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judgment of a single Judge of a High Court because such an appeal lies with a certificate granted under Art. 132.

We therefore hold that the present appeal does not lie to this Court and that it lies to the High Court of Judicature at Allahabad. We therefore direct that the memorandum of appeal be returned for presentation to the proper Court.

Appeal incompetent.

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September 15.

SHEW BUX MOHATA AND OTHERS

v.

BENGAL BREWERIES LTD. AND OTHERS

(JAFER IMAM, A. K. SARKAR and RAGHUBAR DAYAL, JJ.)

Execution proceedings—Delivery of possession acknowledged—Execution case dismissed—If further execution proceeding permissible—Purchaser of respondent's interest—Whether could be added as party—Code of Civil Procedure, 1908 (5 of 1908), O. 21, r. 35, s. 146.

The appellant decree-holders in an execution proceeding accepted delivery of possession and granted a receipt to the Nazir of the Court acknowledging full delivery of possession to them but allowed the respondents, Bengal Breweries, to remain in possession with their permission. The appellant also permitted the execution case to be dismissed on the basis that full possession had been delivered to them by the respondents. Sometime thereafter the appellant made a fresh application for execution against the respondent, for eviction which was resisted under s. 47 of the Civil Procedure Code alleging that so far as they were concerned, the decree had been fully executed as a result of the earlier execution proceeding which had terminated, and that further execution was not permissible in law.

Held, that it is open to the decree-holder to accept delivery of possession under O. 21, r. 35, of the Code of Civil Procedure without actual removal of the person in possession. If he does that then he is bound to the position that the decree has been fully executed, and it cannot be executed any more.

Held, further, that on the principle in *Saila Bala Dassi* v.

Nirmala Sundari Dassi whereby the purchaser from the appellant under a purchase made prior to the appeal was brought on the record of the appeal, a purchaser from the respondent under a conveyance made prior to the appeal could be brought on the record of the appeal.

Saila Bala Dassi v. *Nirmala Sundari Dassi*, [1958] S.C.R. 1287, followed.

Maharaja Jagadish Nath Roy v. *Nafar Chandra Paramanik*, (1930) 35 C.W.N. 12, approved.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 58 of 1958.

Appeal from the Judgment and decree dated April 5, 1955, of the Calcutta High Court in Appeal from Original Order No. 206 of 1953, arising out of the judgment and order dated May 20, 1953, of the Fourth Additional Sub-Judge, 24 Parganas at Alipore in Misc. Case No. 15 of 1951.

C. K. Daphtary, Solicitor-General of India, C. B. Aggarwala and *Sukumar Ghose*, for the appellants.

H. N. Sanyal, Additional Solicitor-General of India and *R. C. Datta*, for the respondents Nos. 3 and 4.

1960. September 15. The Judgment of the Court was delivered by

Sarkar J.

SARKAR J.—This appeal arises out of an execution proceeding. It is filed by the decree-holders and is directed against the judgment of the High Court at Calcutta setting aside the order of a learned Subordinate Judge at Alipore dismissing the objection of a judgment-debtor to the execution. The High Court held that the decree having earlier been executed in full, the present proceedings for its execution were incompetent and thereupon dismissed the decree-holders' petition for execution. The question that arises is whether the decree had earlier been executed in full.

The facts appear to have been as follows:—One Sukeshwari died sometime prior to 1944 possessed of three plots of land which at all material times, bore premises Nos. 26, 27 and 28, Dum Dum Cossipore Road, in the outskirts of Calcutta. She left a will of which defendants Nos. 1, 2 and 6 were the executors.

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The executors granted leases of these different plots of land to defendants Nos. 3, 4 and 5 respectively and put them in possession.

Certain persons called Mohatas whose interests are represented by the appellants in the present appeal, claimed that Sukeshwari had only a life interest in the lands which on her death had vested in them and the executors had therefore no right to grant the leases. They filed a suit against the executors and the tenants on September 15, 1954, in the Court of a Subordinate Judge at Alipore for a decree declaring that the defendants had no right to possess the lands and for khas possession by evicting the defendants from the lands by removing the structures, if any, put up by them there. On March 30, 1948, the learned Subordinate Judge passed a decree for khas possession in favour of the Mohatas and gave the defendants six months time to remove the structures put up on the land. It is the execution of this decree with which the appeal is concerned.

