Rekha Mukherjee vs Ashis Kumar Das & Ors on 3 March, 2005

Equivalent citations: AIR 2005 SUPREME COURT 1944, 2005 (3) SCC 427, 2005 AIR SCW 1381, (2005) 1 CLR 412 (SC), (2005) 2 JCR 319 (SC), (2005) 3 JT 68 (SC), (2005) 28 ALLINDCAS 78 (SC), 2005 (1) UJ (SC) 723, 2005 (1) CLR 412, 2005 (28) ALLINDCAS 78, 2005 UJ(SC) 1 723, 2005 (2) SCALE 523, 2005 SCFBRC 215, 2005 (4) SRJ 143, 2005 (2) SLT 739, 2005 (2) ALL CJ 1142, (2005) 2 RECCIVR 615, (2005) 3 MAD LW 549, (2005) 2 SUPREME 437, (2005) 2 ICC 644, (2005) 2 SCALE 523, (2005) 59 ALL LR 284, (2005) 3 ALL WC 2920, (2005) 1 WLC(SC)CVL 519, (2005) 1 CURCC 219, (2005) 2 ALL RENTCAS 194, (2005) 3 CIVILCOURTC 337, (2005) 2 MAD LJ 147, (2005) 3 MAD LW 559, (2005) 2 SCJ 580, (2005) 2 CAL HN 148, (2005) 3 CIVLJ 29, (2005) 2 CTC 112 (MAD), (2005) 30 ALLINDCAS 458 (MAD)

Bench: N.S. Hegde, S.B. Sinha

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           CASE NO.:
Appeal (civil)  1509 of 2005

PETITIONER:
Rekha Mukherjee

RESPONDENT:
Ashis Kumar Das & Ors.

DATE OF JUDGMENT: 03/03/2005

BENCH:
N.S. Hegde & S.B. Sinha

JUDGMENT:
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J U D G M E N T [Arising out of S.L.P. (Civil) no.26502 of 2004] CIVIL APPEAL NO. OF 2005 [Arising out of S.L.P. (Civil) No. 39 of 2005] S.B. SINHA, J : : .

Leave granted.

Both these appeals being inter-related were taken up for hearing together and are being disposed of by this common judgment.

BACKGROUND FACT :

> The Appellant is the owner of a premise situate at 77/1, Hazra Road, in the town of Kolkata. The father of the Respondent Nos.1 and 2, Manick Chandra Das, (since

deceased) was inducted in the said tenancy on 1.4.1959 for a tenure of 15 years. On the expiry of the period of lease by efflux of time, the Appellant herein filed Title Suit No.105 of 1975 in the Court of 3rd Munsif, Alipore, for his eviction. The original tenant died during the pendency of the suit, whereupon the Respondent Nos. 1 and 2 and their mother were substituted in his place. The said suit on transfer was renumbered as Title Suit No.412 of 1977. During pendency of the said suit, the parties entered into settlement pursuant whereto three purported agreements for sale were executed whereby the Appellant agreed to sell the suit premises to the Respondent Nos.1 & 2 and their mother. The Appellant herein also filed an application for grant of income tax clearance certificate in terms of Section 280-A of the Income Tax Act, 1961. Allegedly, on the ground that the Respondent Nos.1 and 2 and their mother failed to send the draft deeds of sale to the Appellant within the stipulated time despite notices served on them in that behalf, the said agreements were cancelled by the Appellant on 1.6.1990. The mother of Respondent Nos.1 and 2 died.

On or about 31.10.1990, the Respondent Nos. 1 and 2 filed a suit before the 9th Assistant District Judge, Alipore, against the Appellant for specific performance of the aforementioned three agreements, which was marked as Title Suit No.49 of 1990. In the said suit, the Respondent Nos.1 and 2 herein filed an application for injunction restraining the Appellant herein from alienating the suit premises. The Appellant filed her written objection specifying the grounds of cancellation thereof. No reply thereto was filed by the Respondent Nos 1 and 2. They filed and application in the court of 1st Munsif in the said Title Suit No.412 of 1977 for marking the Appellant's aforementioned written objection as exhibit to prove cancellation of agreements so as to enable them to contend that the suit premises had vested in the State of West Bengal in terms of the provisions of the Calcutta Thika Tenancy (Acquisition & Regulation) Act, 1981. According to the Appellant herein such a stand was taken by the Respondents as existence of the said agreements negated their said defence. The said written objection was marked as Ex.-R in the said suit.

