

(2013) 03 CAL CK 0009

Calcutta High Court

Case No: E.C. No. 214 of 2012, G.A. No. 10 of 2013 and C.S. No. 102 of 1994

Kharag Singh Baid and Others

APPELLANT

Vs

Ramdas Bansal

RESPONDENT

Date of Decision: March 18, 2013**Citation:** (2013) 4 WBLR 236**Hon'ble Judges:** Indra Prasanna Mukerji, J**Bench:** Single Bench**Advocate:** Ahin Choudhuri, Roibat Banerji, Pooja Das Chowdhury and S.S. Khanna, for the Appellant; P.K. Das and F. Gaffar, Dhruva Ghosh for the Sublessee, for the Respondent

Judgement

Indra Prasanna Mukerji, J.

BACKGROUND

1. More than 40 years ago, on 19th September, 1972, the first and second plaintiffs, as trustees granted a lease of a property to the defendant for a period of 21 years commencing from 1st November, 1972. The property is very huge and is located in the most central part of Kolkata. One part of it comprised of a theatre and cinema house together with a parcel of land. The cinema house was called "Grace". All cinemagoers of this city know it. The area in the lease document was no less than 1 Bigha 3 Cottahs 14 Chittacks and 30 sq.ft. This part was described as premises No. 91, Mahatma Gandhi Road. It was described in Part I of the Schedule to the Deed of Lease. The other part of the property which was described in Part II of the document measured 3 Cottahs and 30 sq. ft. The theatre and cinema house spread over this part also. It was described as premises No. 91A, Mahatma Gandhi Road. Therefore, the entire property leased out to the defendant comprised, according to the deed of lease, an area of 1 Bigha 6 Cottah 14 Chittacks and 60 sq. ft. I was told that on the same day the defendant was granted a 21 years lease of a shop room of about 350 sq. ft. in a part of the premises numbered as 91, Mahatma Gandhi Road.

2. Now, this property, which comprised the subject of the second lease, is well demarcated and nobody has any problem in identifying it.

3. On expiry of the term of the lease the plaintiffs issued a notice to the defendant claiming possession. They had to file a suit in this Court claiming it. It was marked as C.S. No. 102 of 1994. In paragraph 7 of the plaint the plaintiffs pleaded that there were some mutual mistakes made by the lessors and the defendant in the document and asked for its rectification. These mistakes were mentioned in sub-paragraph (a) and (b) of paragraph 7.1 set out those paragraphs:

(a) Whereas the Deed of Lease purported to state that the leasehold premises described in Part-E of the Schedule to the said Deed bears Municipal premises No. 91, Mahatma Gandhi Road, the actual Municipal Premises number of the leasehold premises described in Part-I of the said Schedule was portion of 91A, Mahatma Gandhi Road and one room in the ground floor and one open passage in a portion of premises No. 6A, Sambhu Chatterjee Street.

(b) Whereas the deed of lease purported to state that the leasehold premises described in Part-II of the Schedule to the said deed contains by estimation an area of 3 Cottahs and 30 Sq. ft. the actual measurement of the said premises is 3 Cottahs 3 Chittacks and 30 Sq. ft.

4. Now, I come to the reliefs asked for in the plaint. Claim (a) is very important for the purpose of this application. I set it out:

a) Decree for quiet peaceful and vacant possession of the said property comprising of the demised premises described in the Schedule appended hereto and Marked "A" and delineated in the Map or Plan annexed hereto and marked with the letter "B" and movable Articles particularized in Annexure "C" hereto forming parts of the Demised Premises and meant to be used for the demised premises or in connection therewith as provided for and in terms of the said Indenture of Lease;

