

(1980) 09 CAL CK 0008
In the Calcutta High Court

Biswa Bhusan Bose and Another

APPELLANT

Vs

Smt. Kusum Agarwalla

RESPONDENT

Date of Decision : 24-09-1980

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 11, 47
Evidence Act, 1872 — Section 58
Transfer of Property Act, 1882 — Section 106, 108, 114A

Citation : 85 CWN 120

Hon'ble Judges : Bhabes Chandra Chakravorti, J; Anil Kumar Sen, J

Bench : Division Bench

Advocate : Saktinath Mukherji and Pradipta Roy, for the Appellant; Mahindra Nath Ghosh, Subhas Banerjee and Shyamal Kumar Mukherjee, for the Respondent

Final Decision : Allowed

Judgement

1. This is a revisional application at the instance of the decree-holders arising out of an execution case, being Title Execution Case No. 25 of 1971, of the First Court of the learned Subordinate Judge, Alipore, District 24-Parganas. The revisional application is being heard on contest by the sole judgment-debtor. The orders impugned in the present revisional application are the two orders dated July 3, 1980, and July 22, 1980 passed by the learned Subordinate Judge. By the first order the learned Subordinate Judge rejected an application for amendment to the execution petition filed by the decree-holders and by the second order he allowed an objection u/s 47 of the CPC filed by the judgment-debtor in the aforesaid execution case which registered as Miscellaneous Case No. 6 of 1972. Upholding one out of the two objections raised u/s 47 of the Code, the learned Judge by his order dated July 22, 1980, has held that the decree under execution is a nullity, and as such, is not executable.

2. Premises No. 3, Ashoke Road, Calcutta, formed a part of the estate of late Sribhusan Bose. The judgment-debtor obtained a lease in respect of a part of the

said premises more fully described in the plaint schedule from the two Executors appointed under the Will of the said late Sribhusan Bose. The lease was for 7 years being effective from January 1, 1966. The rent agreed to be paid was Rs. 1,500/- per month inclusive of service and other charges. The lease contained the usual terms to the effect that the lease would maintain the leasehold property on proper repairs and would not raise any permanent structure in any part thereof. On an allegation that the judgment-debtor lessee had failed to pay rent since September, 1966, and had further committed breach of the covenants contained in the lease by not maintaining the leasehold property on appropriate repairs and having raised permanent structures in a part thereof, the decree-holders as plaintiffs filed Title suit No. 29 of 1970 on March 18, 1970. In filing the suit they claimed that they were the legatees under the Will of the Sribhusan Bose and the Executors having assented to the legacies in their favour, the lessee attorned I their favour by paying rent to them since May, 1969.

3. The lease being one for 7 years would be governed by the provisions of the West Bengal Premises Tenancy Act (hereinafter referred to as the said Act). Such being the position, the plaintiffs in filing the suit only made out a case of forfeiture under the lease itself but further pleaded that they are entitled to a decree for eviction u/s 13(1) of the said Act on the two twofold grounds of (1) default and (2) the lessee having committed acts contrary to the provisions of clauses (m), (o) and (p) of section 108 of the Transfer of Property Act. In the suit the plaintiffs also claimed a decree for a sum of Rs. 7,350/-, being the arrears of rent, from September, 1969 to 28th January, 1970, and for mesne profits.

4-5. The lessee defendant filed an application u/s 17(2) and section 17(2A) of the said Act. In this application the lessee defendant did not deny or dispute non-payment of rent since September, 1969, but pleaded suspension of rent and adjustment of certain amounts claimed to have been realised by way of service and other charges though the lessors had rendered no such services. Her specific defence was that as the lessors had built a garage blocking one of the rooms leased out to her in such a manner that it had become uninhabitable she was entitled to suspension of rent. She further claimed that the monthly rent payable by her was Rs. 1200/- and not Rs. 1500/-, the other sum of Rs. 300/- being paid as service and other charges though no such services having been rendered a heavy amount on that account have been realized by the lessors which is liable to be adjusted.