Defendant No. 3 appealed from this decree and that appeal succeeded for reasons which do not appear on the record. It is not necessary to refer to defendant No. 3 further as we are not concerned in this appeal with him. It may however be stated that he was in possession of premises No. 26 and no application for execution appears to have been made against him.

The executor defendants also appealed from the decree. The other two tenants, defendants Nos. 4 and 5, did not appeal. Of these tenants we are concerned only with defendant No. 4, the Bengal Breweries Ltd., a company carrying on business as distillers. It was in possession of premises No. 27, on which it had built a factory for distilling liquor and yeast. Defendant No. 5 was in possession of premises No. 28 on which stood some temples.

On September 22, 1948, the Mohatas, the decree-holders, filed an application in the Court of the learned Subordinate Judge for execution of the decree against defendants Nos. 1, 2, 4, 5 & 6. On September 25, the learned Subordinate Judge passed an order in execution

issuing a writ for delivery of possession of premises Nos. 27 and 28 to the decree-holders by removing any person bound by the decree who refused to vacate the same and fixed November 22 for making the return to the writ. On September 28, the decree-holders applied to the learned Subordinate Judge for obtaining help from the police for executing the decree. On September 29, the executor defendants applied for a short stay of execution to enable them to obtain a stay order from the High Court. Defendant No. 4 also itself made an application for staying the execution for two months to enable it to come to an arrangement with the decree-holders in the meantime. On the decree-holders assuring the Court that they would not execute the decree till 2 p. m. of the next day these two petitions by the judgment-debtors were adjourned till September 30.

On September 30, 1948, the two petitions for stay were taken up for hearing by the learned Subordinate Judge. With regard to the petition by the executor defendants, he observed that he had no power to stay execution in view of O. 41, r. 5, of the Code of Civil Procedure and thereupon dismissed that petition. The petition for time by defendant No. 4 was also dismissed but in respect of it the following observation appears in the order: "The decree-holders undertake that they will allow the company to carry on normal business for six weeks from now by which time the company will settle matter with the decree-holders". Thereafter on the same day the decree-holders deposited in Court, the necessary costs for police help for executing the decree and the learned Subordinate Judge requested the police to render the necessary help on October 1, 1948. It also appears that subsequently on the same day defendant No. 4 filed another petition for stay of execution and also a petition under s. 47 of the Code objecting to the execution, alleging that there was a tentative arrangement between it and the decree-holders that it would pay Rs. 150 as monthly rent and it need not file any appeal to challenge the validity of the decree. The decree-holders opposed these petitions by defendant

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No. 4. The learned Subordinate Judge made no order on them but adjourned them to November 11, 1948, as he felt that the matter required investigation.

On October 1, 1948, the Nazir of the Court proceeded to premises Nos. 27 and 28 with certain police officers to execute the decree in terms of the writ. He found the gate of premises No. 27 closed but later the manager of defendant No. 4 opened it at his request. What happened thereafter appears from the return of the Nazir which is in the following words: "We then entered into the factory house and delivered possession in each of the buildings at about 10-30 a. m. Before removal of the furniture and other movables from those buildings there was an amicable settlement between the decree-holders and the manager of the factory that the factory will run its normal business as before for 6 weeks and in the meantime the executive body of the factory will make settlement with the decree-holders and some of the decree-holders' men will remain there as guards". It is admitted that the decree-holders' guards were thereafter posted on the premises.

The Nazir then proceeded to premises No. 28 and the return also shows that he delivered possession of these premises to the decree-holders. The relevant portion of the return is in these words: "Then we proceeded towards the premises No. 28 (Old No. 8) consisting of 2 temples and found that the priest of the temple was present. He amicably came out of the compound and possession was delivered of the temples, lands, tanks and other plots mentioned in the writ."

