

Anil Kumar Sinha and ors. Vs. Subhas Kumar Sinha and ors.

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Court : Kolkata

Decided On : Dec-13-1984

Reported in : AIR1985Cal315,1985(1)CHN129,89CWN372

Judge : G.N. Ray and ;Sankari Prasad Das Ghosh, JJ.

Acts : [Specific Relief Act, 1963](#) - Sections 34 and 41

Appeal No. : A.F.O.O. No. 651 of 1983

Appellant : Anil Kumar Sinha and ors.

Respondent : Subhas Kumar Sinha and ors.

Advocate for Def. : A.K. Sarkar and ;D.N. Batabyal, Advs.

Advocate for Pet/Ap. : P.K. Roy, ;A.K. Roy, ;M. Sinha and ;Ajoy Datta, Advs.

Disposition : Appeal allowed

Judgement :

G.N. Ray, J.

1. This appeal arises out of the order No. 54 Dt. May 12, 1983 passed by the learned Judge, 12th Bench, City Civil Court, Calcutta in Title Suit No. 1663 of 1981. By the aforesaid order, the application made by the plaintiffs-respondents for temporary injunction restraining the defendants 1 to 7 from interfering with the

plaintiffs' possession in respect of 4 rooms with annexed covered verandahs appertaining to Premises No. 5A, Brindaban Mullick Lane and comprised in Lot 'C' of the plan annexed with the said application for temporary injunction was allowed by the learned Judge. It may be noted that the plaintiffs-respondents instituted the said Title Suit No. 1663 of 1981 for a declaration to the following effect : --

'(a) A decree declaring that the decree dt. 23-2-65 passed in O.S. Suit No. 2590 of 1956 being a preliminary compromise scheme decree declaring merely shares of parties on partition in joint properties in schedule and not a decree for possession, the same cannot be executed for recovery of possession by one or more co-owners inter alia defendant 1 in respect of their shares only to the exclusion of others and the same was executable for joint or simultaneous possession of all co-owners in respect of their individual shares only on effecting actual partition by metes and bounds, making each unit self-contained and independent through separate procedure under Order 20, Rule 18(2) C.P.C. and may be directed to be so done.

(b) A decree declaring that recovery of tenants' possession at premises No. 33/A, Badur Bagan Street as forming parts of Schedules 'A' and 'B' properties being 'King Pin' of entire scheme for partition, terms of settlement and the compromise decree, impossibility of such recovery of possession beyond the control of parties renders the compromise decree passed in O.S. Suit No. 2590 of 1956, void, inoperative and not binding on the parties, which consequently restores 1/7th share of co-ownership on all properties of Schedules I, II, III and IV to plaintiffs 1 to 6, 1/7th share that of to defendant 1, 1/7th share that of to defendants 2 to 7, remaining 4/7th share that of to defendants 8 to 11 and such jointly owned properties be valued afresh and be partitioned in aforesaid proportionate shares by metes and bounds amongst the plaintiffs and defendants through passing of preliminary and final decree respectively.

(c) A decree declaring that the decree in O.S. Suit No. 2590 of 1956 having imposed reciprocal obligation on each of the parties to make out each lot of scheduled properties self-contained and independent only on successful discharge of their duties in obtaining vacant possession from tenant none of the said (sic)

inter alia defendant 1 can seek execution of the said decree for recovery of possession of his allotted portion isolated by without showing his inability to put plaintiffs 1 to 8 in possession of Lot A as self-contained and independent unit or without at least delivering to them the portion of Lot A in possession of defendant 1.

(d) A decree declaring that the reciprocal licensing arrangement and/or realisation of fees therefor as contained in Clause 21 of terms of settlement being consideration are void, inoperative and/or not binding on the parties inter alia, plaintiffs 1 to 8, alternatively the same being not related to or within the scope of the O.S. Suit No. 1590 of 1956 but extraneous to it, incorporating the said arrangement within the operative part of the decree passed in the said suit has no sanction of law and hence not executable and/or the time schedule for recovery of tenants' possession and the duration of plaintiffs' stay at Lot C as in Clause 21 of the terms of settlement being not the essence of the agreement/terms of settlement for partition, forfeiture, if any, if altered, the same is relievable and/or extendable till actual recovery of tenants' possession by obtaining and executing the decree for ejectment against them.

