

(1985) 02 CAL CK 0028

Calcutta High Court

Case No: Civ. Rev. No. 3723 of 1981

Juthika Basu

APPELLANT

Vs

Parul Bala Kundu and Others

RESPONDENT

Date of Decision: Feb. 27, 1985**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Order 21 Rule 97, 151, 47, 80
- Constitution of India, 1950 - Article 19, 19(1)(f)
- West Bengal Premises Tenancy Act, 1956 - Section 13(1), 13(3A), 17E

Citation: 89 CWN 792**Hon'ble Judges:** Sukumar Chakravarty, J**Bench:** Single Bench**Advocate:** Shyama Prosanna Roychowdhury and Asoke Day, for the Appellant; Ranjit Kumar Banerjee and Haripada Saha, for the Respondent**Final Decision:** Allowed

Judgement

Sukumar Chakravarty, J.

By this revisional application the petitioner Smt. Juthika Basu, one of the judgment debtors in Title Execution Case No. 128 of 1973, has challenged the order dated 24.11.81 passed by the learned Judge, 10th Bench, City Civil Court, Calcutta, in Misc. Case No. 851 of 1978 u/s 47 of the CPC read with section 151 of the said Code, arising out of the aforesaid title execution case. The plaintiff decree-holder-opposite party no. 1 (Sm. Parul Bala Kundu) who acquired the. suit premises by purchase sometime in March 1965 filed the Ejectment Suit No. 824 of 1966 in May 1966 for eviction of the defendant who was the predecessor-in-interest of the petitioner judgment-debtor and proforma judgment-debtor opposite parties on the ground of reasonable requirement. The suit was decreed on contest on 16.12.68. The defendant preferred the appeal being F. A. No. 842 of 1969 before the High Court. The said F. A. No. 842 of 1969 was dismissed on 7.12.71. The decree in the ejectment

suit was put into execution in Title Execution Case No. 128 of 1973 for recovery of possession in the suit premises. The bailiff" who was sent To execute the writ of delivery of possession was resisted by the original judgment-debtor. Misc. Case No. 1128 of 1973 under order 21, Rule 97 of the CPC for execution of the writ of delivery of possession with the police help was started at the instance of the decree-holder. The judgment-debtor in the meantime filed an application u/s 17E of the West Bengal Premises Tenancy Act, 1956 (hereinafter referred to as the "Basic Act") and also filed the Misc. Case No. 90 of 1974 u/s 47 of the Civil Procedure Code. The application u/s 17E of the Basic Act was dismissed on 22.2.73 and the Misc. Case No. 90 of 1974 was dismissed on 1.6.74. The defendant judgment-debtor filed a revision being C. R. No. 2881 of 1974 against the order dated 1.6.77 and the High Court by its order dated 12.12.77 dismissed the revisional case. The original defendant judgment-debtor died during the pendency of the revision case and the present petitioner judgment-debtor and other proforma-judgment debtors-opposite parties were substituted. The Misc. Case No. 1128 of 1973 under Order 21, Rule 97 of the CPC was then allowed on 6.3.78. The petitioner judgment-debtor came to know that the opposite party decree-holder was going to execute the writ of delivery of possession with the police help and accordingly filed the instant Misc. Case No. 851 of 1978 u/s 47 of the CPC read with section 151 thereof, alleging inter alia that the decree in the ejectment suit having been passed in contravention of section 13 (3A) of the Basic Act was a nullity as the Court passing the decree had no jurisdiction to entertain the suit and that accordingly the decree was not executable. The plaintiff decree-holder opposite party no. 1 contested the misc. case by filing objection.

2. The learned Judge, City Civil Court, Calcutta, by the impugned order dismissed the said misc. case u/s 47 read with section 151 C. P. C. on the ground that the decree passed by the Court in contravention of section 13 (3A) of the Basic Act was voidable and not void and that the judgment debtor"s attempt to set aside the said decree by filling the application u/s 17E of the Basic Act was unsuccessful because of the dismissal of that application and that the instant Misc. Case No. 351 of 1978 was hit by constructive res judicata because of the dismissal of the earlier Misc. Case No. 90 of 1974 u/s 47 of the Civil Procedure Code.