After possession had been delivered, the decree-holders executed on the same day a receipt in acknowledgment of possession having been received by them. That receipt is in these terms:

"Received from Sri Bhabataran Banerjee, Naib Nazir, District Judge's Court, Alipore, 24-Parganas, delivery of possession of premises Nos. 7 and 8 (formerly Nos. 27 and 28) Dum Dum Cossipore Road in the above execution case, this day at 10-30 a.m. including all buildings, tanks, gardens and temples, etc., all these mentioned in the writ in its schedule."

The receipt by mistake describes the premises as "formerly" Nos. 27 and 28 for the premises then bore these numbers.

It appears that at 11-15 a. m. on October 1, 1948, the executor defendants moved the High Court for a stay of execution in the appeal filed by them from the decree. The High Court directed an ad interim stay. After this order had been made the executor defendants moved the learned Subordinate Judge on the same day for consequential orders on the strength of the stay of execution granted by the High Court. The learned Subordinate Judge thereupon made the following order: "In the special circumstances recall the writ provisionally. To 5th November, 1948, for fresh consideration if formal stay order is not received in the meantime". This order was passed on the verbal representation of the lawyers for the executor defendants that the High Court had directed the stay of execution, for there had not been time for the High Court's order to be formally drawn up and produced before the learned Subordinate Judge.

On November 22, 1948, which was the day fixed for making the return to the execution of the writ, the following order appears to have been passed by the learned Subordinate Judge in the execution case: "Possession delivered. One third party has filed an application under Or. 21, r. 100, C.P.C. Let the execution case be put up after the disposal of Misc. Case No. 13 of 1948." The Miscellaneous Case No. 13 of 1948 was the one started on the petition of the third party under Or. 21, r. 100 of the Code, objecting to his removal by the execution. This third party was one Bhairab Tewari and he presumably was claiming some right in premises No. 28 for there was no question of his making any claim to premises No. 27 which were exclusively in the possession of defendant No. 4.

The *ad interim* stay issued by the High Court on October 1, 1948, in the appeal filed by the executor defendants, came up for final hearing and resulted in the following order on January 21, 1949.

"If anything is due on account of costs which

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has not been paid, that amount will be deposited in the Court below by defendant No. 4 (i.e., Mr. Sen's client) within a month from to day, and then three month's time from to-day will be given to him to remove the machineries and vacate that portion of the land in suit which he is occupying as a lessee and which he is using now as a brewery. In default of the deposit being made and also in default of vacating the premises as directed above, this Rule will stand discharged.

We do not stay delivery of possession in respect of any other item in which defendant No. 4 or No. 1 or any other defendant save and except defendant No. 3 is interested."

The appearances of the parties recorded in this order do not show any appearance having been made in connection with it by defendant No. 4. It does not appear from the records what other proceedings, if any, were taken in the appeal by the executor defendants but it is agreed that that appeal was dismissed on September 8, 1954.

Defendant No. 4 did not vacate at the end of the three months mentioned in the order of January 21, 1949. The parties then took proceedings in Criminal Courts under s. 144 of the Code of Criminal Procedure and other connected provisions. It is not necessary to refer to these proceedings and it is enough to state that they did not affect the possession of premises No. 27 by defendant No. 4, who continued in possession till the United Bank of India Ltd. took over possession as hereinafter stated.

On September 8, 1949, the following order was made by the learned Subordinate Judge in the execution case:

"Decree-holder takes no other steps. Possession so far as regards the Bengal Breweries are concerned, delivered.

Ordered

that the execution case be dismissed on part satisfaction."

On September 27, 1951, the decree-holders made a

fresh application for execution against defendant No. 4 alone by evicting it from premises No. 27. Defendant No. 4 put in an objection against the execution under s. 47 of the Code alleging that so far as it was concerned, the decree had been fully executed as a result of the earlier execution proceedings which terminated by the order of September 8, 1949, and that further execution was not permissible in law. It is out of this objection that the present appeal has arisen and the question for decision is whether the objection to the execution so raised, is sound. As earlier stated, the learned Subordinate Judge dismissed the objection to the execution but on appeal the High Court set aside his order and dismissed the petition for execution. The High Court granted a certificate for an appeal to this Court on June 15, 1956 and on August 3, 1956, the High Court passed an order directing that the appeal be admitted.

