

IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE

The Hon'ble **JUSTICE BIBEK CHAUDHURI**

**IA No.:CAN/1/2017(Old No.:CAN/449/2017),
CAN/2/2018(Old No.:CAN/5426/2018)**

In

SMA 4/2017

Mahindra & Mahindra Limited

Vs.

M/s. Pranaj Merchants Pvt. Ltd. & Anr.

For the Appellant: Mr. Biswaroop Bhattacharya, Adv.,
Mr. S. Bhattacharya, Adv.,
Mr. S. Ghosh, Adv.,
Mr. A. Ghosh, Adv.,
Mr. S. Bhattacharya, Adv.

For the Respondents: Mr. Pramit Kumar Ray, Sr. Adv.,
Mr. Debjit Mukherjee, Adv.,
Mr. Sanjay Mukherjee, Adv.,
Mr. Arjun Gooptu, Adv.,
Mr. Kaustavv Bhattacharyya, Adv.

Heard on: 17.09.2021 & 24.06.2022.

Judgment on: 28.07.2022.

BIBEK CHAUDHURI, J. : –

1. The instant miscellaneous appeal filed by the decree holder of Title Suit No. 59 of 1987 is directed against the judgment and order dated 26th August, 2016 passed by the learned Additional District Judge, 5th Court

at Alipore in Miscellaneous Appeal No.4 of 2014 reversing the order dated 19th December, 2013 passed by the learned Civil Judge (Senior Division), 1st Court at Alipore in Miscellaneous Case No.21 of 2012.

2. It is pertinent to mention at the outset that the learned Civil Judge (Senior Division) passed the order dated 19th December, 2013 in a proceeding under Order 21 Rule 99 and 101 read with Section 151 of the Code of Civil Procedure (hereafter described as CPC for short). The learned Civil Judge (Senior Division) in Misc Case No.21 of 2012 rejected an application under Order 21 Rule 99 and 101 read with Section 151 of the CPC and dismissed Misc Case No.21 of 2012. As a consequence thereof it is directed by the executing court that execution case filed by the decree holder which was registered as Title Execution Case No.4 of 2004 shall proceed in accordance with law.

3. The learned Judge in the First Court of Appeal reversed the said judgment and order allowing, inter alia, the said application under Order 21 Rule 99 and 101 read with Section 151 of the CPC and dismissed Title Execution Case No.4 of 2004.

4. The said order passed by the learned Judge in First Appellate Court is under challenge in the instant Second Miscellaneous Appeal.

5. On factual score, it is not disputed that the respondents purchased premises No.403, Block-G, New Alipore, Kol-53 consisting of a two storied building by two registered deeds of conveyance dated 14th March, 2001 from its erstwhile owner Mohit Kumar Mukherjee. It is also not in dispute that the present appellant, viz, Mahindra and Mahindra Ltd was a

monthly tenant in respect of the ground floor in the said premises and one Arun Kumar Verma an Officer of the appellant/company used to reside in the said ground floor flat of the premises in suit with his wife Nitu Verma.

6. Sometimes in August, 2009, the said Arun Kumar Verma and Nitu Verma left the ground floor flat and went away with all the household goods and articles keeping the flat unlocked. It is alleged that Mahindra and Mahindra Company never approached the respondents/company nor did it tender any rent for the said tenanted premises in favour of the respondents. The appellant/company never asserted their tenancy right and did not take over possession of the ground floor flat of the premises in suit after it was vacated by the said Arun Kumar Verma and his family. Since the date the said Arun Kumar Verma vacated the flat, the respondents/company has been using the said ground floor openly, uninterruptedly and continuously.

7. Sometimes in the month of September, 2012 the respondents came to know that the appellant filed Title Suit No.59 of 1987 against his employee Arun Kumar Verma and obtained a decree for eviction. The said decree was put into execution being Title Execution Case No.4 of 2004. In the said execution case the appellant prayed for police help which was granted by the executing court and one day in the month of September police came to the premises in suit to evict the respondents.