6. On August 13, 1970, the learned Judge in the trial court disposed of the application u/s 17(2) and section 17(2A) of the said Act. In the order disposing of the said application the learned Judge found that the defendant had admitted the rents to be in arrears since September, 1969. The learned Judge, however, overruled both the pleas raised by the lessee defendant claiming suspension of rent and adjustment based on the plea of over-payment. He did not accept the case of the lessee defendant that any of the rooms leased out to her had been rendered uninhabitable due to any construction raised by the lessor. He further

found that the rent payable by the lessee was Rs. 1500/- and not Rs. 1200/- as claimed by her and that she had failed to make out any case for adjustment. The lessee-defendant's prayer for installments being overruled the learned Judge passed the following order :

The defendant do deposit in Court arrears of rent and/or the amount calculated at the rate of rent from September, 1969 to July, 1970 at the rate of Rs. 1500/- per month together with statutory interest thereon calculated upto date to deposit within 15 days from date. The defendant shall thereafter continue to deposit month by month by the 15th of each succeeding month a sum equivalent to the rate of rent, namely, at the rate of Rs. 1500/- per month.

7. The lessee defendant moved this Court in revision against the aforesaid order dated August 13, 1970.

8. This Court by its order dated September 24, 1970, substantially upheld the said order, though on the concession made on behalf of the present petitioners, then the plaintiffs, this Court set aside the order for payment of interest and also made an order for payment of the arrears from September, 1969 till August, 1970 calculated at Rs. 18,000/- on certain easy installments.

9. The lessee defendant, however, failed to pay any of these installments and on an application made u/s 17(3) of the said Act, her defence against delivery of possession was struck out. The suit was then heard exparte though the defendant was allowed to cross-examine the plaintiffs' witnesses. By the judgment and decree dated July 21, 1971, the plaintiffs' claim both for eviction and arrears of rent and mesne profits was decreed. For our present purpose it would be necessary to refer to some of the findings recorded by the learned Judge on the exparte evidence in support of the decree. Referring to material pleadings of the parties, the learned Judge observed : "In support of the plaintiff allegations the plaintiff No. 2 deposed and he had been subjected to cross-examination. His evidence goes to prove the plaintiff case". The learned Judge further recorded a specific finding that the Executors having assented to the legacies in favour of the plaintiffs the lessee defendant attorned in their favour by payment of rent. He further found that the plaintiffs' evidence goes to indicate that the lessee defendant began violating the terms of the lease since April, 1969, "that no white-washing was done, that the defendant made a permanent construction". Referring to Exts. 4 and 5, he further found that the lessee defendant was called upon to remedy the breaches but it was not done. The learned Judge found due service of the notice to quit. In that view, the learned Judge observed: "I find no difficulty to passing decree".

10. On August 10, 1971, the decree-holders put the said decree into execution in the aforesaid Title Execution Case No. 25 of 1971 and the judgment-debtor filed an objection thereto u/s 47 of the Code.

11. The lessee defendant, however, preferred an appeal to this Court, being F.A. 32 of 1972. In that appeal an application for stay of execution was filed and

there was no dispute that such stay was granted only when the defendant/appellant deposited the arrears on installments in terms of the order passed on the stay application. At the hearing of the appeal the orders passed by the trial court on the applications u/s 17(2), (2A) or 17(3) were not challenged but a plea was raised to the effect that, though belated, the arrears having been deposited in terms of the order passed on the stay application the defendant/appellant was entitled to relief u/s 17(4) of the said Act. It was further contended that there was no valid determination of the tenancy u/s 106 of the Transfer of Property Act and that the notice determining the tenancy was contrary to the provisions of section 114A of the Transfer of Property Act. All these grounds raised in the appeal having been overruled the appeal was dismissed on March 4, 1977, and the decree under appeal was affirmed.

12. The defendant lessee filed a special leave- application before the Supreme Court of India against the said appellate decree but the leave prayed for being refused the Supreme Court upheld the decree by an order dated October 4, 1979.

