

**(1974) 10 CAL CK 0018**

**Calcutta High Court**

**Case No:** S.A. No. 958 of 66

Subodh Gopal Basu

APPELLANT

Vs

Royal Calcutta Turf Club

RESPONDENT

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**Date of Decision:** Oct. 7, 1974

**Citation:** 79 CWN 276

**Hon'ble Judges:** P.K. Chanda, J; A.K. Sinha, J

**Bench:** Division Bench

**Advocate:** P.N. Mitter and Joy Gopal Ghosh, for the Appellant; S.D. Banerjee, D.N. Das and P.N. Biswas, for the Respondent

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### **Judgement**

A.K. Sinha, J.

This second appeal is preferred by the plaintiff-appellant against an appellate judgment and decree reversing the decision of the trial Court briefly in the following circumstances :

A suit was instituted by the present appellant against the defendant inter alia, for damages for being in wrongful use and occupation of certain land belonging to him. The appellant's case briefly was that after purchase of certain share of Touzi No. 6 under the 24-Parganas Collectorate he annulled the interest of all persons in possession of the suit lands and thereafter obtained a decree for khas possession against the present respondent and others. This suit was decreed on contest in his favour and affirmed on appeal by the respondent. Thereafter, though he took delivery of possession through Court he could not get actual possession and the respondent continued to possess the disputed lands as a trespasser.

The suit was contested by the respondent and apart from the general denial of material allegations the specific case of the respondent was that in view of the Land Revenue-Sales Ordinance of 1949 and the subsequent Amendment Act VII of 1950 amending the Bengal Revenue-Sales Act, 1889, no such suit was maintainable and the decree for khas possession obtained by the appellant in the earlier suit became

wholly ineffective and invalid.

2. The learned trial Court decreed the suit substantially on the view that since the possession, though symbolical, was already delivered the decree passed in favour of the appellant remained unaffected under the proviso to sub-, section (2) of Section 7 of the above Amendment Act with the result that the appellant as rightful owner of the land could maintain a suit for damages against the respondent for its wrongful use and occupation. On appeal, the appellate Court took a contrary view and dismissed the suit of the appellant. That is how in short the appellant felt aggrieved and preferred the present appeal.

3. In this case there is no dispute substantially on facts stated in the plaint. The admitted position of the parties is that the appellant retained symbolical and not actual possession on 2nd April, 1949 in execution of a decree for khas possession of the disputed land on annulment of the interest of the present respondent and several others passed on 18th March, 1948 in a suit being Title Suit No. 92 of 1945 in the Second Court of Subordinate Judge at Alipur. The appeal preferred against this decree was dismissed on 15th March, 1949. On 24th April, 1949 the West Bengal Land Revenue Sales Ordinance, 1949 (Ordinance No. I of 1949) was promulgated. u/s 3 of this Ordinance all suits, appeals and proceedings which include an execution proceeding in pursuance of the provisions of Section 37 or Section 52 of the Bengal Land Revenue Sales Act, 1889 were stayed. On 5th March, 1950 the Bengal Land Revenue Sales (West Bengal Amendment) Act, 1950, came into force which made certain substantial amendment of the parent Act.

4. Now, in the background of this admitted position, the whole case mainly turns on the question whether in spite of the Ordinance and the Amendment Act the appellant has still the right to pursue the respondent in damages. It appears, the appellate Court below considered at the very outset the question of acquisition of title by the respondent by adverse possession raised before it and on the authority of the proposition laid down by this Court in several decisions referred to in its judgment concluded, we think, rightly, that a case of adverse possession even after the decree obtained by the appellant in the earlier suit and delivery of symbolical possession in execution of such decree could not be established. In the appeal before us also the correctness of the decision of the appellate Court on this aspect of the matter was also not disputed on behalf of the respondent.