8. The case of the appellant, on the other hand, is that the appellant/company was a tenant under one Mohit Kumar Mukherjee in

respect of the ground floor flat including garden, garage, servant's quarter in respect of premises No.403, Block-G, New Alipore at a monthly rental of Rs.650/- payable according to English calendar month. The said tenancy is still continuing. One Arun Kumar Verma being an Officer of appellant/company was permitted to use the said flat for residential purpose by the appellant/company. Mohit Kumar Mukherjee filed Title Suit No.526 of 1986 in the 2nd Court of the learned Civil Judge (Junior Division) at Alipore for ejectment of the appellant/company. The said suit filed by Mohit Kumar Mukherjee was abated on 3rd February, 2003 due to the death of the landlord. Thus, tenancy right of the appellant/company still exists. Arun Kumar Verma was a permissive occupier in respect of the suit flat under the appellant/company. The appellant/company obtained a decree for eviction against the said Arun Kumar Verma and the said decree was put in execution being Execution Case No.4 of 2004. Even assuming that the respondents/company purchased the entire premises in suit, tenancy right of the appellant/company does not evaporate and the appellant/company is still a tenant in respect of the ground floor flat. The respondent is in illegal possession of the suit flat and he is liable to be evicted. On such facts and circumstances, the order passed by the learned Judge in First Appellant Court is challenged by the appellant/company.

9. At the time of admission of the appeal following substantial questions of law were framed by the Division Bench:-

- i) Whether the illegal trespass by the third party-objectors against the judgment debtor can be deemed to be implied surrender by the decree holder in favour of third party on the face of the execution levied by the decree holder/appellant against the licensee/judgment debtor on the strength of an eviction decree or not?
- ii) Whether mere non-payment of rent amounts to termination of tenancy of the decree holder/appellant under the superior landlord, as erroneously held by the learned first appellate court or not?
- iii) Whether the third party objector, having not instituted any eviction suit and/or asserted its purported rights as a transferee-landlord, is a mere trespasser and at best an agent of the judgment debtor vis-à-vis the decree holder/appellant and not entitled to any protection as extended by the learned Court of appeal below or not?

10. In addition to the above substantial question of law two more substantial questions of law were framed at the time to hearing of the instant appeal vide order dated 3rd March, 2020.

They are:-

- (a) Whether the third party objectors by virtue of their purchase of the suit property from the lawful owner and erstwhile landlord of the same, can be deemed to be an illegal

trespasser in respect of the suit property in relation to the original tenant as well as the judgment-debtor.

(b) Whether the original tenant is bound by the alleged surrender of tenancy by his employee in favour of the respondent/third party objector on the principle of implied surrender?

11. Again on 15th September, 2021 on the prayer of the learned Counsel for the respondent the substantial question of law in B was modified in the following manner:-

“Whether the learned Lower Appellate Court substantially erred in law in holding that the landlord can resist an attempt of the tenant to evict him from actual physical possession, in execution of a decree for eviction obtained by the tenant against his licensee and that landlord is not bound by the said decree of eviction?”

12. It is submitted by Mr. Biswaroop Bhattacharya on behalf of the appellant that indisputably Mohit Kumar Mukherjee was the original owner and landlord of the premises in suit and Mahindra & Mahindra Company was the tenant in respect of ground floor flat of the premises in suit. One Arun Kumar Verma being an employee of Mahindra & Mahindra Company was permitted to stay in the said ground floor flat by Mahindra & Mahindra. During the lifetime of Mohit Kumar Mukherjee he filed a suit for eviction against the appellant company which was registered as Title Suit No.526 of 1986. The said suit abated on 23rd April, 2003. During

pendency of the said suit Mohit Kumar Mukherjee transferred the suit property in favour of the respondent by two registered deeds of sale in the year 2001. In the said deeds of sale reference of pendency of Title Suit No.526 of 1986 was clearly made and disclosed. However, after purchasing the suit property the respondent company did not take any step for its substitution in Title Suit No.526 of 1986. Accordingly the said suit abated on 23rd April, 2003. In the meantime appellant/company filed Title Suit No.59 of 1987 against Arun Kumar Verma for his eviction alleging, inter alia, that he was a licensee and his license was revoked. The said suit was decreed ex-parte. The decree holder put the decree in execution. In the said execution the decree holder prayed for execution of decree through police help. The said application was allowed.

