

## Dukhharan Mukherji Vs Tara Sundari Dassi and Others

**Court:** Calcutta High Court

**Date of Decision:** Nov. 8, 1978

**Acts Referred:** Civil Procedure Code, 1908 (CPC) " Section 115, 47  
West Bengal Premises Tenancy Act, 1956 " Section 13, 13(1)(f), 13(4)

**Citation:** 83 CWN 147

**Hon'ble Judges:** N.C. Mukherji, J

**Bench:** Single Bench

**Advocate:** Sakti Nath Mukherji and Deba Prosad Mukherji 2, for the Appellant; Bankim Chandra Dutta and Partha Dutta, for the Respondent

**Final Decision:** Allowed

### Judgement

N.C. Mukherji, J.

This Rule arises on application u/s 115 of the CPC and is directed against order dated 30th August, 1977, passed by

Shri K.N. Mukherji, Judge, 10th Bench, City Civil Court, Calcutta, in Miscellaneous Case No. 253 of 1976 arising out of Ejectment Execution

Case No. 242 of 1975. The Opposite Parties as landlords instituted Ejectment Suit No. 284 of 1964 before the 10th Bench, City Civil Court,

Calcutta against the petitioner for eviction from the premises in suit, that is, 3 rooms on the first floor and a kitchen on the ground floor of premises

No. 61 A, Madhu Roy Lane on the ground that they reasonably require the same for their own use and occupation. The learned Judge decreed

the suit. Being aggrieved, the petitioner preferred an appeal being F.A. No. 581 of 1967 before this court. During the pendency of the appeal

clause (f) of sub-section (1) of section 13 of the West Bengal Premises Tenancy Act was substituted by Clauses (f) and (ff). The said new Clause

(ff) applied to the aforesaid appeal and it became necessary to determine whether or not the opposite parties were in possession of any reasonable

suitable accommodation. Chittatosh Mukherji, J., who heard the appeal, was pleased to frame two additional issues for a proper determination of

the case and to send the case to the trial court keeping the appeal pending before his Lordship. The two additional issues were to the following

effect:--

(1) Are the plaintiffs already in possession of any reasonably suitable accommodation, or not ?

(2) Whether the requirement of the plaintiffs may be substantially satisfied by ejecting the defendant from a part only of the premises in terms of

sub-section (4) of section 13 of the West Bengal Premises Tenancy Act ?

The trial court was directed to make findings on the above two issues after giving the parties opportunities to adduce further evidence. The trial

court after taking additional evidence passed an order on 20th March, 1972 to the effect that the plaintiffs' requirement, being only of one bed

room, may substantially be satisfied by evicting the defendant from one of the 3 bed rooms in his occupation on the first floor and the learned Judge

held accordingly. The learned Judge after making his findings as above on the two issues sent his findings to this Court. Thereafter, the appeal was

again heard by Chittatosh Mukherji, J, who, however, set aside the judgment and decree of the trial court and dismissed the suit. Being aggrieved,

the opposite parties preferred Letters Patent Appeal No. 36 of 1974. S.K. Mukherji and M.N. Roy, JJ., allowed the Letters Patent Appeal. Their

Lordships agreed with the finding of the trial court that the requirement of plaintiffs 1, 2 and 3 can be satisfied from the existing accommodation,

but the plaintiff No. 4 required only one room. Their Lordships also agreed with the finding of the trial court that in the circumstances the plaintiffs'

requirement may substantially be satisfied by evicting the defendant from one of the 3 rooms. Even though their Lordships very clearly found so in

their judgment, in the concluding portion it was stated that the judgment and decree of the appellate court are set aside and those of the learned

trial court are restored. It may be mentioned that the trial court decreed the suit in full, though their Lordships in the Letters Patent Appeal found

that if the opposite parties got one room their requirement will be satisfied and that can be done by partially evicting the petitioner, yet the effect of

the concluding portion of the judgment is that the opposite parties got a full decree.

