PETITIONER:
SRI BUDHIA SWAIN & ORS.

Vs.

RESPONDENT:
GOPINATH DEB & ORS.

DATE OF JUDGMENT: 07/05/1999

BENCH:
A.P.Misra, R.C.Lahoti

JUDGMENT:

R.C. LAHOTI, J.

The respondent no.1 is a deity seated at village Bishwanathpur in the District of Puri. On an application filed by the respondent no.1 under Sections 6 and 7 of the Orissa Estates Abolition Act, 1951 (hereinafter 'the Act', for short), the Estate Abolition Collector-cum- Additional Tashildar passed an order of settlement dated 2.4.1966 in favour of respondent no.1 settling the lands covered by khata numbers 431 & 438 of village Bishwanathpur. Rent schedule was issued pursuant to the order of settlement and rent was realised from the respondent no.1 from the date of settlement. There was no appeal preferred against the order dated 2.4.1966 and thus the order of settlement achieved a finality.

On 24.7.74 the appellants, 12 in number, who are residents of village Panibhandar, District Puri filed an application seeking review of the order of settlement dated 2.4.66. The only ground for review raised in the application was that the public notice of the claim preferred by the respondent no.1 was not served in the locality as prescribed. The O.E.A. Collector purported to exercise the power of review under Section "151 CPC" having formed an opinion that the proclamation was not properly done in accordance with the law as the order-sheet of the case did not disclose the manner of proclamation. The respondent no.1 preferred an appeal before the Additional District Magistrate (Land Records) Puri, who formed an opinion that the O.E.A. Collector was not expressly conferred with any power of review but the order could be justified as one of recalling of an earlier order which had occasioned failure of justice. If the mandatory provisions of Section 8A (2) of the Act were not followed then the order dated 2.4.1966 was rendered a nullity. The learned ADM observed that the claim petition by respondent no.1 was filed some time in 1963, i.e. beyond the prescribed period of six months. The learned ADM also observed that the claim preferred by the respondent no.1 should have been treated as a lease case and not as a claim case. At the end, sustaining the setting aside of the order dated 2.4.1966 the learned ADM remanded the case to the O.E.A. Collector-cum-Additional Tahsildar for disposal afresh in the light of the observations made by him. The respondent no.1 preferred a petition under Article 226/227 of the Constitution before

the High Court of Orissa. The petition has been allowed and the orders of O.E.A. Collector and the ADM have both been set aside by the High Court forming an opinion that the power to review as assumed by O.E.A. Collector did not exist and the circumstances of the case did not warrant the exercise of power to recall an earlier order passed by the O.E.A. Collector which was one passed within the jurisdiction of the O.E.A. Collector being set aside, more so when the averments made in the application seeking review/recall did not go beyond alleging an irregularity merely or at the worst an illegality. The aggrieved appellants, the 12 villagers who had sought for review/recall, have filed this appeal by special leave impugning the order of the High Court. Having heard the learned counsel for the parties we are of the opinion that no fault can be found with the order of the High Court and the appeal therefore deserves to be dismissed.

The only provision for review in the Act is to be found in Section 38A whereunder a review may be sought for within one year from the date of the decision or order but only on the ground that there has been a clerical or arithmetical mistake in the course of any proceedings in the Act. It was also conceded by the learned counsel for the appellants that the proceedings initiated by the appellants were certainly not under Section 38A. It was also conceded at the bar that the subsequent action of the O.E.A. Collector could be sustained only if supportable by the power to recall. What is a power to recall? Inherent power to recall its own order vesting in tribunals or courts was noticed in Indian Bank Vs. M/s Satyam Fibres India Pvt. Ltd. 1996 (5) SCC 550. Vide para 23, this Court has held that the courts have inherent power to recall and set aside an order (i) obtained by fraud practised upon the Court, (ii) when the Court is misled by a party, or (iii) when the Court itself commits a mistake which prejudices a party. In A.R. Antulay Vs. R.S. Nayak & Anr. AIR 1988 SC 1531 (vide para 130), this Court has noticed motions to set aside judgments being permitted where (i) a judgment was rendered in ignorance of the fact that a necessary party had not been served at all and was shown as served or in ignorance of the fact that a necessary party had died and the estate was not represented, (ii) a judgment was obtained by fraud, (iii) a party has had no notice and a decree was made against him and such party approaches the Court for setting aside the decision ex debito justitiae on proof of the fact that there was no service. In Corpus Juris Secundum (Vol. XIX) under the Chapter "Judgment- Opening and Vacating" (paras.265 to 284 at pages 487-510) the law on the subject has been stated. The grounds on which the courts may open or vacate their judgments are generally matters which render the judgment void or which are specified in statutes authorising such actions. Invalidity of the judgment of such nature as to render it void is a valid ground for vacating it at least if the invalidity is apparent on the face of the record. Fraud or collusion in obtaining a judgment is a sufficient ground for opening or vacating it. A judgment secured in violation of an agreement not to enter judgment may be vacated on that ground. However, in general, a judgment will not be opened or vacated on grounds which could have been pleaded in the original action. A motion to vacate will not be entered when the proper remedy is by some other proceedings, such as by appeal. The right to vacation of a judgment may be lost by waiver or estoppel. Where a party injured acquiesces in the rendition of the judgment or

