

(1992) 06 CAL CK 0005
Calcutta High Court
Case No: Suit No. 131 of 1978

Mundra Mills Stores
Co.

APPELLANT

Vs

Smt. Bimla Devi
Poddar

RESPONDENT

Date of Decision: June 8, 1992

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 47
- Partnership Act, 1932 - Section 67, 68, 69, 69(2), 69(3)

Citation: 96 CWN 1130

Hon'ble Judges: Shyamal Kumar Sen, J; Ajit Kumar Sengupta, J

Bench: Division Bench

Judgement

Shyamal Kumar Sen, J

1. The facts involved in this application, which is treated by consent of parties as an appeal, inter alia are that respondents nos. 1, 2 and 3 are the owners of the premises No. 8, Canning Street, Calcutta now known as Biplabi Rashbehari Basu Road, Calcutta. The said premises was given on long lease originally to Mr. Galstan and after several assignments of leasehold interest Rai Bahadur Bansilal Abirchand Kasturchand which was a family concern of Badri Das Daga became the lessee. Badridas Daga was also the Promoter and Director of the family company known as Rai Bahadur Bansilal Abirchand Kasturchand Pvt. Ltd. the said Private Company was collecting rents from the sub-tenants inducted by the lessee and/ or the assignee of the lessee. The said Private Company was also paying rents under the lease to the owners and obtaining rent receipts in the name of the said family firm Rai Bahadur Bansilal Abirchand Kasturchand. Upon expiry of the tenure of the long lease which was for a period of 70 years and which expired on January 1, 1978 the suit for possession was filed in this court being suit No. 131 of 1978 The lessee assignee and the said Private Company were made defendants in the said suit. In addition thereto

the sub tenants and / or occupants as were known to the owners were made party defendants. Originally there were 93 defendants in the suit. After filing of the suit, plaintiffs to the said suit came to learn of some other sub-tenants occupants and added 10 more party defendants in the suit. The petitioner herein was one of those added defendants. In the suit the said Family firm of Badri Das Daga and the Private Company both filed written statements. Several of the sub-tenants also filed separate written statements. Writ of summons in the suit was served on Mundra Mill Stores Co. on December, 15 1980 which was accepted by R.K. Mundra as authorised agent for and on behalf of Bulakidas Mundra. Service by registered post was also accepted by R.K. Mudra on behalf of Bulakidas Mundra. The defendant No. 98 in the suit was described as follows:" Bulakidas Mundra. carrying on business under the name and style of Mundra Mill Stores Company ". R.K. Mundra means Raj Kumar Mundra, Raj Kumar Mundra is the son of Bulakidas Mundra. another sub-tenant namely Mundra & Co. was made defendant no. 54 in the suit. Defendant No. 54 filed written statement in the said suit and through Raj Kumar Mundra gave evidence in the suit. Defendant No. 98 Mundra Mill Stores Company did not file any written statement. The suit was heard for several days and several witnesses were called by both sides. Raj Kumar Mundra gave evidence in the suit on December, 20, 1988. In his evidence Raj Kumar Mundra stated in Examination in chief that he is a partner of Mundra Mill Stores Company and also of & Mundra Co. Raj Kumar Mundra categorically stated in his evidence that Mundra Mill Stores Company is in occupation of one shop Room at No. 138, Canning Street, Calcutta and the firm or business by the name of Mundra Mill Stores Company is not at No. 8, Canning Street, Calcutta. Raj Kumar Mundra and Bijoy Kumar Mundra are the brother and are living in the same house at No. 52, Pathuria Ghat Street, Calcutta as will be evident from the Telephone Directory and they are sons of Bulakidas Mundra. After protracted litigation a decree for possession was passed by this Court on July 25, 1990. Appeal was filed and application for stay of execution of decree was made, inter alia by Mundra & Co. The said application for stay is affirmed by Raj Kumar Mundra. The conditional stay has been granted and Mundra & Co. and several sub-tenants who have preferred separate appeals have been directed to deposit the amount of mesne profit calculated at the rate of 1.60 p. per sq. ft. from the date of expiry of the lease till 30th November. 1990 and thereafter they have been directed to go on depositing month by month at such rate. Room No. 8A and 8B are adjacent to each other. It now appears that Mundra Mill Stores Company did not file written statement and defend the suit in its own name because they are not actually occupying any portion of the suit premises. Mundra & Go. and Mundra Mill stores company have even on the basis as disclosed by them have common partners. The partners of Mundra Mill Stores Company as disclosed in the alleged deed of partnership are four sons of Balakidas Mundra and wife of Bulakidas Mundra partners of Mundra & Co. as disclosed in the evidence of Raj Kumar Mundra are his father Bulakidas Mundra, his three brothers and wife of Raj Kumar Mundra and wife of one of his brothers. As stated in evidence that he and one of his brother look after