After obtaining such a decree the opposite parties started Execution Case. The petitioner filed an application under Sec. 47 of the Code and

hence, the Miscellaneous Case. In the objection under Sec. 47 of the Code it was stated some subsequent events happened which clearly go to

show that the plaintiff No. 4 is no more in requirement of any accommodation in the suit premises. It was also stated in the said application that the

decree passed by the High Court simply stated that the judgment and decree of the trial court were restored. The order of this court in Letters

Patent Appeal required clarification. In view of the findings of the learned Judges, the opposite parties cannot get a decree for recovery of

possession of the entire premises. After the disposal of the Letters Patent Appeal the petitioner filed an application in this Court for making a note

of the subsequent events. The said application was ultimately taken up for hearing by R. Bhattacharyya and Jana, JJ., who were pleased to allow

the Petitioner to withdraw the said application and to file an application for review. Ultimately an application for review was filed. The said

application was taken up for hearing by M.N. Roy, J., who dismissed the application as the same was barred by limitation. His Lordship however,

did not enter into the merits of the application. The learned Judge, City Civil Court, dismissed the application under Sec. 47 of the Code holding

that this Court restored the judgment and decree of the trial court which passed a full decree in favour of the opposite parties. An application for

review was filed and the same was dismissed by this Court. That being so, the learned Judge was of opinion that the execution of the decree

cannot be effectively challenged by the judgment-debtor. Being aggrieved by the aforesaid order the petitioner has come up to this court.

2. Mr. Sakti Nath Mukherji, learned Advocate appearing on behalf of the petitioner, contends that the decree passed by the Letters Patent Bench

is a nullity. In this connection, it is further submitted that the decree is not executable being contrary to the provisions of the West Bengal Premises

Tenancy Act. Mr. Mukherji contends that section 13(4) of the West Bengal Premises Tenancy Act provides that where the landlord requires the

premises on any of the grounds mentioned in clause (f) or clause (ff) of sub-section (1) and the court is of opinion that such requirement may be

substantially satisfied by ejecting the tenant or the sub-tenant from a part only of the premises and allowing the tenant or the sub-tenant to continue

in occupation of the rest, then, if the tenant or the subtenant agrees to such occupation, the court is to pass such decree accordingly and fix the

proportionate rent for the portion remaining in the occupation of the tenant or the sub-tenant. Mr. Mukherji submits that section 13(4) is really a

proviso to section 13(1) (f) and (ff) and the provisions of section 13(4) are mandatory. Mr. Mukherji submits that the Letters Patent Bench in very

clear terms agreed with the findings of the trial court that the plaintiff Nos. 1, 2 and 3 did not require any portion of the suit premises and that their

requirement could be substantially met by the existing accommodation. Their Lordships also agreed with the finding of the trial court that the

plaintiff No. 4 required only one room of the suit premises. Their Lordships also agreed with the further finding of the trial court that plaintiff No.

4's requirement can be satisfied by evicting the defendant from one of the rooms of the suit premises. It may be mentioned that Chittatosh

Mukherji, J., did not agree with the finding of the trial court that plaintiff No. 4 required one room in the suit premises and dismissed the suit The

Letters Patent Bench was, therefore, correct in setting aside the judgment and decree of Chittatosh Mukherji, J. But, after setting aside the

judgment and decree of Chittatosh Mukherji, J. the Letters Patent Bench restored the judgment and decree of the trial court. Mr. Mukherji submits

that the Letters Patent Bench omitted to note that the trial court passed a decree for eviction in respect of the entire suit premises. According to

Mr. Mukherji the Letters Patent Bench never meant to pass a full decree in favour of the plaintiff. The Letters Patent Bench in very plain and clear

words found that it was only plaintiff No. 4 who required one room in respect of the suit premises. Letters Patent Bench also agreed with the

finding of the trial court that the requirement of plaintiff No. 4 can be satisfied by evicting the defendant from one of the rooms of the suit premises.

In view of such finding it was incumbent on the Letters Patent Bench to pass a decree for partial eviction in respect of one of the rooms of the suit

premises. But, that has not been done in this case. Instead, the decree of the trial court has been restored and as a result, the plaintiffs have started

execution of the said decree. If this decree is allowed to be executed then the defendant will be evicted from the entire suit premises. It may be

mentioned that after the suit was sent back, the trial court found that the plaintiffs required only one room and the Letters Patent Bench agreed with

such finding. In such circumstances, Mr. Mukherji submits that the decree passed by the Letters Patent Bench being in violation of the provisions

of section 13(4) of the West Bengal Premises Tenancy Act is a nullity and such a decree cannot be executed being contrary to the provisions of

the Act. To fortify his argument, Mr. Mukherji cites before me several decisions.

