

THE  
INDIAN LAW REPORTS,

Calcutta Series.

CIVIL RULE.

Before Jenkins, C.J., and Ray, J.

HARI CHARAN GHOSE

v.

MANMATHA NATH SEN.\*

1913

April 18

*Execution-proceedings—Civil Procedure Code (Act V of 1908), s. 141 and O. IX, r. 13.*

Order IX, rule 13 of the Civil Procedure Code, 1908, is not applicable to a proceeding under rules 100 and 101 of Order XXI of that Code.

*Thakur Erasad v. Fakir-ullah* (1) referred to.

CIVIL RULE obtained by Hari Charan Ghose, the auction-purchaser.

The opposite party, Manmatha Nath Sen and others, recovered two decrees for arrears of rent in respect of two *jamias*. In execution of one of the decrees, the petitioner purchased the *jama*. It was alleged that the opposite party illegally dispossessed the petitioner from the major portion of the lands so purchased on the allegation that the said lands belonged to the

\* Civil Rule No. 239 of 1913, against the order of Khagendra Nath Dutt, Munsiff of Barasat, dated Feb. 8, 1913.

(1) (1894) I.L.R., 17 All. 106.

1913

HARI  
CHARAN  
GHOSE  
v.  
MANMATHA  
NATH SEN.

other *jama*, which the opposite party had themselves purchased in execution of the other decree. Petitioner thereupon applied to the second Munsif under O. XXI, r. 100 of the Code of Civil Procedure. The objection case arising out of the application was decided *ex parte* in favour of the petitioner. The opposite party thereafter applied under O. IX, r. 13 for setting aside the said *ex parte* order, alleging that they could not be present at the hearing of the objection case as they had been informed of a wrong date by their pleader. The Munsif allowed the application and restored the objection case. The auction-purchaser thereupon moved the High Court and obtained this Rule.

*Babu Mohinimohan Chatterji*, for the petitioner. The Munsif has acted without jurisdiction. The order under O. XXI, r. 101, Civil Procedure Code, is conclusive subject to the result of a regular suit. The Munsif has apparently acted under O. IX, r. 13. That rule does not apply to execution proceedings. Section 141 does not make the rule applicable to such proceedings. The omission in section 141 of the explanation that went with the corresponding section of the old Code, viz., s. 647, does not indicate any change in the law. The explanation was superfluous: *Thakur Prasad v. Fakir-ullah*(1). See also *Asim Mondal v. Raj Mohan Das*(2). The case of *Safdar Ali v. Kishun Lal* (3) in so far as it held that section 141 has changed the provisions of the old Code is not good law.

*Babu Shivaprasanna Bhattacharya* (with him *Babu Prabodhchandra Bose* and *Babu Manmohan Bose*), for the opposite party. The provision contained in O. IX, r. 13 of the Civil Procedure Code has always been held to apply to execution proceedings:

(1) (1894) I.L.R., 17 All. 106.

(2) (1910) 18 C.L.J. 532.

(3) (1910) 12 C.L.J. 6.

*Gaur Mohan Bandopadhyaya v. Tarachand Bando-  
padhyaya*(1), *Ram Kristo Roy v. Naik Tara Dass*(2)  
and *Biswa Sonan Chunder Gossyamy v. Binanda  
Chunder Dibingar Adhikar Gossyamy*(3). But it  
has been held that in view of section 4 of Act VI of  
1892, the rule contained in this order does not apply  
to execution proceedings: *Hairat Akramnissa Begam  
v. Valiulnissa Begam*(4) and *Dhonkal Singh v.  
Phakkar Singh*(5). Compare section 141 of the  
new Code with section 647 of the Code of 1882. The  
explanation is now omitted.