13. In the background of the aforesaid facts and attempt on the part of the judgment-debtor to obtain an injunction in a collateral suit challenging the decree restraining the execution thereof having failed, the decree-holders filed an application on June 9, 1980, for a formal amendment of the application for execution. The amendment sought for was to incorporate a notice that the decree under execution had been affirmed by the High Court by the decree passed in F. A. 32 of 1972 and for deleting the prayer for recovery of the decretal dues obviously in view of the payments made by the judgment-debtor in terms of the order passed on the stay application in the aforesaid First Appeal. This application was opposed though we fail to appreciate the reason for the opposition particularly when the decree-holders were bona fide foregoing their claim for realization of the decretal dues, such dues being already paid by the judgment-debtor. More strange is the fact that the learned Judge in the Executing Court thought it fit to reject this application as he did by his order dated July 3, 1980. It was so rejected on the view that in the application for amendment the decree-holders had failed to furnish any reason or to point out the existence of any defect which requires to be rectified. When it was pointed out to the learned Judge in the Executing Court that such an amendment would be necessary in view of the subsequent affirmation of the decree by the High Court and in view of the subsequent events, the learned Judge seems to have taken the view that these are not relevant for the purpose of execution. This view, however, is clearly unsustainable. The application for execution was filed at a time when there was no appeal preferred to this Court. Obviously, therefore, the decree that was sought to be executed was the decree passed by the trial court. But when the judgment-debtor subsequent thereto filed an appeal and obtained the stay of execution and when the said appeal having failed the decree under execution got merged into the decree of the appellate Court it was necessary for the decree-holders to seek a formal amendment of the application for execution to the effect that the decree under execution is the decree since

affirmed by the appellate court. This Court pointed out as early as in the case of (1) Baburam Lal and Another Vs. Debdas Lala, that such a formal amendment is needed in view of the merger of the trial court's decree in the decree passed by the appellate court. It is obvious, therefore, that the learned Judge in the Executing Court rejected the decree-holders' application for amendment as aforesaid upon a clear misconception of the legal position when he thought that the amendment sought for was wholly irrelevant.

14. In the objection u/s 47 of the Code though several grounds were raised on behalf of the judgment-debtor, only two of them were passed at the hearing. The first objection that was so pressed was to the effect that the decree passed in Title Suit No. 29 of 1970 under execution having been passed without any finding as to the grounds of eviction contemplated by section 13(1) of the said Act, and such grounds being non-existent in the judgment, the decree must be considered to be a nullity. The second objection that was pressed on behalf of the judgment-debtor was to the effect that the decree-holders have no locus standi to execute the decree, inasmuch as they were not the owners of the suit property, there being no valid assent to the legacies in their favour by the Executors. Both the objections so raised on behalf of the judgment-debtor were contested by the decree-holders. Apart from contesting those objections on their merits, the decree-holders took the stand that issues ought to be raised on the basis of such an objection being concluded by the judgment itself must be held to be barred by principles of res judicata.

15. As we have indicated hereinbefore though the first objection succeeded before the learned Judge in the Executing Court, the second one failed. In overruling the second objection, the learned Judge found that when the Will was probated and the decree-holders became the owners of the property on the basis of the grant made in respect of the Will, their claim of ownership cannot collaterally be disputed. Reliance was placed on a decision of this Court in the case of (2) Kripamay Mukherjee Vs. Dharendra Nath Mukherjee, . Though on the objection raised neither the Will nor the grant of the probate being challenged, the decision relied on by the learned Judge may not have much relevance, yet in our view his ultimate conclusion on the issue is correct. We have indicated hereinbefore the issue as to whether the property vested in the decree-holders by virtue of the Executors assenting to the legacies in their favour was an issue raised in the suit and concluded by the judgment. As a matter of fact the learned Judge in disposing of the suit found on the evidence by the plaintiffs that not only was there such vesting but then the judgment-debtor herself attorned in favour of the decree-holders by payment of rent. That issue being concluded by the judgment itself was not open at the execution stage. Such being the legal position, Mr. Ghosh, who is appearing on behalf of the judgment-debtor, in his usual fairness has not challenged that finding of the learned Judge of the Executing Court.

16. The principal point of controversy between the parties now before us, as

raised by their respective advocates, relate to the other objection as to whether the decree under execution is a nullity or not. In holding it to be so, the learned Judge considered only the trial court's judgment. There again clearly misreading the said judgment he observed: "On perusal of the judgment it appears there is no finding as to the ground for eviction." Having found as such and relying on four decisions of the Supreme Court in the cases of (3) Kaushalya Devi and Others Vs. Shri K.L. Bansal, , (4) Ferozi Lal Jain Vs. Man Mal and Another, , (5) K.K. Chari Vs. R.M. Seshadri, , (6) Nai Bahu v. Lala Ramnarayan, AIR 1978 SC 32 and two of the earlier decisions of this Court based on the principles enunciated by the Supreme Court in the aforesaid decisions, the learned Judge held that when there is no finding recorded in the judgment as to the existence of any of the grounds contemplated by section 13(1) of the said Act, it must be held that the Court passed the decree without being satisfied as to the existence of one or more of such grounds on which satisfaction alone a decree could have been passed and as such the decree passed without such satisfaction is a nullity.