the business of Mundra & Co. From the above it is evident that even if Mundra Mill Stores Co. occupied room No. 8A of the first floor of the said premises the partners of the said firm at all material times were aware of the suit No. 131 of 1978 filed by the respondents No. 1, 2, and 3 herein. The same would also be evident from the fact that M/s. Mundra Mill Stores-Co. has paid rent to the joint receivers appointed in the instant suit No. 131 of 1978. It is significant that at the time of service of the writ of summons Raj Kumar Mundra did not raise any objection that Bulakidas Mundra was not the sole proprietor of the firm of Mundra Mill Stores Co. who was the sub-tenant and supposed to be in occupation of room No. 8A on the first floor of the said premises. Not having taken any part in the proceedings in the instant suit, the appellant filed a suit in this Court being suit No. 185 of 1991 only after the decree of eviction dated 25-7-90 was passed in the instant suit. In the said suit No. 185 of 1991 filed by the appellant, the appellant claims the following reliefs :

A declaration that the plaintiff is a monthly tenant" and/or a sub tenant in respect of the suit premises as described in the schedule. If necessary, a declaration that the defendant No. 4 is a monthly tenant in respect of the whole of premises No. 8. Biplabi Rash Behari Basu Road, Calcutta.

A declaration that the decree dated July 25, 1990 passed in suit No. 131 of 1978 is not binding upon or enforceable against the plaintiff.

A decree for Rs. 1,02,600/- and further sums as pleaded.

Alternatively, an enquiry into damages as pleaded and a decree for such sum as may be found due from and payable by the defendant Nos. 1, 2, and 3 upon such enquiry.

A perpetual injunction do issue restraining the defendant Nos. 1,2, and 3 and each one of them their servants, agents, and/or assigns from interfering with or disturbing the possession or enjoyment of the plaintiff in respect of the suit premises.

A mandatory injunction directing the defendants Nos. 1,2, and 3 and each one of them to restore the water supply line of the plaintiff in the suit premises and the toilet facilities by removing the padlock on the common toilet and to close the main gate of the premises at 8 P.M. instead of at 6 P. M.

Receiver, Injunction, attachment before judgment, costs, further and/or other reliefs.

2. In the said suit No. 185 of 1991 the appellant made an application praying for the following reliefs :-

An order of injunction do issue restraining the respondent Nos. 1, 2, and 3 their servants, agents and/or assigns from disturbing and/or interfering with the peaceful possession use and enjoyment of the suit premises by putting into execution the

decree dated July 25, 1990 passed in suit No. 131 of 1978 or otherwise in any manner whatsoever until disposal of the instant suit.

A mandatory order of injunction do issue directing the respondents nos. 1,2, and 3 their servants agents and/or assigns to restore the toilet facilities and water supply and to extent the timing of closing the main gate of premises No. 8, Biplabi rash Behari Basu Road, upto 8 P.M. instead of 6 P.M.

Ad-interim order, suitable order be passed as to costs of and incidental to this application, such further or other order or orders be passed and direction or directions be given as to this Court may seem fit and proper.

3. The said application was moved by the appellant on 22-3-91 and he obtained an ex parte order of status quo as to possession of the said room as on date. After filling of the affidavits, the matter was heard as an adjourned application by the learned Judge taking up interlocutory matters on 7th May, 1991. Thereafter by an order dated 16-5-91 the learned Judge was pleased to vacate the ad-interim order of status quo and directed that the execution proceedings with regard to the said room against the appellant may be taken but only after 72 hours notice of the execution application. In course of the hearing of the said application in suit no. 185 of 1991, it was found there were certain clerical mistakes in the said decree dated 25-7-90 arising therein from accidental slip or omission. The said decree as on that date did not tally with the judgment in so far as the said decree misdescribed the suit premises as well as the said decree was not against the respondents No. 4,5, and 6 herein. The judgment in the instant suit passed by the Hon"ble Mr. Justice S.K. Hazari on 25-7-90 was specifically made against all the defendants in the instant suit. Accordingly, an application was taken out by the plaintiffs the respondent Nos. 1, 2, and 3 herein on or about 14-6-91 for rectification and/or for amending the said decree so as to bring it in line with the judgment. His Lordship the Hon"ble Mr. Justice S.K. Hazari was pleased to give opportunity to all the defendants in the said suit to file affidavit against the said application for amendment of the decree. The appellant did not care to file any affidavit but on the last day of hearing of this application for amendment, prayed for leave to (sic) the said amendment application by filing affidavit thereto in order to delay the matter and the learned Judge was pleased to refuse such leave, but allowed them to make submission through their counsel.

