

(1977) 08 CAL CK 0031**Calcutta High Court****Case No:** F.A. No. 457 of 1973

Durga Rani Debi

APPELLANT

Vs

Shib Chandra Das

RESPONDENT

Date of Decision: Aug. 5, 1977**Acts Referred:**

- West Bengal Premises Tenancy (Second Amendment) Act, 1969 - Section 17D

Citation: 82 CWN 112**Hon'ble Judges:** P.K. Banerjee, J; G.N. Ray, J**Bench:** Division Bench**Advocate:** B.C. Dutt and Partha Dutt, for the Appellant; Debaprosad Bhattacharya, for the Respondent**Final Decision:** Dismissed**Judgement**

P.K. Banerjee, J.

This appeal at the instance of the plaintiff-appellant arises out of a suit for ejectment of the defendant on the ground of default and reasonable requirement. The plaintiff is the deity represented by the Shebait. The plaintiff's case is that the defendant is a monthly tenant under the plaintiff in respect of two rooms and a cooking space on the ground floor of premises No. 85, Durga Charan Mitra Street, Calcutta, at a monthly rental of Rs. 48-50 np. payable in advance according to the English Calendar month. The plaintiff's further case is that the defendant was a defaulter in payment of rent since 1962 till the date of suit, i.e. 1966 and further the plaintiff required the premises in question for his own use and occupation. The notice determining the tenancy and the notice of suit were served on the defendant. The defendant not having vacated the premises, the suit was filed. The defendant contested the suit by filing a written statement denying the default or the ground of reasonable requirement. The defendant admitted the service of ejectment notice but contended that it is not legal and valid. A decree was eventually passed against the defendant by the Judge City Civil Court on 26th March, 1966. The defendant

preferred an appeal in this Court which was disposed of by this Court in the following terms :

The appeal is accordingly dismissed for non-prosecution without any order as to costs. The cross objection is not also pressed and it is accordingly dismissed for non-prosecution without any order as to costs.

During the pendency of the appeal in this Court, West Bengal Premises Tenancy (Second Amendment) Act. 1969 came into force and within the period limited u/s 17D of the West Bengal Premises Tenancy (Second Amendment) Act, 1969, the application was filed by the defendant for setting aside the ejectment decree passed in Ejectment Suit No. 621 of 1964. The said application however was not disposed of by the learned Judge as the appeal was pending in this Court. The application u/s 17D of the Act was taken up for hearing and disposed of by the learned Judge, City Civil Court setting aside the decree passed by the Court below on the ground of default. The said order was passed on 2nd April, 1973. Being aggrieved by the said order, the plaintiff-appellant filed the present appeal.

2. Mr. Dutt on behalf of the appellant contended firstly that when the appeal was disposed of by this Court the decree passed by the Trial Court on 26th March, 1966 merged in the appellate Court decree and therefore it is argued by Mr. Dutt that section 17D in terms does not apply as the decree was after the date of coming into force of the West Bengal Premises Tenancy (Second Amendment) Act. 1969. It is argued that section 17D will only apply in cases where the ground in the suit is for default and not on other ground and therefore in the present case, apart from the ground of default there was a ground of reasonable requirement and therefore section 17D has no application in the facts of the present case.

3. Mr. Deboprasad Bhattacharya on behalf of the respondent contended that the appeal in this Court was not pressed by the defendant-appellant and therefore the appeal was dismissed for non-prosecution. If an appeal is not pressed and the appeal is dismissed for non-prosecution, the Trial Court's decree does not merge in the appeal Court as the appeal was not dismissed on merit and the decree which is executable is the Trial Court decree. It is further argued by Mr. Bhattacharya that as the appeal was dismissed for non-prosecution, it must be taken that there was no appeal in the eye of law.

Mr. Dutt relied upon the case reported in Gojer Bros. (Pvt.) Ltd. Vs. Shri Ratan Lal Singh, in support of his contention. The Supreme Court held that--

The benefit of section 17-D is available to a tenant if the decree for possession can be said to have been passed against him before the commencement of the West Bengal Premises Tenancy (Amendment) Act of 1968, which came into force with retrospective effect from 26-8-1967. Section 17-D confers power on the Court "to set aside decrees" which are operative, that is, capable of execution. Where the decree of the Trial Court is carried in appeal and the appellate Court disposes of the appeal

after a contested hearing, the decree to be executed is the decree of the appellate Court and not of the Trial Court. The reason for this rule is that in such cases the decree of the Trial Court is merged in the decree of the appellate Court.

It was further held that:

Where the decree for possession of the premises was passed by the Trial Court in 1958 but that decree was taken in first appeal where it was confirmed, and then in second appeal, the High Court, after a contested hearing, dismissed the appeal and confirmed the decree of the first appellate Court in 1969, that is, after and not before the commencement of the 1968 Act, the decree of the Trial Court must be taken to have merged in the decree of the High Court, and it was the decree of the High Court which was the only decree executable. It was therefore not liable to be set aside u/s 17-D.

Mr. Dutt basing his argument on the decision contended that in the present case the decree was passed in 1966 by the Trial Court before the commencement of the West Bengal Premises Tenancy (Amendment) Act of 1968 which came into force on 27th August, 1968, and therefore section 17-D would have applied but an appeal was taken by the defendant in this Court and the appeal was disposed of after the said date as not proceeded with by the defendant. As the appeal was dismissed for non-prosecution the decree of the Trial Court passed in 1966 merged in the decree of the High Court. Applying this principle laid down in the Supreme Court decision Mr. Dutt argued that section 17-D of the Act is not applicable as in the High Court decree, the Trial Court's decree merged.