(e) Decree declaring that all orders passed, steps taken or operations undergone in execution of recovery of possession of isolated portion of defendant 1 in purported enforcement of the joint decree, at the instance of defendant 1 only are void, inoperative and not binding on the parties inter alia plaintiffs 1 to 8.

(f) Decree for permanent injunction restraining defendants 1 to 7 from disturbing, obstructing and/or interfering with peaceful use, occupation and possession of plaintiffs 1 to 8 in respect of their present exclusive possession of 4 rooms with attached covered verandahs and commonly usable entrance passage courtyard and tap water connection situated at 5A, Brindaban Mullick Lane, falling under Lot C, till the plaintiffs are delivered with the Lot 'A' in entirety as independent and self-contained unit, by execution of the decree in O.S. Suit No. 2590 of 1956 or otherwise.'

2. A prayer for temporary injunction was made in the plaint and a separate application was made under Order 39, Rules 1 and 2, C.P.C. for temporary

injunction inter alia, praying for a Rule calling upon the opposite parties 1 to 7 to show cause as to why they will not be restrained by an injunction from obstructing, disturbing or interfering with the petitioners' present possession in 4 rooms with annexed covered verandahs under their exclusive use and occupation and their right to common use with opposite party 1 in respect of entrance door and passage, courtyard and the drinking tap water in part of the premises No. 5A, Brindaban Mullick Lane fallen in Lots B and C by execution of the decree passed in O.S. 2590 of 1956 or otherwise till the hearing of the present suit.

3. It appears that the learned Judge by order No. 3 dated 28-8-81 granted an ex parte interim order on the said application restraining the defendants from disturbing the peaceful possession of the plaintiffs in any manner till the disposal of the application, The said application was thereafter contested by the defendant 1 and he also filed an affidavit-in-opposition which has been incorporated in the paper book in this appeal. It also appears that the defendant 1 has also filed a written statement in the said suit. It may be noted in this connection that respondents 15 to 18 instituted a suit being Suit No. 2590 of 1956 in the ordinary original civil jurisdiction of this Court inter alia praying for a declaration and for injunction directing the defendants to give effect to certain partition scheme or alternatively for partition of the joint properties by metes and bounds in respect of premises No. 5A, Brindaban Mullick Lane, 33A, Badur Bagan Street, and 18/2, Vidyasagar Street within the city of Calcutta. On 23-2-65, a compromise decree was passed in the said partition suit and it appears that in terms of the said decree, premises No. 18/2, Vidyasagar Street was allotted exclusively to respondents 15 to 18 and 5A, Brindaban Mullick Lane and 33A, Badur Bagan Street which are adjoining houses were divided into three Lots 'A', 'B' and 'C'. Lot 'A' was allotted to the predecessor-in-interest of the respondents 1 to 8 namely one Sudhir Kumar Sinha and Lot 'B' was allotted to the predecessor-in-interest of the respondents 9 to 14 and Lot 'C' was allotted exclusively to the defendant 1 who is the appellant in this appeal.

4. On 9-8-79, the defendant 1 namely the appellant in this appeal put into execution of the said compromise decree in the ordinary original jurisdiction of this Court and prayed for delivery of possession of the portion of the premises No. 5A,

Brindaban Mullick Lane which was then in occupation of the respondent 8. It may be noted that the said portion is still in occupation of the respondents 1 to 8.

5. The respondents 1 to 8 preferred a petition of objection under Section 47, C.P.C. on various grounds inter alia, challenging the validity and executability of the said compromise decree passed on 23-2-65. D. K. Sen J. after hearing the parties was pleased to dismiss the said petition of objection under Section 47, C.P.C. and directed the issue of a writ for taking delivery of possession in favour of the appellant. The said order of D. K. Sen J. has been annexed in the paper book at pages 90 to 93. It also appears from the facts disclosed by the parties that an officer of the office of the Sheriff of this Court went to the premises No. 5A, Brindaban Mullick Lane for the purpose of giving effect to the said order of this Court passed on 25-2-81. But the execution was opposed and delivery of possession could not be delivered. Respondents 1 to 8 namely the plaintiffs preferred an appeal before this Court against the said order of D. K. Sen J. and made an application for stay of the operation of the order dt. 25-2-81. The said application has been included in the paper book at pages 101 to 126. It appears that the appeal court did not pass any order of stay and the application was disposed of without any order. There is some controversy between the parties as to under what circumstance, the said application for stay was disposed of without passing any order and we shall refer to such contentions at a later stage.