It is not in dispute that the said suit was decreed and the matter ultimately came up before this Court in Civil Appeal No.2249 of 1999. By an order dated 18.10.2000, this Court while dismissing the application for grant of special leave recorded an undertaking given on behalf of the Appellant herein not to execute the decree passed in Title Suit No.412 of 1977 till the decision of Title Suit No.49 of 1990. Meanwhile, the Respondent Nos.3 and 4 herein, who are wives of Respondent Nos. 1 and 2 respectively, were permitted to be impleaded as parties in the suit on the premise that they were nominees in respect of half of their share in the agreement.

On or about 18.11.2000, an application was filed by the Appellant herein before the 9th Senior Civil Judge, Alipore, purported to be in terms of Order XII, Rule 6 of the Code of Civil Procedure (for short, CPC) for dismissing the said suit for specific performance of contract on the premise that by adopting the contention of the Appellant herein that the said agreements for sale stood cancelled, they have

admitted the truth of all her assertions including the one that such cancellations of agreements were valid. The said suit for specific performance of contract was dismissed by the 9th Senior Civil Judge, Alipore, in terms of Order XII Rule 6 of CPC purported to be on admission on the part of the Respondent Nos.1 and 2. Being aggrieved by and dissatisfied therewith, the Respondent Nos.1 and 2 filed an application for review of the said judgment and decree and by an order dated 15.7.2002, the learned 9th Senior Civil Judge allowed the said review petition which was marked as Misc. Case No. 1 of 2002, in part, stating :

"Accordingly, I arrive at the conclusion that there has been an error or commission while passing the impugned order No.179 dated 20.12.2001 of T.S. 49/90 by omitting to spell out as to whether the earnest money should be refunded or forfeited. This is an error on the face of the record, which can be rectified by passing necessary order in this regard after hearing both sides. So review lies. Therefore, I hold that the application under Order 47, Rule 1 of the C.P.C. is liable to be allowed.

Court fee is paid is correct.

Hence, it is Ordered That Misc. Case No. 1/02 is allowed on contest without costs. Necessary order will be passed in T.S. 49/90 regarding re-opening of Order No.179 dated 20.12.2001 of that suit in the light of this judgment/order."

The Appellant herein preferred an appeal thereagainst before the High Court of Judicature at Calcutta which was marked as First Miscellaneous Appeal No.2817 of 2002. The Respondents also filed an appeal being First Appeal No.124 of 2003 before the High Court allegedly suppressing the fact that the decree dismissing the Title Suit No.49 of 1990 had been partly set aside on the basis of the review application filed by the Respondents herein. The Respondents also filed cross objections in the said First Miscellaneous Appeal No.2817 of 2002. Admittedly, all the three matters were directed to be heard analogously. By reason of an order dated 31.3.2004, the High Court allowed the First Miscellaneous Appeal No.2817 of 2002 filed by the Appellant herein and dismissed the Respondents' cross objection as not pressed. However, by the impugned judgment dated 22.9.2004, the First Appeal No.124 of 2002 filed by the Respondents herein was allowed.

EXECUTION PROCEEDING :

In the meanwhile, the Appellant herein had filed an Execution Petition for executing the decree passed in the said Title Suit No.412 of 1977. The Respondent Nos. 1 and 2 applied for stay of execution thereof on the ground that their suit for specific performance of contract had been restored as the review application filed by them was in the meanwhile allowed in part. In view of the fact that the undertaking was given by the Appellant herein, the Executing Court gave liberty to the parties to approach this Court for obtaining a clarification as to whether the Appellant's undertaking subsisted after dismissal of Title Suit No.49 of 1990. On such an application having been made, this Court in Civil Appeal No.9131 of 2003 by an order

dated 18.11.2003 (since reported in (2004) 1 SCC 483) allowed the same, observing :

"An undertaking of this nature furthermore must be construed in favour of the person giving such undertaking. It should not be stretched too far. A party giving an undertaking is bound thereby but by reason thereof, the same cannot be given a meaning whereby the scope and extent thereof is enlarged.

