IN THE HIGH COURT OF MADHYA PRADESH
AT JABALPUR

BEFORE

HON'BLE SHRI JUSTICE DWARKA DHISH BANSAL

ON 29th OF JULY, 2025

SECOND APPEAL No.1824 of 2025

DR. SUBHASH CHANDRA JAIN

Versus

SHRI DIGAMBAR JAIN MAHILA TRUST

Appearance

Shri Dhanya Kumar Jain and Shri Avinash Zargar – Advocates for the appellant.

Shri Mohd. Aadil Usmani – Advocate for respondent.

JUDGMENT

Heard on the question of admission and IA no.15516/2025, which is an application under Section 144 CPC and perused the record of Civil Suit, Civil Appeal and Execution Case.

2. Instant second appeal has been filed by the appellant/defendant/tenant challenging the judgment and decree dated 04.07.2025 passed by Third District Judge, Sagar in RCA No.126/2024 affirming the judgment and decree dated 27.09.2024 passed by First Civil Judge Junior Division, Sagar in RCSA 61/2018, whereby Courts below have concurrently decreed the plaintiff's suit for eviction of rented premises as well as arrears of rent as per general provisions of the Transfer of Property Act, 1882.

3. Learned Counsel for the appellant submits that the respondent/plaintiff being registered public trust under the M.P. Public Trust Act, 1951, provisions of the M.P. Accommodation Control Act, 1961 are not applicable to the rented

premises. Further, in the light of concurrent findings recorded by Courts below, there is no dispute about relationship of lessor/landlord and lessee/tenant between the parties and the appellant is tenant on rent of Rs.800/- p.m. in rented premises. He also does not dispute about valid determination and termination of tenancy by issuing notice dtd.18.10.2017 (Ex.P/8) under Section 106 of the Transfer of Property Act, 1882 and submits that the appellant is engaged in medical store business and for vacating the rented premises he may be granted some reasonable time as shifting the business operation involves procedural requirements including obtaining a fresh drug license at the new location. After discussion with their clients, who were present on the dates of hearing, learned counsel for the parties are agreed that the appellant may be granted time upto 30.06.2026 to vacate the rented premises.

4. As a result of the aforesaid, learned counsel for the appellant prays for withdrawal of the second appeal and as agreed between the parties time upto 30.06.2026 is granted to vacate the rented premises on following conditions:-

(i) The appellant/defendant/tenant shall vacate the rented premises on or before **30.06.2026.**

(ii) The appellant/defendant/tenant shall regularly pay monthly rent to the respondent/landlord and shall also clear all the dues, if any, including the costs of the litigation, if any, imposed by Courts below, within a period of 30 days.

(iii) The appellant/defendant/tenant shall not part with the rented premises to anybody and shall not change nature of the same.

(iv) The appellant/defendant/tenant shall furnish an undertaking with regard to the aforesaid conditions within a period of three weeks before the learned Court below/Executing Court.

(v) If the appellant/defendant/tenant fails to comply with any of the aforesaid conditions, the respondent/landlord shall be free to execute the decree forthwith.

(vi) If after filing of the undertaking, the appellant/defendant/tenant does not vacate the rented premises on or before 30.06.2026 and creates any obstruction, appellant shall be liable to pay mesne profits of Rs.500/- per day, so also contempt of order/judgment of this Court.

(vii) It is made clear that the appellant/defendant/tenant shall not be entitled for further extension of time after **30.06.2026**.

5. But, as it is clear from the record of Executing Court, in the present case even before filing of this second appeal by the appellant before this Court, under the orders of Executing Court, the appellant was dispossessed from the rented premises, therefore, with a view to remove ambiguity, if any, which may occur at the time of restoration of possession, some order is required to be passed on the pending application under Section 144 of C.P.C.

6. As has been argued by learned Counsel for the parties**,** in the instant second appeal, following substantial question of law is involved for consideration of this Court :

> **"Whether notice to the judgment debtor is not necessary, when execution application is filed within a period of two years?**

7. With the consent of parties, arguments on the aforesaid substantial question of law, are heard.

8. Apparently the impugned judgment and decree was passed by First Appellate Court on 04.07.2025. Certified copy of impugned judgment and decree shows that it was applied for on 07.07.2025, which after preparation was delivered to the appellant on 14.07.2025 by copying section of Sagar District. On that basis, second appeal was preferred on 21.07.2025, meaning thereby the appellant took reasonable and best efforts in preferring the second appeal before this Court and in total 14 days of passing of the impugned judgment and decree, the second appeal was filed and registered.