5. The property was described in the first Schedule Part-I and Part-II as follows:

PART-I

All that the brick built message tenement of theatre house together with the piece or parcel of land whereon or on part whereof the same is erected and built measuring 15 Cottahs 12 Chittacks be the same a little more or less situate lying at and being 91A, Mahatma Gandhi Road (formerly known as 91A, Harison Road and still formerly known as 91, Harison Road) and one room in the ground floor and one passage in a portion of premises No. 6A, Sambhu Chatterjee Street and comprised in Holding Number (Block No.) XXI of the Northern Division of the town of Kolkata and bounded on the North partly by Sambhu Chatterjee Street and partly by 7, Sambhu Chatterjee Street and partly by College Street Market and partly by premises No. 89, Mahatma Gandhi Road (formerly Harison Road) on the South partly by premises No. 89, Mahatma Gandhi Road (formerly Harison Road), partly by

the remaining portion of the said premises No. 91A, Mahatma Gandhi Road (formerly Harison Road) partly by premises No. 6, Sambhu Chatterjee Street and partly by Mahatma Gandhi Road (formerly Harison Road) and on the West partly by 93, Mahatma Gandhi Road (formerly Harison Road) partly by the said premises No. 5, Sambhu Chatterjee Street and partly by public land. The annual Government Revenue payable in respect of the entire premises is Rs. 7/- 14 Annas.

PART-II

All that the messuage hereditament and premises and the cinema house together with the piece or parcel of land whereon or on part whereof the same is erected and built containing by estimation an area of 3 Cottahs 3 Chittacks and 30 Sq.ft. more or less being part of the premises No. 91A, Mahatma Gandhi Road in the North division of the town of Calcutta and bounded on the North by the remaining portion of the premises No. 91A, Mahatma Gandhi Road, on the East by 89, Mahatma Gandhi Road, on the South by Mahatma Gandhi Road on the West by 93, Mahatma Gandhi Road.

6. Now, it is to be noticed that if the claim portion of the plaint was read with the schedule referred to in it, possession of 18 Cottahs 15 Chittacks 30 Sq. ft. in 91A, Mahatma Gandhi Road was inter alia, claimed.

In the Deed of Lease it was about 26 Cottahs.

7. It took about 11 years for the suit to be made ready for hearing. It was heard and decreed by the judgment and decree of Girish Chandra Gupta J. made on 11th April, 2005.

8. The defendant went up in appeal. The appeal was admitted and heard. It was dismissed on 16 July, 2007.

9. From that judgment and decree the defendant approached the Supreme Court by way of a Special Leave Petition. It was admitted and heard as an appeal. By a judgment and order dated 19 January, 2012, the Supreme Court saw no reason to interfere with the judgment and order of the Division Bench of this Court. The appeal was dismissed with costs assessed at Rs. 25,000/-.

10. Two applications were before me, one was an application for execution, the other was a Section 47 application taken out by the defendant judgment-debtor.

11. I need not say anything about the execution application, now, except that the execution application was moved, I passed an order on 27th September, 2012, upon notice to the judgment debtor appointing Joint Receivers to take symbolic possession of the property in question. The judgment debtors did not appear. Only the sublessee of 350 sq. ft. area was represented. By a subsequent order passed on 18th December, 2012, in the presence of the judgment debtor and the sublessee, I directed that Grace Cinema could continue only till 15th January, 2013. This order

was taken up in appeal by the defendant before a Division Bench of our Court presided over by the Chief Justice. Immediately thereafter the section 47 application (G.A. 10 of 2013) was filed by the judgment debtor. The Appeal Court did not disturb my order. The Appeal was dismissed on 18th January, 2013.

SUBMISSIONS:

12. In the application u/s 47 of the CPC three or four points have been taken by the defendant.

13. The first point is this. In the Deed of Lease the area of the property is shown as 26 Cottahs, whereas in the plaint its area is declared as 18 Cottahs. The decree was passed on the basis of the description of the property in the plaint. Therefore, the plaintiff could not execute the decree based on 26 Cottahs but could execute it for 18 Cottahs only.

14. The second point taken on behalf of the defendant judgment-debtor was that in the tabular statement the decree-holder had tried to execute the original decree as passed by the Court. This decree had been affirmed by the Division Bench and had been reaffirmed by the Supreme Court. Therefore, the decree of the trial Court had merged in the decree of the Supreme Court following the principle of merger as laid down in the case of [Gojer Bros. \(Pvt.\) Ltd. Vs. Shri Ratan Lal Singh](#), ; [Kunhayammed and Others Vs. State of Kerala and Another](#), and [Assambrook Ltd. Vs. Manju Devi Singhania and Others](#), . Therefore, the execution application was defective in as much as it asked for the execution of the trial Court decree. Hence, it should be dismissed.