5. Now, turning to the main question as indicated above it could not be seriously disputed on behalf of the appellant that under the Ordinance the proceedings which include an execution proceeding shall remain stayed. But the fact remains that the symbolical possession was delivered, admittedly, on 2nd April, 1949, long before the date, namely, 24th April, 1949 when the Ordinance was promulgated. It was, as appears, urged on behalf of the respondent before the appellate Court below that although symbolical possession was delivered the execution case was pending till 26th April, 1949 as the Court allowed time to the present appellant to take steps for

getting actual possession by that date. As the appellant did not turn up to take steps, the execution case it is now stated before us, was dismissed on part satisfaction. But it is submitted, that in view of the salutary provision of the Ordinance it was beyond the competence of the Executing Court to dismiss the case on part satisfaction. It was clear that under the Ordinance all proceedings were stayed and the executing Court had no jurisdiction to take up the execution case for further consideration or dismiss it on part satisfaction. The execution case must be deemed to have remained stayed and any order to the contrary must be held to be totally ineffective and invalid in law. So, where due to stay of proceedings by virtue of the Ordinance the delivery of possession could not be entered in full satisfaction or could be entered in part satisfaction or at any rate the application for execution could not be disposed of, it is difficult to see how the decree-holder would be estopped from claiming further actual possession in execution of the decree before the executing Court.

6. It is, however, contended by Mr. Mitter on behalf of the appellant that even then in view of the subsequent provisions of the Amendment Act question is not whether the execution case remained stayed but whether the possession in execution of the decree or order was delivered before the date of commencement of this Act. In this case, it is said, the possession was delivered, admittedly, on 2nd April, 1949. So, according to Mr. Mitter the decree though passed before the commencement of this Act would be covered by the exception clause under proviso to sub-section (2) of Section 7 of the Amendment Act. We are not concerned in this case with the first part namely, sub-section 1(a) and (b) of Section 7 as it deals with all suits, proceedings, appeals, applications for review and revision etc. Subsection (2) of Section 7 which is relevant for our present purpose reads as follows:--

Every decree passed or order made, before the date of commencement of this Act, for the ejectment of any person from any land in pursuance of S. 37 or S. 52 of the said Act shall, if the decree or order could not have been validly passed or made had this Act been in operation at the date of the passing or making thereof be void.

Provided that nothing in the Section shall affect any decree or order in execution whereof the possession of the land in respect of which the decree or order was passed or made has already been delivered before the date of commencement of this Act.

7. On a fair reading of the above provision it seems clear that all decrees and orders validly passed in pursuance of S. 37 and Section 52 of the Parent Act before the date of commencement of this Act were declared by the legislature as void but with the exception that such decrees or orders in respect of which possession had already been delivered in execution thereof would remain unaffected. Mr. Mitter does not dispute the legal position relating to such decrees and orders brought into effect by the above amendment. But what he says is that the requirements of the proviso could be met where only symbolical possession in execution of such decrees or

orders is obtained by the decree-holder. Precisely, his argument is that where actual possession is required to be taken but only symbolical possession was delivered it would be no longer open to the decree-holder to ask for actual possession. In such circumstances, it is argued, the decree-holder is only entitled to bring fresh suit for recovery of actual possession from the defendants as they merely continue as trespasser after the symbolical possession is obtained. In aid of such contention Mr. Mitter has relied on a long line of decisions beginning from one of the earliest Full Bench decision of this Court as also some decisions of Judicial Committee, namely, ILR 5 Cal. 584 Jagabandhu Mukherjee v. Ram Chunder Bysack and 22 C.W.N. 330 (P.C.). Thakur Sri R. Krishna v. Ram Bahadur. To reinforce this argument Mr. Mitter has also relied on a decision of the Supreme Court in [Shew Bux Mohata and Others Vs. Bengal Breweries Ltd. and Others,](#) . The appellate Court below, it appears, noticed some of the decisions and though it thought that symbolical possession "is as good as the actual possession against the judgment debtor", it held that this was merely a legal fiction which could not be imported to interpret a statute. Thus, on a construction of the proviso it held that the word "possession" would mean "physical possession" and not "symbolical possession". In our opinion, this was not the correct approach to the question involved in this case. If it be the law that in a case where the actual possession is asked for but only symbolical possession is obtained with the consequence that it would no longer remain open to the decree-holder to ask for actual possession in execution of the same decree, then in absence of any appropriate words qualifying such possession occurring in the impugned proviso it is difficult to see how" it would still be open to the Court to supply that omission in interpreting such provision. Strictly speaking, this is not really a case of applying a legal fiction but applying the law settled by Judicial decisions in construing a statute. Craies on Statute Law 5th Ed. p. 148 has stated the law on this aspect of the matter inter alia, as follows :

When a particular construction has been put upon an Act of Parliament and that construction may have affected the legislature in subsequent legislation the Courts will not disturb that construction unless it is clearly wrong.

