

(1980) 12 OHC CK 0001

In the Orissa High Court

Case No : Miscellaneous Appeal No. 256 of 1980

Babaji Charan Sahoo and Others

APPELLANT

Vs

Laxmipriya Debi and Others

RESPONDENT

Date of Decision : 08-12-1980

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10, 144 , 151

Citation : (1981) 51 CLT 137

Hon'ble Judges : P.K. Mohanty, J

Bench : Single Bench

Advocate : B.H. Mohanty, S.C. Misra and J.K. Bastia, for the Appellant; B.M. Patnaik and D. Pattanayak, for the Respondent

Final Decision : Dismissed

Judgement

P.K. Mohanti, J.—This appeal by the Plaintiffs-decree holders is directed against the order of the learned District Judge of Cuttack confirming an order u/s 144, CPC passed by the learned First Additional Subordinate Judge of Cuttack.

2. The Original Plaintiff Nityananda Sahu and the original first Defendant Jayaram Das having died during the pendency of the litigation their legal representatives have been substituted in their places.

3. Nityananda Sahu filed Money Suit No. 475 of 1954 against Jayaram Das for resolution of arrears of house rent on the allegation that he had purchased the disputed property from Laxmipriya Debi by a registered sale deed dated 22.12-1950 and that the said Jayaram Das was a monthly tenant in respect of the house. Jayaram Das filed written statement contending that he was not a tenant, but he was residing in the suit house as a relation of Laxmipriya. Laxmipriya filed an application under Order I, Rule 10, CPC for being impleaded as a party to the suit. Her prayer was allowed and she was added as Defendant No. 2. The stand taken by her was that the aforesaid document dated 22-12-1950 executed in favour of Nityananda Sahu was intended to be a deed of

mortgage and not a sale deed and that Jayaram Das was residing in the house with her permission as a relation.

4. Money Suit No. 475 of 1954 was dismissed on 23-2-1961 on the findings that ownership of the suit house had not passed to Nityananda Sahu under the sale deed dated 22-1-1950; that possession had not been delivered to him; that Laxmipriya was in possession and that Jayaram Das was not a tenant in respect of the house. Aggrieved by this decision, Nityananda went up in appeal. During the pendency of the appeal, Nityanda filed Title Suit No. 348 of 1962 for declaration of his title and confirmation of possession or in the alternative recover of possession. The appeal was dismissed and Nityananda filed Second Appeal No. 18/1964 This Court by judgment dated 20-12-1965 remanded the money suit for fresh disposal along with Title Suit No. 348/1962. After remand, both the suits came up for further hearing before the trial Court. On the date of hearing the Defendants remanded absent. The trial Court, on a consideration of the evidence on record, decreed both the suits on 6th April, 1968 declaring the Plaintiff's title to the suit land and confirming his possession over the same. It is to be remembered 10 this connection that there was no decree for recovery of possession.

5. Laxmipriya filed Money Appeal No. 40 of 1968 and Title Appeal No. 130 of 1968 against the ex parte decrees passed against her. Both the appeals were dismissed as barred by limitation. Then Laxmipriya filed Second Appeal Nos. 240 and 241 of 1970 which we allowed on 13.2.1973. The delay in filing the appeals before the first appellate Court was condoned and the appeals were remitted to the first appellate Court for disposal on merits. The first appellate Court set aside the ex parte decrees and remanded both the suits for fresh disposal.

6. In the meantime, Nityananda Sahu levied execution of the ex parte decrees. In Execution Case No. 231 of 1969, he sought for recovery of possession and realisation of rent decreed. Possession was delivered to him through Court on 20-3-1977. After the ex parte decree was set aside, Laxmipriya filed a petition u/s 144, CPC on 15.11-1977 contending that she was in possession of the disputed property at the time of delivery of possession and the parte decree in execution of which she was dispossessed having been set aside, she was entitled to be put back in possession. The Appellants filed counter contending, inter alia, that since there was no direction in the decree for delivery of possession, the formal act of taking possession through Court had no legal force especially when the Plaintiff-decree-holder's possession was confirmed by the decree.

7. The Court of first instance allowed the application u/s 144, CPC and delicate restitution of the property in favour of Laxmipriya. On appeal the District Judge confirmed the order of restitution.

8. It is Urged in this appeal that the provisions of Section 144, CPC are not applicable to the facts of this case as the decree for confirmation of possession would mean that the decree-holder was 10 possession of the land prior to the

decree and that the prayer for recovery of possession was inadvertently inserted in the execution petition and the decree-holder did not acquire any additional benefit under the decree and therefore the judgment-debtor was not entitled to re-delivery of possession u/s 144, Code of Civil Procedure.