Had the intention of the parties been that 'decision in the suit' would mean a 'final decision' therein, which may include final determination of the dispute upto this Court, it could have been stated so specifically. In our opinion, in such an event, a strained meaning will have to be put which was not the intention of the appellant. If that was the intention of the appellant, the question of this Court's making observations to facilitate early disposal of the suit would lose all relevance. The Title Suit is pending decision only for a limited purpose, namely, for refund of the earnest money. The substantive prayer of the respondents for review of the judgment and decree passed by the trial court, therefore, has not been accepted. The court has not granted a decree for specific performance of the contract. The question of eviction of the respondents in execution of the decree passed in Title Suit No 412 of 1977 had only a direct relationship with the right of the respondents to continue to possess the tenanted premises in furtherance of their plea of part performance of the terms and conditions of the agreement for sale. Such a right claimed by the respondents herein to continue to possess the same on the basis of her independent right in terms of Section 53-A of the Transfer of Property Act had been negatived by the court. The respondents cannot resist their eviction pursuant to or in furtherance of the decree for eviction passed against them in execution proceedings thereof."

THIRD PARTY CLAIM :

The Respondent Nos.3 and 4, it may be noticed at this juncture, had set up a case a fresh agreement for sale by and between the parties herein after the death of mother of the plaintiffs (Respondent Nos.1 and 2), Smt. Gouribala Das, on 23.9.1990 in the following terms :

"That thereafter the respondent No.1 and 2 filed an application under Order VI Rule 17 read with Section 151 of the CPC for amendment of the plaint in their suit for specific performance/injunction i.e. Title Suit No.49 of 1990 on 2.1.1990. By the said application for amendment, respondent No.1 and 2 herein, the applicants proposed to include the names of their wives as co- plaintiffs; because in the meantime, the mother of the plaintiff (respondent No.1 and 2) Smt. Gouribala Das died on 23.9.1990 and eventually thereafter whereupon the petitioner herein upon fresh negotiation and after alleged cancellation of the earlier agreements for sale, once again agreed to sell the entire disputed suit premises in favour of all the respondents herein, having 1/4th share each, and accordingly four number of draft deeds of sale were prepared, which were handed over to the petitioner and her son, Mr. Santanu

> Mukherjee, Advocate Calcutta High Court for approval and necessary submission before the Income Tax Authorities for obtaining prior clearance as it was required at the relevant time under the provisions for Income Tax Act "

Despite the same Respondent Nos. 3 and 4 filed application under Order XXI Rules 95, 97 to 101 read with Section 47 of the Code of Civil Procedure on the premise that they were not bound by the decree passed against Respondent Nos. 1 and 2 and prayed for stay of the execution, but the Executing Court did not grant any interim stay. The said Misc. Case No.52 of 2003 was also dismissed by an order dated 25.8.2004. Although the Executing Court allowed the Appellant's application for issuance of a writ for delivery of possession; but the same was not actually issued. As the Appellant herein filed an application marked as CO No.3229 of 2004 before the Calcutta High Court for direction upon the Respondents herein for issuance of such a writ but by reason of the impugned order dated

14..10.2004, the said application was dismissed.

The Appellant is, thus, before us.

SUBMISSIONS :