6. It appears that on 11-8-81, the officer of the Sheriff of this Court being accompanied with the bailiff went to the premises No. 5A, Brindaban Mullick Lane to carry out the order of D. K. Sen J., but he was resisted from taking possession of the said portion of the aforesaid premises by the plaintiffs 1 to 8 and or their representatives. The Officer thereafter sought police help for executing the said decree. At this stage, the plaintiffs 1 to 8 filed the suit being Title Suit No. 1663 of 1981 in the City Civil Court and prayed for permanent and temporary injunction. A separate application for temporary injunction was made under Order 39, Rule 1 and 2, C.P.C. and as aforesaid an ex parte interim order was passed. The said interim order was also made absolute by the learned Judge, 12th Bench, City Civil Court, Calcutta. Being aggrieved by the said order, this instant appeal has been preferred by the defendant 1 appellant.

7. Mr. Roy appearing for the defendant 1 appellant, has contended that the said title suit was instituted in order to frustrate the compromise decree and the order of execution passed by this Court. It has been contended by Mr. Roy that the said suit is not maintainable in view of the fact that the maintainability and/or executability of the said decree cannot be questioned in a separate suit in view of the provisions of Section 47, C.P.C. Mr. Roy has also contended that under the amended provisions of Order 23, Rule 3A, a separate suit cannot be instituted for challenging the legality and validity of the said compromise decree. Mr. Roy has further contended that in effect, in the said suit, the plaintiffs have been trying to get a declaration that the said compromise decree is nullity and as such, the same should be set aside but such suit is barred by limitation because the said compromise decree was passed in February, 1965 and if the plaintiffs or their predecessor-in-interest were aggrieved by the said decree, they were aggrieved on the very same date when the compromise decree was passed. Mr. Roy has submitted that the plaintiffs have been trying to contend in the suit instituted by them in the City Civil Court and also in the application for temporary injunction that the said compromise decree cannot be executed until the plaintiffs will get vacant possession from the tenants occupying the portion allotted in their favour in the ejectment suit since filed on behalf of the plaintiffs in the City Civil Court. It may be noted here that the said ejectment suit was decreed and the same is now pending before this Court in appeal at the instance of the tenants occupying the said premises.

8. Mr. Roy has contended that the plaintiffs are contending that under Clause 21 of the agreement on the basis of which the said compromise decree was passed by this Court in 1965, the time for execution of the said compromise decree was fixed and it is contended by the plaintiffs that in the compromise decree, the term is that the plaintiffs will deliver possession of the portion now in their occupation in the premises in question in favour of the defendant 1 appellant within three years from the date of the final decree to be passed in the ejectment suit instituted or within 2 1/2 years from the date of delivery of possession by the tenants whichever is earlier. Mr. Roy has submitted that such contention of the plaintiffs in the instant suit or in the application for injunction is absolutely mala fide and afterthought because it was not agreed between the parties on the basis of which the

compromise decree was passed that the plaintiffs would deliver vacant possession of the premises in their occupation in favour of the defendant 1 in terms of the compromise decree within 3 years from the date of the decree to be passed in the ejectment suit. On the contrary, it was expressly agreed upon between the parties that the said plaintiffs would deliver vacant possession of the rooms in their occupation to the defendant 1 in terms of the agreement within 3 years from the date of the passing of the compromise decree and/or within 2 1/2 years from the date of getting vacant possession from the tenants whichever is earlier. In this connection, Mr. Roy has drawn our attention to the application made by the present plaintiffs-respondents 1 to 8 before the Appeal Court in the appeal preferred against the order of D. K. Sen, J., under Order 47 C.P.C. In para 3 of the said application made in Appeal No. 228 of 1981 before this Court, it has been stated as follows : --

'It was agreed that the defendant 2 will occupy the portion of 5A, Brindaban Mullick Lane, Calcutta allotted to defendant 3 for maximum period of 3 years from the date of compromise decree or up to 2 1/2 years from the date of vacation of the premises No. 33A, Badur Bagan Street, Calcutta by the tenants thereof whichever is earlier, as licence under the defendant 3 and shall pay Rs. 26/- per month as occupation charges. Similarly the defendant 3 will occupy the portion of premises No. 5A, Brindaban Mullick Lane allotted to defendant 2 as a licensee under the defendant 2 paying no occupation charges.'