3. He first refers to a decision reported in Bahadur Singh and Another Vs. Muni Subrat Dass and Another, . In this case, a decree was passed for

recovery of possession of a premises without being satisfied that a ground of eviction existed. It was held that the decree was a nullity and could

not be executed. Mr. Mukherji next refers to a decision reported in Kaushalya Devi and Others Vs. Shri K.L. Bansal, . In this case, it was held

that ""the decree passed on the basis of an award was in contravention of section 13(1) of the Delhi and Ajmir Rent Control Act because the court

had passed the decree in terms of the award without satisfying himself that the ground of eviction existed. Accordingly the decree in so far as it

directed delivery of possession of the premises to the landlord was a Nullity and could not be executed."" Mr. Mukherji next refers to a decision

reported in Ferozi Lal Jain Vs. Man Mal and Another, . In this case it has been held that ""the jurisdiction of the court to pass a decree for recovery

of possession of any premises depends upon its satisfaction that one or more of the grounds mentioned in section 13(1) of the Delhi and Ajmir

Rent Control Act have been proved". Mr. Mukherji next refers to a decision reported in AIR 1976 Gau 54 (Chandan Mall Bapna vs. Abdul Gani

Meah). It has been laid down in this case that "if a decree is not in conformity with or in violation of certain mandatory provisions of law or barred

by certain statutory provisions it cannot be executed; and if an objection is taken by the judgment debtor to that effect the executing court will have

to decide u/s 47 of the Code." Mr. Mukherji very much relied on this decision and contends that in the present case also the decree that has been

passed by the Letters Patent Bench is in violation of the mandatory provisions of section 13(4) of the West Bengal Premises Tenancy Act. An

objection has been taken u/s 47 of the Code and if it be found that the decree is a nullity being in contravention of the provisions of the West

Bengal Premises Tenancy Act then it must be held that the decree is non-executable. Mr. Mukherji next relies on a decision reported in Bhavan

Vaja and Others Vs. Solanki Hanuji Khodaji Mansang and Another, . In this case, the court had to deal with the question of powers of an

executing court in disposing of an application u/s 47 of the Code. It has been held that "for construing a decree an executing court can and in

appropriate cases ought to take into consideration the pleadings as well as the proceedings leading upto the decree". Relying on this decision Mr.

Mukherji contends that reading the judgment of the Letters Patent Bench it becomes very clear that their Lordships did not agree with the findings

of Chittatosh Mukherji, J., that even the plaintiff No. 4 did not require any room in the suit premises. But their Lordships agreed with the findings of

the trial court that plaintiff Nos. 1, 2 and 3 did not require any room and only plaintiff No. 4 required one room and that plaintiff No. 4's

requirement could be sufficiently met by evicting the defendant from a portion of the suit premises. This being the conclusive findings of the Letters

Patent Bench the decree which has been passed by the Letters Patent Bench cannot, by any stretch of imagination, be said to follow from the

judgment and that being so, Mr. Mukherji contends that such a decree is a nullity. The last case referred to by Mr. Mukherji has been re-parted in

K.K. Chari Vs. R.M. Seshadri, , In this case, it has been held that "even when a decree is passed on the basis of a compromise the court must be

satisfied that one or other ground of eviction exists. If without such satisfaction a decree for eviction is passed then such a decree must be

considered as a nullity".

4. Mr. Bankim Chandra Dutta, learned Advocate appearing on behalf of the opposite parties, contends that the objection which has been raised in

the application u/s 47 was rightly rejected by the executing court as the executing court was bound to execute the decree which was passed by the

Letters Patent Bench. The executing court, Mr. Dutta submits, has no authority to question the correctness of the decree passed by the Letters

Patent Bench. Even assuming that there has been an error in the passing of the decree of the Letters Patent Bench that can only be corrected by

the Bench itself, or by the higher court. The executing court cannot come to a finding that the decree which has been passed by the Letters Patent

Bench is not a correct decree and that some other decree ought to have been passed by the said Bench. Mr. Dutta also submits that in the present

case, the trial court never passed a decree for partial eviction. At the first instance, the trial court decreed the suit in full. There was an appeal. The

case was sent back on remand by Chittatosh Mukherji, J., after his Lordship framed two issues. After remand, the trial court found that the

plaintiffs have no other reasonably suitable accommodation and that the plaintiff No. 4 required one room in the suit premises and his requirement

could be satisfied by partial eviction. Those findings were forwarded to this court. Chittatosh Mukherji, J. did not agree with the finding of the trial

court that plaintiff No. 4 required one room and as such dismissed the suit. The plaintiffs preferred an appeal to the Letters Patent Bench which set

aside the judgment and decree passed by Chittatosh Mukherji, J. and restored the judgment and decree of the trial court. In such circumstances, it

cannot be said that the decree passed by the Letters Patent Bench is a nullity and that the same is not executable. In the circumstances as stated

above Mr. Dutta Submits that the executing court has no jurisdiction to question the legality and validity of the decree and the executing court has

no other option but to pass an order for executing the decree. Mr. Dutta in support of his contention first referred to a decision reported in