4. On 3rd July, 1991, S.K. Hazari, J. upon hearing the contesting parties passed an order whereby the said decree dated 25th July, 1991 was amended. By amending the said decree learned Judge directed that the defendant Nos. 1, 2, and 3 as well as the other defendants to deliver up vacant and peaceful possession of the said premises, including the portion in the occupation of them and/or any other person or persons to the plaintiffs. The appellant is claiming to be a sub-tenant of the said respondent No. 4 in respect of the said room at the suit premises. Decree for vacant possession of the said premises has been passed against the respondent no. 4 and

the appellant is bound by the decree. The appellant accordingly has no interest remaining in the said room at the suit premises and should be directed to give vacant peaceful possession of the same. It has been submitted that the appellant is in law bound by the said decree dated 25th July, 1990. It has also been submitted that the plaintiffs made an application for execution of the said decree dated 25th July, 1990 as amended on 3rd July, 1991. The appellant, thereafter, appealed against the said order of amendment which" was withdrawn after the stay application was heard in part and after the appellant realised that if the appeal is not withdrawn the stay application and appeal would be dismissed. The plaintiffs made an application for execution of the decree on or about 13th August, 1991. Such application was made after giving the appellant the due notice of 72 hours as directed by the Court on 16th May, 1991. Upon such application the order was passed in terms of prayer in Col. 10 of the Tabular statement. On the prayer of the Learned Counsel for the appellant there was an order made staying of such execution proceedings by 3 days. Thereafter the appeal was preferred against the decree dated 25th July, 1990 as amended on 3rd July, 1991.

5. It is the contention of the Learned Counsel for the appellant that Rai Bahadur Bansilal Abirchand Kastur Chand Limited the Defendant NO. 2 in the suit was found to be a trespasser by the Learned Single Judge. The Appellant claims, to have come in possession from the defendant no. 2. Therefore, the principle that the decree against the lessees is binding against the sub-lessees will not apply in the facts of the instant case and the appellant is entitled to remain in possession on its own right. Learned Counsel in this connection relied upon the judgment and decision in the case of [Jagadguru Gurushiddaswami Vs. Dakshina Maharashtra Digambar Jain Sabha,](#)

6. It has also been contended on behalf of the appellant that the appellant was not a party to the suit in which the eviction decree was passed. Therefore, it is not bound by the decree passed in that suit and that decree cannot be enforced against the appellant. It has further been submitted that if a lease is determined, the sub-lessee is bound by the decree as laid down by the Supreme Court does not apply to the facts and circumstances of this case. Mr. Ghose, Learned Counsel for the appellant referred to paragraph 10 of the plaint, wherein it has been alleged that the defendant no. 1 sub-let different portions of the property to various defendants amongst the defendant nos. 4 to 103. It has been found by the learned Trial Judge that the defendants nos. 3 to 104 were never lawful-sub-tenants and that no relationship of landlord and tenant of any kind existed between the plaintiff and the said defendants. According to the Learned Counsel for the appellants it cannot be said that the defendants nos. 4 to 103 were sub-lessees. It has further been submitted that there is no allegation in the plaint that the appellant was a sub-lessee of the defendant No. 1 and as the appellant was not a party, it cannot be contended that the appellant was a sub-lessee whose interest came to an end with the determination of the interest of the lessee, i.e. the defendant No. 1. Learned

Counsel for the appellant referred to the rent receipts annexed to the stay petition and submitted that the appellant had been inducted as a sub-tenant by the defendant No. 2 (which is a private limited company) long prior to the suit and that the appellant had been paying rent to the defendant no.- 2 and subsequently to the Receiver appointed over the premises. The rent receipts had been issued for and on behalf of the defendant no 1. It has further been contended on behalf of the appellant that the case in the plaint regarding the defendant no, 2 that he was claiming to be an assignee of the lease, but the plaintiffs did not accept that claim and never consented to any assignment of the lease in favour of the defendant no. 2 and the same was not binding on the plaintiffs. The case of the defendant no. 2 in the written statement filed by it and this case was supported by the defendants 4 to 103 was that in 1941 or 1943 the lease had come to an end and that the defendant no. 2 had become a monthly tenant under the plaintiffs. The finding of the learned Trial Judge is that the defendant no. 2 was not an assignee of the lease. He further held that the defendant no. 2 had no right, title or interest in the property as a monthly tenant. It has been submitted on behalf of the appellant that on the basis of the judgment of the Learned Single Judge the defendant no. 2 is nothing but a trespasser. Accordingly it has been submitted that the decree for eviction against the defendant no. 2 was made on the basis that it was a trespasser.