9. It may be noted in this connection that the defendant 2 in the said partition suit is the predecessor-in-interest of the plaintiffs-respondents 1 to 8 and the defendant 3 is the defendant 1 in the instant suit and appellant in the instant appeal. The said application was affirmed by one Subhas Kumar Sinha who is the plaintiff 1 in the instant suit and para 3 has been affirmed as true to his knowledge. Mr. Roy has, therefore, contended that on the admission of the plaintiffs, it is, therefore, quite evident that the parties to the said partition suit before this Court expressly agreed that the predecessor-in-interest of the present plaintiffs would deliver vacant possession of the portion under his occupation at 5A, Brindaban Mullick Lane to the defendant 1 appellant within 3 years from the date of compromise decree or within 2 1/2 years from the date of the vacation of the premises by the tenant

thereof whichever is earlier and the contention now being sought to be raised that Clause 21 of the compromise decree really referred to the ejectment decree and not the compromise decree is utterly false and an afterthought.

10. Mr. Roy has also contended that although prima facie the said suit instituted by the plaintiffs respondents 1 to 8 in the City Civil Court is not maintainable for the reasons indicated hereinbefore, it may not be necessary for this Court to decide the merits of the said suit for the purpose of disposing of this appeal arising out of an interlocutory order. Mr. Roy has, however, submitted that the plaintiffs-respondents 1 to 8 had raised various objections under Section 47, C.P.C before this Court for opposing the maintainability or executability of the said compromise decree and similar contentions have been sought to be raised in the said suit instituted in the City Civil Court. As a matter of fact, the learned Judge in disposing of the said application for temporary injunction has noted categorically that the contentions which have been raised in the suit as also in the application for temporary injunction are similar to the contentions raised before this Court in the proceeding under Section 47 of the Code, Mr. Roy has submitted that when this Court has negated the contention of the plaintiffs and dismissed the said application under Section 47 and when the plaintiffs failed to get any interim order in the application for stay made before the appeal court, the learned Judge, City Civil Court, should not have passed the interim order thereby stultifying the effect of the order passed by this Court. Mr. Roy has submitted that by the said interim order, the very effect of the order of D. K. Sen J. has been stalled and although the plaintiff has failed to obtain any stay from the appeal court they can now merrily enjoy the possession of the said premises and the decree cannot be executed in terms of the order passed by D. K. Sen J. Mr. Roy has submitted that on this score alone, the application for temporary injunction should have been dismissed by the learned Judge, City Civil Court and this Court should allow this appeal and set aside the order of injunction passed by the trial Court. In this connection Mr. Roy has drawn the attention of the Court to a decision of the Supreme Court made in the case of Cotton Corporation of India Ltd. v. United Industrial Bank Ltd. reported in : [1983]3SCR962 . It has been held in the said decision that ordinarily a preventive relief by way of prohibitory injunction cannot be granted by a Court with a view to restraining any person from instituting or prosecuting any proceeding and

this is subject to one exception enacted in larger public interest, namely, a superior court can enjoin a person from instituting or prosecuting an action in a subordinate Court with a view to regulating the proceeding before the subordinate courts. At any rate, the court is precluded by a statutory provision i.e. Section 41(b) from granting an injunction restraining a person from instituting or prosecuting a proceeding in a Court of co-ordinate jurisdiction or superior jurisdiction.

11. The Supreme Court has also held that the expression 'injunction' in Section 41(b) is not qualified by an adjective and therefore, it would comprehend both interim and perpetual injunction. An interim relief can be granted only in aid of and as ancillary to the main relief which may be available to the party on final determination of his rights in a suit or proceedings. If this be the purpose to achieve which power to grant temporary relief is concerned, it is inconceivable that where the final relief cannot be granted in terms sought for because the statute bars granting such a relief ipso facto, the temporary relief of the same nature cannot be granted.