On August 11, 1960, an order was made by this Court adding three persons named Mool Chand Sethia, Tola Ram Sethia and Hulas Chand Bothra as parties respondents to this appeal. The order however provided that the appellants decree-holders would have a right to object to the locus standi of these persons in the appeal. At the hearing before us only these added parties appeared to contest the appeal. The appellants have raised a preliminary objection that the added parties have no locus standi and cannot be heard in the appeal.

It appears that defendant No. 4 had executed three successive mortgages of premises No. 27 with all structures and appurtenances, to a bank called the Comilla Banking Corporation Ltd. The first of these mortgages had been executed on May 25, 1944, and the other two mortgages had been executed after the suit in ejectment had been filed but before that suit had been decreed. The assets of the Comilla Banking Corporation Ltd. became subsequently vested in the United Bank Limited. Some time in 1953, the United Bank filed a suit for enforcement of the mortgages. On May 30, 1955, a final mortgage decree was passed

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in favour of the United Bank. On July 20, 1956, the mortgaged properties were put up to auction and purchased by the United Bank. On March 1, 1958, the mortgage sale was confirmed and subsequently the United Bank was put in possession of premises No. 27. On July 13, 1960, the United Bank conveyed premises No. 27 along with all structures and appurtenances and all its right, title and interest therein to these added respondents. It is by virtue of this conveyance that the added respondents obtained the order from this Court dated August 11, 1960, making them parties to the appeal. Defendant No. 4, the Bengal Breweries Ltd., is now in liquidation and it has not entered appearance to this appeal nor taken any steps to defend it.

It appears to us that the added respondents were properly brought on record. The decision of this Court in *Saila Bala Dassi* v. *Nirmala Sundari Dassi* (1), supports that view. There it was held that an appeal is a proceeding within the meaning of s. 146 of the Code and the right to file an appeal carried with it the right to continue an appeal which had been filed by the person under whom the appellant claimed and on this basis a purchaser from the appellant under a purchase made prior to the appeal was brought on the record of the appeal. We think that on the same principle the added respondents in the case before us were properly brought on the record.

It is not in dispute that if the decree was once executed against defendant No. 4 in full, then it cannot be executed over again regarding premises No. 27. In other words, if possession had been fully delivered to the decree-holders in execution of the decree on October 1, 1948, the decree must have been wholly satisfied and nothing remains of it for enforcement by further execution. The decree was for khas possession and under Or. 21, r. 35, of this Code in execution of it possession of the property concerned had to be delivered to the decree-holders, if necessary, by removing any person bound by the decree who refused to vacate the property. The records of the proceedings

(1) [1958] S.C.R. 1287.

show that such possession was delivered. Defendant No. 4 was the party in possession and bound by the decree. With regard to defendant No. 4, the order made on September 8, 1949, states, "Possession so far as regards the Bengal Breweries are concerned, delivered." This is an order binding on the decree-holders. It has not been said that this order was wrong nor any attempt made at any time to have it set aside or to challenge its correctness in any manner. The same is the position with regard to the order of November 22, 1948, recording on the Nazir's return that possession had been delivered in terms of the writ.

The order of September 9, 1949, no doubt further states, "Ordered that the execution case be dismissed on part satisfaction". The words "part satisfaction" in this order, however clearly do not refer to part satisfaction as against defendant No. 4, the Bengal Breweries, for the order expressly states, "possession so far as regards the Bengal Breweries are concerned, delivered." The decree had therefore been satisfied in full as against the Bengal Breweries Ltd. and consequently as regards premises No. 27 in its possession. Even the learned Subordinate Judge who held the execution maintainable found that "the decree-holders had no doubt previously got possession". Notwithstanding this, the learned Subordinate Judge decided that the decree could still be executed as he took the view that at the hearing before the High Court on January 21, 1949, defendant No. 4 "must have ignored the delivery of possession by the Naib Nazir and he cannot now be heard to say that the delivery of possession by the Naib Nazir was legal and valid". For reasons to be stated later, we are unable to agree with this view.