15. Thirdly, the execution application could only be filed when the original Supreme Court decree had been sent by that Court to the Registry of our Court. Moreover, even a certified copy of the Supreme Court decree was not annexed to the execution application. What was annexed was a certified copy of the decree of the trial Court. Learned Counsel relied upon my decision in the case of [Smt. Madvai Ahluwalia Vs. Vimal Kumar Gupta and Others](#), Since the original Supreme Court decree was not available in our registry, the execution application was not maintainable, it was argued, on the basis of this decision.

16. In the alternative, it was submitted that the execution application was defective and should be dismissed because even a certified copy of the Supreme Court decree was not annexed, relying on a Division Bench judgment of our Court in the case of [Satyendra Nath Bose Vs. Bibhuti Bhusan Bhar and Others](#),

17. Furthermore, there was an area of 350 sq. ft. in respect of which there was a separate lease, executed on the same day. It was subleased. The sublessee was in possession. It was said that this part of the property was also sought to be recovered, illegally. It could not be separated from the rest.

DECISION:

18. Let me deal with the contentions point by point.

The scope of Section 47 of the CPC is indeed very wide. There is no dispute that the court can go into, amongst other things, the question of executability of the decree. But not, when the same point has been raised in appeal and decided by two superior Courts. Then that determination acts as *res judicata*. The executing court cannot reopen that issue, even if it ordinarily had the power to go into it. I find that the question regarding the alleged mis-description of the property was raised before the Division Bench of this Court, on appeal from the decree as appears at internal page 8 of its judgment delivered on 16th July, 2007:

After hearing the learned Counsel for the parties and after going through the materials on record we find that the plaintiffs in the plaint have specifically stated that the subject-matter of the property is the portion delineated by red ink in the lease-deed, which was treated as part of the schedule of the plaint. The defendant has not disputed the execution of the deed and it is not the case of the defendant that otherwise than through the induction by the plaintiffs, he acquired any right, title or interest over the property or the adjoining land by any other translation or by virtue of his own independent right. In such a case, there is no difficulty in identification of the subject-matter of the suit property with only this modification that the property should be described as 91A, Mahatma Gandhi Road which was formerly known as Harison Road. The description has been wrongly given as 90, Harison Road in the lease deed. We, therefore, find no substance in the first contention raised by Mr. Bachawat.

19. The defendant did not accept this decision. He raised this point in appeal before the Supreme Court.

20. This point was decided by the Supreme Court in its judgment and order dated 19th January, 2012 in the following way:

Such a prayer was made on account of the fact that the description of the suit properties in the plaint did not tally with the description of the property in the Lease Deed itself. While in the Lease Deed, the demised property was described as premises No. 91, Mahatma Gandhi Road, Kolkata, in the plaint, the suit property was described as being the property situated at premises No. 91A, Mahatma Gandhi Road and portion of premises No. 6A, Sambhu Chatterjee Street, Kolkata. It is in such context that a separate prayer had been made in the plaint for rectification of the schedule in the Deed of lease, if necessary. The said two reliefs were more or less connected with each other, but even without such rectification, it was possible for the decree to be executed.

27. The said question has been dealt with in detail both by the learned Single Judge, as well as the Division Bench of the High Court, and both the Courts had held that the said issue was not of much consequence, since, as is evident from paragraph 2 of the Written Statement, the Appellant herein was fully aware at the time of

granting of the lease that the demised premises consisted of a building constructed on the premises which consisted of both premises No. 91-A, Mahatma Gandhi Road, as Well as 6-A, Sambhu Chatterjee Street, and that the said two premises were inseparable. Both the Courts, accordingly, rejected the plea of the Appellant that the suit was not maintainable as the description of the suit property did not tally with the description of the property in the lease deed. Consequently, both the Courts allowed the prayer of the Respondent/Plaintiff to rectify the schedule of the lease deed to correct the mis-description of the suit property therein, as there was no doubt as to the identity of the suit property on which Grace Cinema Hall was situate, and the building erected on the two plots was inseparable.

28. In the facts of the case, we see no reason to interfere with the decision of the High Court in this regard.

21. My going into this point would be a serious breach of judicial discipline. It has been finally decided by two superior Courts. Yet, as a matter of formality I reject this point.