12. The Supreme Court has noted in the said case that previously by judicial interpretation, a consensus was reached that as injunction acts in personam while the court by its injunction cannot stay proceedings in a court of superior jurisdiction, it could certainly by an injunction restraining a party before it from further prosecuting the proceeding in other courts may be superior or inferior in the hierarchy of Courts. To some extent, this approach not only effectively circumvented the provision contained in Section 56 of the repealed Act but denuded it of its consent. The Legislature took notice of this judicial interpretation and materially altered the language of the succeeding provision enacted in Section 41(b) replacing Section 56(b) of the repealed Act while enacting Specific Relief Act of 1963. The Legislature manifestly expressed its mind by enacting Section 41(b) in such clear and unambiguous language that an injunction cannot be granted to restrain any person, the language takes care of injunction acting in personam, from instituting or prosecuting any proceeding in a court not subordinate to that from which injunction is sought. Section 41(b), according to the Supreme Court, denies to the Court the jurisdiction to grant an injunction restraining any person from instituting or prosecuting any proceeding in a Court which is not subordinate

to the Court from which the injunction is sought. The Supreme Court has held that the Court is precluded from granting an injunction restraining any person from instituting or prosecuting any proceeding in a court of co-ordinate or superior jurisdiction. This change in language deliberately adopted by the Legislature after taking note of judicial vacillation has to be given full effect.

13. The Supreme Court has held that in an appropriate case, an order of injunction may be passed under inherent powers in Section 151, C.P.C. but even in exercising such power in granting injunction, the Court must take note of the salutary principle noted in Section 41(b) of the Act and for the said reason, the court should be very slow in granting injunction in exercise of the power under Section 151. Mr. Roy has submitted that the order under Section 47, C.P.C. has been passed by this Court in exercise of its ordinary original civil jurisdiction and an appeal preferred by the plaintiffs is now pending before this Court. The plaintiffs in the instant suit had also attempted to get an order of stay of the order of D. K. Sen J. from the Court of Appeal but as aforesaid, the said application had been disposed of without passing any order of stay. Mr. Roy has contended that there is no manner of doubt that in the hierarchy of Courts, this court is superior to the City Civil Court and by any stretch of imagination, there is no scope of contending that this Court is subordinate to the City Civil Court so that the provisions of Section 41(b) is not attracted. Mr. Roy has submitted that on salutary principle noted by the Supreme Court in the aforesaid decision, the City Civil Court should not have entertained the said application for temporary injunction restraining the decree-holder defendant 1 appellant from interfering with the possession of the plaintiffs-respondents 1 to 8. The learned Judge, City Civil Court, had in fact, entertained the said application and passed the interim order thereby stultifying the effect of the order passed by this Court and in effect, staying the execution proceeding until disposal of the suit by the City Civil Court in complete derogation of the provisions contained in Section 41(b) of the Specific Relief Act. He has, therefore, submitted that this appeal should be allowed and the order of temporary injunction passed by the learned Judge, City Civil Court, should be set aside.

14. Mr. Sarkar appearing for the respondents has, however, contended that the said suit instituted in the City Civil Court is maintainable and the executability

and/or maintainability of the decree passed by this Court in the said partition suit is not really germane and the plaintiffs have prayed for declaration of certain rights of the plaintiffs on the grounds indicated in the plaint. Mr. Sarkar has submitted that if for some reason or other, a decree passed in a partition suit becomes infructuous or inoperative by subsequent events and/or agreement entered into between the parties after the decree is passed, a further suit for partition and/or for declaration can be effectively brought and the instant suit is a suit of this nature. In support of this contention Mr. Sarkar has referred to the decision of Patna High Court made in the case of Santan Narain v. Sujan Narain, : AIR1959 Pat331 and also a decision of this Court made in the case of Monsharam Chakravarty v. Gonesh Chandra Chakravarty (1913) 17 Cal WN 521 and in the case of Gour Chandra v. Prasanna Das (1961) 65 Cal WN 743. It may be noted in this connection that there is also a serious dispute between the parties as to whether or not the compromise decree passed by this Court is a preliminary decree or a final decree and whether or not, the said decree contains the provision for giving full effect to the scheme of partition. It is not necessary for us to refer to the said contentions raised by the respective parties before this Court about the maintainability of the said suit because we are only hearing an appeal arising out of an interlocutory order passed on an application for temporary injunction and any observation about the maintainability of the said suit on any ground whatsoever is likely to prejudicially affect either of the parties. Mr. Sarkar has, however, disputed the contentions raised by Mr. Roy that the application for temporary injunction should not have been entertained by the City Civil Court and the said application should have been dismissed because of the provisions of Section 41(b) of the [Specific Relief Act, 1963](#). Mr. Sarkar has contended that Section 42 of Specific Relief Act, 1877 or Section 34 of the [Specific Relief Act, 1963](#) are not exhaustive and some declaratory suits which may not strictly come within the purview of the said section, can also be brought as a civil suit within the meaning of Section 9 of the Civil P.C. In support of this contention. Mr. Sarkar has referred to the decision of the Supreme Court made in the case of Vemareddi v. Konduru Seshu, : AIR 1967 SC436 . In the said decision, the Supreme Court has noted that Section 42 of the Specific Relief Act, 1877 is not exhaustive and declaratory suit not contemplated in the Specific Relief Act can be instituted and in the facts of the case under

