

## Sashimohan Debnath and Another Vs Monomohan Debnath and Others

**Court:** Gauhati High Court

**Date of Decision:** Aug. 6, 1969

**Acts Referred:** Civil Procedure Code, 1908 (CPC) – Order 21 Rule 34, Order 21 Rule 34(1), Order 21 Rule 34(3), 104(2), 115

**Citation:** AIR 1971 Guw 118

**Hon'ble Judges:** P.K. Goswami, J

**Bench:** Single Bench

**Advocate:** J.P. Bhattacharjee and S.N. Medhi, for the Appellant; P. Choudhuri and S.K. Sen, for the Respondent

### Judgement

P.K. Goswami, J.

This Miscellaneous second appeal is directed against an order of the learned Subordinate Judge No. 1, Cachar,

allowing the objection petition of the judgment-debtors in the course of an execution proceeding relating to a decree for specific performance of a

contract.

2. At the very outset Mr. Choudhury, the learned Counsel for the Respondents, raises a preliminary objection that the appeal is not maintainable

u/s 104 (2) of the Code of Civil Procedure. Mr. Bhattacharjee, the learned Counsel for the Appellants, fairly enough,, and in my opinion, rightly,

concedes that the appeal may not be maintainable, but he submits that this should be treated as an application for revision to which Mr. Choudhuri

does not object. This matter is, therefore, heard as an application u/s 115 of the Code of Civil Procedure.

3. The decree was for specific performance of a contract and the parties fought upto the High Court and the decree of the High Court was, as

found by the learned Subordinate Judge, that the Defendant "mi. 1, the Respondent No. 1 therein, would sell this suit land to the Plaintiff on receipt

of the consideration of Rs. 500/-. There was also another observation in the judgment of the High Court that the question of tenancy was kept

open holding that the tenancy right could not be decided in that suit The draft deed of conveyance was submitted in the course of the execution

proceeding under Order 21. Rule 34 of the Code of CPC and the judgment-debtor objected to some portions of the draft, particularly relating to

handing over of possession, as he claimed that in the meantime, he has acquired right of occupancy tenant in a portion of the land. The learned

Munsiff refused to accept the objection of the Respondent." The learned Subordinate Judge in appeal, however, directed as follows;

The condition of giving has possession of the entire land to the purchaser cannot arise and so in the proposed Kabala, there should be a recitation

for giving symbolical possession of the tenanted lands and for giving khas possession of the lands besides the tenanted lands and the proposed

draft Kabala should be accordingly approved after correction.

It is this portion of the order which is seriously objected to by Mr. Bhattacharjee. under Order 21. Rule 34 of the CPC where a decree is for the

execution of a document, the decree-holder may prepare a draft of the document in accordance with the terms of the decree and deliver the same

to the Court. The draft, therefore, should be in conformity with the terms of the decree. under Sub-rule (3) of that Rule, where" the judgment-

debtor objects to the draft, his objections shall be stated in writing within such time, and the Court shall make such order approving or altering the

draft, as it thinks fit, Mr. Choudhuri, the learned Counsel for the opposite party, puts considerable emphasis on the words ""as it thinks fit"" in Sub-

rule (3). According to him, this gives the Court complete and absolute power to pass any order it thinks fit regarding approving or altering the draft

document. This argument, however, fails to take note of the provisions of Sub-rule (1) of Rule 34. All that the executing court in a matter like this is

concerned is to determine whether the draft is in conformity with the terms of the decree. The executing court cannot go behind the decree and

therefore has to scrutinize the terms of the decree in order to find whether the draft has gone beyond the terms of the decree. Reading the decree

of the final court in that case, it is not possible to find that there has been any direction regarding the possession of the party. The decree for

executing a document can be executed if the document represented to be only a sale of the land in suit but a deed of conveyance of immovable

property, as is well-known. ordinarily contains such clauses as giving of possession extinguishing the rights of the vendor. In that view of the matter,

the draft deed is not open to objection. Mr. Choudhuri apprehends that by agreeing to the draft as proposed, he may be jeopardizing his rights that

have accrued under the law. It will have to be seen whether such an apprehension is justified or not. Be that as it may, the objected terms of the

learned Subordinate Judge's order are not within"" the scope of Order 21, Rule 34 of the Code of Civil Procedure. There is nothing in the order of

the learned Subordinate Judge to indicate that these terms which he is insisting in the document were incorporated as terms of the decree. That

being the position, he had no jurisdiction to order for incorporating the terms which I have recited above. The draft as submitted by the decree-

holders is approved and the court below will execute the sale deed in accordance with law. This would, however, be without prejudice to the

rights of the judgment-debtor, if any, that have accrued to him under the law. which he may be entitled to agitate in an appropriate proceeding in

future.

4. The appeal treated as a revision petition is allowed. There will, however, be no order as to costs.