3. Mr. Shyama Prasanna Roy Chowdhury, appearing on behalf of the judgment-debtor defendant petitioner, has submitted that because of the retrospective effect of section 13 (3A) of the Basic Act upon the pending suits and appeals, due to section 13 of the West Bengal Premises Tenancy (Second Amendment) Act, 1969 (hereinafter referred to as the Amendment Act) the Court had no jurisdiction to entertain the suit and pass the decree as the suit was instituted within three years from the date of the purchase by the transferee plaintiff landlord, and that accordingly the decree passed by the Court having no jurisdiction being a nullity was not executable and that the same may be successfully resisted by filing objection u/s 47 C. P. C. before the Executing Court. In support of his such submission Mr. Roy Chowdhury has relied on the decision in the

case of [Sunder Dass Vs. Ram Prakash](#), the decision in the case of [Satish Kumar and Others Vs. Surinder Kumar and Others](#), and the decision in the case of [Sibapada Roy Chowdhury Vs. Sudhangsu Kumar Sen](#), Mr. Roy Chowdhury has further submitted that the dismissal of the earlier Misc. Case No. 90 of 1974 u/s 47 of the CPC cannot bar the instant Misc. Case No. 851 of 1978 u/s 47|151 C. P. C. even on the principle of constructive res judicata as the decision given on the question relating to the jurisdiction of the Court by erroneous interpretation of the Statute cannot operate as res judicata and in support of his such submission, he has relied on the decision in the case of [Mathura Prasad Bajoo Jaiswal and Others Vs. Dossibai N.B. Jeejeebhoy](#), .

4. Mr. Ranjit Kumar Banerjee, appearing on behalf of the opposite party decree-holder plaintiff, drawing the Court's attention to the well-established principle of law regarding the meaning and scope of the word "jurisdiction" and the distinction between the exercise and existence of jurisdiction as reported in 27 I. A. 2=16 C.W.N. 725, has submitted that sub-section (3A) of section 13 of the Basic Act lays embargo upon the transferee landlord to institute the suit for eviction on the ground of reasonable requirement within three years of his purchase of the suit premises and has not ousted the jurisdiction of the Court to entertain the suit although the Court's entertainment of such suit for adjudication in view of the mandatory provisions of section 13 (3E) of the Basic Act may be wrong and erroneous and accordingly such erroneous decision being not void ab initio for want of jurisdiction of the Court, requires to be avoided. Mr. Banerjee has further submitted that the decision in [Sunder Dass Vs. Ram Prakash](#), relating to a case where the Court had no jurisdiction to entertain the suit is not applicable in the facts and circumstances of the present case. Mr. Banerjee has further submitted that the decisions in [Kaushalya Devi and Others Vs. Shri K.L. Bansal](#), and [Sibapada Roy Chowdhury Vs. Sudhangsu Kumar Sen](#), are based on different facts and provisions and the law enunciated therein is also not good law. It has been further submitted by Mr. Banerjee that the dismissal of the earlier Misc. Case No. 90 of 1974 u/s 47 C. P. C. operate as constructive res judicata to bar the subsequent Misc. Case No. 851 of 1978 u/s 47 C. P. C. because a wrong decision by a Court having jurisdiction is as much binding between the parties as a right one unless and until it is set aside by a competent court, and in support of his such submission, he has relied on the decision in the case of the [State of West Bengal Vs. Hemant Kumar Bhattacharjee and Others](#), .