It is true that the Nazir's return showed that defendant No. 4 had not been bodily removed. But the same return also shows that it had not been so removed because of certain arrangement arrived at between it and the decree-holders and as the decree-holders had not required the removal of defendant No. 4 from the premises. Now under Or. 21, r. 35 a person in possession and bound by the decree has to be removed

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only if necessary, that is to say, if necessary to give the decree-holder the possession he is entitled to and asks for. It would not be necessary to remove the person in possession if the decree-holder does not want such removal. It is open to the decree-holder to accept delivery of possession under that rule without actual removal of the person in possession. If he does that, then he cannot later say that he has not been given that possession to which he was entitled under the law. This is what happened in this case. The decree-holders in the present case, of their own accepted delivery of possession with defendant No. 4 remaining on the premises with their permission. They granted a receipt acknowledging full delivery of possession. They permitted the execution case to be dismissed on September 8, 1949, on the basis that full possession had been delivered to them by defendant No. 4. The fact that they put their guards on the premises as mentioned in the Nazir's return would also show that they had obtained full possession. It was open to the decree-holders to accept such possession. Having once done so, they are bound to the position that the decree has been fully executed, from which it follows that it cannot be executed any more. In the case of *Maharaja Jagadish Nath Roy* v. *Nafar Chandra Parmanik* (1) an exactly similar thing had happened and it was held that the decree was not capable of further execution. It was there said at p. 15,

"The case, therefore, seems to me to be one of those cases in which a decree-holder having armed himself with a decree for khas possession executes that decree in the first instance by obtaining symbolical possession only with some ulterior object of his own, and thereafter subsequently and as a second instalment asks for khas possession. The question is whether such a course is permissible under the law. I am of opinion that it is not".

We entirely agree with the view that was there expressed.

The learned Solicitor-General appearing for the appellants contended that the order of September 30,

(1) (1930) 35 C.W.N. 12.

1948, shows that the decree-holders had undertaken to allow defendant No. 4 to carry on normal business for six weeks and therefore, on October 1, 1948, when they proceeded to execute the decree, they were not seeking to execute it in full by removing defendant No. 4 from possession. He said that the execution on October 1, 1948, was therefore not complete as defendant No. 4 had not been removed pursuant to the undertaking given on September 29, 1948. We are unable to read the order made on September 8, 1949, or the Nazir's return and the receipt granted by the decree-holders in a manner contrary to the plain meaning of the words used in them, because of the undertaking. Further, it is not the case of the decree-holders that that order, the Nazir's return or the receipt is incorrect or had come into existence through any misapprehension. The legality or correctness of none of these was ever nor is now challenged. The order of September 8, 1949, is binding on the decree-holders and they cannot now go behind its terms. For the same reason, neither can they go behind the order of November 22, 1948, recording in terms of the Nazir's return that possession had been delivered.

It further seems to us that if the undertaking meant that defendant No. 4 was not to be removed from possession, then the execution would have been stayed, which it was not, for the only way in which it was possible to execute the decree was by removal of defendant No. 4 from possession as it was alone in actual possession, the executor defendants claiming only rent from it as landlord. Then again the order in which the undertaking appears, also states that the stay of execution against defendant No. 4 as asked by it, was refused. Besides this, the order sheet shows that immediately after the order stating the undertaking had been made another order was made on the same day acknowledging receipt from the decree-holders of the costs of the police for helping the execution and directing that the police might be approached to render any help necessary on October 1, 1948, at the time of the execution of the decree. The only possible way to reconcile all the various orders, the return

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and the receipt, is to proceed on the basis that by the undertaking the decree-holders agreed that after they had taken possession, they would allow defendant No. 4 to continue its business on the premises for six weeks with their permission. Such undertaking does not show that it was not intended to remove defendant No. 4 from possession.