8. This statement of law appears to be based on the high authority of the proposition laid down in Lancashire and Yorkshire Railway Corporation v. Durray Corporation (1889), 14 App. Cas. 417, 419. It is, however, not necessary to decide this point finally in this case for, it appears, the question whether it was still open (o the decree-holder on" the facts of this case to ask for actual possession- in the execution case has not been decided at all. In the case of Shew Bux v. Bengal Breweries (supra), the Supreme Court observed, inter alia, as follows :--

Now, under O. 21 R. 35, a person in possession and bound by the decree has to be removed only if necessary, that is to say, if necessary to give the decree-holder the possession he is entitled to ask for. It would not be necessary to remove the person in possession if the decree-holder does not want such removal. It is open to the

decree-holder to accept delivery of possession under that rule without actual removal of the person in possession to which he was entitled under the law.

9. It follows from the above observation that in appropriate cases the decree-holder is not precluded from insisting on delivery of actual possession in execution of the decree. Mulla, it appears, in his commentary on the CPC 13th Ed. at p. 1039 has quoted certain observations of Kerala High Court in *Kunhan v Manu Beari* 1962 K.L.J. 927 (1962 K.L.T. 764) inter alia, as follows :

Where the decree-holder was given possession, but before satisfaction was entered and the execution petition disposed of, there was an order staying delivery, it was held that it was open to the decree-holder to file a fresh execution petition for possession after the stay was dissolved.

10. It is, therefore, to be judged whether on the facts of this case the decree-holder could have asked for actual possession in this case before the executing Court. But this question has not been decided at all by the appellate Court. As this is a point which involves mixed question of fact and law we should remit the case back to the appellate Court for a fresh decision. We make it clear that the other point namely as to whether the decree was dead or alive is left open to be decided afresh by the appellate Court below. But in determining such question the appellate Court will also consider whether the decree on the basis of which actual possession is now sought to be recovered by a separate suit can be enforced again in view of the provisions of sub-section (2) of Section 7 of the Act, even if at all the Court finds that after taking symbolical possession it was no longer open for the appellant to ask for actual possession in execution of the decree.

11. Before we conclude we must notice, the argument advanced on behalf of the respondent. It is said that in view of the decision in [The State of West Bengal Vs. Subodh Gopal Bose and Others](#), it is argued, that the purpose of the Amendment Act would be frustrated if the appellant is found to be again entitled to bring a fresh suit for recovery of possession from the respondent. It is said that these are beneficial legislations and could not admit of any narrow and restrictive interpretation of any of the provisions of the Amendment Act. Reliance is placed on a decision of the Supreme Court in [Mangulu Sahu Ramahari Sahu Vs. The Sales Tax Officer, Ganjam](#), in support of the contention that the word "possession" as used in the proviso would really mean actual possession. It is also said relying on (1974) 1 SCC. 708 D.N. Sanghavi & Ors. v. Ambalal T. Das that the proviso in the instant case ought to be construed to avoid friction and absurdities and to fulfil the purpose and object of the Act. We do not express any opinion as to correctness of either of these contentions. For, in our opinion, there has not been a correct and proper decision of the matters in controversy in the appeal by the appellate Court below. Accordingly, we set aside the judgment and decree of the appellate Court and remit the case back to that Court for a fresh decision in accordance with law and in the light of the observations made above. There will be no order as to costs.

The oral application as made by Mr. P.N. Biswas, learned Advocate for the respondent for stay of the operation of this order is refused.

Chanda, J.

I agree.