CALCUTTA HIGH COURT

Sheikh Yusuf

Vs

Jyotish Chandra Banerjee

(Suhrawardy ,J.)

29.07.1931

JUDGMENT

Suhrawardy, J.

1. This revision case arises out of an execution proceeding following upon a decree in ejectment. The property in suit is a house in Kidderpur in the suburbs of Calcutta. The plaintiff decree-holder obtained a decree in ejectment against his tenant by serving a notice upon him to quit. When he attempted to take possession of this property in execution of the decree it was found that there were several subtenants under the defendant. All the other tenants vacated but the petitioner who has a biri shop in a small room on the premises refused to vacate. Thereupon the decree holder applied to the Court for police help for delivery of khas possession by ejecting the petitioner. The petitioner thereupon made an application to the executing Court under Section 151, Civil P. C, in which he urged that he could not be evicted in execution of the decree against his lessor but that the proper procedure to be followed by the decree-holder was that under Order 21, Rule 97, Civil P.C. On the suggestion of the Court the decree-holder filed an application also under Order 21, Rule 97, but he at the same time contended that no application under that rule was necessary in this case as the petitioner was bound by the decree. The learned Munsif thereupon proceeded to determine the question as to whether the petitioner could be ejected in execution of the decree against his lessor or it was incumbent upon the decree-holder to proceed under Order 21, Rule 97. After considering the facts of the case and the law the learned Munsif ordered that the decree-holder should be allowed to take khas possession of the disputed property with the help of the police. Against this order the present Rule has been obtained on the ground that the executing Court had no jurisdiction to order eviction of the petitioner except by proceeding under Order 21, Rule 97 and the following rules, as the petitioner was a person other than the judgment-debtor in possession of the property.

2. The decree under execution is a decree for delivery of possession of immovable property and was being executed under Order 21, Rule 35 under which possession of the property shall be delivered, if necessary, by removing any person bound by the decree who refuses to vacate the

property. The question therefore that falls for determination is whether the petitioner is a person bound by the decree. If he is not so, the only remedy open to the decree-holder is to proceed under Order 21, Rule 97. If he is so, he is liable to be evicted in execution of the decree under Rule 35. The learned advocate for the petitioner argues that the words "any person bound by the decree" are synonymous with "judgment-debtor." In my judgment the words include judgment-debtor as well as any person who may be held under the law as bound by the decree. The word "judgment-debtor" is defined in Section 2 (10), Civil P.C., as meaning any person against whom a decree has been passed or an order capable of execution has been made. If the scope of Rule 35 is limited only in respect of the person against whom a decree has been passed or an order capable of execution has been made then it would have been much easier to use the expression 'judgment-debtor" in the rule instead of the descriptive clause any person bound by the decree." It is also suggested that the expression is used to include a transferee pendente lite, as hinted in a reported case, but provision has been made in Rule 102 for such a transferee. It may include a person who may have come into possession after the institution of the suit and the legal representative of the judgment-debtor, but need not be confined to such persons only.

3. Now it has to be seen whether the petitioner is a person who is bound by the decree. Under Section 115, T. P. Act, he being a sublessee his interest ceased with the forfeiture of the lease and he ceased to have any tangible right to the property. It seems to me that it would bo unreasonable to force a landlord to make in a suit for ejectment against his lessee all the under-lessees or even persons under such under-lessees who may be in actual possession, parties to the suit the nature of which may change from a simple suit for ejectment on forfeiture or determination of the lease. So far as the landlord is concerned the possession is with his lessee. The possession of the lessee may be by his occupying the premises himself or by his allowing other persons to occupy the premises on his behalf either as sublessees or licensees or as servants. It would be most oppressive to insist upon the landlord to make all such persons parties to a suit. For instance in the case of a house in Calcutta which is popularly called "mansion" or Court" there may be some 150 subtenants in occupation of different portions of it. The owner, if the view urged by the petitioner is accepted, will have to make all these persons parties in a suit for ejectment against his lessee. Take another common instance of a market or bazar held under lease. If the owner seeks possession of it by ejecting the lessee, it will be absurd to hold that he must make every squatter or stallholder party to the suit.

4. A question similar to this came for consideration incidentally in England in Geen v. Herring [1905] 1 K.B. 152 where the plaintiff had made all subtenants parties to an action for recovery of a house. The Court disallowed the costs of serving all the subtenants with writs or notices on the ground that it was not necessary to make all the subtenants parties to the action. In delivering the judgment of the Court of appeal Stirling, L.J., observed:
It was not disputed, and I think rightly so, by the counsel for the plaintiff that the action for recovery of these houses would have been well; brought against Herring (the lessee) alone, without joining his weekly tenants.