17. Mrs. Mukherji appearing in support of this revisional application has contended that such a conclusion is clearly unsustainable for two reasons. Firstly, such a conclusion, according to Mr. Mukherji, is based on apparent misreading of the trial court's judgment and non-consideration of the appellate judgment altogether. Secondly, it has been contended by Mr. Mukherji that even accepting the finding of the learned Judge that no such finding as to establishment of a ground of eviction contemplated by section 13(1) of the said Act had been recorded by the trial court in its judgment decreeing the suit for eviction, that by itself would not render the decree nullity if on the records of the suit there are materials to show the existence of such a ground and the satisfaction of the Court as to such existence. In the present case, according to Mr. Mukherji, on disposing of the application u/s 17(2) and section 17(2A) the Court considered the specific issue as to whether the defendant judgment-debtor had been in default in payment of rent since September, 1969 or not. Such default was found on the admission of non-payment of rent when her only defence claiming suspension and adjustment was overruled by the trial court. Such a decision being on the record of the suit and the same being further upheld by this court on revision, it has been strongly contended by Mr. Mukherji that the learned Judge could not have held the decree to be one passed without jurisdiction. The learned Judge misread the decision relied on by him when he thought that the existence of the ground of eviction and the court's satisfaction in that regard must necessarily be recorded in the judgment decreeing the suit and not otherwise.

18. Mr. Ghosh, appearing on behalf of the Judgment-debtor in support of the impugned order has contended that in neither of the judgments passed by the trial court and the appellate court is there any specific finding as to the existence of a ground for eviction contemplated by section 13(1) of the said Act, and the learned Judge's finding in this regard is well justified. In contesting the second point raised by Mr. Mukherji, Mr. Ghosh has strongly contended that the finding

on the point of default recorded by the trial court in its order disposing of the application u/s 17(2) and section 17(2A) of the said Act, is not a conclusive finding. That order being an interlocutory order findings recorded therein are tentative in nature, as such, the findings therein recorded cannot be considered to furnish the foundation for the decree. Reliance has been placed by Mr. Ghosh on a single Bench decision of this Court in the case of (7) Maharam Ali Vs. Dinanath Prasad Sha, . Hence according to Mr. Ghosh, it was necessary for the trial court to finally decide the issue on the point of default as a ground for eviction in the judgment disposing the suit and no finding in this regard having been recorded in that judgment, even if ex parte, the decree based thereon cannot but be held to be without jurisdiction on the principles laid down in the decisions relied on by the Executing Court.

19. We have carefully considered the rival contentions put forward before us and on such careful consideration we have come to the conclusion that there is ample substance in both the points raised by Mr. Mukherji. Though shortly, we have referred to in some details the material findings of the learned Judge in the trial court when he decreed the suit ex parte only to show that it is far from correct to say that the decree for eviction is not based upon a finding that the plaintiff had made out a ground for such eviction contemplated by section 13 (1) of the said Act. The suit was so declared in the presence of the defendant after her defence against delivery of possession was struck out because of non-compliance with the requirements of section 17 (2). In doing so not only did the learned Judge record a finding that the ex parte evidence of the plaintiff goes to prove the plaintiff's case but he further found that the judgment-debtor-defendant had made permanent construction in breach of the covenant between the parties and the defendant failed to remedy the said breach. On such a finding the suit was decreed not only on the prayer for eviction but also on the prayer for arrears of rent amounting to Rs. 7,350/-, such arrears being since September, 1969. Clearly, therefore, the defendant was found to be in default since September, 1969, and was further found guilty of committing acts contrary to the provisions of clauses (m), (o) and (p) of section 108 of the Transfer of Property Act. Such grounds come within the purview of section 13(1) and well justify passing of a decree for eviction. The learned Judge in the Executing Court failed to take note of these findings. That apart it had been rightly pointed out by Mr. Mukherji that when the decree under execution has merged into the appellate decree, the executing court should have taken into consideration the appellate judgment. That was not done in the present case. The executing Court failed to take note of the fact that an appeal being preferred against the decree for eviction the default since September, 1969 and non-compliance with the requirement of section 17(1) and (2) at the trial stage were admitted on behalf of the defendant-appellant (judgment-debtor) when it was contended on her behalf that she having deposited the entire arrears pending the appeal was entitled to relief under sub-section (4) of section 17. That plea was overruled by this Court and the defendant-appellants' application for special leave to the Supreme Court

