecutable after its passing. In the case on hand, the decree was passed against the defendant—M/s. Orissa Mining Corporation (Alloys) Ltd., which was subsidiary of Orissa Mining Corporation Ltd., and later merged with it as its Charge Chrome Division which was taken over by the Government of Orissa, without seeking leave of the Court to continue the suit against the Government of Orissa upon whom interest of the defendant devolved and impleading it. Such an omission would not make the decree void ab initio so as to invoke Section 47 of the Code and entail dismissal of execution. The validity or otherwise of a decree may be challenged by filling a properly constituted suit or taking any other remedy available under law on the ground that original defendant absented himself from the proceeding of the suit after appearance as it had no longer any interest in the subject of dispute or did not purposely take interest in the proceeding or colluded with the adversary or any other ground permissible under law.

H In the case *Dhurandhar Prasad Singh* (supra), suit was filed challenging

order of termination of the plaintiff passed by governing body of a college in which the governing body which was defendant entered appearance but did not file written statement. During the pendency of the suit, the college became a constituent unit of Bihar University and the governing body ceased to exist. The University was not impleaded as a party to the suit inasmuch as no prayer was made seeking leave of the Court to continue the suit against the University. An ex parte decree was, however, passed against the erstwhile management, i.e., the governing body. When the decree was put into execution against the University as well, it filed objection under Section 47 of the Code to the effect that as the University had not been impleaded as party, the suit was fit to be dismissed, the decree passed against the governing body which ceased to exist on the date of passing of the decree was nullity and could not have been enforced against the University. The objection, which was first allowed by the executing court, on remand by the High Court, rejected. Thereafter, when the matter was taken in revision to the High Court of judicature at Patna, the objection under Section 47 of the Code to the executability of the decree was allowed. Against the said order, an appeal by special leave was successfully preferred and in view of the decisions referred to above, it was laid down that such a decree was not a nullity and could be executed against the successor-in-interest even though interest devolved upon it during the pendency of the suit but neither it was impleaded as a party nor leave was sought by any person to contest the suit against it. It appears that while so laying down the law some observations were made in paragraph 26 of the judgment at page 549 which run thus:-

"It simply says that the suit may be continued by the person upon whom such an interest has devolved and this applies in a case where the interest of the plaintiff has devolved. Likewise, in a case where interest of the defendant has devolved, the suit may be continued against such a person upon whom interest has devolved, *but in either eventuality, for continuance of the suit against the persons upon whom the interest has devolved during the pendency of the suit, leave of the court has to be obtained.*"

It is true that from a bare perusal of the portion underlined above, which is not happily worded, it can be reasonably inferred that this Court laid down the law that in case of devolution of interest either of plaintiff or defendant, the requirement of seeking leave of the court to continue the suit is mandatory. The Court really intended to say that leave of the court to contest the suit could be obtained in cases of devolution of interest of plaintiff and defendant

A both, without there being any distinction.

The present case is squarely covered by the aforesaid decision of this Court in the case of *Dhurandhar Prasad Singh (singh)* and the same in my view cannot be distinguished and does not require reconsideration as there is nothing to doubt correctness of law laid down therein.

B As pointed out by learned counsel appearing on behalf of the appellant Section 47 of the Code, *inter alia*, provides that *all questions* arising between the parties to the suit in which the decree was passed, or their representatives, and *relating to the execution, discharge or satisfaction of the decree*, shall be determined by the Court executing the decree and not by a separate suit.

C Explanation (1) whereof lays down that for the purposes of this section, a plaintiff whose suit has been dismissed and a defendant against whom a suit has been dismissed are parties to the suit. For better appreciation, it may be useful to refer to relevant portion of Section 47 of the Code which runs thus:

D “47. **Questions to be determined by the Court executing decree.** (1) *All questions* arising between the parties to the suit in which the decree was passed, or their representatives, and *relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit.*

E **Explanation I.**—For the purposes of this section, a plaintiff whose suit has been dismissed and a defendant against whom a suit has been dismissed are parties to the suit.”

[Emphasis added]

F It is true that if the questions raised in the objection under Section 47 of the Code is such which can be decided by the Executing Court, it is that court alone which is obliged to determine the same and it cannot be adjudicated by a civil court in a separate suit. But as I have already laid down that the question whether a decree can be executed against successor-in-interest of the defendant upon whom interest has devolved during the pendency of the suit without bringing him on the record and seeking leave to continue the suit against him, cannot be decided under Section 47 of the Code by Executing Court such a decree being not a nullity, and only voidable which can be avoided by challenging the same effectively in a properly constituted suit in a court of competent jurisdiction on the grounds permitted by law as already enumerated above and in such a case the bar created by Section 47(1) of the

G Code to the institution of separate suit shall not operate. The provisions of

H

Sections 50 and 52 of the Code relied upon by learned counsel appearing on behalf of the appellant can be of no avail for deciding the point in issue as the same can apply in cases of *death of a person* covered by Order 22 Rules 3 and 4 of the Code, as the case may be, and not in cases of *assignment, creation or devolution of interest* which is governed exclusively by Rule 10 of Order 22 of the Code.