13. It is the case of the respondents/objectors that the respondents came to know about the existence of decree in Title Suit No.59 of 1987, when police came to execute the decree passed in Title Suit No.59 of 1987. On the other hand, according to Mr. Bhattacharya the appellant/company obtained a decree for possession of the suit flat in Title Suit No.59 of 1987 against Arun Kumar Verma and the decree was put in execution. During the pendency of the execution case, the said Arun Kumar Verma in collusion with the respondents left the suit flat sometimes in August 2009 without knowledge of the appellant delivering possession in favour of the respondents.

14. Mr. Pramit Ray, learned Senior Counsel on behalf of the respondents submits that the appellant never pleaded as to how the

respondents were bound by the decree. It is not in dispute that the appellant got ex-parte decree in a suit for eviction against licensee on the allegation that one Arun Kumar Verma was an officer of the appellant/company and he was permitted by the appellant to occupy ground floor flat of the premises in suit as a licensee. He left the said ground floor flat with all his bag and baggages. The respondents were the subsequent purchasers from the rightful owner of the premises in suit. The respondents took over possession of the vacant ground floor flat of the premises in suit. The respondents are not bound by the decree which the appellant got against Arun Kumar Verma. The appellant again claimed more than his tenancy right in respect of the decreetal property. Admittedly, he does not have possession. The respondents are in lawful possession over the suit property by virtue of their purchase from the rightful owner. Thus, where a cloud is raised over the appellant's title and he does not have possession, a suit for declaration and possession, with or without a consequential injunction, is the remedy. Where the plaintiff's title is not in dispute or under a cloud, but he is out of possession, he has to sue for possession with a consequential injunction where there is a merely an interference in favour of the plaintiff's possession or threat of dispossession, it is not sufficient to sue for injunction simpliciter. Therefore, it is contended by Mr. Ray that the appellant cannot recover possession from the respondent in execution of a decree obtained by the appellant against one Arun Kumar Verma. In support of his contention he refers to a decision of the Hon'ble Supreme Court in

Ananthula Sudhakar Vs. P. Buchi Reddy (dead) by LRs & Ors. reported in **2008 (4) SCC 594**.

15. Mr. Ray further submits referring another decision of the Hon'ble Supreme Court in **Silverline Forum Private Limited vs. Rajiv Trust & Another** reported in **(1998) 3 SCC 723** that when a decree-holder complains of resistance to the execution of a decree, it is incumbent on the executing court to adjudicate upon it. But while making adjudication, the court is obliged to determine only such question as may be arisen between the parties to a proceeding on such complaint and that such questions must be relevant to the adjudication of the complaint.

16. He also refers to a decision of this Court in **Castle Wood (India) vs. Life Insurance Corporation of India** reported in **AIR 2001 Cal 15** and submits that the provisions contained in Order 21 Rules 97, 98 and 99 of the Code of Civil Procedure postulates that a third party before dispossession can complian to the executing court asserting his independent right but nevertheless the position has been settled by the Apex Court in **Brahma Das Chowdhury vs. Rishikesh Prasad** reported in **AIR 1997 SC 85** that at the instance of a third party an application under Order 21 Rule 97 is maintainable before actual dispossession and in such a case, a third party can come forward with the application for objection on his independent right in accordance with Rule 101 of Order 21 of the Code. The respondents filed the application under Order 21 Rule 97 and 99 read with Rule 101 of the Code of Civil Procedure inviting the executing court to adjudicate its independent right of possession as the

owner of the decreetal property. The decree obtained by the appellant against Arun Kumar Verma is not executable against the respondents.