Topanmal Chhotamal Vs. Kundomal Gangaram and Others, . In this case their Lordships found "it was manifest from the pleadings and the

judgment that though a personal decree was sought against defendants 2 to 6 the court expressly refused to give that relief and expressly confined

it to the assets of the firm in the hands of the parties". It was held that the executing court could not go behind the decree. Mr. Dutta next submits

that only lack of jurisdiction of a court can be challenged in an execution proceeding. In support of his contention Mr. Dutta refers to Seth Hiralal

Patni Vs. Sri Kali Nath, . Mr. Dutta next contends that if it be found that the court has jurisdiction over the subject matter and the parties then even

if the decision be wrong it cannot be said that such a decision is a nullity. In support of his submission Mr. Dutta seeks reliance from a decision

reported in Ittavira Mathai Vs. Varkey Varkey and Another, . In this connection, Mr. Dutta further submits that the executing court cannot go

behind the decree even if it is erroneous in law, or on facts. Mr. Dutta next submits that in such circumstances the real point is to see whether the

court could have passed the order. But the facts of the present case, it may be noted, are different. In the present case nobody challenges the

orders of the Letters Patent Bench in setting aside the judgment and decree of Chittotosh Mukherji, J. But, the difficulty was created by passing an

order that the judgment and decree of the trial court be restored. As has already been stated, the Letters Patent Bench never intended to pass a

decree for eviction in respect of the entire premises. The Letters Patent Bench very clearly found that the plaintiffs requirement could be satisfied if

the plaintiffs got only one room out of the suit premise. Mr. Dutta very much relies on a decision reported in Erandol Taluka Gramodyog, Utpadak

Sahakari Society, Erandol Vs. Sunil Waste Corporation, In this case, a suit was filed without prior service of a notice as required under the law. It

was held ""that is a defect which affects the maintainability of the suit and not the inherent jurisdiction of the court. If a decree is passed in such a suit

such decree was open to challenge in appeal. But if no appeal is preferred such a decree must be held to be binding between the parties and this

point cannot be agitated in execution proceeding as the executing court cannot go behind the decree"".

5. As has already been indicated the Letters Patent Bench found as follows:--""On the other question of partial eviction it appears that the

defendant agreed to vacate one of the bed rooms in his occupation of the first floor in favour of the plaintiffs if it was found that the plaintiff's

requirement would be satisfied by such partial eviction. We find that the learned trial court has found that the requirement of the plaintiff Nos. 1, 2

and 3 would be satisfied from the accommodation which was available and plaintiff No. 4 only requires one bed room. I uphold the findings of the

learned trial court on that issue"". After findings as above, the Letters Patent Bench ordered as follows:--""In view of the above and respectfully

agreeing with the reasons as given hereinafter by S.K. Mukherji, J, I am of opinion that the learned appellate court was not right in allowing the

appeal of the tenant defendant and dismissing the suit. We, thus, set aside the judgment and decree of the appellate court as made in F.A. No. 581

of 1967 and confirm the judgment and decree as was made by the learned trial court in Ejectment Suit No. 284 of 1964. This Letters Patent

appeal thus succeeds and is allowed.....

6. On a careful reading of the judgment I have no hesitation to say that the decree that has been passed by the Letters Patent Bench does not

follow from the judgment passed by the said Bench. Their Lordships never intended to pass a decree in respect of the entire suit premises as their

Lordships themselves found that the plaintiff Nos. 1, 2 and 3 did not require any accommodation and that the plaintiff No. 4 required only one bed

room. In such circumstances, I am of the opinion that the Letters Patent Bench really intended to pass a decree for partial eviction. But,

unfortunately that has not been done. After hearing the learned Advocates at length and considering the decisions referred to by them and carefully

considering the facts and circumstances of the case, I am of the opinion that the decree passed by the Letters Patent Bench is a nullity and is

inexecutable. In the result, the application succeeds and the Rule is made absolute. The order passed by the learned Judge is set aside. The

application filed by the petitioner u/s 47 of the CPC is allowed and the execution case is dismissed. There will be no order for costs in this Rule.