having been dismissed the said decision became conclusive. The finding of the trial court in respect of the other ground of defendant committing acts contrary to clauses (m), (o) and (p) of section 108 of the Transfer of Property Act was not even challenged before the appeal court. Therefore, the finding of the Executing Court to the effect that no ground for eviction contemplated by section 13(1) of the said Act is borne out by the findings recorded in the judgment decreeing the suit, is a highly irregular finding, if not perverse, being based on clear misreading of trial court's judgment and non-consideration of the appellate judgment. The order impugned in the revisional application based on such a finding being one passed in gross irregular exercise of jurisdiction and such an order having resulted in a serious miscarriage of justice, is liable to be set aside on this ground alone.

20. Next we proceed to consider the second point raised by Mr. Mukherji. Here again we agree with Mr. Mukherji that though the learned Judge in the Executing Court referred to most of the relevant decisions of the Supreme Court, he failed to appreciate the correct principles that emerge from the said decisions. In the three earlier decisions in the cases of (8) Bahadur Singh and Another Vs. Muni Subrat Dass and Another, , Kaushalya Devi and Others Vs. Shri K.L. Bansal, and Ferozi Lal Jain Vs. Man Mal and Another, , Supreme Court merely laid down that where a statutory provision like section 13(1) of the said Act bars the jurisdiction of a Court to pass a decree for eviction except on the existence of one of more of the grounds sanctioned by the statute and on the court's satisfaction as to such existence, no decree could be passed either in invitum or with the consent of parties on a ground which he de hors the statute or ultra vires the same. But it is not correct to think, as has been the view taken by the learned Judge in the present case, that the existence of such a ground or the satisfaction regarding thereto must be expressed on the face of the decree.

21. In K.K. Chari Vs. R.M. Seshadri, , the Supreme Court pointed out that if at some stage the Court is called upon to apply its mind to the question and there was sufficient material before it before the parties invited it to pass an order in terms of their agreement, it is possible to postulate that the Court was satisfied about the grounds on which the order of eviction was passed. The Supreme Court expressly observed therein that "satisfaction of the Court, which is no doubt a pre-requisite for the order of eviction, need not be by the manifestation borne out by a judicial finding". It was also pointed out that the Executing Court for determining such a question can go behind the decree and look into the pleadings and the proceedings before the Court to find out whether such a ground was in existence at the time when the decree was passed and whether the Court could be said to have been satisfied as to its existence. The Supreme Court went further to observe in (9) Nagindas Ramdas Vs. Dalpatram Ichharam alias Brijram and Others, as follows: -

From a conspectus of the cases cited at the bar, the principle that emerges is that if at the time of passing of the decree, there was some material before the

Court on the basis of which the Court could be prima facie satisfied about the existence of a statutory ground for eviction, it will be presumed that the Court was so satisfied and the decree for eviction apparently passed on the basis of a compromise would be valid. Such material may take the shape either of evidence recorded or produced in the case or it may partly or wholly be in the shape of an express or implied admission made in the compromise agreement itself. Admissions, if true and clear, are by far the best proof of the facts admitted. Admissions in pleading or judicial admissions admissible u/s 58 of the Evidence Act made by the parties or their agents at or before the hearing of the case stand on a higher footing than evidentiary admission. The former class of admission are fully binding on the party that makes them and constitute an waiver of the proof.

22. Judged on the principle so explained by the Supreme Court itself, in the present case there can be no doubt as to the existence of a ground contemplated by section 13(1) of the said Act and the court's satisfaction as to such existence at the time when the decree for eviction was passed because prior to the decree the Court specifically went into that issue in disposing of the defendant's application u/s 17(2) of the Act. That was a part of the proceeding of the suit and when the satisfaction as to the existence of a ground sanctioned by the statute for passing of a decree for eviction is explicit on the records of such proceedings it is difficult for us to support the view taken by the learned Judge that mere non-recording a finding in that respect in the decree would render the decree a nullity. It is the existence of such a ground and the satisfaction of the Court as to such existence which confer jurisdiction on the Court to pass a decree and the jurisdiction is not dependent on recording such satisfaction in the decree itself. This distinction the learned Judge failed to appreciate when he held that the learned Judge in the trial court not having recorded a finding as to existence of such a ground in the decree must be deemed to have passed the decree without jurisdiction rendering in a nullity.