consideration of the Supreme Court it has been held that the said case does not come within the purview of that section.

15. Mr. Sarkar has also referred to another decision of the Supreme Court made in the case of *M/s. Supreme General Films Exchange Ltd. v. Brijnath Singhji Deo*, : [1976]1SCR237 . The Supreme Court has noted that similar view has also been taken by the Supreme Court in the case of *Vemareddi (supra)*. It has been held in the said decision that Section 42 of the Specific Relief Act, 1877 merely gives statutory recognition to well recognised types of declaratory relief and Section 42 does not exhaust all types of declaratory relief. It has also been noted by the Supreme Court in the said decision that the suit coming within the purview of Section 42 of the Act is discretionary. But beyond the scope of Section 42, some declaratory suits may also be instituted. Mr. Sarkar has contended that the decision made in the Cotton Corporation's case reported in : [1983]3SCR962 is not applicable in the facts and circumstances of the case and the said decision can be clearly distinguished. He has submitted that the suit instituted by the respondents 1 to 8 is basically a suit for declaration and the prayer for permanent and temporary injunction has been made only as an ancillary relief. Mr. Sarkar has contended that declaratory relief prayed for in the instant suit does not come within the scope and ambit of Section 34 of the [Specific Relief Act, 1963](#) and the declaratory relief prayed for in the instant suit not being covered and prohibited by Section 34 of the Specific Relief Act, the said suit is not governed by the Specific Relief Act. Accordingly, Section 41(b) of the Specific Relief Act has no manner of application in the instant suit. Hence the decision of the Supreme Court in Cotton Corporation's case is not applicable, Mr. Sarkar has also strenuously argued that the City Civil Court, Calcutta is not a subordinate Court when this Court exercises its Ordinary Original Civil Jurisdiction under Letters Patent. Mr. Sarkar has contended that under the Judicature Act of 1861 and also under the Letters Patent the Ordinary Original Civil Jurisdiction has been conferred on this Court. From a reference to the provisions of Letters Patent it will be quite evident that when this Court exercises Ordinary Original Civil Jurisdiction it exercises a jurisdiction similar to that exercised by the City Civil Court in trying a suit as a Court of first instance subject however to the pecuniary jurisdiction and subject to the subject matter enumerated in the City Civil Court Act. Mr. Sarkar has

