

(1980) 09 CAL CK 0028

In the Calcutta High Court

Case No : S.M.A. No. 46 of 1977 with S.A. No. 840 of 1977

Sachindra Nath Bose and Another

APPELLANT

Vs

Jyoti Bikash Ghose and Others

RESPONDENT

Date of Decision : 22-09-1980

Acts Referred:

West Bengal Premises Tenancy Act, 1956 — Section 13(3A), 17E

Citation : AIR 1981 Cal 13

Hon'ble Judges : G.N. Ray, J

Bench : Single Bench

Advocate : M.N. Ghose and Ashoke De, for the Appellant; Shyama Charan Mitter, A.K. Sengupta and Bhaskar Bhattacharyya and Amar Nath Shaw, for the Respondent

Judgement

G.N. Ray, J.—This appeal is directed against the judgment dated 23rd August, 1976 passed by the learned Additional District Judge, 6th Court, Alipore in Miscellaneous Appeal No. 434 of 1976 affirming the Order No. 55 dated 24th April, 1976 passed by the learned Munsif in Miscellaneous Case No. 10 of 1976. The judgment-debtors are the appellants in the instant appeal and the said Miscellaneous Case No. 10 of 1976 arose out of an application made by the judgment-debtors u/s 47 read with Section 151 of the CPC inter alia contending that the decree for eviction passed in Title Suit No. 137 of 1968 under the West Bengal premises Tenancy Act was null and void and as such the said decree was not executable. It appears that the landlords brought Title Suit No. 137 of 1968 against the appellants judgment-debtors Sachindra Nath Bose and Samarendra Nath Bose for recovery of khas possession of the disputed premises under the West Bengal Premises Tenancy Act after eviction of the said two tenants from the suit premises. The said suit was decreed and the said decree was affirmed by the Court of Appeal below in Title Appeal No. 525 of 1969. Thereafter the judgment-debtors preferred an appeal before this Court being Second Appeal No. 634 of 1970 but the said appeal was also dismissed for non-prosecution. The aforesaid decree for eviction was put to execution in Title Execution Case No. 59 of 1972

and on 4th February, 1976, the said application u/s 47 read with Section 151, C. P. Code was filed by the appellants judgment-debtors challenging the validity of the decree. For appreciating the contentions of the judgment-debtors appellants, certain facts with dates are relevant and such facts are set out here-under:

2. On August 8, 1966, the suit property was purchased by the decree-holder and on March 17, 1967, the said Ejectment Suit No. 137 of 1968 was instituted by the landlord on the ground of reasonable requirement of the suit premises by the landlord and also on the ground of default. The decree for eviction was passed in the said Title Suit No. 137 of 1968 on 14th February, 1969 and on August 21, 1969, the said decree was affirmed by the Court of Appeal below in Title Appeal No. 525 of 1969 and on August 16, 1969, a second appeal was preferred before this Court and on March 14, 1972 the said second appeal being S.A. No. 634 of 1970 was dismissed for non-prosecution. During the pendency of the said appeal before this Court, the West Bengal Premises Tenancy Act was amended and the Amending Act XXXIV Of 1969 came into operation on 14th November, 1969. The West Bengal Premises Tenancy (Amendment) Act XVIII of 1970 also came into force on March 6, 1970.

3. Sub-section (3A) of Section 13 of the west Bengal Premises Tenancy Act, 1956 was added with retrospective operation. It is provided for in the said subsection (3A) of Section 13 of the West Bengal Premises Tenancy Act that where a landlord has acquired his interest in the premises by transfer, no suit for recovery of possession of the premises on any of the grounds mentioned in Clause (f) and Clause (ff) of Sub-section (1) of Section 13 shall be instituted by the landlord before the expiration of a period of three years from the date of his acquisition of such interest. The judgment-debtors under one of the amended provisions of the Act namely u/s 17E made an application for setting aside the decree of eviction passed in the said Title Suit and the said application was filed on 7th May, 1970. On August 9, 1972 the said application u/s 17E was dismissed. The judgment-debtors contended in their application u/s 47 read with Section 151 of the Coda of Civil Procedure that the decree was passed on the ground of reasonable requirement of the landlord, but the suit having been instituted before the completion of three years from the date of purchase of the suit premises by the landlord, such suit on the ground of reasonable requirement viz. on a ground under Clause (ff) of Section 13 (1) of the West Bengal Premises Tenancy Act could not have been instituted but such suit having been instituted within the prohibited period, the decree passed in the said suit was a nullity and as such not executable. The learned Munsif, however, held in the said Miscellaneous Case No. 10 of 1976 arising out of the aforesaid application u/s 47 read with Section 151 of the CPC that although Sub-section (3A) of Section 13 of the West Bengal Premises Tenancy Act was enforced with retrospective operation the decree passed in the Title Suit was not a nullity and as such the executing court could not go behind the decree. In that view of the matter, he dismissed the said Misc. Case No. 10 of 1976. The judgment-debtors thereafter preferred the said Misc. Appeal No, 434 of 1976 before the Court of Appeal below. The respondents,