9. It is well known that right to appeal is not a mere matter of procedure but is a substantive and statutory right, for which as per Article 116 of the Limitation Act, 1963, there is a limitation of 90 days for appeals to a High Court and 30 days for appeals to any other Court that too after excluding the period spent in obtaining the certified copy as provided under Section 12 of the Limitation Act, 1963. If provision of Order XXI Rule 22 of CPC is considered in the manner, in which Executing Court has considered, then probably there

would not be any right of first or second appeal, after passing of the judgment and decree by Trial Court i.e. the Court of first instance.

10. Although trial Court had passed its judgment and decree on 27.09.2024 and first appellate Court had passed its judgment and decree on 04.07.2025, affirming the judgment and decree of Trial Court but then in the light of principle of merger, the decree of First Appellate Court became executable, because there can be only one decree and the decree of Trial Court gets merged in the decree of First Appellate Court.

11. In the case of Kunhayammed and others vs. State of Kerala and another, **(2000) 6 SCC 359,** Hon'ble Supreme Court has held as under :

> **"43.** We may look at the issue from another angle. The Supreme Court cannot and does not reverse or modify the decree or order appealed against while deciding a petition for special leave to appeal. What is impugned before the Supreme Court can be reversed or modified only after granting leave to appeal and then assuming appellate jurisdiction over it. If the order impugned before the Supreme Court cannot be reversed or modified at the SLP stage obviously that order cannot also be affirmed at the SLP stage.

To sum up our conclusions are :-

> (i) Where an appeal or revision is provided against an order passed by a Court, tribunal or any other authority before superior forum and such superior forum modifies, reverses or affirms the decision put in issue before it, the decision by the sub-ordinate forum merges in the decision by the superior forum and it is the latter which subsists, remains operative and is capable of enforcement in the eye of law.
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> (ii) The jurisdiction conferred by Article 136 of the Constitution is divisible into two stages. First stage is up to the disposal of prayer for special leave to file an appeal. The second stage commences if and when the leave to appeal is granted and special leave petition is converted into an appeal.
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> (iii) Doctrine of merger is not a doctrine of universal or unlimited application. It will depend on the nature of jurisdiction exercised by the superior forum and the content or subject-matter of challenge laid or capable of being laid shall be determinative of the applicability or merger. The superior jurisdiction should be capable of reversing, modifying or affirming the order put in issue before it. Under Article 136 of the Constitution the Supreme Court may reverse, modify or affirm the judgment-decree or order appealed against while exercising its appellate jurisdiction and not while exercising the discretionary jurisdiction disposing of petition for special leave to appeal. The doctrine of merger can therefore be applied to the former and not to the latter.
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> (iv) An order refusing special leave to appeal may be a non-speaking order or a speaking one. In either case it does not attract the doctrine of merger. An order refusing special leave to appeal does not stand substituted in place of the order under challenge. All that it means is

that the Court was not inclined to exercise its discretion so as to allow the appeal being filed.

(v) If the order refusing leave to appeal is a speaking order, i.e. gives reasons for refusing the grant of leave, then the order has two implications. Firstly, the statement of law contained in the order is a declaration of law by the Supreme Court within the meaning of Article 141 of the Constitution. Secondly, other than the declaration of law, whatever is stated in the order are the findings recorded by the Supreme Court which would bind the parties thereto and also the Court, tribunal or authority in any proceedings subsequent thereto by way of judicial discipline, the Supreme Court being the Apex Court of the country. But, this does not amount to saying that the order of the Court, tribunal or authority below has stood merged in the order of the Supreme Court rejecting special leave petition or that the order of the Supreme Court is the only order binding as res judicata in subsequent proceedings between the parties.

(vi) Once leave to appeal has been granted and appellate jurisdiction of Supreme Court has been invoked the order passed in appeal would attract the doctrine of merger; the order may be of reversal, modification or merely affirmation.

(vii) On an appeal having been preferred or a petition seeking leave to appeal having been converted into an appeal before Supreme Court the jurisdiction of High Court to entertain a review petition is lost thereafter as provided by sub-rule (1) of Rule (1) of Order 47 of the C.P.C.**"**

12. Following the principles laid down by Hon'ble Supreme Court in the case of Kunhayammed (**supra**), this Court also in the case of Smt. Ushabai and anr. V. Sarubai and others, **I.L.R. 2024 MP 946,** observed as under :

"9. Following the aforesaid decision in the case of Kunhayammed and others (supra), the Supreme Court in the case of Surinder Pal Soni vs. Sohan Lal (D) Thru LR and others (2020) 15 SCC 771, has held as under:-

> "17. We are unable to accept the submission. The doctrine of merger operates as a principle upon a judgment being rendered by the Appellate Court. In the present case, once the Appellate Court confirmed the judgment and decree of the Trial Court, there was evidently a merger of the judgment of the Trial Court with the decision of the Appellate Court. Once the Appellate Court renders its judgment, it is the decree of the Appellate Court which becomes executable. Hence, the entitlement of the decree holder to execute the decree of the Appellate Court cannot be defeated."