> Mr. Santanu Mukherjee, learned counsel appearing on behalf of the Appellant, in assailing the judgment and order dated 14.10.2004 in Civil Appeal No.39 of 2005, would submit that the High Court committed a serious error in entertaining the Respondents' First Appeal inasmuch as at the time of filing thereof, the original decree stood modified in terms of the order passed in the review petition. Reliance, in this connection, has been placed on Gour Krishna Sarkar and Another vs. Nilmadhab Saha and Others [(1922) XXXVI Cal.L.J.484). The learned counsel would contend that the High Court also erred in entertaining the said appeal after passing of the said order dated 15.7.2002 on the premise that the Respondents could appeal in anticipation. Reliance, in this behalf, has been placed on Garikapatti Veeraya vs. N. Subbaiah Choudhury [(1957) SCR 488]. Mr. Mukherjee would urge that as rights had accrued to the Appellant in view of the dismissal of the review petition, the High Court could not have allowed the Respondents to withdraw the review application; once the appeal was filed by the Appellant against the order dated 15.7.2002 setting aside the decree passed in the suit for specific performance of contract in part. It was submitted that the High Court even could not have permitted the Respondents to withdraw their review application in view of the fact that the suit was restored for the limited purpose of considering as to whether the earnest money paid by them should be refunded or forfeited. Reliance, in this connection, has been placed on K.S. Bhoopathy and Others vs. Kokila and Others ((2000) 3 SCR 1168]. In any event, as the Respondents have filed a cross objection in the said appeal filed by the Appellant herein, the High Court erred in reversing the Trial Court's decree upon its purported revival on the Respondents' withdrawing their review application although they did not prefer any appeal from it thereafter. Reliance on the said proposition has been

placed on Sushil Kumar Sen vs. State of Bihar [(1975) 3 SCR 942].

The learned counsel would contend that filing of an application for grant of income tax clearance certificate would not give rise to a new agreement and, thus, the High Court committed a manifest error in holding that the Appellant is bound thereby. The learned counsel, in this connection, relied upon Srimathi Indira vs. Income Tax Officer [150 I.T.R. 351 and Immudipattam v. Periya, [28 I.A. 46].

Mr. Mukherjee submitted that the judgment and order dated 20.12.2001 passed by the learned Trial Court dismissing the Respondents' suit for specific performance of contract was correct as the Respondents herein adopted her contention in the written objection filed in the suit that the agreements stood validly cancelled. Such an admission according to Mr. Mukherjee, must be read as a whole and having regard to the fact that such admission on the part of the Respondent made by adoption in one suit without any reservation was admissible in evidence in the other suit.

Mr. G.L. Sanghi, the learned senior counsel appearing on behalf of the Respondents, on the other hand, would contend that the learned Trial Court having dismissed the suit for specific performance of contract, an appeal thereagainst was maintainable in terms of Order 96 of CPC. The learned counsel submitted that despite the order dated 15.7.2002 granting a limited review as the suit for specific performance of contract stood dismissed, no objection as regard the maintainability of the appeal could be raised by the Appellant. Mr. Sanghi would urge that in any event the appeal became maintainable after the review petitioner was permitted to be withdrawn.

The learned counsel argued that in view of the fact that the judgment and order passed by the learned trial judge purported to be in terms of Rule XII Rule 6 of CPC being per se bad in law, no technicality should be allowed to come in the way of the Respondents' right to pursue the suit for specific performance of contract as otherwise the same would cause manifest injustice to them. The learned counsel would further urge that keeping in view the fact that this Court in its judgment and order dated 18.11.2003 in Rekha Mukherjee (supra) has clearly held that the undertaking was operative till the decision of the suit, in view of the judgment and order dated 22.9.2004 passed by the High Court in First Appeal No. 124 of 2003, the suit for specific performance of contract being Title Suit No. 49 of 1990 having been revived, the undertaking would also revive.

ISSUE :

The primal question which falls for our consideration in these appeals is as to whether the High Court was justified in entertaining the First Appeal filed by the Respondents herein against the original judgment and decree passed in Title Suit No. 49 of 1990 for specific performance of contract. SCOPE OF REVIEW :

The suit filed by the Respondents for grant of specific performance of contract was dismissed. The said decree although was appealable but in view of the order dated 15.7.2002, the said decree in its entirety ceased to operate. Order XLVII Rule 1 CPC postulates filing of an application by a person considering himself aggrieved, by a

decree or order from which an appeal is allowed but from which no appeal has been preferred, to file an application if he desires to obtain a review from a decree passed against him. An appeal during the pendency of the review petition was, therefore, not maintainable. In terms of Order XLVII Rule 4, the Court may either reject or grant an application for review. In case a review is rejected, the order would not be appealable whereas an order granting an application may be objected at once by an appeal from the order granting the application or in an appeal from the decree or order finally passed or made in the suit. Rule 8 of Order XLVII of CPC postulates that when an application for review is granted, a note thereof shall be made in the register and the court may at once re-hear the case or make such order in regard to the re-hearing as it thinks fit.