22. Next is the question of non availability of the original Supreme Court decree. Order XIII Rules 5 and 6 of the Supreme Court Rules, 1966 say that a Supreme Court decree has to be drawn up and signed. It is to be transmitted by that Court to the High Court. I find that a copy of the judgment and order of the Supreme Court dated 19th January, 2012 has been annexed from page 32 onwards of the execution application. Mr. Choudhuri, learned Senior Counsel for the plaintiff decree-holder submitted that the certified copy of the decree was issued by the Supreme Court Registry on 15th February, 2013. The original certified copy was produced before me.

23. It was submitted on behalf of the judgment debtor that the original decree was not in the registry of this Court. In other words the original decree was not sent by the Supreme Court.

24. To resolve this problem I made an order on 27th February, 2013 directing the Registrar, Original Side to give me a report in this respect. The Registrar, Original Side with great dispatch made an enquiry and filed a report dated 4th March, 2013. It stated that a certified copy of the decree had been received by the Registry on 27th February, 2012. Shortly thereafter a certified copy of the judgment was also received by it.

25. Now, let me discuss the effect of the absence of the original decree in the registry of this Court on this case. Furthermore, the production of a certified copy of the decree at the time of hearing of this application.

26. The application for execution was filed in July, 2012. The certified copy of the decree was issued by the Supreme Court on 15th February, 2013. The certified copy tells us that it was applied for on the same day. At the time of hearing of this

application, it was produced.

27. Under the Code of Civil Procedure, 1908, normally every application for execution of a decree has to be in writing (Order XXI Rule 2). Under sub-Rule 3 the court may require the applicant to produce a certified copy of the decree. It is only in Chapter XVII Rule 10 of the Original Side Rules that it is stated that the application "shall be accompanied by a duly certified copy of the decree". Again Order XLV Rule 15 of the CPC stipulates that for execution of a decree of the Supreme Court the petition shall be accompanied by a certified copy of the Supreme Court decree. It is to be made to the first Court. In this case the first Court is this Court.

28. Now, my judgment in the case of [Smt. Madvai Ahluwalia Vs. Vimal Kumar Gupta and Others](#), cited by Mr. Das, learned Senior Advocate for the judgment debtor stated:

Therefore, this clearly indicates that the original decree of the Supreme Court must be in the file of the court before an execution application is made.

29. It also stated:

I do not find any mandate in the above law or rules for dismissal of an execution application because the original decree of the Supreme Court is not in the file of the court. It is a matter of procedure. The procedure has to be followed. But when the Supreme Court has not sent the original decree and the decree holder has filed an application for execution of that decree on the basis of a certified copy thereof, which is permitted both by the CPC and by the Original Side Rules, I do not think it would serve the purpose of justice to dismiss the application, just because the original decree of the Supreme Court is not in the file of the court.

30. Two things are important in this passage. If the original decree has not been sent by the Supreme Court, that is not fatal. An execution application can be filed with a certified copy of the decree. But I held in that particular case, that the execution application was to remain stayed till the original decree arrived in our Registry from the Supreme Court. The application was not dismissed. Moreover, the interim order of attachment passed was vacated on the ground that this Court had no jurisdiction to attach properties outside its jurisdiction.

31. First of all I would like to clarify the observation that I made in the case of Smt. Madvai Ahluwalia v. Vimal Kumar Gupta & Ors. (supra). In that case the original decree was not sent at all to this Court. So the observation was made on the basis of the above Supreme Court rules that the original decree had to be sent to the High Court.

32. Mr. Das, learned Senior Advocate was quick to submit that since the original decree was not available in the registry, the execution application was incompetent.

33. I am unable to accept this submission. Mr. Choudhuri has very well explained the situation, which I accept. The Supreme Court is the highest Court in the country and is a Court of records. There is every reason to believe that the Court would retain the original decree as part of its records. When Rule 6 refers to the decree it means the certified copy of the decree also.

34. At the time of filing of the execution application the certified copy of the Supreme Court decree was not in the registry of this Court. It arrived subsequently at the time of its hearing. As I held in *Smt. Madvai Ahluwaiia v. Vimal Kumar Gupta & Ors.* (supra), for non availability of the Supreme Court decree, the execution application could not be dismissed but should be stayed. Since, the certified copy of the Supreme Court decree reached the registry of this Court during hearing of this execution application, there is no need to stay it.