A

Sections 2(c), (3) 4(5) and of the Ordinance, under which the right, title and interest of the Corporation in relation to its Charge Chrome Division, stood transferred and vested in the Government of Orissa and its consequences were provided read thus:-

B

“2(c). Company means the Orissa Mining Corporation Ltd.”

C

“3. On and from the appointed day, Charge Chrome Division of the Company and the right, title and interest of the Company in relation to the Charge Chrome Division shall, by virtue of the Ordinance, stand transferred to, and vested in, the State Government of Orissa.”

D

“4(5). If, on the appointed day, any suit, appeal or other proceedings of whatever nature in relation to any property which has vested in the State Government under Section 3 or instituted or preferred by or against the Charge Chrome Division is pending, *the same shall not abate, be discontinued or be, in any ways pre-judicially affected by reason of the vesting and transfer of the Charge Chrome Division of the Company* but the suit, appeal or other proceeding may be continued or enforced by or against the State Government or, where the Charge Chrome Division of the Company is vested under Section 6 in any other company, by or against the other company.”

E

[Emphasis added]

F

“5 Every liability of the Charge Chrome Division of the Company including dues to foreign and Indian Banks shall be the liability of the State Government on which the properties of the Charge Chrome Division has vested and shall be enforceable against the State Government or, where the Charge Chrome Division of the Company is directed to vest in any other company, against the other company.”

G

From a bare perusal of the aforementioned provisions of the Ordinance, it would be plain that liability of the Charge Chrome Division in the suit upon its being taken over became liability of the Government of Orissa and

H

A is enforceable against it. Ordinance lays down that if a suit is pending against the Charge Chrome Division or in relation to its properties, both of which have vested in the Government of Orissa, under the provisions of Ordinance, *the same shall neither abate nor be discontinued nor in any manner prejudicially affected by reason of vesting and transfer* under the Ordinance.

B Such a provision that the suit shall not abate, be discontinued or in any manner prejudicially affected by reason of devolution of interest during its pendency has not been explicitly made in Order 22 Rule 10 of the Code like Section 4(5) of the Ordinance, but the same is implicit therein. Both the provisions lay down that in case there is devolution of interest during the pendency of a suit under Order 22 rule 10 of the Code as well as Section 4(5) of the Ordinance, the suit may be continued by or against the person upon whom the interest has devolved. A successor-in-interest may challenge validity or otherwise of a decree passed against the predecessor-in-interest without impleading the successor-in-interest upon whom the interest has devolved during the pendency of the suit, by filing a properly constituted suit or taking any other remedy available under law on the ground that the original defendant

D absented himself from the proceeding of the suit after appearance and filing written statement as he had no longer any interest in the subject of dispute or did not purposely take interest in the proceeding or colluded with the adversary or any other ground permissible under law as such a challenge would make the decree voidable and not void much less ab initio so as to

E make it nullity. If a question that a decree is voidable is allowed to be raised under Section 47 of the Code, the same would amount to opening the doors for unscrupulous litigants to take second round of litigation as a result of which lis can never attain any finality. In the case on hand, it has nowhere been stated in the objection that the Government of Orissa had no knowledge of pendency of the present suit. It has also not been stated that the original defendant after appearance and filing written statement in the suit did not take interest in the proceeding as by virtue of devolution it lost interest therein or there was some purpose behind it or it colluded with the adversary but the ground has been simply taken that the Government of Orissa has not been brought on the record, therefore, the decree passed against the

G predecessor-in-interest cannot be enforced against it even though, the interest has devolved upon the Government of Orissa during the pendency of the litigation. In my view, in the present case, on the ground taken in the objection, it cannot be said that the decree is even voidable much less void or void ab initio. Therefore, the Government of Orissa is precluded from challenging its validity or otherwise even by filing a separate suit much less taking objection under Section 47 of the Code. Consequently I hold that it was rightly found

in the impugned orders that the decree was enforceable against the Government **A** of Orissa and no interference with the orders impugned is called for.

Accordingly, the appeal fails and the same is dismissed. In the circumstances, there shall be no order as to costs.

ORDER OF THE COURT

B

In view of the difference of opinion, the matter may be listed before a larger Bench. The registry is directed to place the matter before Hon'ble the Chief Justice of India for appropriate directions.

K.K.T.

Matter referred to Larger Bench. **C**