7. Learned Counsel for the appellant submitted that the principle that a sub-lessee fails with the head lease is not applicable when the defendant is not a sub-lessee and he is not sued on a ground which determines the lease and also the sub-lease. Learned Counsel in support of his contention relied upon the judgment and decision in the case of [Sailendra Nath Bhattacharjee Vs. Bijan Lal Chakravarty and Others](#), It has been submitted by the Learned Counsel for the appellant that principles laid down in the aforesaid decision apply squarely to the present case. The appellant was not a sub-lessee. It derived its interest from the defendant no. 2 who has been found in effect to be a trespasser. Therefore, as the appellant was admittedly not a party to the suit, the appellant cannot possibly be bound by the decree passed in the suit. It has also be contended that the questions raised by the appellant cannot be gone into in this appeal and can only be determined by the Court executing the decree u/s 47 of the Code of Civil Procedure.

Learned Counsel for the appellant gave several reasons in support of his aforesaid contention.

8. In the first place, Section 47 bars a Separate Suit in respect of the questions covered by the section. The present proceeding is an appeal, and not a separate suit. It is well established that an appeal is a continuation of the same suit.

9. Secondly Section 47 only deals with questions relating to the execution, discharge or satisfaction of the decree. A question as to whether the decree was properly passed or not is not a question relating to execution, discharge or satisfaction of the decree and falls outside Section 47. AIR 1953 Allahabad 281. The question as to

whether the decree as correctly passed or not can only, be decided by a court of appeal. The executing court cannot go behind the decree except where there is an inherent lack of jurisdiction or the decree is a nullity.

10. Thirdly, in any event, the appellant is not a "representative" within the meaning of Section 47. It had become a sub-tenant under the defendant No. 2 long prior to the institution of the suit. That being so, it is not a "representative" within the meaning of Section 47. See [Shivu Shidda Chaugula Vs. Lakhmichand Tuljaram Kothari,](#)

11. Mr. Aninda Mitra Learned Counsel for the plaintiffs/respondents Nos. 1,2, and 3 on the other hand contended that Mundra Mill Stores Company should not be granted leave to appeal in the proceeding.

12. It has been contended that Mundra Mill Stores Company was made defendant no. 98 and was described as Bulakidas Mundra carrying on business under the name and style of "Mundra Mill Stores Co." as partners. Writ of summons was served but no appearance was entered upon. Mundra & Company was defendant No. 54 in the suit. Mundra & Company filed a written statement and contested suit. Raj Kumar Mundra stated that Mundra Mill Stores Company was not occupying any portion of No. 8, Canning Street, Calcutta but was occupying a portion at No. 138, Canning Street, Calcutta.

13. After a decree was passed an application was made in the name of Mundra Mill Stores Company, stated to be a partnership firm of which Raj Kumar Mundra and his brothers are partners. In other words, three sons of Bulakidas Mundra and his wife are the partners of Mundra Mill Stores Co. It has been submitted under such circumstances it cannot be disputed that Mundra Mill Stores Co., the partnership firm and its partners had all along full knowledge of pendency of the suit for eviction being Suit No. 131 of 1978. They were fully aware that sub-tenants were sought to be parties to the suit. Mundra Mills Stores" Co. never applied to become a party to the suit no. 131 of 1978. The other partners of Mundra & Company contested the suit and lost. Mundra and Company was claiming to be a sub-tenant in respect of the room No. 8B and now after decree has been passed Mundra Mill Stores Company claiming to be a sub-tenant in respect of the room No. 8B which is adjacent.

14. It has further been contended that the appellant did not deliberately take steps for it was aware of the proceeding. Only after the decree holder/landlord started the execution proceedings against those occupants who had not preferred appeal against the decree and obtained order of execution on 27th February, 1991 and the decree has been put into execution on 22nd March 1991 on the very same day the suit No. 185 of 1991 was filed by Mundra Mill Stores Company for challenging the decree as collusive and the same is not binding on them.

15. It has been submitted by Mr. Mitra that a stranger to the suit has got two alternative remedies against the decree which affects him

i) to file a suit for challenging validity of the decree or :

ii) seek the leave of the appeal court to prefer the appeal from the decree.

16. In this case, Mundra Mill Stores Company has elected to adopt the first remedy. Mundra Mill Stores Company is still pursuing the remedy and continuing with the suit. Therefore, after having made the election, Mundra Mill Stores Company cannot now ask Court for leave to appeal.

17. In any event, Mundra Mill Stores Company claiming to be a sub-tenant of one of the judgment debtors in the ejectment suit has no right to prefer an appeal. In fact, their only remedy is to file a suit for declaration that the decree is initiated by reason of fraud. In support of his contention learned advocate for the plaintiff-respondent relied upon the judgment and decision in the case Shankarrao Govindrao Naik v. Kisan Pal Nayarmal and others, reported in AIR 1950 MB 19. It has also been submitted that the leave to appeal cannot be claimed by any stranger as a matter of right. The parties to the suit have got right to appeal. They are aggrieved but not a stranger. It is discretion of Court whether to grant leave to appeal or not. While considering the question of discretion the Court should take into account the conduct of the applicant. It has been submitted that the Court will take into consideration the following conduct of Mundra Mill Stores company for exercising any discretion against them.

