

**(1982) 07 CAL CK 0030****Calcutta High Court****Case No:** C.O. No. 1644 of 1982

Nanda Kumar Mukherjee and  
Others

**APPELLANT****Vs**

Hari Charan Ganguly

**RESPONDENT****Date of Decision:** July 20, 1982**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Section 47
- West Bengal Premises Tenancy Act, 1956 - Section 17

**Citation:** 86 CWN 1122**Hon'ble Judges:** S. N Sanyal, J; Anil K Sen, J**Bench:** Division Bench**Advocate:** Sudhir Kumar Bose and Satish Kr. Chatterjee, for the Appellant; S. P. Roy Chowdhury and Rupen Mitra, for the Respondent**Final Decision:** Allowed**Judgement**

Anil K. Sen, J.

An objection u/s 47 of the CPC which was registered as Misc. Case No. 37 of 1978 of the 2nd Court of the learned Subordinate Judge, Hoogh-ly, having been allowed by an order dated February 16, 1982, the decree holders have preferred the present revision-al application. The application is being heard on notice to and on contest by the judgment debtor. One Harihar Mukherji, the predecessor-in-interest of the present petitioners filed Title Suit No. 33 of 1968 in the 2nd Court of the learned Subordinate Judge, Hooghly, for recovery of possession and for mesne profits against three defendants including the present judgment debtor respondent. The case made in the plaint was to the effect that defendant No. 3 who was a nephew of the plaintiff was left to look after the suit property on his behalf and the said defendant No. 3 inducted the defendant No. 1 the present judgment debtor as a monthly tenant in the suit premises. As no, rent was paid by the defendant No. 1, the plaintiff filed Title Suit No. 286 of 1962 in the 2nd Court of the learned Munsif,

Serampore, for eviction against the defendant No. 1 on the ground of default. In that suit in a proceeding u/s 17 of the West Bengal Premises Tenancy Act, the learned Munsif found that the defendant No. 1 was not a tenant under the plaintiff. The plaintiff then withdrew the suit with leave of the court and then instituted the present suit for recovery of possession of the suit premises from defendant Nos. 1 and 2 who were in possession of the suit premises as trespassers and for mesne profits. This suit succeeded and was decreed on contest against defendant Nos 1 and 2 with costs and against defendant No. 3 without costs.

2. The decree for recovery of possession being put into execution an objection was raised u/s 47 of the CPC to the effect that the decree under execution being void and without jurisdiction is not executable. It was claimed to be so on the ground that in granting permission to withdraw the previous suit, namely, Title Suit No. 286 of 1962 the court permitted the plaintiff to withdraw the suit with liberty to sue afresh on payment of costs which was made condition precedent to the filing of the fresh suit and since such costs were not paid the subsequent suit, namely, Title Suit No. 33 of 1968 was not maintainable so that the decree passed therein was void and without jurisdiction. In disposing of this objection the learned judge in the executing court found that costs of the earlier suit, namely, Title Suit No 286 of 1962 were not deposited or paid when the subsequent suit, in which the decree under execution was passed, was filed. On such a finding he concluded that because of such a default the decree holder had no locus stand to file the present suit and the decree passed therein must be treated as non est. Feeling aggrieved, the decree holders have preferred the present revisional application.

3. Having heard the learned advocates, we are unable to sustain the order passed by the learned Subordinate Judge. The learned Subordinate Judge failed to appreciate that the bar, if any, to the subsequent suit is under Order 23 Rule 1(4) of the CPC which precludes the plaintiff from instituting any fresh suit only in the event he withdraws from the previous suit without the permission referred to in sub-rule (3). The bar under sub-rule (4) on its terms does not arise since necessary permission was obtained. The bar, if any, is on the terms of the order granting the permission. Such bar, however, does not stand in the way of plaintiff filing a fresh suit. This court in the case of *Abdul Aziz v. Ibrahim* 11.H. 1904 (31) Calcutta 965 laid down that where leave was granted to the plaintiff to bring a fresh suit on payment of the defendants cost, it was held that though payment of cost was condition precedent to the institution of a second suit non payment of cost before the institution of the second suit did not render the fresh suit bad ab initio. The preponderance of judicial opinion is in favour of the said view and the default on the part of the plaintiff to pay such costs has been held to be an irregularity not affecting the jurisdiction of the court in entertaining a suit for not fulfilling such a condition precedent. Reference may be made to the decisions in the case of [Raja Traders Vs. Union of India \(UOI\) and Another](#), and *Mela vs Labhu* AIR 1955 Punjab 97. Such being the position of law we seriously doubt the correctness of the view

taken by the learned Subordinate Judge in holding the decree under execution to be one as non est.

4 That apart in our VIEW the learned subordinate Judge made a obvious error in not appreciating that assuming for a moment that sub-rule a fresh suit only in respect of the same subject matter which constitutes the subject matter of the suit withdrawn. It is no bar on the plaintiff's right to file any other suit. Now in the present case it is quite evident that Title Suit No. 286 of 1962 was filed on the basis that the judgment debtor is a tenant governed by the West Bengal Premises Tenancy Act. because of the default since February 1961 and whose tenancy had been determined by a notice dated May 25, 1962, while the suit which resulted in the decree new under execution was instituted for recovery of possession after eviction of the defendant who was claimed to be a trespasser and who is liable to pay mesne profits for the period of his occupation Obviously In the present suit relying upon his own title the plaintiff claimed recovery or possession by eviction of trespassers and not on eviction of a tenant whose tenancy had been determined. Such being the position, the subject matter In the subsequent quit was totally different from the subject matter of the previous suit and bar under sub-rule (4) could have no application to such a quit. In any view of the matter, therefore, it is difficult to uphold the view of the learned Subordinate Judge that the decree under execution is either without Jurisdiction or non est. The revisional application, therefore, succeeds and is allowed, the impugned order being set aside, the objection u/s 47 of the Code is dismissed the learned Subordinate Judge Is directed to proceed with the execution.

S.N. Sanyal, J.

I agree.