5. The position will be more intolerable if a person in the position of the decree-holder in this case is compelled on resistance being offered by each of the subtenants to bring a suit for possession of this property against each of them. A valid notice to quit not only determines the original demise, but any tinder-lease which the tenant might have made: Pox on the Law of Landlords and Tenants, Edn. 6, p. 683. The petitioner therefore is a person who has no right to remain on the land and whose right, if any, came to an end along with that of his lessor. Where he is a necessary party in an action-of ejectment against his lessor, as in the case of Minet v. Johnson [1891] 63 L.T. 507 the only remedy open to a person who has been evicted in execution of a decree against his lessor is to bring an action for being reinstated in possession under Order 12, Rule 25 of the Rules of the Supreme Court, provided he has any right independent of the right of his lessor. In *Minet's case*[1] Lord Esher, M. R., observed:In pursuance of a writ of possession the Sheriff turns out of possession the persons on the premises and delivers possession to the plaintiff. If Hartley (the subtenant) were a tenant of Johnson's of course he must go out; therefore to support his complaint now he must say that he had some independent right of his own.

6. This is an authority for holding that a person in the position of the petitioner in this case must go out under the decree passed against his lessor. In Great *Western Ry. Co. v. Smith*[2] a distinction was made which was adopted in *Mellor v. Watkins*[3] between forfeiture and surrender. Mellish, L.J., in his judgment in the Court of appeal, observed:
It is a rule of law that if there is a lessee and he has created an under-lease or any other legal interest, if the lease is forfeited, then the under-lessee or the person who claims as under lessee, loses his estate as well as the lessee himself; bat if the lessee surrenders he cannot, by his own voluntary act in surrendering, prejudice the estate of the under-lessee or the person who claims under him.

7. The latter proposition of law has been accepted in this Court in the Full Bench decision in *Mohsenuddin v. Bhagaban Chandra Sutradhar*[4]

8. There are two decisions of this Court which have to be considered in this connexion. The first is *Ezra v. Gubbay*[5] in which some opinion was expressed that where an under-tenant was not made a party to an action in ejectment the decree-holder could not proceed to eject him in execution of the decree. That was the case of a decree obtained upon forfeiture of a term and the question arose at the time when an application for execution was made and a subtenant intervened. This fact would bring the case within the principle of the English law under Order 12, Rule 25 of the Rules of the Supreme Court in England. Ezra's case [1920] 47 Cal. 907 was subsequently considered and distinguished in *Ram Kissen Das v. Binraj Choudhuri*[6] where it was definitely held by the learned Judge that in an action in ejectment a subtenant need not have been made a party and a decree obtained against his lessor was binding upon him. Ezra's case [1920] 47 Cal. 907(Supra) was distinguished probably on the ground that it was a case of forfeiture though I do not see the force of the distinction. Both these cases were decided by learned Judges

sitting on the original side and are not binding upon us. But I am of opinion that the view taken in the later case of Ram Kissen Das A.I.R. 1923 Cal. 691(Supra) is in accordance with the law. A decree in ejectment passed 'against a losses at the instance of a lessor is not only binding upon the lessee but also upon his subtenants provided they have no right independent of the right of their lessor in the demised premises. The learned Munsif, in my opinion, has taken the correct view of the matter.

9. The petitioner as under-tenant is moreover bound by the estoppel against his lessor, under Section 116, Evidence Act. He is estopped from denying the title of the opposite party or setting up any title of his own in these proceedings having come into possession under the tenant: Woodroffe's Evidence Act, Edn. 9, p. 909.

10. Then there is another fact which should not he overlooked. It appears from the order sheet of the learned Munsif that by his order of 18th November 1930 he ordered the petitioner to deposit a sum of Rs. 240 in Court by 21st November 1930 in order to have a stay of proceedings for delivery of possession. This he did not do, but on the other hand on 24th November 1930, moved an application here and obtained this Bale suppressing the order of the Munsif dated 18th November 1930. It was possible that in spite of the order of the Munsif we would have issued the Rule; but he should have brought the matter to the notice of this Court. Not having obeyed the order of the Munsif the petitioner is still in contempt and not entitled to he heard.

11. The Rule is discharged with costs. Hearing fee three gold mohurs.

Graham, J.

12. I agree. In my judgment the law is against the petitioner, nor do I find any merits in his case such as would justify us in interfering in the exercise of our powers in revision. Admittedly the petitioner is a subtenant in occupation of the premises and is dependent upon His lessors for such right as he may be possessed of. His lessor's right has been determined by due course of law so that it follows as a necessary consequence that the petitioner has no longer any right to continue in possession of the property.

Cases Referred.

1[1891] 63 L.T. 507
2[1876] 2 Ch. D. 235
3[1875] 9 Q.B. 400
4A.I.R. 1921 Cal. 444
5[1920] 47 Cal. 907
6A.I.R. 1923 Cal. 691