In Hameed Joharan (Dead) and Others Vs. Abdul Salem (Dead) by LRs. And Others [(2001) 7 SCC 573] whereupon reliance has been placed by the Respondents, this Court while interpreting the provisions of Article 136 of the Limitation Act observed:

"34. Be it noted that the legislature cannot be subservient to any personal whim or caprice. In any event, furnishing of engrossed stamp paper for the drawing up of the decree cannot but be ascribed to be a ministerial act, which cannot possibly put under suspension a legislative mandate. Since no conditions are attached to the decree and the same has been passed declaring the shares of the parties finally, the Court is not required to deal with the matter any further - what has to be done - has been done.

The test thus should be - has the Court left out something for being adjudicated at a later point of time or is the decree contingent upon the happening of an event - i.e. to say the Court by its own order postpones the enforceability of the order - in the event of there being no postponement by a specific order of the Court, there being a suspension of the decree being unenforceable would not arise. As a matter of fact, the very definition of decree in Section 2(2) of the Civil Procedure Code lends credence to the observations as above since the term is meant to be "conclusive determination of the rights of the parties"."

In Ratansingh Vs. Vijaysingh and Others [(2001) 1 SCC 469] it was held that in order that a decision should become a decree there must be an adjudication in a suit wherein the rights of the parties as regard all or any of the matters in controversy in the suit must have been determined and such determination must be conclusive in nature.

The said decisions are not applicable in the instant case.

From a bare perusal of the order dated 15.7.2002 passed by the learned trial judge in Misc. Case No.1 of 2002, it would be evident that he had arrived at a conclusion that there had been an error or omission had crept in the judgment dated 20.12.2001 as he had omitted to spell out as to whether the earnest money should be refunded or forfeited. The learned Judge found that there was an error on the face of record which could be rectified by passing the necessary order in that regard after

hearing both the sides. He, therefore, while upholding that the review petition was maintainable allowed the said application under Order XLVII Rule 1 CPC. He had thereafter passed an order restoring the Title Suit No.49 of 1990 to its original file and number by order dated 15.7.2002.

In view of the aforementioned order, the original decree dated 20.12,2001 did not survive.

MAINTAINABILITY OF APPEAL :

An appeal preferred against the said order dated 15.7.2002 by the Appellant herein was maintainable in terms of Order 47 Rule 7 CPC. However, no cross objection was maintainable at the instance of the Respondents.

The Respondents before the High Court did not file any application for withdrawing the review petition. Had such an application been filed, the High Court would have applied its mind as regard existence of the grounds therefor. Such application of mind on the part of the High Curt was imperative as in the meantime a third party interest was created.

In K.S. Bhoopathy (supra), this Court held :

"The provision in Order XXIII Rule 1 CPC is an exception to the common law principle of non-suit. Therefore on principle an application by a plaintiff under sub-rule (3) cannot be treated on par with an application by him in exercise of the absolute liberty given to him under sub-rule 1. In the former it is actually a prayer for concession from the court after satisfying the court regarding existences of the circumstances justifying the grant of such concession. No doubt, the grant of leave envisaged in sub-rule (3) of Rule 1 is at the discretion of the court but such discretion is to be exercised by the court with caution and circumspection. The legislative policy in the matter of exercise of discretion is clear from the provisions of sub-rule (3) in which two alternatives are provided; (1) where the court is satisfied that a suit must fail by reason of some formal defect, and the other where the court is satisfied that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim. Clause

(b) of sub-rule (3) contains the mandate to the court that it must be satisfied about the sufficiency of the grounds for allowing the plaintiff to institute a fresh suit for the same claim or part of the claim on the same cause of action. The court is to discharge the duty mandated under the provision of the Code on taking into consideration all relevant aspects of the matter including the desirability of permitting the party to start a fresh round of litigation on the same cause of action. This becomes all the more important in a case where the application under Order XXIII Rule 1 is filed by the plaintiff at the stage of appeal. Grant of leave in such a case would result in the unsuccessful plaintiff to avoid the decree or decrees against him and seek a fresh adjudication of the controversy on a clean slate. It may also result in the contesting

> defendant losing the advantage of adjudication of the dispute by the court or courts below. Grant of permission for withdrawal of a suit with leave to file a fresh suit may also result in annulment of a right vested in the defendant or even a third party. The appellate/second appellate court should apply its mind to the case with a view to ensure strict compliance with the conditions prescribed in Order XXIII Rule 1(3) CPC for exercise of the discretionary power in permitting the suit with leave to file a fresh suit on the same cause of action.