17. As the next limb of argument it is submitted by Mr. Ray that in a proceeding under Order 21 Rule 97 and Rule 99 read with 101 of the Code of Civil Procedure it is bounden duty of the court to consider as to whether the third party objector is bound by the decree or not. In support of his contention he refers to a decision of the Hon'ble Supreme Court in the case of **Mohd. Hussain (dead) BY LRs & Ors. vs. Occhavlal & Ors.** reported in **2008 (3) SCC 233**. Paragraph 13 of the abovementioned report runs thus:

“13. In *N.K. Mohd. Sulaiman Sahib v. N.C. Mohd. Ismail Saheb* [AIR 1966 SC 792] this Court in para 14 observed as follows : (AIR p. 796)

“14. Ordinarily the court does not regard a decree binding upon a person who was not impleaded eo nomine in the action. But to that rule there are certain recognised exceptions. Where by the personal law governing the absent heir the heir impleaded represents his interest in the estate of the deceased, there is yet another exception which is evolved in the larger interest of administration of justice. If there be a debt justly due and no prejudice is shown to the absent heir, the decree in an action where the plaintiff has after bona fide enquiry impleaded all the heirs known to him will ordinarily be held binding upon all persons interested in the estate. The court will undoubtedly investigate, if invited, whether the decree was obtained by fraud, collusion or other means intended to overreach the court. The court will also enquire whether there was a real contest in the suit, and may for that purpose ascertain whether there was any special defence which the absent defendant could put forward, but which was not put forward. Where however on account of a bona fide error, the plaintiff seeking relief institutes his suit against a person who is not representing the estate of a deceased person against

whom the plaintiff has a claim either at all or even partially, in the absence of fraud or collusion or other ground which taint the decree, a decree passed against the persons impleaded as heirs binds the estate, even though other persons interested in the estate are not brought on the record. This principle applies to all parties irrespective of their religious persuasion.”

(emphasis supplied)

From a bare reading of the aforesaid observation of this Court in the abovementioned decision, it is clear that ordinarily the court does not regard a decree binding upon a person who was not impleaded in the action. While making this observation, this Court culled out some important exceptions:

(i) Where by the personal law governing the absent heir, the heir impleaded represents his interest in the estate of the deceased, the decree would be binding on all the persons interested in the estate.

(ii) If there be a debt justly due and no prejudice is shown to the absent heir, the decree in an action where the plaintiff has after bona fide enquiry impleaded all the heirs known to him will ordinarily be held binding upon all persons interested in the estate.

(iii) The court will also investigate, if invited, whether the decree was obtained by fraud, collusion or other means intended to overreach the court. Therefore, in the absence of fraud, collusion or other similar grounds, which taint the decree, a decree passed against the heirs impleaded binds the other heirs as well even though the other persons interested are not brought on record.

18. Mr. Ray also refers to a decision in the case of **Ratan Lal Jain & Ors. vs. Uma Shankar Vyas & Ors.** reported in **2002 (2) SCC 656**.

Factual aspect of the abovementioned report is important and narrated below:- Appellant being the land owner executed a deed of lease with the

respondent permitting him to raise construction of shop rooms and inducted tenants in respect of the said shop rooms with the following conditions that the lease would not extend beyond 51 years. In terms of the lease the respondent inducted tenants in the shop rooms. The tenants inducted in turn sub-tenants. Nevertheless, the persons in actual possession are holding such possession in behalf of the objectors. Objectors were, therefore, held justified in preferring the objection petition under Order 21 Rule 97 and 99 read with 101 of the Code of Civil Procedure. The Hon'ble Supreme Court further held that the Executing Court was wrong in dismissing the objection petitions on the grounds, firstly, the Executing Court could not have gone behind the decree and overruled the objections preferred by the said objectors who invite the attention of the Executing Court to execute the decree as it stands and not to physically throw them out though the decree directs delivery of only symbolic possession in so far as the shops in their occupation are concerned. Secondly, the objectors were not rank trespassers but entitled to hold the shops as sub-tenants of tenants in the shops though they might have been so inducted in breach of the terms of the lease created by the lessee in favour of the tenants in shop. Whether they were authorized or unauthorized sub-tenants is a question that has not been adjudicated upon so far and will be decided in appropriate proceedings wherein they would be parties. The fact remains that they are not the person bound by the decree. The lessee of the land had insisted on the sub-lessees of the shops and further sub-lessees in actual possession

being joined as parties to the suit but the plaintiffs resisted such prayer and were successful in their resistance. Conscious of these facts and the relevant law, the Trial Court passed a decree taking care to specify that actual possession shall be delivered to the decree-holders only on such part of the property as would be in actual possession of the defendants before it; so far as the remaining shops are concerned which are not in actual possession of the tenants of the plaintiff- decree-holders but in actual possession of the sub-tenants, the mode of execution of decree would be by delivering only symbolic possession.