contended that the High Court may be a superior Court in the hierarchy of Courts than the City Civil Court but in order to hold that a Court is a superior Court in its jurisdiction and power it must be held that the said Court has a power to sit as an appellate Court or a revisional Court on the order passed by the Court which will be deemed to be subordinate to the other Court. He has submitted that the appellate and/or the revisional power exercised by this Court against the order passed by the City Civil Court is exercised in the appellate jurisdiction and not in the Ordinary Original Civil Jurisdiction of this Court. Mr. Sarkar has submitted that as a matter of fact, in the matter of trying suits as a court of first instance, this court in exercise of its ordinary original civil jurisdiction, has practically a co-axial jurisdiction with the City Civil Court. In the aforesaid circumstances it cannot be contended that the order passed by Mr. Justice D. K. Sen in disposing of the application under Section 47 of Civil P.C. is an order passed by a Court exercising a superior jurisdiction. We are, however, unable to accept the said contention of Mr. Sarkar. It is true that this Court in the exercise of powers conferred on it under the Letters Patent, exercises Ordinary Original Civil Jurisdiction and in exercise of such jurisdiction tries the suit as a Court of first instance but on that score, it cannot be contended that this Court while exercising power under Ordinary Civil Jurisdiction loses its character as the highest court of the State. It may be noted in this connection that even if in deciding a suit in its ordinary original civil jurisdiction, any question of law is decided by this Court, such decision will nonetheless be a decision of the High Court and as such binding on all Courts and tribunals inferior to the High Court. For the purpose of disposal of this appeal, however, it may not even be necessary to decide as to whether or not the High Court in the exercise of its Ordinary Original Civil Jurisdiction, is a superior Court than the City Civil Court, Calcutta. By any stretch of imagination it cannot be contended that this Court even in the exercise of Ordinary Original Civil Jurisdiction is subordinate to the City Civil Court and Section 41(b) is attracted if the Court which passes the order is not a higher Court. We are also unable to accept the contention of Mr. Sarkar that if a particular declaratory suit is a civil suit not covered within the scope and ambit of Section 34 of the Specific Relief Act, the provisions of Section 41(b) of the Specific Relief Act has no manner of application. Whether the instant suit is a suit well within Section 34 of the Specific Relief Act or

not, need not be decided for the purpose of disposal of this appeal and if the said contention is raised, the trial Court will go into the same. We may, however, note here that in a declaratory suit whether governed by the provisions of Section 34 of the Specific Relief Act or not, the principles embodied in Section 41(b) of the Specific Relief Act is equally applicable. Mr. Sarkar has also contended that although in the prayer for temporary injunction the plaintiffs-respondents 1 to 8 had prayed for an injunction restraining the defendant 1 from proceeding with the execution but the learned Judge, City Civil Court has not passed an order restraining the defendant 1 or any other defendant from proceeding with the execution pending before this Court. He has, therefore, submitted that Section 41B (41(b)?) is not therefore applicable. We are also not inclined to accept the said contention of Mr. Sarkar. In our view, for the purpose of applying the provisions of Section 41B (41(b)) of the Specific Relief Act, the pith and substance of the order passed by the City Civil Court and not the form in which it is couched is got to be looked into. The effect of the order is clearly to prohibit and/or restrain the decree-holder/opposite parties from proceeding any further with the execution despite the order of execution passed by Mr. Justice Dipak Kumar Sen and in such circumstances it must be held that Section 41(b) is attracted. That apart, on the score of balance of convenience and inconvenience also, we do not feel that the order of injunction should be passed against the defendant 1 appellant. The decree was passed in the month of February, 1965 and on the face of the compromise decree and the admission of the plaintiff 1 in the application for stay filed in the appeal preferred against the order of D. K. Sen, J. it prima facie appears that at the time of passing the compromise decree, it was agreed between the parties that the predecessor-in-interest of the present plaintiffs respondents would deliver vacant possession of the portion in their occupation within three years from the date of the compromise decree or within two and half years from the date of delivery of possession by the tenant whichever was earlier. It appears to us that it will be inequitable to deny possession to the appellant of the lot allotted to him in the compromise decree passed as far back as in 1965 on the face of the said agreement. Whether a subsequent arrangement was entered into between the parties or not, need not be gone into at this stage and such contention if raised, will be decided in the suit if the same is otherwise maintainable in law and not

barred by limitation. It also appears to us that similar contentions were made by the present appellants in the objection under Section 47 of Civil P.C. before this Court and the learned Judge, City Civil Court has noted that contentions which have been raised before him are similar to the contentions already raised in the said proceedings under Section 47 of C.P.C. The executing Court, however, dismissed the said objections under Section 47 of C.P.C. and the Court of Appeal has also not passed any order of stay on the application of the present plaintiffs-respondents although such an application was made before the appeal Court but the said application stands disposed of.

16. In the circumstances this appeal is allowed and the impugned order is set aside but there will be no order as to costs.

17. Prayer for stay of this order has been made by the learned counsel for the respondents 1 to 8 but in the facts of the case the said prayer is rejected.

Sankari Prasad Das Ghosh, J.

18. I agree.

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