Yet another reason in support of this view is that withdrawal of a suit at the appellate/second appellate stage results in wastage of public time of courts which is of considerable importance in the present time in view of large accumulation of cases in lower courts and inordinate delay in disposal of the cases."

Before the High Court, the cross objection filed by the Respondents was not pressed. The appeal preferred by the Appellant herein was allowed. It was, therefore, stricto sensu not a case where a prayer was made for withdrawing the application for review so as to render the decree wide open to challenge in an appeal under Section 96 CPC. A Respondent may concede that the appeal filed by the Appellant may be allowed or his cross- objections may be dismissed but if he intends to withdraw his suit or review application and that too at the appellate stage, he must make out proper grounds therfor so as to enable the court to apply its own mind thereupon. Order 23 Rule 1 CPC confers a discretionary jurisdiction on the court. Although Order 23 Rule 1 ipso facto is not applicable to a review petition, the principles analogous thereto would be, in terms whereof an order directing withdrawal of such a suit or abandonment of part of claim may be allowed only when the court is satisfied that one or the other conditions specified in sub-rule (3) of Rule 1 are satisfied. In terms of the sub-rule (4) thereof, the plaintiff shall be liable for such cost as the court may award and shall be precluded from instituting any fresh suit in respect of such subject matter or such part of the claim.

Such an application in the peculiar facts and circumstances of the case even might not have been entertained by the High Court.

In Sushil Kumar Sen (supra), Mathew J considered the effect of allowing an application for review of a decree holding that the same would amount to vacating the decree passed, stating :

> "2. It is well settled that the effect of allowing an application for review of a decree is to vacate the decree passed. The decree that is subsequently passed on review, whether it modifies, reverses or confirms the decree originally passed, is a new decree superseding the original one (see Nibaran Chandra Sikdar v. Abdul Hakim (AIR 1928 Cal 418), Kanhaiya Lal v. Baldeo Prasad (ILR (1906) 28 All 240), Brijbasi Lal v. Salig Ram (ILR (1912) 34 All 282) and Pyari Mohan Kundu v.
>
> Kalu Khan (ILR (1917) 44 Cal 1011 : 41 IC 497).

> 3. The respondent did not file any appeal from the decree dated August 18, 1961 awarding compensation for the land acquired at the rate of Rs. 200 per katha. On the other hand, it sought for a review of that decree and succeeded in getting the decree vacated. When it filed Appeal No. 81 of 1962, before the High Court, it could not have filed an appeal against the decree dated August 18, 1961 passed by the Additional District Judge as at that time that decree had already been superseded by the decree dated September 26, 1961 passed after review, So the appeal filed by the respondent before the High Court could only be an appeal against the decree passed after review. When the High Court came to the conclusion that the Additional District Judge went wrong in allowing the review, it should have allowed the cross appeal. Since no appeal was preferred by the respondent against the decree passed on August 18, 1961, awarding compensation for the land at the rate of Rs. 200 per katha, that decree became final. The respondent made no attempt to file an appeal against that decree when the High Court found that the review was wrongly allowed on the basis that the decree revived and came into life again."

Our attention has been drawn to the following regretful concurring opinion of Krishna Iyer, J. by Mr. Sanghi :

> "The processual law so dominates in certain systems as to overpower substantive rights and substantial justice. The humanist rule that procedure should be the handmaid, not the mistress, of legal justice compels consideration of vesting a residuary power in judges to act ex debito justiciae where the tragic sequel otherwise would be wholly inequitable. In the present case, almost every step a reasonable litigant could take was taken by the State to challenge the extraordinary increase in the rate of compensation awarded by the civil court. And, by hindsight, one finds that the very success in the review application and at the appellate stage has proved a disaster to the party May be, Government might have successfully attacked the increase awarded in appeal, producing the additional evidence there. But maybes have no place in the merciless consequence of vital procedural flaws "

but this Court is bound by the ratio decidendi of a decision and not mere observations.