18. Mundra Mill Stores Company deliberately chose not to become a party to the suit with full knowledge for the last 12 years but the appeal is in continuation of the suit and Mundra Mill Stores Company not having participated in the suit with full knowledge of pendency thereof cannot claim any right to appeal in the suit from the appellate stage only since they have deliberately decided not to participate in the suit at the trial state.

19. Whether Mundra Mill Stores Company, the partnership firm who is the applicant, has really been a sub-tenant and occupant of Room No. 8A of the suit premises is a matter of dispute. The case of the respondents has been that the Mundra Mill Stores Company which is a sole proprietary concern of Bulakidas Mundra was a sub-tenant of the defendant No. 1 in the suit. Now a different Mundra Mill Stores Company is coming forward, namely, a partnership firm. In the ejectment suit, however, the partners of this very partnership firm of Mundra Mill Stores Company have deposed that Mundra Mill Stores Company have been occupying portion at No. 138, Canning Street, Calcutta and not No. 8, Canning Street, Calcutta. This dispute cannot be decided only in the suit which has been filed by Mundra Mill Stores Company in this court namely Suit No. 185 of 11. This disputed question of fact cannot be decided in the appeal since this was not the subject matter of dispute in the suit for ejectment. If leave to appeal is granted that will mean allowing this disputed claim of Mundra

Mill Stores Co. No leave can be granted unless it is on the basis that partnership firm of the Mundra Mill Stores Company have really been sub-tenant of the room No. 8A at No. 8, Canning Street, Calcutta which is the suit premises. Unless this is held in favour of Mundra Mill Stores Company, a partnership firm, the said firm cannot be said to be in any way affected by the decree of eviction or cannot possibly be aggrieved by the decree, so the appeal is not the proper remedy or proper forum for deciding this type of factual dispute.

20. It has also been contended on behalf of the plaintiff-respondent that the appeal proposed to be filed by Mundra Mill Stores Company is in any way barred by limitation. The decree for eviction is dated 25th July, 1990. The application for certified copy of the decree was made by Mundra Mill Stores Company on 13th August, 1991. So it is much beyond 30 days and there is no explanation for this, delay. The Clerical error in the said decree was corrected by the order dated 3rd July, 1991. The appeal against the order of correction of decree was filed by Mundra Mill Stores Company on July 1991 which was withdrawn on 6th August, 1991. Even from the date of amendment of decree no application for certified copy of the amended decree was filed within 30 days. But limitation should be computed from the original date of decree that is 25th July, 1990, because amendment relates back to the date of decree. Furthermore the judgment of the trial Court was available when the affidavit-in-opposition to the inter locutory application made in the suit filed by the Mundra Mill Stores Company was filed by respondents. The Judgment annexed to the affidavit-in-opposition which was affirmed on 9-4-1 and supplied immediately to the Mundra Mill Stores Company. From the judgment it was very clear that decree has been passed against all the defendants in the suit except the defendant no. 88. So, Mundra Mill Stores Co. was all along fully aware that decree has been passed as mentioned in the judgment against the defendant No. 2 as well under whom they were claiming to be subtenants and the decree will be binding on them. In spite thereof no step to prefer an appeal from the judgment passed in ejectment suit was filed.

21. We have considered the submissions of the parties and decision cited from the bar.

22. In the application filed in suit No.. 185.of 1991 as also in the instant stay petition, it has been clearly stated that Mundra Mill Stores Company claim to be sub-tenant under Rai Bahadur Bansilal Abirchand Kastur Chand Ltd. who is the defendant No. 2 in the ejectment Suit No. 131 of 1978 and decree for eviction has been passed against the defendant No. 2 as well. Therefore, the said decree is clearly binding on Mundra Mill Stores Company. Mundra Mill Stores Company has no ground to resist execution of decree for eviction against them.

23. The contention that Rai Bahadur Bansilal Abirchand Kastur Chand Ltd. the defendant No. 2 in the suit was a trespasser is not founded on correct facts. There is no finding in the judgment in the ejectment suit that defendant no. 2 has been a

trespasser. All that it has been observed in the judgment is that the defendant No. 2 was not a monthly tenant. This does not mean that the defendant No. 2 was a trespasser. on the other hand there is finding in the judgment that the defendant No. 2 in the said suit was paying rent on behalf of the defendant No. 1 who was the lessee under the expired long lease. The defendant No. 2 Rai Bbahadur Bansilal Abirchand Kasture Chand Ltd. was therefore held to be an agent of the defendant No. 1 in the suit and would naturally be bound by the decree against the defendant No. 1.