5. The present ejectment suit was instituted in 1966 within one year from the plaintiff landlord's purchase of the suit premises in 1965. The ejectment suit was decreed on 16.12.68. F. A. No. 842 of 1961 was preferred in the High Court against the said ejectment decree. During the pendency of F. A. No. 842 of 1969 the Amendment Act came into force in 1969. Section 13 of the Amendment Act directs that the amendment to section 13 of the Basic Act by section 4 of the Amendment Act shall have effect in respect of suits including appeals pending at commencement

of the Amendment Act. "Section 4 has two links. It amends section 13 of the Basic Act by substituting two new clauses (f) and (ff) in place of the old clause (f) of sub-section (I) of section 13. Secondly, it forbids for a period of three years from the date of acquisition suits by new acquires of landlords interest in premises for recovery of possession on any of the grounds mentioned in clause (f) or clause (ff) of sub-section (1)." The F. A. No. 842 of 1969 by against the ejectment decree was dismissed and the judgment and decree of the trial court were confirmed on 7.12.71. The copy of the judgment in F. A. No. 842 of 1969 is Annexure "A" to the revisional application. It appears there from that the retrospective effect of section 13 (3A) of the Basic Act to the pending suits and appeals was not pressed in view of the decision in the case of [Sailendra Nath Ghosal and Others Vs. S. Ena Dutt and Others](#), declaring section 13 of the Amendment Act as ultra vires of the provisions of Article 19(1) (f) of the Constitution.

6. The Supreme Court by the decision in the case of [B. Banerjee Vs. Smt. Anita Pan](#), overruled the Calcutta High Court's decision in [Sailendra Nath Ghosal and Others Vs. S. Ena Dutt and Others](#), and held that section 13 of the Amendment Act giving retrospective effect to section 13 (3A) of the Basic Act is not violative of Article 19(1) (f) of the Constitution.

7. In the meantime, the defendant judgment-debtor's application u/s 17(E) of the Basic Act for setting aside the ejectment decree on the ground of institution of the suit within three years from the date of the purchase by the transferee landlord was dismissed on 22.2.73 and the decree was put into execution in Title Execution Case No. 128 of 1973 and the defendant judgment-debtor's application u/s 47 C. P. C. in Misc. Case No. 90 of 1974 was also dismissed on 1.6.74.

8. Pursuant to the Supreme Court decision in [B. Banerjee Vs. Smt. Anita Pan](#), , the defendant, judgment-debtor has filed the present Misc. Case No. 851 of 1978 u/s 47/151 C. P.C. as the decree-holder has not yet taken delivery of possession in the suit premises. Placing reliance on the decision in [Sunder Dass Vs. Ram Prakash](#), , Mr. Roy Chowdhury, learned Counsel for the judgment debtor petitioner, submits that the judgment-debtor can successfully resist the execution of the decree in view of the retrospective effect of section 13 (3A) of the Basic Act upon the pending suits and appeals and that the decree passed in the instant suit by the Court having no jurisdiction to pass the decree is a nullity, According to Mr. Roy Chowdhury, section 13 (3A) of the Basic Act has ousted the jurisdiction of the Court to entertain the eviction suit within three years form the date of the purchase by the transferee Landlord.

10. Section 13 (3A) of the Basic Act provides as follows :

Where a landlord has acquired his interest in the premises by transfer no suit for the recovery of possession of the premises on any of the grounds mentioned in clause (f) or clause (ff) of sub-section (1) shall be instituted by the landlord before the

expiration of a period of three years from the date of his acquisition of such interest.