The learned Solicitor-General also contended that the fact that the undertaking was confined only to a period of six weeks would show that the decree-holders were not permitting defendant No. 4 to continue in possession after they had obtained possession from it, for then no period would have been mentioned. We are unable to accept this argument for there is nothing to prevent the decree-holders after they had obtained possession under the decree, to grant permission to defendant No. 4 to continue in possession for any period they liked; such permission could be for six weeks or for any longer or shorter period as the decree-holders thought fit.

The learned Solicitor-General then contended that the case was one where the decree had been partly executed on one day and execution had been stopped on that day for want of time or other reason, with the object of continuing it on a subsequent day. In such a case, he said, there would be nothing to prevent subsequent execution of the same decree. It does not seem to us that the present case is of this nature. The orders and documents on the record are against this view. The further execution is not in the course of the earlier execution but is a fresh execution. The interrruption in the execution was for over two years. Apart from other things, the placing of their own guards on the premises by the decree-holders could only be on the basis that they had taken possession. The learned Solicitor-General said that the guards had been put there with the permission of defendant No. 4. The Nazir's return is entirely against such a view. Indeed, it is difficult to see why defendant No. 4 would permit the decree-holders' guards on the premises unless it was on the basis that possession had been taken by the decree-holders and the guards

were there to protect their possession. The guards were subsequently removed but it does not appear from the records in what circumstances they were removed.

Nor do we think that the order of October 1, 1948, assists the decree-holders. That order directed the writ to be recalled provisionally. The order was wholly infructuous for the writ had earlier been duly executed. The learned Subordinate Judge himself came to that finding. This, as we have said, is also clear from the records of the execution case. The writ could not be recalled after it had been executed fully. Nor does the order establish that the decree had been executed in part only. The writ was not in fact recalled before the decree had been executed in full. The order of September 8, 1949, makes it impossible to hold that the writ was recalled after it had been executed in part only.

The other argument advanced by the learned Solicitor-General was based on the order of the High Court dated January 21, 1949. It was said that that order indicated that the decree had not been executed by removing defendant No. 4 from possession because it, in substance, was an order for a stay of execution of the decree. It was also said that the order must have been on the basis of a representation by defendant No. 4 and a finding that the decree had not been executed by removing defendant No. 4 from possession. The contention was that that finding and representation was binding on defendant No. 4 and therefore on the added respondents and further that having obtained the order on the basis that it had not been ousted from possession in execution, defendant No. 4 and hence the added respondents, could not be permitted to approbate and reprobate that position and now be heard to say that the decree had been executed in full.

We think that both these contentions are ill-founded. The order is far from clear. We have already pointed out that there is nothing in it to show that defendant No. 4 had asked for any stay. Defendant No. 4 had not appealed from the decree. It was not

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entitled to a stay of the execution of the decree. It was in possession of the premises with the permission of the decree-holders. The permission had initially been for six weeks which period had expired. It was executor defendants who had obtained an *ad interim* stay from the High Court on October 1, 1948. This order was infructuous because fortyfive minutes prior to the time that it was made, the decree had been executed in full. In those circumstances the Court on January 21, 1949, may be at the request of defendant No. 4, gave it three months' time to vacate the premises. The request, if any, by defendant No. 4 does not involve a representation that the decree had not been executed in full. It may, at most, mean that the six weeks' permission initially granted by the decree-holders might be further extended. With regard to the other contention, namely, that the order of January 21, 1949, amounted to a finding that the decree had not been executed in full, we have to point out that no such finding appears on the face of it. The order was made on an interlocutory proceeding and was only in aid of the final decision in the appeal. The proceeding in which the order was made did not involve a decision of the issue whether the decree had earlier been executed in full. No finding on such an issue can therefore be implied in the order. This order does not in our view in any way prevent the added respondents from contending that the decree had been executed in full.

In the result this appeal fails and it is dismissed. We do not think it fit to make any order as to costs.

Appeal dismissed.