24. Secondly, even if a decree for eviction is passed against a trespasser the person inducted by a trespasser cannot claim any independent right and would be bound by the decree for eviction. To hold otherwise would lead to absurdity, namely, a person inducted by a lawful tenant would be held bound by the decree passed against the tenant but a person inducted by a trespasser would not be bound by the decree passed against the trespasser, it would mean that a person inducted by trespasser, who has no lawful right to occupy the suit premises, will have a better right than the person inducted by a lawful tenant.

25. The contention that Mundra Mill Stores Company would be in serious inconvenience if the decree is executed against them is baseless. Admittedly, Mundra Mill Stores Co. have got their office and is carrying on business from No. 138, Canning Street, Calcutta. The area at the room No. 8A, Canning Street, Calcutta which is claimed to be in possession by Mundra Mill Stores Co. is only 271 sq. ft. Their sister concern, Mundra & Company is occupying the room No. 88 which covers the area of around 600 sq. ft. So it cannot be said by any stretch of imagination that Mundra Mill Stores Co. will be out of business if decree is executed against them and possession is taken of the room No. 8A at No. 8, Canning Street, Calcutta.

26. Other sub-tenants who are defendants in the ejectment suit and who have contested the suit have the right to prefer an appeal because of being parties to the suit, they have contested the suit by filing written statements and by giving evidence and by making an oral submission. Mundra Mill Stores Co. stands on the different footing altogether. Since Mundra Mill Stores Co. claims to be not a party they are not entitled to prefer an appeal as of right.

27. The possession of the Mundra Mills Stores Co. is also different from the sub-tenants/defendants on another aspect also. Other sub-tenants defendant have not filed any suit challenging the decree. Mundra Mill Stores Co. have filed a separate suit challenging the Ejectment Decree and have prayed for injunction restraining execution but have failed to obtain the order of the injunction. Mundra Mill Stores Co. should not now be permitted to nullify the order of S.C. Sen, J. by this circuitous method.

28. The appeal filed by Mundra Mill Stores Co. against the order for amendment of decree was withdrawn on August 6, 1991. The order of amendment of decree

cannot therefore be challenged. Amendment relates back to the date of decree. Decree is against the defendant No. 2 as well. No ground has been shown as to why the order for execution is wrong. No judgment has been cited to show that if a decree is passed against a defendant on the ground that he is a trespasser, his sub-tenant would not be bound by such decree.

29. After the argument was concluded and the matter was fixed for orders the Learned advocate for the respondent-submitted that the appeal was not maintainable u/s 69(2) of the Indian Partnership Act since the persons suing have not been shown as partners in the register of firms.

30. Two proceedings have been initiated before us by Mundra Mill Stores Company. One is an application for leave to appeal from the decree for eviction passed by S.K. Hazari, J. on 25th July, 1990 in Suit No. 131 of 1978. Other one is an appeal from an order for execution of the decree dated 13th August, 1991 passed by Padma Khastgir, J. evicting Mundra Mill Stores Company.

31. Both the aforesaid proceedings are in the name of Mundra Mill Stores Company, a partnership firm allegedly registered under the Indian Partnership Act as would be obvious from the cause title of the said proceedings.

32. u/s 69(2) of the Indian Partnership Act read with Sub-section 3 of the Section 69, no legal proceeding to enforce a right arising from a contract shall lie unless i) the firm is registered and ii) the persons suing are shown or have been shown in the register of firms as partners in the firm.

33. In the aforesaid proceedings, Mundra Mill Stores Co. is seeking to enforce the contract of tenancy/sub tenancy allegedly entered into by an between Mundra Mill Stores Co. and Rai Bahadur Bansilal Abirchand Kasturchand Private Limited..

34. The suit filed by Mundra Mill Stores Co. in this Court is also for enforcement of the same contract of Tenancy/sub tenancy and on that basis relief by way of a declaration of tenancy/sub-tenancy in respect of the suit premises and other reliefs on the basis have been claimed.

35. The contract of sub tenancy was stated to have been entered in the year 1970 between Mundra Mill Stores Co. a partnership firm and Rai Bahadur Bansilal Abirchand Kasturchand Private Limited.

This tenancy right is being now sought to be enforced in the above two legal proceedings.

36. From the records produced by the Registrar, of Firms, it appears that Mundra Mill Stores Co. has been registered twice. The first firm of Mundra Mill Stores Co. was established on 24th October, 1954 and the registration was made in 1961 and a number 41650 was allotted.

The second Mundra Mill Stores Co. was established on 29th October, 1970 and registration was filed in 1971 and the firm was allotted the number 73147.