10. In the light of aforesaid settled legal position relating to principle of merger, it is clear that it is decree of first appellate Court, which has to be executed. But impugned order passed by executing Court does not show that it has taken into consideration decree of first appellate Court**."**

13. From the record of Execution Case no. EX-A/34/2025 it is clear that application under Order XXI Rule 11 CPC for execution of decree of Trial Court was filed on 09.07.2025. Taking into consideration the provisions of Order XXI Rule 22 of CPC and as execution was filed within 2 years of the

decree, the Executing Court without issuing any notice and in a hurried manner ordered to issue warrant of possession/recovery for the date 26.07.2025, pursuant thereto process fee was submitted on 12.07.2025, thereupon warrant was issued on 16.07.2025, which was executed on 19.07.2025 by District Nazir by forcibly keeping all the medicines outside the rented premises, however without removing all the articles, which admittedly are inside the rented premises, which is also clear from the supurdginama dtd. 19.07.2025 signed by District Nazir, whereby 18 items/articles have been given in supurdgi of the decree holder.

14. For better appreciation, the provision of Order XXI Rule 22 of CPC is reproduced as under :

Order XXI

22. Notice to show cause against execution in certain cases

"(1) Where an application for execution is made,-

(a) more than two years after the date of the decree, or

(b) against the legal representative of a party to the decree or where an application is made for execution of a decree filed under the provisions of section 44A, or

(c) against the assignee or receiver in insolvency, where the party to the decree has been adjudged to be an insolvent,

the Court executing the decree shall issue a notice to the person against whom execution is applied for requiring him to show cause, on a date to be fixed, why the decree should not be executed against him :

Provided that no such notice shall be necessary in consequence of more than two years having elapsed between the date of the decree and the application for execution if the application is made within **two years** from the date of the last order against the party against whom execution is applied for, made on any previous application for execution, or in consequence of the application being made against the legal representative of the judgment-debtor if upon a previous application for execution against the same person the Court has ordered execution to issue against him.

(2) Nothing in the foregoing sub-rule shall be deemed to preclude the Court from issuing any process in execution of a decree without issuing the notice thereby prescribed, if, for reasons to be recorded, it considers that the issue of such notice would cause unreasonable delay or would defeat the ends of justice."

15. Aforesaid provision does not clearly mention meaning of the decree for the purpose of issuance of notice, which is required to be considered in the light of decision of Hon'ble Supreme Court in the case of Kunhayammed and others (**supra**) and Surinder Pal Soni (**supra)**, which clearly says that there can be a single decree capable for execution. If it is so, then it is clear as a light of the day, that period of two years shall start from the date of last order/judgment/ decree, it may be the order/judgment/decree of Trial Court, First Appellate Court, Second Appellate Court or the Hon'ble Supreme Court.

16. There is another provision under Order XLI Rule 5(2) CPC which gives the power to appellate Court to stay the execution of decree and as per the decision in the case of Ku. Arvinder Kaur and Ors. Vs. Shankerlal Jain and Ors., **1997 MPJR (I) SN 14,** the Executing Court itself has jurisdiction to stay the execution for some reasonable time, certainly upon filing an application in that regard. But in the present case, no notice to the appellant/judgment debtor was issued, therefore, he could not take that recourse available under the Civil Procedure Code, 1908. In my considered opinion, all the aforesaid provisions have been made with a view to avoid any hardship to the bonafide litigant/judgment debtor.

17. It is well known that ***justice delayed is justice denied*** but at the same time in some cases ***justice hurried may amount to justice buried***. In the case of Mahadev Govind Gharge & others v. Special Land Acquisition Officer, Upper Krishna Project, Jamkhandi, Karnataka, **(2011) 6 SCC 321**, Hon'ble Supreme Court has held as under :

> **"28.** In the case of Kailash v. Nanhku & others, [(2005) 4 SCC 480], a Bench of three Judges of this Court while interpreting the provisions of Order VIII Rule 1 of the Code, which has more stringent language and provides no such discretion to extend the limitation as provided to the Courts in Order XLI Rule 22, had observed that despite the use of such language in the provisions of Order VIII Rule 1 of the Code, the judicial discretion to extend the limitation contained therein has been a matter of legal scrutiny for quite some time but now the law is

well settled that in special circumstances, the Court can even extend the time beyond the 90 days as specified therein and held as under:

> "**The object is to expedite the hearing and not to scuttle the same. The process of justice may be speeded up and hurried but the fairness which is a basic element of justice cannot be permitted to be buried...**
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> **In an adversarial system, no party should ordinarily be denied the opportunity of participating in the process of justice dispensation.** Unless compelled by express and specific language of the statute, the provisions of CPC or any other procedural enactment ought not to be construed in a manner which would leave the Court helpless to meet extraordinary situations in the ends of justice."

18. In the present case due to hurried steps taken by the Executing Court, the appellant has suffered a great loss to his property and reputation, who was forced to vacate the rented premises illegally i.e. without issuing any notice provided under Order XXI Rule 22 of CPC, which is nothing but burial of justice, because the act of Executing Court has flouted well known principle of natural justice, mistakenly or otherwise.

19. It is also well known principle of law that nobody should remain unheard and if before passing an order against a party, he is not heard, the order would be void and would not be binding on that party because the Court gets jurisdiction over the matter only when the opposite/affected party is heard. Meaning thereby, the order passed without notice/hearing is without jurisdiction and order passed without jurisdiction is nullity. In the case of Mujtabai Begum and another v. Mehbub Rehman and others, **AIR 1959 MP 359**, a division Bench of this Court has held as under:

> **"16.** The effect of an omission to issue notice is elaborately discussed in Govinda Pillai v. K. L. Muthali (S) AIR 1955 Tray Co 113. In that case, an ex parte decree was first passed against three defendants, but it was set aside at the instance of one of them. The suit was heard again and was decreed against all of them for a larger sum. It was held that defendant No. 1, who was not given notice of subsequent trial, was not bound by the decree which was null and void against him. The following passage from Brown on Jurisdiction was quoted in support of the dictum:

> "When service of the notice or process is made the Court acquired jurisdiction after the lapse of the, time fixed for the defendant's appearance, and if he fails his default will be entered. The Court has necessarily the power to determine the sufficiency of service. If it determines this wrongfully and enters the default prematurely, the defendant should call its attention to it and ask that the default be set aside. Hence the rule that such error is not jurisdictional.
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> A distinction is to be made between a case where there is no service whatever, and one which is simply defective or irregular. In the first case the Court acquires no jurisdiction and its judgment is void; in the other case, if the Court to which the process is returnable adjudges the service to be sufficient, and renders a judgment thereon, such judgment is not void, but only subject to be set aside by the Court which gave it, upon reasonable and proper application, or reversed upon appeal".
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> Reference was also made to several cases decided by the Travancore-Cochin High Court, and the conclusion reached was that a decree which is passed without notice to a defendant must be regarded as no decree in the eye of law and must be disregarded. We respectfully agree with this view**."**

20. In the case of Canara Bank v. State of T.N. and another**, (2000) 3 SCC 210**, Hon'ble Supreme Court has also held as under:

> **"6.** We have set out in the earlier part of this order that the learned single Judge on full investigation of the records found that notice to the company had not been given, which was admitted by the learned counsel for the appellant before the learned single Judge. Under the scheme of the Act it is clear that the company is also liable to make good the amounts which remain outstanding and, therefore, principles of natural justice also require that a notice should have been given to it. The view taken by the learned single Judge and accepted by the Division Bench to which we have adverted to is placed on sound footing. **Therefore, we are of the view that the adjudication made by the Commissioner is void for want of notice to the company and, therefore, unenforceable** and so the High Court was justified in refusing to grant the relief to the appellant**."**

21. So, it is well settled that when a decree or order is without jurisdiction, the same is void, and the same is not required to be declared void, cancelled or set aside, and as being a nullity, it can be ignored. In the case of State of Maharashtra vs. Pravin Jethalla Kamdar (Dead) By LRs, **(2000) 3 SCC 460**, Hon'ble Supreme Court has held as under :