however, contended that although the judgment-debtors had the privilege to have the Judgment and decree passed on this ground of reasonable requirement set aside by making an application u/s 17E on the ground that such decree for reasonable requirement was passed in favour of a landlord who instituted a suit for reasonable requirement within three years from the date of purchase, the petitioner in the instant case pursued two remedies, one being the second appeal preferred in this Court against the judgment and decree passed in the said ejectment suit and the other being the said application u/s 17E of the West Bengal Premises Tenancy Act but, as before the hearing of the said application u/s 17E, the said Second Appeal was dismissed for default on 14th March, 1972, the decrees passed by the Courts below had merged in the decree passed by this Court in the Second Appeal and at the time of disposal of the said application u/s 17E, only the decree passed by this Court was in force and as such u/s 17E, the decree of this Court could not have been set aside, Apart from that in view of dismissal of the said application u/s 17E, the judgment-debtors were precluded from questioning the validity and legality of the said decree for eviction passed against them. It appears that the Court of Appeal below accepted the contention of the decree-holders respondents and held that it was no longer open to the judgment-debtors appellants to contend that the decree under execution was a nullity and as such the execution proceeding was not maintainable. In that view of the matter, the learned Additional District Judge, 6th Court, Alipore, dismissed the said Miscellaneous Appeal and affirmed the order passed by the learned Munsif,

4. Mr. Ghose, the learned counsel appearing for the appellants, contends that if the decree is a nullity the objection about the said fact of nullity can be raised wherever and whenever it is sought to be enforced and even at the stage of execution and in collateral proceeding. He contends that because of the provision of Sub-section (3A) of Section 13 of the Premises Tenancy Act enforced with retrospective effect there was a bar in instituting the suit for eviction on the ground of reasonable requirement of the landlord within three years from the date of purchase. But despite such bar, the decree for eviction was passed and as such the decree was clearly null and void and hence the objection as to the nullity of the decree can be lawfully raised in the said execution proceeding. For this contention, Mr. Ghose referred to the Supreme Court decision made in the case of Kiran Singh and Others Vs. Chaman Paswan and Others, . It was held in the said decision that it is a fundamental principle that a decree passed by a Court without jurisdiction is a nullity and its invalidity can be set up wherever and whenever it is sought to be enforced even at the stage of execution and collateral proceedings. Mr. Ghose in this connection also refers to the decision of the Supreme Court made in the case of B. Banerjee Vs. Smt. Anita Pan, . It was held in the said case by the Supreme Court that Sub-section (3A) of Section 13 was retrospective in operation. Mr. Ghose contended that as in view of amendment of original Section 13 (1) (f) there was necessity of specific pleading of reasonable requirement in terms of amended Section 13 (1) (ff) the Supreme

Court held in the said case of *B. Banerjee v. Anita Pan* that as three years had already elapsed from the date of purchase of the suit premises and as by amending the plaint there would be necessity of framing additional issues and consequential retrial of such additional issues and for all practical purposes the suit was required to be heard afresh and in the aforesaid circumstances it could be held that a new suit was instituted and as such there was no bar of instituting the suit in view of provisions of Sub-section (3A) of Section 13 of the West Bengal Premises Tenancy Act. Mr. Ghose contends that in the instant case during the pendency of the said second appeal before this Court, the Amendment Act incorporating Sub-section (3A) with retrospective effect came into force and it was the duty of the decree-holders landlords either to withdraw the suit and to institute a fresh suit after the expiry of three years from the date of purchase and/or to take recourse to amendment of pleading and consequential retrial of the suit in terms of the observation made by the Supreme Court in the said case of *B. Banerjee v. Anita Pan*, but the decree-holders landlords not having taken recourse to such procedure, the bar to institute the said Title Suit was not removed and/or cured and as such the decree passed in the said Title Suit had become null and void and not executable. Mr. Ghose further contends that in the case of nullity of a decree the executing court can very well examine the validity of the decree and hold that the decree is a nullity. Mr. Ghose in this connection also refers to a decision made by this Court in the case of *Sibapada Roy Chowdhury Vs. Sudhangsu Kumar Sen*, . It was held by D.C. Chakravorti, J. (sitting singly) in the said case that generally the executing court cannot go behind the decree nor can it question legality or correctness, but to this general rule there is an exception furnished by cases where the decree sought to be executed is a nullity on the ground of want of inherent jurisdiction of the Court passing the decree. If the Court passing the decree lacks inherent jurisdiction to pass the same, the judgment-debtors may before the executing court, challenge the executability of the decree. Mr. Ghose also cites another decision of the Supreme Court made in the case of *Balai Chandra Hazra Vs. Shewdhari Jadav*, . Mr. Ghose contends that the decree in question was passed without the satisfaction of the court that the plaintiffs had no other reasonably suitable accommodation in their occupation within the meaning of Section 13 (1) (ff). Accordingly the said decree was a nullity and therefore the executing court was wrong in executing the said decree. Mr. Ghose further submits that simply a second appeal was preferred by the judgment-debtors, the right of the judgment-debtors to present the said application u/s 17B could not have been taken away and it must be held that the remedy u/s 17E of the West Bengal Premises Tenancy Act for setting aside the decree of eviction on the ground of reasonable requirement in a case where the landlord purchased the premises within three years from the date of institution of the suit is an additional remedy available to the tenant. For this contention, Mr. Ghose also refers to the said decision of the Supreme Court made in *Balai Hazra's* case (AIR 1978 SC 1662).