The appellant firm is the second-one being no. 73147 which was established on 29th October, 1970 as would be apparent from the stay petition.

37. From the recital in the said Deed of Partnership it will appear that the previous partnership firm of Mundra Mill Stores co. was dissolved on November 28, 1970 upon the retirement of two out of three partners thereof, the surviving partner started the new partnership firm of Mundra Mill Stores Co. by inducting three partners, this new partnership was constituted w.e.f. 29th October, 1970. the Original partnership firm of Mundra Mill Stores Co. was comprised of three partners viz. Lal Chand Mundra, Ramchand Bagri and Bulaki Das Bagri which stood dissolved. The appellant firm is a new partner-ship firm bearing the same name of Mundra Mill Stores Co. and it has been registered with the Registrar of Firms and has been allotted a new registration No. 73147. The certificate of registration has been produced. The original register has been produced by Registrar of Firms and this corroborates the certificate produced on behalf of the respondent. u/s 68 of the Partnership Act, the certificate is conclusive evidence. The name of Sree Kumari Mundra has not been shown on the register of firms and consequently, the said name is not on the certificate of registration issued on 1st day of January, 1992.

The name of Sree Kumari Mundra is not shown in the register of firm as partner in the appellant firm. Therefore, these above two proceedings are barred u/s 69(2) read with Section 69(3) of the Partnership Act.

38. It is the case of the appellant that Sree Kumari Mundra became a partner of appellant firm by a Deed of Reconstitution of Partnership dated 8th December, 1973 w.e.f. 6th December, 1973. there was further re-constitution of the appellant firm by a deed dated 24th July. 1975 w.e.f. 3rd June. 1975" under which Sree Kumari Mundra has continued to remain a partner of appellant firm. This is the last reconstitution of the appellant firm.

Reliance has been placed in Abdul Hossain v. Salimar Paint, Colour and Varnish Co. Ltd. reported in AIR 1947 Calcutta 36, Sunderlal and Sons v. Yagendra Nath Singh and Another reported in AIR 1976 Calcutta 471 and [Krishna Chandra Agarwalla and Others Vs. Shanti Prasad Jain and Others,](#)

39. It is the case of the appellant firm that the appellant firm is not a defendant in the suit for eviction. The above two legal proceedings before the court of appeal have not been filed by the appellant firm as a defendant in the suit. Therefore the question whether an unregistered partnership firm, which has been made defendant in the suit can prefer an appeal from a decree passed in the suit do not arise in this case.

40. The certificate of registration as produced by the appellant firm is dated 27th March, 1991 and relates to Mundra Mill Stores Co. which has been allotted the number of 41650. There is no entry relating to this certificate in the register of firms. The page is supposed to be missing. The Additional Registrar stated to the Court of Appeal that this certificate is certificate of document Nos. 1 & 2 and not a certificate of an entry relating to a firm in the "register of firms. Therefore, the rubber stamped expression "Certified to be a true copy of the entries in the register of firms is not true. This certificate relating to a firm bearing registration No. 41650 is not an entry in the register of firms and hence is not covered either by Sec. 67 or by Sec. 68 of the Indian Partnership Act. There is no provision in the partnership Act for issue of such a certificate relating to documents. No reliance can be placed on this certificate at all. It is significant that Mundra Mill Stores Co. having failed in their suit to obtain an interim order restraining execution or decree now seeks to raise the same contentions before the Court of Appeal for restraining execution of the decree. No appeal has been preferred from the order of Suhas Chandra Sen, J. dated 16th May 1991 passed on the application of Mundra Mill Stores Co. refusing to grant injunction restraining execution of the decree and giving express leave to the decree-holder to execute the decree by giving 72 hours notice to Mundra Mill Stores Co.

41. The decree was executed against Mundra Mill Stores Co. riot as a Judgment-debtor or a defendant in the suit but as an outsider who is bound by the decree passed against the defendant No. 2 (Rai Bahadur Bansilal Abirchand Kasturchand Pvt Ltd.) in the suit for eviction under Order 21 Rule 35 of CPC.

42. In view of the admitted case of Mundra Mill Stores Co. that they have been inducted in the suit premises by the defendant No. 2 in the suit for eviction, there was realty no necessity for further affidavits in the execution proceedings. In any event, Mundra Mill Stores Co. in the stay petition and in affidavit-in-reply filed before the Court of Appeal have placed all the facts they would have liked to place before executing Court. The Court of appeal would decide the matter on the basis of the petition and affidavit in reply failed by Mundra Mill Stores. Co. It is now contended by Mundra Mill Stores Co. that had an opportunity been given to file an affidavit by executing Court they would have placed any further or other facts. Therefore, the grievance that executing court had not given an opportunity to Mundra Mill stores Co. to file affidavit loses all its efficacy

43. From the said petition and Affidavit-in-reply, it is clear that Mundra Mill Stores Co. has claimed to be a sub-tenant -under defendant No. 2 in the suit for eviction and therefore is clearly bound by the decree for eviction which is passed against the defendant no. 2 as well.