4. In our opinion the Supreme Court case hereinbefore referred to is distinguishable. The Supreme Court held that the benefit of section 17-D is available only to a tenant if the decree for possession have been passed before the commencement of the West Bengal Premises Tenancy Act. In the said case the appeal was disposed of by the High Court after the commencement of the West Bengal Premises Tenancy Act, 1968. In view of the fact as the Lower Court decree merged in the Appeal Court decree it has been held by the Supreme Court that the West Bengal Premises Tenancy (Second Amendment) Act, 1968 will not apply in such decree. It appears however that Their Lordships of the Supreme Court specifically stated that the appeal should be disposed of after the contested hearing. The Hon'ble Judges of the Supreme Court however specifically made it clear that "they are not concerned to determine whether the decree passed by a trial court can merge in an unspeaking order passed by the higher Court while summarily dismissing the proceeding because the High Court has not given a considered judgment after a contested hearing." But in paragraph 12 Their Lordships made an observations that "the principle, therefore, that there is no decree as such of the appellate Court if it dismisses the appeal for default of appearance or for want of prosecution or in the ground that the appeal has abated or is withdrawn or that the appellant has failed to furnish security for costs as provided in Order 41, Rule 10 of

the Code of Civil Procedure, can have no application to the instant case." This observation, it appears to us, supports the contention put forward by the respondent. The case reported in 41 I.A. 104 (Batuk Nath vs. Munni Dei) supports the case of the respondent. The Privy Council in the said case was considering the effect of the Limitation Act for the purpose of making an application for execution of a decree. In the said case a decree for sale of certain immovable property was obtained on March 29, 1898 and an application for execution was made on 2nd October, 1907. It appears that from the decree of 29th March, 1898 an appeal was taken to the High Court, Allahabad. The appeal was dismissed by the High Court on 12th February, 1900 but in dismissing the appeal the High Court extended the time for payment of the prior mortgage debt to August 9, 1900. From the said decree of the High Court dated February 12, 1900 the appellant preferred an appeal to the Privy Council. On December 15, 1904, the appeal to His Majesty in Council stood dismissed for non-prosecution under Rule V of the Order in Council of June 13, 1853 without further order. The question arose whether the said dismissal for want of prosecution amounts to a final decree or order of the Privy Council made in appeal. It has been held that there was no final decree or order of the Privy Council in the appeal and therefore the application for execution was barred by limitation. Their Lordships held that there was however no order of His Majesty in Council dismissing the appeal, nor was it necessary that any such order should be made in the appeal. Under Rule V of the Order in Council of June 13, 1853, the appellant or his agent not having taken effectual steps for the prosecution of the appeal, the appeal stood dismissed without further order. While Mr. Bhattacharya relied upon this observation in support of his case, Mr. Dutt contended that as there was no order of the Privy Council, the appeal stood dismissed for non-compliance of the rule, the case does not support the contention of the respondent.

5. In a case reported in I. L. R. 44 Cal. 954 (Shyam Mondol vs. Satinath Banerjee) it has been held by this Court that the original decree is merged in the Appellate decree whether the latter confirms, amends or reverses the original decree, and it is the Appellate decree alone which can be executed. It is further held that this doctrine cannot be applied where the appeal is dismissed for default, in such a case, the appeal fails for non-prosecution and it cannot appropriately be said that the Court of appeal adopts the decree of the primary Court and the Judgement of the Lower Court, therefore, would be the judgement to be enforced. At page 960 this Court held as follows :-

But this doctrine cannot be applied where the appeal is dismissed for default; in such a case, the appeal fails for non-prosecution and it cannot appropriately be said that the Court of Appeal adopts the decree of the primary Court. This was recognised by Sir Barnes Peacock C.J. when in his judgement in the Full Bench case of Bipro Das vs. Chunder Seekur, he observed that if in the case of an appeal, a new judgement of affirmation of the former decree should be given then a new judgement would have to be executed, but if the appeals were dismissed for

default, there would be no new judgement, and the judgement of the Lower Court would be the judgement to be enforced.

6. In our opinion, in consideration of, this judgement and also the judgement of the Supreme Court hereinbefore stated, the principle which is considered for the decision is one whether a new judgement is made either confirming or reversing the Trial Court's judgement after a contested hearing. If the appeal is disposed of for default or for non-prosecution or for not pressing the appeal it does not become the disposal of the appeal after a contested hearing and no new judgement is made which is to be enforced. Mr. Dutt relied upon the case reported in Ganesh Prasad Vs. Mt. Makhna and Another, in support of his contention. In view of the Supreme Court's decision and in view of our High Court's decision we are inclined to hold that if an appeal is dismissed for non-prosecution or for default, the trial court's decree does not merge in the appeal Court's decree and the trial court's decree is the decree which is executable. Therefore the Supreme Court's decision reported in Gojer Bros. (Pvt.) Ltd. Vs. Shri Ratan Lal Singh, does not apply. Therefore, in our opinion, the application u/s 17-D for setting aside the decree passed by the Trial Court is still maintainable if filed within the time allowed u/s 17-D of the Act. Mr. Dutt further contended that the appeal is the continuation of the suit and therefore the question of avoiding the decree already passed under appeal does not arise. This point is no longer open in view of the Division Bench decision reported in Mrs. J. Paul Vs. Calcutta Boys School and Others, with which we respectfully agree.

This appeal, therefore, must fail and we dismiss the appeal.

There will be no order as to costs.

In view of our judgement above, we are not inclined to take additional evidence in this case. The application for additional evidence is therefore rejected.

G.N. Ray, J.

I agree.