19. In the instant case the respondents were not the parties to the suit. They are in possession of the suit premises on their own right. Such right is independent of the right of the licensee under the appellant/company. Therefore, the principle laid down in *Ratan Lal (supra)* is squarely applicable in the instant appeal. With the help of a decree obtained against the licensee by the appellant who was the tenant under the lawful owner, the present respondent cannot be held to be liable by the decree.

20. In **N.S.S Narayana Sarma & Ors. vs. Goldstone Exports (P) Ltd. & Ors.** reported in **(2002) 1 SCC 662** the Hon'ble Supreme Court relied on its earlier decision **Silverline forum (P) Ltd (supra)**. In this report the Hon'ble Supreme Court traced out the scope of the phrase "all questions arising between the parties" in relation to Rule 97 of Order 21. The Hon'ble Supreme Court held that the Court is not obliged to determine a question merely because the resister raised it. The questions which the Executing Court is obliged to determine under Rule 101, must possess

two adjuncts. First is that such questions should have legally arisen between the parties, and second is, such questions must be relevant for consideration and determination between the parties, e.g., if the obstructor admits that he is a transferee pendente lite it is not necessary to determine a question raised by him that he was unaware of the litigation when he purchased the property. Similarly, a third party, who questions the validity of a transfer made by a decree-holder to an assignee, cannot claim that the question regarding its validity should be decided during execution proceedings. Therefore, it is necessary that the questions raised by the resister or the obstructor must legally arise between him and the decree-holder. In the adjudication process envisaged in Order 21 Rule 97(2) of the Code, the Executing Court can decide whether the question raised by a resister or obstructor legally arises between the parties. An answer to the said question also would be the result of the adjudication contemplated in the sub-section.

21. In fine, Mr. Ray has raised the issue as to whether the respondents are bound by the decree passed against Arun Kumar Verma. It is submitted by Mr. Ray, learned Advocate for the respondents that the respondent did not come to possess the suit premises obtaining their legal right to possess from the judgment debtor, namely, Arun Kumar Verma. In other words, the respondents did not step into the suit premises following the shoes of the said Arun Kumar Verma, judgment debtor in the suit filed by the appellant/company. The respondents are the third parties to the said suit, the decree of which has been put in execution and

they are in possession of the suit property on their independent right as owners of the suit property. Thus, it is contended by the learned Advocate for the respondents that if they are evicted from the suit premises in execution of the decree, their independent right over the suit premises will be violated and a decree obtained by a tenant against his sub-tenant cannot be executed against the rightful owners of the said property.

22. I have already narrated the factual circumstances involved in the instant matter. It is not in dispute that one Mohit Kumar Mukherjee was the rightful owner of the suit property. The appellant/decreed holder was a tenant under Mohit Kumar Mukherjee. He filed Title Suit No.526 of 1986 in the 2nd Court of the learned Civil Judge (Junior Division) at Alipore for eviction of the appellant however the said suit abated on 3rd February, 2003 after the death of the said Mohit Kumar Mukherjee. It is also matter of record that during his life time he sold out the property in suit in favour of the respondents by executing two separate deeds of sale. In recitals of both the deeds, the vendor, namely, Mohit Kumar Mukherjee, since deceased clearly stated that Title Suit No.526 of 1986 filed against the appellant was pending on the date of execution of the deeds of sale. After purchase the respondents did not send any communication or letter of attornment requiring the appellant to accept the respondents as its landlord and pay/deposit rent in their names which fell due after execution of the deeds of sale. They also did not take any step in Title Suit No.526 of 1986 for substitution in place of the landlord/plaintiff claiming devolution of interest in favour of them. Thus, it is absolutely clear that

the respondents took possession of the suit premises after Arun Kumar Verma an employee and licensee under the appellant left the suit premises without delivering possession to the appellant.