35. Now, this certified copy of the decree was only obtained on 15th February, 2013, from the registry of the Supreme Court.

36. The execution application had been filed on the basis of the decree passed by the trial court. Reliance was placed on three judgments in the cases of [M/s. Tetulia Coke Plant\(P\) Ltd. and Others Vs. P.S. Bhattacharya](#), 494 by Debasish Kar Gupta J., an unreported judgment in the G.A. No. 332 of 2009 with E.C. No. 6 of 2009 in the case of *Turner Morrison Limited v. National Insurance Company Limited* rendered by Patherya J. and an unreported judgment of Sanjib Banerjee J. on 21st June, 2011 in E.C. No. 159 of 2011 in the case of *Mrityunjoy Seal & Ors. v. M/s. Delite Builders (P) Ltd.* on the question of merger, it was argued that after the Supreme Court decree the original decree was merged with it and could not be executed. By not producing the certified copy of the Supreme Court decree at this time of filing of the execution application, the decree-holder had made a fatal mistake. Hence, by application of the judgment rendered in the case of *Satyendra Nath Bose v. Bibhuti Bhusan Bhar and Others* reported in AIR 1963 Calcutta 104 the execution application should be dismissed.

37. I think the case [Pushpa Sahakari Avas Samiti Ltd. Vs. Gangotri Sahakari Avas S. Ltd. and Others](#), cited by Mr. Choudhuri is most relevant. There, a compromise decree had been made between the parties, containing some conditions to be performed within six months" of the decree. The execution application had been filed before expiry of the six months" time. The Court of the first instance thought that the execution application could not be held to be non-maintainable. But the High Court before which a revision application was preferred thought that filing of an execution application before time was incurable and the application had to be dismissed. In this case the Supreme Court relied upon an earlier authority of the case [Dhurandhar Prasad Singh Vs. Jai Prakash University and Others](#), . It was of the opinion that to succeed it had to be proved inter alia that the decree was a nullity or was in-executable. Filing of a premature application did not suggest that the decree was in-executable. It allowed the appeal.

38. Two of the three orders of our Court cited, above were concerned with the decrees which were executable, after there had been an appeal and a reasoned decision of the Appeal Court. The judgment in the case of [M/s. Tetulia Coke Plant\(P\) Ltd. and Others Vs. P.S. Bhattacharya](#), was, however, concerned with the order of which contempt could be alleged, when the initial order merged with the order of the Appeal Court. In each of these orders the Court held that the proper decree or order was the order of the Appellate Court. In each of these cases the petitioner was permitted to file a proper application before the appropriate Court.

39. In our case, the facts are similar to the case of [Pushpa Sahakari Avas Samiti Ltd. Vs. Gangotri Sahakari Avas S. Ltd. and Others](#), . The execution application was filed before application by the decree holder for a certified copy of the decree of the Supreme Court. It was filed in July, 2012, whereas the certified copy of the Supreme Court was obtained in February 2013. However, after the certified copy of the Supreme Court was obtained it was produced in Court during the hearing of the execution application. The execution application was filed together with a certified copy of the decree of the trial court.

40. As far as the subsequent production of the Supreme Court certified decree copy is concerned, the case [Pushpa Sahakari Avas Samiti Ltd. Vs. Gangotri Sahakari Avas S. Ltd. and Others](#), does not say that premature filing of an execution application could make it in-executable. Hence, the execution application could not be dismissed.

41. Now, what is the effect of the execution application having been filed with a certified copy of the decree of the trial court, without the certified copy of the decree of the Supreme Court? A Division Bench of this High Court in the case of Satyendra Nath Bose v. Bibhuti Bhusan Bhar and Others reported in AIR 1963 Calcutta 104 opined that under Rule 10 of Chapter 17 of the Original Side Rules production of a certified copy of the decree was "an essential requirement" upon an application for execution made to the High Court on its Original Side. The requirement was "express" and of an "imperative character". In the absence of a certified copy the execution application was not maintainable. However, it appears from paragraph 31 of the judgment that there was no decree at the time of filing of the execution application.