According to Mr. Banerjee, learned counsel for the decree-holder opposite party, embargo upon the transferee landlord to institute the suit for recovery of possession on the ground of reasonable requirement as laid down by the section 13 (3A) of the Basic Act cannot be interpreted as embargo upon the Court to entertain such suit, whereas according to Roy Chowdhury, learned counsel for the judgment-debtor petitioner, the embargo should be interpreted as the embargo upon the Court also to entertain such suit. On careful perusal of the provisions of Section 13(3A) of the Basic Act I accept the submission of Mr. Roy Chowdhury and hold that the embargo laid by section 13(3A) of the Basic Act prevents the transferee landlord to institute such suit and accordingly impliedly prevents also the Court to entertain such suit. Such being the position, section 13 (3A) has ousted the jurisdiction of the Court to entertain the suit for recovery of possession by transferee landlord on the ground of clause (ff) of section 13(1) of the Basic Act within three years from the date of purchase and following the decision in [Sunder Dass Vs. Ram Prakash](#), the decree passed by the Court on entertaining such suit shall be a nullity or void ab initio. In the case reported in [Sunder Dass Vs. Ram Prakash](#), based on Delhi Rent Control Act, section 50 of the said Act ousted the jurisdiction of the Civil Court to entertain any suit or proceeding in so far as it relates to eviction of any tenant from any premises to which the Act applies or to any other matter which the controller is empowered by or under the Act to decide.

10. While considering the question of the jurisdiction of the Court, I am not unmindful of the well-established principle of law as enunciated and pointed out to me by Mr. Banerjee in the case of Hriday Nath Roy & Ors. vs. Ram Chandra Barna Sarma & Ors. reported in 24 C.W.N. 725 wherein it has been held as follows :

Since jurisdiction is the power to hear and determine, it does not depend either upon the regularity of the exercise of that power or upon the correctness of the decision pronounced, for the power to decide necessarily carries with it the power to decide wrongly as well as rightly. As an authority for this proposition reference may be made to the celebrated dictum of Lord Hob-house in *Malkarjun vs. Narahari*.

A Court has jurisdiction to decide wrong as well as right, if it decides wrong, the wronged party can only take the course prescribed law for setting matters, right, and if that course is not taken, the decision however wrong cannot be disturbed.

11. The aforesaid well-established principle of law has got no scope of its application in the instant case where section 13 (3A) of the Basic Act has prevented the institution of the suit for the recovery of possession within three years from the date of purchase and accordingly has prevented the Court also to entertain such suit. If, however, any, such suit is instituted in violation of the mandatory provisions of section 13 (3A), of the Basic Act, the only course open to the Court is to reject the plaint being premature and not to pass any decree or dismiss the suit. The decision

in the case of The Province of Bengal vs. Midnapore Zamindary Co. Ltd. reported in 49 C.W.N. 325 is relied on. In that case the plaint was rejected, the suit being premature as the suit was instituted before the expiry of two months from the date of the notice as required u/s 80 of the Civil Procedure Code.

12. It is therefore clear, placing reliance on the decision in [Sunder Dass Vs. Ram Prakash](#), that if the Court without rejecting the plaint of the premature suit entertains the same and passes the decree, that decree shall be a nullity or void but not voidable. The aforesaid finding of myself is also supported by the principle of law. as enunciated in [Sibapada Roy Chowdhury Vs. Sudhangsu Kumar Sen](#), and [Kaushalya Devi and Others Vs. Shri K.L. Bansal](#).

13. The decision in [Sibapada Roy Chowdhury Vs. Sudhangsu Kumar Sen](#), is based on the provisions of section 13(1), clause (ff) of the Basic Act which bar the Court to make any decree for recovery of possession of the tenanted premises in favour of the landlord unless the landlord proves that he reasonably requires the premises and he is not in possession of any reasonably suitable accommodation. In the case reported in [Sibapada Roy Chowdhury Vs. Sudhangsu Kumar Sen](#), His Lordship D.C. Chakravorty, J. has observed as follows :

In the present case, if there be no finding recorded by the Court passing the decree that the landlord was not in possession of any reasonably suitable accommodation, the decree would be bad for want of inherent jurisdiction of the Court.

