
(1978) 11 CAL CK 0005

Calcutta High Court

Case No: Civ. Rev. No. 2974 of 1977

Dukhharan Mukherji

APPELLANT

Vs

Tara Sundari Dassi and
Others

RESPONDENT

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.