42. Those were the days in our Court when procedure could subvert the goals of substantive law. Procedure was given utmost importance, at times, forgetting what justice required. Procedure should aid the cause of justice, not defeat it. When procedure comes to that breaking point, its requirement should be waived or modified to promote a just result. But very happily with the march of time another Division Bench of this Court realized that there was really no point in insisting on these little technicalities. It was charges better to substantive justice by passing an order which was just and convenient.

43. Although Order XXI Rule 17 of the CPC provided for amendment of an execution application to cure a defect, the above judgment in the case of [Satyendra Nath Bose Vs. Bibhuti Bhusan Bhar and Others](#), did not apply it. But the Division Bench in [Rajendra Prasad Agarwalla and Others Vs. Allahabad Bank and Others](#), did. It said that the Court had to consider whether the amendment had the effect of substantially altering the character of the execution proceedings. If it did not the amendment was to be allowed.

44. Following the principle of law in the case of [Rajendra Prasad Agarwalla and Others Vs. Allahabad Bank and Others](#), I am minded to give an opportunity to the decree holder to file a supplementary affidavit containing a certified copy of the Supreme Court decree to cure the defect, arising out of non-production of the certified copy of the Supreme Court decree with the execution application.

45. There is an added reason for this. When the execution application was moved on 12th September, 2012 there was a direction to serve notice upon the judgment debtor. This notice was accordingly served. They did not appear on the returnable date, i.e., the 27th September, 2012. Only the sublessee appeared. The judgment debtors appeared when the order dated 18th December, 2012 was made. Up to that stage, which was more than three months of their having notice of the execution application, they did not raise this point that a certified copy of the Supreme Court decree had not been annexed. If it had been urged at that time, the court may have passed an order dismissing the execution application and permitting the decree holder to file a fresh execution application. This course is now not open to the Court, following the case of th [Rajendra Prasad Agarwalla and Others Vs. Allahabad Bank and Others](#), , as the execution application is at its final stage. It would be unjust to adopt that procedure now.

46. Moreover, after appointment of Joint Receivers to take symbolic possession of the property and orders that the Cinema would stop after 15th January, 2013, taking cognizance of this procedural defect would defeat the ends of substantive justice, in my opinion. Therefore, there is an almost reason to follow the case of [Rajendra Prasad Agarwalla and Others Vs. Allahabad Bank and Others](#), , Hence, I direct the decree holder to file a supplementary affidavit containing a certified copy of the Supreme Court decree within two weeks of this order.

47. As far as the 350 sq. ft. space on the ground floor of the property is concerned, it was made absolutely plain by the decree holder that they were not exerting any rights in execution over the same space, unless and until they obtained substantive orders from a Court of law to do so. I am of the opinion, upon hearing the submissions on behalf of the parties that this area is separable from the rest of the property.

48. Therefore, there is no merit in the Section 47 Application (G.A. 10 of 2013). It is accordingly dismissed.

49. The execution application is allowed by directing the Joint Receivers to carry out the execution in terms of prayer (b) of the Tabular Statement. They will act under the Deputy Sheriff of this Court. Order also in terms of prayers (d) of the Tabular Statement. Leave is granted to the decree-holder to make a subsequent application in respect of prayers (c) and (e) of the Tabular Statement. The Officer-in-Charge of the local police station is to render all assistance to the Joint Receivers and the Deputy Sheriff on the instructions of the Deputy Sheriff. This order will become immediately effective upon the decree holder filing the supplementary affidavit containing the certified copy of the Supreme Court decree, as directed above. Urgent certified photocopy of this judgment/order, if applied for, be supplied to the parties subject to compliance with all requisite formalities.

Later:

Mr. Gaffar, learned Counsel for the judgment debtor, prays for stay of operation of this judgment and order.

Considering the issues involved, the Joint Receivers and the Dy. Sheriff will maintain the status quo regarding the property as existing today for a period of three weeks from date to enable the judgment debtor to avail of any further remedy.

Leave is also granted to the Advocate on record for the decree-holder to take back the certified copy of the Supreme Court decree produced in Court to incorporate the same in the supplementary affidavit as directed by this judgment and order.