It is interesting to note that although the learned judge hoped that the Parliament would consider the wisdom of making the judge, the ultimate guardian of justice by a comprehensive, though guardedly worded, provisions where the hindrance to rightful relief relates to infirmities, even serious sounding in procedural law but the Parliament has failed to respond thereto.

The doctrine of eclipse has no application in a case of this nature. An appeal preferred in terms of Section 96 CPC must conform to the requirements contained in Order 41 thereof. An appeal at the time of its filing would either be maintainable or would not be. The High Court, with respect, was not correct in holding that such an appeal could be filed in anticipation. If such a procedure is contemplated in the law; the Respondents herein might not have filed the substantive appeal or would have prayed for withdrawal of the review application before the trial court itself. Having filed

a review application on legal advice and having succeeded therein in part, it was not open to it to prefer an appeal against the entire decree dated 20.12.2001 whereby the suit in its entirety was dismissed. The Respondents could have only preferred appeal only from that part of the decree in respect whereof review was not granted. In a suit for specific performance of contract, a prayer in the alternative is ordinarily made to the effect that in the event the court declines to grant a decree for specific performance of contract, it may direct refund of the earnest money with interest.

The right of review is a statutory right. Such right can be invoked if the conditions therefor are fulfilled. So is a right of appeal. A right of review and right to appeal stand on different footings although some grounds may be overlapping. If a review is granted, the decree stands modified but such modification of a decree is not an ancillary or a supplemental proceeding so as to be revived upon setting aside the decree granting review.

In Garikapatti Veeraya (supra), this Court held :

> "Considering the question on principle, an appeal is a proceeding by which the correctness of the decision of an inferior court is challenged before a superior court. A right of appeal therefore can arise by its very nature only when a decision by which a litigant is aggrieved is given, and it sounds praradoxical to say that it arises even before judgment in the case is pronounced "

In Gour Krishna Sarkar (supra), Asutosh Mookerjee, J. speaking for a Division Bench opined that the Court is competent to determine whether when a review is granted, the case should be re-opened in part or in its entirety, and that the view cannot be supported on principle that whenever an application for review is granted, the entire case must of necessity be reopened and re-considered. It was observed that when a review is made, the original decree ceases to exist as a result of the decision of the judge to grant the application for review.

We are, therefore, of the opinion that the High Curt was not correct in holding that the First Appeal filed by the Respondents was maintainable. This order may cause injustice to the Respondents but it is their own creation. This Court despite sympathy, as was in the case of Sushil Kumar Jain (supra) cannot hold in their favour ignoring the binding precedents.

The Respondents herein cannot take advantage of their own mistake. They had furthermore been taking inconsistent and contradictory stands. They had claimed possession of the suit premises as a tenant in furtherance of a part performance of contract in terms of Section 53-A of the Transfer of Property Act and also the title having vested in the State of West Bengal in terms of the Calcutta Thika Tenancy (Acquisition & Regulation) Act, 1981.

For the views we have taken, it is not necessary for us to go into the larger question as to whether the suit itself could have been dismissed in terms of Order 12, Rule 6 of the CPC or not.

EXECUTION CASE :

In view of the aforementioned findings, the decree passed in Title Suit No.49 of 1990 having regard to our decision in Civil Appeal No.9131 of 2003 reported in (2004) 1 SCC 483, the decree has become enforceable. The submission of Mr. Sanghi to the effect that the undertaking given by the Respondents has revived is stated to be rejected. The undertaking given by the Appellant is analogous to an interlocutory injunction restraining her from executing the decree till the Respondents' suit for specific performance was decided by the trial court as this Court held that the said undertaking cannot be revived after the party giving it has been released therefrom [See Cutler vs. Wandsworth Stadium Ltd. [(1945) 1 All E.R. 103] CONCLUSION :

For the reasons aforementioned, the impugned judgments cannot be sustained which are set aside accordingly. The appeals are allowed. However, in the facts and circumstance of the case, there shall be no order as to costs.