1913  
HARI  
CHARAN  
GHOSE  
v.  
MANMATHA  
NATH SEN.

JENKINS, C.J.—This is a Rule obtained at the  
instance of a claimant under Order XXI, rule 100 of  
the Civil Procedure Code calling upon the opposite  
party, the decree-holder, to show cause why the order  
of the Munsif should not be set aside on the ground  
that it was made without jurisdiction.

The claimant applied under rule 100, and, the  
decree-holder not appearing, he obtained an order in  
his favour under rule 101. Rule 103 provides that  
“any party not being a judgment-debtor against  
whom an order is made under rule 98, rule 99 or rule  
101 may institute a suit to establish the right which  
he claims to the present possession of the property;  
but, subject to the result of such suit, if any, the order  
shall be conclusive.” The claimant therefore main-  
tains that the order in his favour though made in the  
absence of the decree-holder is conclusive: and, his  
complaint is that notwithstanding the terms of rule  
103, the Munsif has set aside the order made under  
rule 101. The Munsif appears to have acted under  
Order IX, rule 13. That rule, as it is expressed, clearly

(1) (1869) 3 B.L.R., App. 17.

(2) (1883) 12 C.L.R. 449.

(3) (1884) I.L.R., 10 Cal. 416.

(4) (1893) I.L.R., 18 Bom. 429.

(5) (1893) I.L.R., 15 All. 84.

1913

HARI  
CHARAN  
GHOSEMANMATHA  
NATH SEN.JENKINS,  
C. J.

does not apply to a proceeding in execution; but an attempt has been made before us to uphold the Munsif's order on the terms of section 141 of the Code which provides that "The procedure provided in this Code in regard to suits shall be followed, as far as it can be made applicable, in all proceedings in any Court of Civil jurisdiction." This section reproduces with modification section 647 of the previous Code. But in section 647 there was an explanation in these terms; "This section does not apply to applications for the execution of decrees, which are proceedings in suits." That explanation has been omitted, and it has been argued before us that this omission is an indication that the Legislature in passing the present Code intended that section 141 should have a wider operation than section 647. There is a certain amount of force in this argument, but it overlooks the history of this section and the case law. At one time there was a considerable divergence of opinion as to whether section 647 applied to execution proceedings: and, it was in consequence of this that by Act VI of 1892 this explanation was introduced into the section of the Code of 1882. But after this alteration in the law, the Privy Council by a case, *Thakur Prasad v. Fakir-ullah*(1) decided on section 647 as it stood before the explanation was added, that the section did not apply to execution proceedings. The purpose of the Legislature in omitting that *explanation* was to do away with that which was shown to be unnecessary by the Privy Council decision and to rely upon the terms of the section as interpreted by the Privy Council. So it was that the explanation came to be omitted. This may have been an unfortunate way of proceedings, because it involves some knowledge of the history of section 647 and of the

---

(1) (1894) I.L.R., 17 All., 106.

decision on that section to appreciate the effect of this change; but this is how the matter was dealt with by the Legislature. The result is that section 141 does not make applicable to proceedings in execution all the procedure provided by the Code, and I think for very good reason; as is indicated by Mr. Justice Mookerjee in *Asim Mondal v. Raj Mohan Das*(1), to hold otherwise would lead to complication and to results which never could have been contemplated. It is not as though there was any necessity in the interest of justice that the provision of rule 13, Order IX, should be applicable to proceedings in execution, because, the order is not conclusive, but is subject to the right of the person aggrieved to bring a suit. I therefore hold that Order IX, rule 13 is not applicable to a proceeding under rules 100 and 101 of Order XXI, and that the learned Munsif had not the jurisdiction which he purported to exercise. We must, therefore, make the Rule absolute.

Having regard to all the circumstances, we will not make any order as to costs.

RAY, J. I agree.

*Rule absolute.*

S. M.

1913  
 HARI  
 CHARAN  
 GHOSE  
 v.  
 MANMATHA  
 NATH SEN.  
 JENKINS,  
 C. J.

---

(1) (1910) 13 C. L. J. 532.