5. Mr. Mitter, the learned counsel appearing for the decree-holder respondents

however contends that by incorporating Section 17 (E) by amending the West Bengal Premises Tenancy Act, the Legislature made it clear that the decree passed in a suit for eviction on the ground of reasonable requirement instituted by the landlord before completion of three years from the date of purchase prior to enforcement of Sub-section (3A) was not ipso facto a nullity but such decree was voidable by presenting an application u/s 17E in the prescribed manner. He submits that such intention of the Legislature was clearly expressed in Section 17E wherein it is provided (a) that the decree has to be set aside by the court, (b) that the decree can be set aside only if an application is filed within sixty days and (c) that the decree will not be set aside if Clause 5 of Section 17E has come into play. Mr. Mitter also submits that if the Legislature had really intended that all decrees passed before the enforcement of Sub-section (3A) with retrospective operation were null and void then there would not have been any necessity of the aforesaid provisions of Section 17E requiring the aggrieved tenant to file application u/s 17E in the prescribed manner to have the decree for eviction set aside provided however that Clause 5 of Section 17E had not come into play in the meantime. Mr. Mitter further contends that the judgment-debtors having filed an application u/s 13 (3A) read with Section 17E of the West Bengal Premises Tenancy Act in Title Suit No. 137 of 1968 and the said application having been rejected by the learned Additional District Judge in Title Appeal No. 525 of 1969 on 9th August, 1972, there had been a finality over the question as to whether the decree in question was to be set aside or not and it should be noted that the said order of rejection passed by the court of appeal below on 9th August, 1972 was not challenged before this Court. Mr. Mitter also contends that in the second appeal before this Court viz. S.A. No. 634 of 1970, the first ground taken was that the said decree was a nullity because of the contravention of provisions of Sub-section (3A) of Section 13, but the said Second Appeal was dismissed for non-prosecution by this Court and as a result the appellants are barred by the principles of resjudicata and/or estoppel to raise the said contention of nullity in the execution proceeding. Mr. Mitter further submits that by non-prosecuting the S.A. No. 634 of 1970, the judgment-debtors had in effect taken away the valuable right of decree-holders to defend their case in other forum and in such circumstances, the judgment-debtors appellants cannot be allowed to urge the identical point before the executing court against the principles of natural justice. Mr. Mitter further submits that the decree to be executed in the present case was a decree dated 21st August, 1969 passed in Title Appeal No. 525 of 1969 inasmuch as the trial court's decree dated 14th February 1969 had merged in the appeal court's decree and such decree having been passed prior to the West Bengal Premises Tenancy (Amendment) Act of 1969 which came into force on 14th November, 1969 the amended provisions of Section 13 (1) (ff) were not then attracted in the said suit and as such there was no inherent lack of jurisdiction and infirmity in the decree for eviction passed in the said suit. Mr. Mitter also contends that Second Appeal No. 634 of 1970 having been dismissed for non-prosecution, the decree passed by the court of appeal below had never merged in a decree passed by this Court. He also