23. The learned Judge relied on an earlier decision of this Court in the case of (10) Sitaram Srigopal Vs. Union Carbide India Ltd., . A Division Bench of this Court in this case merely followed the decision of the Supreme Court in Kaushalya Debi's case and Ferizilal's case in holding a decree for eviction which was passed in vitum where the Court does not appear to have adverted to the existence or otherwise of any of the grounds sanctioned by the statute to be one which was passed without jurisdiction. We have pointed out hereinbefore, however, that the said decisions had been explained by the Supreme Court in the latter decision referred to hereinbefore and so explained the earlier decision of the Supreme Court is no authority for a proposition that the existence of a ground sanctioning a decree for eviction or the satisfaction of the Court as to such existence is to be recorded in the decree itself. Nor is there any in the Bench decision of this Court in the above case to support such a proposition.

24. The learned further relied on a Single Bench decision in the case of (11)

Dukhharan Mukherji Vs. Tara Sundari Dassi and Others, . This decision in our view does not deal with the point now consideration. In that case at the trial of the suit an issue was raised as to whether the requirement of the landlord which was the ground for the eviction could be met by partial eviction as contemplated by section 13(4) of the said Act. This court is disposing of a Letters Patent Appeal arising therefrom came to a finding that a partial eviction would satisfy the plaintiff's requirement but by mistake affirmed the decree for eviction from the entire premises passed by the trial court. When that decree was put into execution, defendant-judgment-debtor raised an objection u/s 47 of the Code that the decree under execution is a nullity. That objection was upheld by a learned single Judge who took the view that the decree not being in consonance with the judgment must be held to be different from the one now under consideration by us. That apart with great respect to the learned Judge the correctness of the view expressed therein is open to serious doubt. Rights of parties with regard to matters in controversy when adjudicated by a Court in a suit are finally determined by the judgment passed. Decree is merely the formal expression of such adjudication so that if the Court had the necessary jurisdiction to adjudicate, there is no reason to think why it would not have the jurisdiction to formally express the adjudication. Under Order 20 Rule 6 of the Code, the decree must agree with the judgment. So long the decree drawn up is in respect of parties and subject matter covered by the suit, any variance between the decree and the judgment is a matter of error to be corrected under the material provisions of the Code. Such an error does not render the decree a nullity.

25. In answer to this point raised by Mr. Mukherji it has been contended by Mr. Ghosh that even assuming that there was a finding recorded by the Court prior to the passing of the decree as to the existence of a ground sanctioned by the statute while disposing of an application u/s 17(2) of the said Act, that finding would not conclude the issue and it was necessary for the Court to decide that issue finally while disposing of the suit though ex parte. Such a finding according to Mr. Ghosh not being conclusive but merely tentative in its nature cannot furnish the foundation for passing of a decree for eviction. Strong reliance is placed by Mr. Ghosh on the Full Bench decision of this Court in the case of (12) Gurudas Biswas v. Sibasankar Seal, (1975) 1 C.L.J. 1 and Maharam Ali Vs. Dinanath Prasad Sha, . The Full Bench decision relied on by Mr. Ghosh was on a point materially different from the one now under consideration. The point that was referred to the Full Bench for consideration was whether a defendant in a suit for eviction whose defence against delivery of possession has been struck out can still take the defence of non-existence or invalidity of a notice u/s 13(6) either at the trial or on appeal. The Full Bench answered the question so referred in the affirmative and in doing so referring to Order 20 Rule 4 of the Code observed that even to pass an ex parte decree in a suit for ejection on one of the grounds in section 13(1) of the said Act, the Court is required to decide (a) whether the tenancy has been validity determined by a notice u/s 106 of Transfer of Property Act, (b) whether a valid notice of suit was served and (c) whether a

ground for eviction within the sanction of the said Act has been established. Even at an ex parte hearing the plaintiff must make out his case on his evidence is a proposition over which there can be no dispute and that is exactly what the Full Bench pointed out. But the point now involved before us is where one of the material issues on the point of period of default was gone into and decided on contest by the defendant while dealing with his application u/s 17(2) of the said Act, is it still necessary for the Court to readjudicate that issue once more at the time of final disposal of the suit or the previous finding being binding on the parties would itself be the finding on the issue at the final disposal of the suit. Such a question did not arise for consideration before the Full Bench.