> **"5.** As already noticed, in Bhim Singhji's case, (AIR 1981 SC 234) (supra) Section 27(1) insofar as it imposes a restriction on transfer of any urban or urbanisable land with a building

or a portion of such building, which is within the ceiling area, has been held to be invalid. Thus, it has not been and cannot be disputed that the order dated 26th May, 1976, was without jurisdiction and nullity. Consequently, sale deed executed pursuant to the said order would also be a nullity**. <u>It was not necessary to seek a declaration about the invalidity of the said order and the sale deed. The fact of plaintiff having sought such a declaration is of no consequence</u>.** When possession has been taken by the appellants pursuant to void documents, Article 65 of the Limitation Act will apply and the limitation to file the suit would be 12 years. When these documents are null and void, ignoring them a suit for possession simpliciter could be filed and in the course of the suit it could be contended that these documents are nullity. In Ajudh Raj v. Moti S/o Mussadi, (1991) 3 SCC 136 : (1991 AIR SCW 1576 : AIR 1991 SC 1600) this Court said that if the order has been passed without jurisdiction, the same can be ignored as nullity, that is, non-existent in the eyes of law and is not necessary to set it aside; and such a suit will be governed by Article 65 of the Limitation Act. The contention that the suit was time barred has no merit. The suit has been rightly held to have been filed within the period prescribed by the Limitation Act**."**

22. Similarly, in the case of Prem Singh and others vs. Birbal and others, **(2006) 5 SCC 353**, Hon'ble Supreme Court has held as under :

"25. In Balvant N. Viswamitra & Ors. vs. Yadav Sadashiv Mule (Dead) Through LRS. & Ors. [(2004) 8 SCC 706], this Court opined that a void decree can be challenged even in execution or a collateral proceeding holding:

> "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 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 a nullity. Validity of such decree or order can be challenged at any stage, even in execution or collateral proceedings."

23. It is also not disputed that if the decree holder has taken some benefit/possession under the order/decree and in appeal/revision, if the order/decree is reversed, then the judgment debtor is entitled for restoration of such benefit/possession, as has been held by Hon'ble Supreme Court in the case of Om Prakash Ram vs. The State of Bihar & Ors., **(2019) 14 SCC 281**, relevant paragraphs of which are as under :

> **"10.** It is evident that the possession of the property in question needs to be restored in favour of the appellant, inasmuch as he was dispossessed based on the ex-parte decree dated 06.06.1994 which ultimately came to be set aside, and as the underlying suit (viz. Title Suit No. 01/2003) itself came to be dismissed vide order dated 29.08.2006, as mentioned supra.
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> **11.** The appeals are allowed with the above observations. It is open to the appellant to get back possession of the property in question in accordance with law in terms of this judgment**."**

24. In view of the aforesaid discussion and as has been observed in foregoing paragraph 15, if an execution application is filed within a period of two years from the date of judgment and decree, notice to the judgment debtor is not necessary, but the period of two years shall start from the date of final order/judgment/decree. Meaning thereby, if an appeal is preferred against a judgment and decree sought to be executed, the requisite period of two years under Order XXI Rule 22 of C.P.C. has to be computed from the date of decision of the said appeal, which may be First Appeal, Second Appeal or the appeal filed before Hon'ble Supreme Court.

25. Although Order XXI Rule 22 of CPC provides that no notice is necessary if the execution petition is filed within two years from the date of final order but an exception must be carved out in certain cases of decrees for possession/eviction. It is a settled principle of law that the decree-holder should not be deprived of the fruits of the decree. However, if the execution is carried out with undue haste, or if there is element of fraud, collusion, or procedural irregularity, and the judgment debtor is dispossessed even before the appeal period lapses, it may result in grave injustice. Particularly where the possession of a house, shop, or land is taken away, which directly affects residence or livelihood, the judgment debtor must be given a fair opportunity to approach the appellate Court.

26. Therefore, even if the execution petition is filed within two years, notice must be issued, if it is filed before expiry of limitation period of 30 days or 90

days, prescribed for filing appeal as provided under Article 116 of the Limitation Act, with a view to allow the judgment debtor a chance to exercise his right to appeal. Beyond this initial appeal period, execution can proceed without notice provided no special circumstances exist. Accordingly, the substantial question of law is answered.

27. Although in the present case, the decree of eviction is still intact, but as agreed between the parties, effect and operation of the impugned judgment and decree has been postponed upto 30.06.2026, therefore, the appellant deserves to be restored with the possession of rented premises along with the articles which are already inside as is clear from the inventory.

28. In view of the aforesaid discussion, the entire proceedings of the Execution Case being void/nullity, the application under Section 144 of C.P.C. (IA no.15516/2025) stands allowed with a direction to the Executing Court to restore the possession of the rented premises to the appellant through the same staff including the District Nazir, who executed the decree on 19.07.2025.

29. With the aforesaid, this second appeal is disposed of.

30. However, parties shall bear their own costs.

31. Pending application(s), if any, shall also stand disposed of.

(DWARKA DHISH BANSAL)
JUDGE

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