contends that filing of an appeal may put the decree or order in jeopardy but until it is so affected by the judicial order of the superior forum the decree remains effective. Mr. Mitter also submits that as the second appeal was dismissed for non-prosecution it must be held that the effect of such dismissal for non-prosecution was that the appeal must be deemed to have not been filed at all. For this contention, Mr. Mitter refers to the decision of the Privy Council made in the case of *Chandri Abdul Majid v. Jawahirlal* reported in AIR 1914 PC 66. In the said decision it was held that an order of His Majesty in council dismissing an appeal for want of prosecution did not deal Judicially with the matter of the suit and as such, such order in no sense could be regarded as an order adopting or confirming the decision appealed from. It merely recognised authoritatively that the appellant had not complied with the condition under which the appeal was open to him and therefore he was in the same position as if he had not appealed at all. Commenting on the decisions of the Supreme Court made in the case of *B. Banerjee Vs. Smt. Anita Pan*, and *Balai Chandra Hazra Vs. Shewdhari Jadav*, and the decision of the Calcutta High Court in *Sibapada Roy Chowdhury Vs. Sudhangsu Kumar Sen*, . Mr. Mitter submits that the decision in *B. Banerejee's* case was made by the Supreme Court when the validity of the decree was challenged in the regular manner before the Supreme Court and not in an execution proceeding. In *Balai Hazra's* case also, the decree was challenged not in the execution proceeding but in the regular way and in all those cases it must be held that appeal being continuation of a suit, the suit itself was alive. So far as Calcutta decision in *Sibapada Boy Chowdhury's* case is concerned, Mr. Mitter contends that it was held in the said case that the existence of the ground on which the decree for eviction could be passed being absent, no valid decree for eviction could have been passed in law and as such there was no valid decree in the eye of law. Hence, the maintainability and/or validity of the decree was allowed to be questioned before the executing court. But in the instant case the court was satisfied on the then existing provision of Section 13 (1) (f) that the suit premises was required reasonably by the landlord and at the time of passing the decree by the trial court and also by the court of appeal below, Sub-section (3A) was not enforced by the Amendment Act. Accordingly at the relevant time both the trial court and the appeal court had jurisdiction to try and dispose of the said suit and/or the appeal and on consideration of the relevant materials the decree for eviction was passed under the existing Section 13 (1) (f).

6. After considering the respective contentions made by the learned counsel on behalf of the parties, it appears to me that at the time of instituting the said Title Suit there was no bar created subsequently by the enforcement of Sub-section (3A) with retrospective effect to institute a suit for eviction on the ground of reasonable requirement within three years of the purchase of the suit premises by the landlord. Accordingly the court which passed the decree had the jurisdiction to entertain the said suit for eviction and to decide the same in accordance with the provisions of West Bengal Premises Tenancy Act as it stood

then. When the Court of appeal below disposed of the said appeal and affirmed the decree of eviction passed by the trial court such bar under Sub-section (3A) was also not enforced and the court of appeal below had therefore, jurisdiction to entertain and decide the said appeal. Although Sub-section (3A) of Section 13 of the Premises Tenancy Act has been subsequently enforced with retrospective operation, it cannot be held that the Legislature intended that the decree passed in a suit instituted earlier and disposed of before enforcement of Sub-section (3A) would also become void. In my view, Mr. Mitter is amply justified in contending that the contrary intention of the Legislature is clearly manifested from the provisions of Section 17E of the West Bengal Premises Tenancy Act. In my view, the decree passed in a suit instituted by a landlord within three years from the date of his purchase of the said premises on the ground of reasonable requirement before amendment of the West Bengal Premises Tenancy Act incorporating the provisions of Sub-section (3A) of Section 13 of the West Bengal Premises Tenancy Act with retrospective effect is not a void decree but such decree can be avoided provided an application u/s 17E is made by the judgment-debtor tenant within the specified time and in accordance with the said provisions of Section 17E. Such decree can also be avoided if the validity of such decree is challenged before the higher court for setting aside the said decree in an appeal. If such an appeal is preferred the appeal being continuation of the suit, the effect of change of law can be implemented and the decree can be set aside. In the instant case, the application u/s 17E was dismissed but no step to challenge such dismissal was taken by the judgment-debtors and the second appeal made before this court was also allowed to be dismissed for non-prosecution. Accordingly both the remedies available to the judgment-debtors tenants to have the decree set aside were exhausted and the judgment-debtors are precluded from challenging the validity of the said decree before the executing court. This Misc. Appeal, therefore, fails and is dismissed, but in, the circumstances of the case, I make no order as to costs,

S. A. No. 840 of 1977.

This appeal arises out of the suit for mesne profits. It was agreed by the learned counsel of the parties that this appeal would abide by the result of the other appeal heard analogously namely S.M.A. No. 46 of 1977. As I have dismissed S.M.A. No. 46 of 1977 on the finding that the decree for eviction was a valid decree and as such executable, the contention of the appellant in S.A. No. 840 of 1977 that the decree for eviction being void, decree for mesne profit must also necessarily fail cannot be accepted. This appeal is, therefore, dismissed but there will be no order as to costs.