26. The other decision relied on by Mr. Ghosh is a decision of a learned single Judge who has no doubt observed that the findings on the point of default recorded in a proceeding u/s 17(3) of the Act are merely tentative and are not conclusive between the parties. Such a view was expressed on the analogy of findings arrived at by Court in passing interlocutory orders under Orders 38, 39 or 40 of the Code. This view, however, is not shared by another learned single Judge in the case of (13) J.K. Sons Vs. Metal Press Works Ltd., which decision was neither referred to nor considered in the case of Maharam Ali. The learned Judge in (13) J. K. Sons's case exhaustively considered all earlier decisions on the point including the Bench decision in (14) Ashalata Mitra Vs. A.D. Viz, in holding that the adjudication of a dispute raised u/s 17(2) overlaps any material issue involved in the suit itself, the decision arrived at on such adjudication would be conclusive. Left to ourselves, on the scheme of the provision of section 17, we feel inclined to prefer approving the said view than the view expressed in Maharam Ali's case subject, however, to the condition that such an issue being fully adjudicated upon had been finally decided. It has been pointed out by the Supreme Court both in (15) Satyadhyan Ghosal and Others Vs. Sm. Deorajin Debi and Another, and in the case of (16) Arjun Singh Vs. Mohindra Kumar and Others, that findings recorded at one stage in the suit may be res judicata between the parties so far as that Court is concerned. In Arjun Singh's case it was observed by the Supreme Court:

Though section 11 of the CPC clearly contemplates the existence of two suits and the findings in the first being res judicata in the later suit, it is well established that the principle underlying it is equally applicable to the case of decisions rendered at successive stages of the same suit or proceeding. But where the principles of res judicata is invoked in the case of different stages of proceedings in the same suit, the nature of the proceedings, the scope of the enquiry which the adjectival law provides for the decision being reached, as well as the specific provisions made on matters touching such decision are some of the material and relevant factors to be considered before the principle is held applicable.

27. The learned single Judge in the case relied on by Mr. Ghosh considered the order passed in an adjudication u/s 17(3) to be an interlocutory order of the nature passed by the Court in suit in proceedings under Orders 38, 39 or 40. But

unfortunately he failed to appreciate that all interlocutory orders are not of the same character. Those orders are meant merely to preserve the property maintaining a status quo so as to ensure that the parties are not prejudiced by the normal delay in the matter of disposal of the suit. An order adjudicating a dispute u/s 17(2) or section 17(3) in our view is not always an order of like nature. It may involve as it had involved in the present case adjudication of an issue overlapping one of the issues involved in the suit itself. When the statute contemplates that such a dispute has to be finally adjudicated and when the statute further provides consequences that are to follow such adjudication affecting the suit itself it is difficult to hold that the decision on such adjudication would not be conclusive between the parties so far as that Court is concerned. In any event, in the present case, that part of the finding had merged into the decree and was not even challenged in the appeal preferred against the decree where the judgment-debtor-defendant took the point that she having paid the money at the appellate stage was entitled to get relief against the statutory forfeiture on the ground of default u/s 17(4) and, therefore, it can no longer be contended that the decision on the issue had not reached the stage of finality in the suit.

28. As both the points raised by Mr. Mukherji succeed, the revisional application is allowed. The impugned orders being set aside we allow the decree-holder's application for amendment of the execution petition and dismiss the objection u/s 47 of the CPC preferred by the judgment-debtor. We further direct the Executing Court to proceed to deliver possession forthwith.

29. Let the order be communicated to the Court below forthwith by a special messenger at the cost of the petitioners and in any event before the Puja Holidays.

Let the certified copy of the order be issued forthwith to whoever makes an application for the same.

30. When the matter goes back the decree-holders will be at liberty to remove a formal defect in their application for amendment of the execution petition as to the year of the First Appeal. We keep it on record that by this order of ours we have allowed the prayer for amendment subject to the aforesaid correction to be made at the Executing Court.

There will no order as to costs.

Chakravorti, J.

31. I agree.