submits to it, waiver or estoppel results. In our opinion a tribunal or a court may recall an order earlier made by it if (i) the proceedings culminating into an order suffer from the inherent lack of jurisdiction and such lack of jurisdiction is patent, (ii) there exists fraud or collusion in obtaining the judgment, (iii) there has been a mistake of the court prejudicing a party or (iv) a judgment was rendered in ignorance of the fact that a necessary party had not been served at all or had died and the estate was not represented. The power to recall a judgment will not be exercised when the ground for re-opening the proceedings or vacating the judgment was available to be pleaded in the original action but was not done or where a proper remedy in some other proceeding such as by way of appeal or revision was available but was not availed. The right to seek vacation of a judgment may be lost by waiver, estoppel or acquiescence. A distinction has to be drawn between lack of jurisdiction and a mere error in exercise of jurisdiction. The former strikes at the very root of the exercise and want of jurisdiction may vitiate the proceedings rendering them and the orders passed therein a nullity. A mere error in exercise of jurisdiction does not vitiate the legality and validity of the proceedings and the order passed thereon unless set aside in the manner known to law by laying a challenge subject to the law of limitation. In Hira Lal Patni Vs. Sri Kali Nath AIR 1962 SC 199, it was held :-

"…….The validity of a decree can be challenged in execution proceedings only on the ground that the court which passed the decree was lacking in inherent jurisdiction in the sense that it could not have seisin of the case because the subject matter was wholly foreign to its jurisdiction or that the defendant was dead at the time the suit had been instituted or decree passed, or some such other ground which could have the effect of rendering the court entirely lacking in jurisdiction in respect of the subject matter of the suit or over the parties to it." As already noted the appellants sought for review or recall of the order from the O.E.A. Collector solely by alleging that the notice which was required to be published in the locality before settling the land in favour of the respondent no.1 was not served in accordance with the manner prescribed by law. The appellants did not plead 'non-service of the notice' but raised objection only with regard to 'the manner of service of the notice'. The High Court had called for and perused the record of the O.E.A. Collector and noted that the notice was issued on 15.12.1963 inviting public objection. The notice was available on record but some

of its pages were missing. The O.E.A. Collector had noted in his order dated 23.2.1966 as under :-.lm20

"It is only due to missing of some pages of the proclamation including the last page over which the report of the process server was there, a scope was available to the objectors to file this petition. Under the above circumstances, it is not necessary to issue another proclamation and entertain further objection since the case is being heard and going to be finalised on 14.3.66."

The O.E.A. Collector was satisfied of the notice having been published. Assuming that the notice was not published in the manner contemplated by law, it will at best

be a case of irregularity in the proceedings but certainly not a fact striking at the very jurisdiction of the authority passing the order. The Appellate Authority, i.e., the ADM has in his order noted two other contentions raised by the appellants, viz., (i) the application for settlement by the respondent no.1 was not filed within the prescribed time, and (2) the application should have been treated as an application for lease and should not have been treated as a claim case. None of the two pleas was raised by the appellants in their pleadings. None of the two was urged before O.E.A. Collector. Therefore there was no occasion to consider those pleas. Still we may make it clear that none of the two pleas could have been a ground for recalling the order which was otherwise within the jurisdiction conferred on the O.E.A. Collector. Though it is a disputed question of fact, as noted by the High Court, that the application by the respondent no.1 was filed within the prescribed time or not. Nevertheless, we are very clear in our mind that an order made on an application filed beyond the time prescribed for filing the same may be an illegal order but is certainly not an order passed without jurisdiction.

A suit or proceeding entertained and decided in spite of being barred by limitation is not without jurisdiction; at worst in can be a case of illegality. In Ittyavira Mathai Vs. Varkey Varkey & Anr. - AIR 1964 (Vol.15) SC 907 this Court has held:-

".....Even assuming that the suit was barred by time, it is difficult to appreciate the contention of learned counsel that the decree can be treated as a nullity and ignored in subsequent litigation. 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 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 it made an error in deciding a vital issue in the suit, it cannot be said that it had 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...."

So also whether an application by way of claim petition or an application for grant by way of lease, both were entertainable by the O.E.A. Collector and it was for him to decide which way he chose to deal with the application. In any case, he had the jurisdiction to deal with the application. No case was made out before the O.E.A. Collector and the ADM for recalling the order of settlement dated 2.4.1966. The order did not suffer from lack of jurisdiction or from error of jurisdiction much less an inherent one. The High Court has rightly set aside the order dated 2.2.1976 passed by the O.E.A. Collector as the same was without jurisdiction. In passing the order dated 2.2.1976 O.E.A. Collector had exercised a jurisdiction which the law did not vest in him. The order could not have

been sustained by the ADM in

appeal. No fault can be found with the view taken by the High Court. The appeal is therefore dismissed though without any order as to the costs.