14. In the case reported in [Kaushalya Devi and Others Vs. Shri K.L. Bansal](#), based on Delhi and Ajmer Rent Control Act 1952 which contains almost similar provisions u/s 13(1) of that Act like the provisions u/s 13(1) of the West Bengal Premises Tenancy Act, the Supreme Court upheld the order of the High Court declaring the decree as a nullity in a revisional case against the order of the lower court in a case u/s 47 of the CPC challenging the validity of the decree passed by the Court on written compromise. by the parties without satisfying itself that no ground of eviction existed, following the decision in Bahadur Singh's case reported in (1961).I S. C. W. R. 51 wherein the Supreme Court held as follows :

The decree passed on the basis of an award was in contravention of section 13(1) of the Act because the Court had passed the decree in terms of the award without satisfying itself 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.

15. In view of the aforesaid decisions, the embargo upon the Court to make the decree for delivery of possession as laid down by section 13(1) of the Basic Act makes the decree a nullity if such decree is passed by the Court in contravention of section 13(1). The embargo upon the institution of the suit for eviction within three years of the purchase by the transferee landlord as laid down by section 13(3A) of the Basic Act is much stronger than the embargo upon the Court to pass a decree in

contravention of section 13(1) of the Basic Act. So the principle of law as established in the decisions in [Kaushalya Devi and Others Vs. Shri K.L. Bansal](#), and [Sibapada Roy Chowdhury Vs. Sudhangsu Kumar Sen](#), will be more forcefully applicable in the case where there is the embargo u/s 13 (3A) of the Basic Act. The decree in the instant case passed in contravention of section 13 (3A) of the Basic Act is therefore a nullity and accordingly not executable and its execution can be successfully resisted in a misc. case like the instant one u/s 47 of the Code of Civil Procedure.

16. Next comes the point whether the dismissal of the previous Misc. Case No. 90 of 1974 u/s 47 C. P. C. will operate as constructive res judicata to bar the Misc. Case No. 851 of 1978 u/s 47/151 C. P. C. In view of my finding that section 13 (3A) of the Basic Act has taken away the jurisdiction of the Court to entertain the suit for eviction within three years from the date of purchase by the transferee landlord on the ground of reasonable requirement, the decision given on the question relating to the jurisdiction of the Court by erroneous interpretation of the Statute cannot operate as res judicata. The decision in [Mathura Prasad Bajoo Jaiswal and Others Vs. Dossibai N.B. Jeejeebhoy](#), is relied on. As argued by Mr. Banerjee, learned counsel for the opposite party decree-holder, I cannot hold that the decision in [State of West Bengal Vs. Hemant Kumar Bhattacharjee and Others](#), will apply in the instant case to bar it on the principle of res judicata. It is not a case where a wrong decision is given by a Court having jurisdiction to bind the parties till its supersession by appeals or other procedures to higher court or tribunal.

17. The dismissal of the defendant judgment-debtor's application u/s 17(E) of the Basic Act does not effect in any way the judgment debtor petitioner's right to challenge the decree u/s 47 C. P. C. at the time of its execution.

18. Having considered all the facts and circumstances as discussed above, I find that the learned Judge, City Civil Court, acted with material irregularity in exercise of his jurisdiction by passing the impugned order whereby he rejected the Misc. Case No. 851 of 1978 and accordingly I find justification to interfere with the said order in exercise of my re-visional power and I do so.

19. In the result, the revisional application is allowed on contest and the Rule is made absolute. The impugned order passed by the learned Judge, City Civil Court, is set aside and the Misc. Case No. 851 of 1978 is allowed on contest and the Title Execution Case No. 128 of 1973 is struck off, the decree in Ejectment Suit No. 824 of 1966 having been found to be a nullity.

20. I make no order as to costs in this revisional application as well as in the Misc. Case No. 851 of 1978.

21. I further direct that the defendant judgment debtor petitioner shall pay all the arrear rents up to February 1985 in five equal monthly installments commencing from March 1985. The first installment must be paid within March 1985. The learned counsel appearing on behalf of the opposite party orally prays for special leave to

appeal. The prayer is refused.