44. The argument that the appeal is a continuation of the suit is not available to Mundra Mill Stores Co. since Mundra Mill Stores Co. has not been a defendant in the suit. This contention may be available only to party to the suit. It is a separate and

independent proceeding by Mundra Mill Stores Co.

45. In the case of [Sunderlal and Sons Vs. Yagendra Nath Singh and Another](#), Sabyasachi Mukharji, J as His Lordship then was observed in paragraph 4 of the said judgment, pages 473 & 474 of the said report as follows :-

In this case the decree has been passed. If the decree is a nullity then of course this point can be taken. But the question is whether a decree passed without this point having been taken is nullity or not. In view of the language of the Section, in my opinion, a plaint filed by an unregistered firm would not be a plaint at all. If that be so, all proceedings thereunder will be proceedings without jurisdiction. Support for this position can be had from the observations of the Division Bench of Madras High Court in the case of [K.K.A. Ponnuchami Goundar Vs. Muthusami Goundar and Another](#), . Similar view was taken in the case of [A.T. Ponnappa Chettiar and Others Vs. Bodappa Chettiar and Others](#), [Shriram Sardarmal Didwani Vs. Gourishankar alias Rameshwar Joharmal](#), [Firm Laduram Sagarmal Vs. Jamuna Prasad Chaudhuri and Others](#), and [Dwijendra Nath Singh and Another Vs. Govinda Chandra and Another](#), . this contention, in my opinion, can also be taken at this stage. Reliance in this connection may be placed on the observations of the Judicial committee in the case of AIR 1925 83 (Privy Council) and in the case of [Gopinath Motilal Vs. Ramdas and Others](#), In the aforesaid view of the matter I am of the opinion that the firm not being registered the decree was a nullity and as such cannot be executed.

Again In paragraph 6 of the said judgment at page 474 of the said report observed as follows :-

I am therefore, of the opinion that where execution is in respect of a claim arising out of a suit based on a contract, the prohibition indicated by Section 69 would apply. Furthermore, the fact that in sub-clause (b) of sub-section (4) of Section 69 of the Act proceedings in execution or other proceedings incidental to the execution of certain specified suit as indicated in that sub-clause have been excluded and no other proceeding of execution has been excluded, in my opinion, is clearly indicative of the fact that the proceedings in execution which are to enforce rights arising from contracts would be covered by Section 69 of the Indian Partnership Act. In that view of the matter I am unable to accept the contention that execution proceedings are not covered by the prohibition of Section 69 of the Indian Partnership Act. Counsel for the decree-holder contended, further, that prohibition was against the institution of the suit and the prohibition was not against the consideration of the suit by the Court. In aid of this submission he relied on the observations of the Patna High Court in the case of [Kuldip Thakur Vs. Sheomangal Prasad Thakur and Another](#), and also on the Bench decision of the Madras High Court in the case of [Jalal Mohammed Ibrahim \(Died\) and Others Vs. Kakka Mohammed Ghouse Sahib and Another](#), In the view I have taken of the nature of prohibition, with great respect, I am unable to accept this conclusion of the aforesaid two decisions. Jurisdiction as observed by Lord Reid in the case of *Anisminic Ltd. v. Foreign*

Compensation Commission (1969) 2 AC 147 at page 171 of the report is the entitlement of the tribunal to enter upon the inquiry in question. That entitlement in my opinion can only arise from a competent plaint instituted by a plaintiff. If the plaint was incompetent, there was no plaint, There was no suit. Ex facie and without any dispute there was no valid suit. A decree based on such a patent and indisputable error would be an error of jurisdiction and decree passed on such error would be nullity. If, however, the error depends upon adjudication of disputes, either of fact or law different considerations could apply. After all the Supreme Court has observed that the question whether there was an error within the jurisdiction or an error of jurisdiction depends upon the nature of the error. In view of the express provision and public policy indicated in Section 69 of the Partnership Act in my opinion entertaining a suit in derogation of that mandatory provision would defeat the purpose of the statute and such an error would amount to an error of jurisdiction and a decree passed on such an error would be a nullity. In the aforesaid view of the matter, in my opinion, on this ground also this decree cannot be executed. In the premises, this application must fail. However, in view of the thoroughness with which this application was argued I direct that the parties should pay and bear their own costs. Interim order, if any, is vacated, Certified for counsel. The instant appeal is a new proceeding by the firm. It is not a party to