9 Section 144, CPC reads as follows;

144 (1) Where and in so far as a decree or order is varied or reversed the Court of first instance shall, on the application of any party entitled to any benefit by way of restitution or otherwise cause such restitution to be made as will, so far as may be, place the parties in the position which they would have occupied but for such decree or such put thereof as has been varied or reversed; and, for this purpose, the Court may make any orders, including orders for the refund of costs and for the payment of interest, damages, compensation and mesne profits, which are properly consequential on such variation or reversal.

(Rest omitted as unnecessary).

10. The doctrine of restitution as embodied in Section 144, CPC is based upon the cardinal principle of law that the facts of Courts should not be allowed to work injury on the suitors. The section contemplates restitution in a case where the property has been received by the decree-holder under his decree and that decree is subsequently, wholly or partially, reversed or varied in other proceedings. In such a case, the law casts an obligation on the party, who received the benefit of such erroneous judgment, to deliver back the property to the person who had lost it.

11. In order that this section may apply to a case the following conditions are necessary to be satisfied:

(I) The restitution sought must be in respect of a decree or order which had been varied or reversed;

(II) The party applying for restitution must be entitled to the benefit under a reversing decree or order;

(III) The relief claimed must be properly consequential on the reversal or variation of the decree or order.

12. In the present case it appears, the Plaintiff-decree-holder filed Execution Case No. 231 of 1969 against the ex parte decree passed in Title Suit No. 348/62 and he took delivery of possession of the Suit property by misrepresenting to the execution Court that there was a decree for recovery of possession in his favour. As indicated earlier there was no direction in the decree for delivery of possession. The Plaintiff-decree-holder could not therefore be put in possession of the property. The decree in execution of which the Plaintiff-decree-holder derived the benefit was set aside by the appellate Court and the suits were remanded for fresh disposal. But the mere setting aside of the decree did not entitle the Defendants to claim restitution. The only effect of the decree being set

aside was that the declaration of title and confirmation of possession granted in favour of the Plaintiff-decree-holder was wiped out and the position which the parties occupied prior to the decree was restored. It, however, did not result in the grant of declaration of title and recovery of possession in favour of the Defendants. Therefore, the provisions of Section 144, CPC per se in terms do not apply to the facts of this case.

13. After remand the suits are now pending disposal and have not come to an end. The defence of Laxmipriya in the suit is that she is in possession of the property, that she allowed Jayaram to remain in the house as a relation and that the document executed by her was meant to be a deed of mortgage and not a sale deed. The defence of Jayaram is that he was residing in the house as a relation of Laxmipriya with her permission. The truth or otherwise of the defence raised in the suit has to be gone into by the Court and a final decision has to be reached thereon. Before a final decision is reached after consideration of the evidence on those points, it is not possible to say that the defence raised in the suit is false. I am unable to accede to the Appellants' contentions that they were in possession of the property prior to the ex parte decree, that the prayer for recovery of possession as inadvertently inserted in the execution petition and that Laxmipriya was not actually dispossessed of the property in execution of the decree. It transpires from columns 9 and 10 of the execution petition that the Plaintiff-decree-holder sought for delivery of possession by ejecting both Laxmipriya and Jayaram from the suit house. In his petition dated 2-11-1976 filed before the executing Court the decree-holder stated that both the judgment-debtors were residing in the suit house and he sought for police help as he apprehended trouble at the time of delivery of possession. Accordingly possession was delivered to him with police help on 20-3-1977. Thus it is clear that Laxmipriya lost the Suit property through an act of the Court. By such act of the Court, the interests of Laxmipriya should not be permitted to be injured during the pendency of the litigation. When such a wrong was done the Court was required to right that wrong on the principle contained in the maxim "*actus curiae neminem gravabit*". In my opinion, on the facts and circumstances of the case, even if the provisions of Section 144, CPC are inapplicable, the inherent powers of the Court u/s 151, CPC could be invoked to grant restitution.

14. Legal position is well settled that Section 144, CPC is not exhaustive and the Court has inherent jurisdiction to grant restitution, vide *Prag Narain v. Kamakhia Singh*, *Jai Berham v. Kedar Nath*, *S. Chokalingam v. N.S. Krishna*, *Jotindra Nath v. Jugal Chandra* and *Gangadhar v. Raghubar Dayal*.

15. It follows from the foregoing discussions that the appeal is without any merit and It is accordingly dismissed with costs.