23. Order 21 Rule 97 of the Code of Civil Procedure clearly envisages that “any person” even including the judgment debtor irrespective of whether he claims derivative title from the judgment debtor or set up his own right, title or interest *de hors* the judgment debtor and he resists execution of a decree, then the court in addition to the power under Rule 35(3) has been empowered to conduct an inquiry whether the obstruction by that person in obtaining possession of immovable property was legal or not. The decree holder gets a right under Rule 97 to make an application against third parties to have his obstruction removed and an enquiry thereon could be done. Since each occasion of obstruction or resistance furnishes a cause of action to the decree holder to make an application for removal of the obstruction or resistance by such person, it is the duty of the executing court to consider the scope and applicability of the relevant rule and pass necessary order in execution of the decree.

24. From the recitals of the deeds of sale by virtue of which the respondents are claiming title over the suit premises, it is absolutely clear that the respondents purchased the premises in suit with notice of the pendency of Title Suit No.526 of 1986 which was filed by the vendor of the respondents against the appellant praying for a decree for ejectment. The said suit abated after the death of original owner and vendor, namely, Mohit Kumar Mukherjee, by efflux of time and also for the reason that the

respondents did not take any step for their substitution in place of their vendor Mohit Kumar Mukherjee in the aforesaid suit on the ground of devolution of interest.

25. Thus, the present status of the appellant by way of legal fiction is that the appellant is the lawful tenant of the suit premises. After the abatement of Title Suit No.526 of 1986, the tenancy of the appellant has not been determined. The respondents are in possession of the suit premises without having any lawful decree for eviction against the appellant. Till date there is no relationship of landlord and tenant between the respondents and the appellant. Thus, there is no legal relation between the respondents and the appellant as on this date. Possession of the respondents in respect of the suit premises qua the appellant is nothing but a trespassers' forcible possession. Therefore, the decree for eviction is executable against the respondents who set up their own right, title or interest *de hors* the judgment debtor and has resisted execution of the decree passed in favour of the appellant against its tenant, namely, Arun Kumar Verma. In **Silverline Forum Private Limited vs. Rajiv Trust & Another** reported in (1998) 3 SCC 723, the Hon'ble Supreme Court followed its earlier decision in **Brahmdeo Chaudhury vs. Rishikesh Prasad Jaiswal** reported in (1997) 3 SCC 694 and held as under:-

“It is pertinent to note that the resistance and/or obstruction to possession of immovable property as contemplated by Order 21, Rule 97 CPC could have been offered by any person. The

words “any person” as contemplated by Order 21, Rule 97, sub-rule (1) are comprehensive enough to include apart from judgment-debtor or anyone claiming through him even persons claiming independently and who would, therefore, be total strangers to the decree. ... Consequently it must be held that Respondent 1's application dated 6-5-1991 though seeking only reissuance of warrant for delivery of possession with aid of armed force in substance sought to bypass the previous resistance and obstruction offered by the appellant on the spot. Thus it was squarely covered by the sweep of Order 21, Rule 97, sub-rule (1) CPC. Once that happened the procedure laid down by sub-rule (2) thereof had to be followed by the executing court. The Court had to proceed to adjudicate upon the application in accordance with the subsequent provisions contained in the said order.”

26. Thus, it was held in the aforesaid report of the Hon'ble Supreme Court that a right given by a landlord in favour of a tenant to create sub-tenancy is valid only as between landlord and tenant and said consent cannot be used by the sub-tenant as against the superior landlord.

27. Similarly in the instant case the relationship between the appellant/decreed holder who is the tenant in respect of the suit premises and the respondent being subsequent purchasers does not create any right in favour of the respondents to take over possession of the suit premises without due process of law, after the licensee under the appellant left the suit premises without delivering possession in favour of the appellant.

28. For the reasons stated above this Court finds that the decree which has been put in execution binds the respondents/third parties and the same is executable against them.

29. Substantial questions of law are accordingly decided in favour of the appellant.

30. Thus, the instant appeal is allowed on contest, however, without costs.

31. The judgment and order passed by the learned Additional District Judge 5th Court at Alipore in Miscellaneous Appeal No.4 of 2014 is set aside.

32. The executing court is directed to execute the decree at the earliest.

(Bibek Chaudhuri, J.)